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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Personal Property Securities Bill 2008

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SYDNEY

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Friday, 23 January 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Participating members: Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin, and Trood

Terms of reference for the inquiry:

To inquire into and report on:

Personal Property Securities Bill 2008

WITNESSES

Committee met at 9.06 am

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs. Today the committee will continue to take evidence for its inquiry into the Personal Property Securities Bill 2008.

I remind witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, the witness may then request that that answer be given in camera.

[9.07 am]

DUGGAN, Professor Anthony James, Private capacity

Evidence was taken via teleconference—

CHAIR—I welcome Professor Duggan to our public hearing. We have your submission, which we have numbered 1 for our purposes. Before I ask you to talk to that submission, are there any changes or alterations that you need to make?

Prof. Duggan—No, not at this stage.

CHAIR—I invite you to make a short opening statement and talk to the submission, and then we will go to questions.

Prof. Duggan—Thank you. I am a strong supporter of this project in concept and have been for quite a long time. The basic idea is really very good. The Australian proposal is better in some ways than article 9 or personal property security type laws in other jurisdictions. In Australia there is going to be just one national statute. That is a big advance on the US and Canada, which both have state or provincial laws. In Canada, for example, parties and their legal advisers have to work with not just one set of laws but 13. In the US it is 50. Another advantage of national legislation is that it gets rid of conflict of laws issues at the interstate level. Also, of course, Australia is planning a single national register and that is another big advance on the United States and Canada where they have separate registers in every state or province. The Australian approach is going to avoid the need for parties to do multiple registrations and multiple searches. That should quite significantly lower the cost of secured lending, it seems to me.

On the other hand, a state-of-the-art national register is not enough. It is also critically important to get the legislation right, otherwise lenders and debtors will have to spend more on legal advice and litigation and these extra costs are going to erode the savings from having a single national register.

My main concern is that the draft bill is full of problems that could have been avoided if the drafters had modelled the bill on the Canadian legislation, like the New Zealanders did, instead of trying to reinvent the wheel. One problem with trying to reinvent the wheel is that you run the risk of making mistakes unless you are sure of what you are doing. I have read the submission from the four large law firms and I agree with them on this point. They say:

We have the impression that the proponents of the Bill have seriously underestimated the difficulty and complexity of the task they have undertaken.

Another problem with reinventing the wheel is that you lose the opportunity to piggyback on the learning from other jurisdictions. New Zealand adopted the Canadian model law and this has made it possible to adapt Canadian secured transactions textbooks for New Zealand use. For example, the New Zealand version of Professor Ron Cumming and Professor Roy Goode's *Personal Property Securities Act Handbook* came out pretty quickly after the legislation was enacted there. So I ask myself what Australia will do if this bill is enacted in its present form. Somebody eventually will put a loose leaf service together but this is going to take much longer and the service is going to be less reliable because whoever writes it will not be able to draw on existing knowledge. In the meantime, the legislation is long and complex and it will be unfamiliar to most people who have to use it. Where are court practitioners and clients going to go for help in deciphering it? I understand there is pressure to get the new law into place quickly and I also understand that a lot of people would prefer a home-grown product and not just a copy of some other country's efforts. The trouble is that it seems to me there is just not enough time or expertise to achieve this and, even if there were, at the end of the day the differences between the Australian version and the Canadian one probably would not be all that great.

To wind up, for what it is worth this is what I think Australia might think about doing: for now, to enact a PPSA based on one or another of the Canadian models, build in a provision for a comprehensive review at the end of three to five years and appoint a committee of local and international experts to do the review. One advantage of doing things this way is that, after three to five years experience with the legislation, it should be easier to find local experts in Australia than it is now.

I will finish on this: I happened to read my horoscope in the paper on Tuesday and it struck me as surprisingly germane. I wonder if I could share it with the committee; it is very short: 'You can go your own way and do your own thing if you wish but chances are that you will make an embarrassing mistake. If on the

other hand you follow in the footsteps of other people you won't suffer any serious mishaps. Boring, yes, but necessary too.' That is pretty much it.

CHAIR—Thank you. I will not make any comment about the horoscope reading! Thank you for your submission. I certainly want to acknowledge your background and extensive involvement in this area. This is now our third day of hearings or briefings on this bill. It has been put to us that what ought to happen is that the national register should be put in place. Some people have submitted that the bill should be split in a sense—a national register be put in place and then when the rest of the legislation has been clarified or refined or been out there for further consultation then that could be enacted. Do you have a view about whether that is the best way forward?

Prof. Duggan—I may be lacking imagination but I find it hard to see what is going to be registrable in the absence of legislation to tell you. That is the difficulty I have. Also, there is a synergy: the register has to be designed with a very close eye to what the legislation is trying to govern. Trying to create a register in a vacuum would be a pretty difficult task.

CHAIR—You have outlined three areas. They do not home in on the specifics of the bill but they talk about the structure of the legislation. Some of the problems our drafters at the federal level have are to do with the cross-referencing. I do not think it is peculiar to this piece of legislation; I think it is in quite a number of pieces of legislation I have read during my time over the last couple of years. You go to a section and to find the meaning of a word you go to another section, then that second section diverts you to a third section. Would you like to comment on that? As I said, I do not think it is peculiar to this piece of legislation, but how do you avoid that?

Prof. Duggan—That is my own impression too, although I have been in Canada now for 10 years so I am reading less Australian legislation than I used to. My impression is the same as yours. The difficulty in this context is that the subject matter is so difficult and complex to begin with that any form of statute is going to be a difficult read. The problem is superimposing this sort of treasure hunt kind of exercise on what is already difficult legislation just puts impossible burdens on the reader. If I was coming to the Australian bill cold, without knowing very much about North American personal property securities legislation, my first reaction would be panic. To allay those sorts of concerns the drafting really ought to be as clear and as succinct and concise as possible. That is my response.

CHAIR—You mention the conflict of laws on page 13 of your submission. A number of witnesses have suggested to us that the conflict of laws section ought to go back into the bill. My understanding is that it was there in the May 2008 version; it was taken out and is now an appendix in the exposure draft. Quite a number of people have put to us that they endorse the format of the appendix but they think the conflict of laws clauses that are in the appendix should be put back into the legislation. Are you aware of this appendix that I am talking about or do you have a view about whether the conflict of laws section ought to be a substantial part of the legislation?

Prof. Duggan—Yes, I am aware of the appendix although I do not have the details of it in my head. I would make two points. The first is that yes, there should definitely be conflict of laws provisions in the bill. Even though, if it is national legislation, there will not be conflict of laws problems between the states there is still the potential for conflict of laws issues between Australia and other countries—Australia and New Zealand, Australia and Singapore, Australia and China, for example. The bill really should address those problems. That is the first point.

The second point is that so far as possible the conflict rules should be uniform with the conflict rules in other jurisdictions because if you have different countries saying different things about how conflict of laws issues should be resolved then you may end up with a different country's law apply depending on where a case happens to be litigated. If it is litigated in New Zealand, for example, the New Zealand court will apply the New Zealand conflicts rules but if it is litigated in Australia the Australian court will have to apply the Australian conflicts rules and they may point in different directions. You really want to avoid that to prevent parties forum shopping. I would go further than saying, yes, there should be conflicts provisions in the bill; I would say that there should be conflicts provisions in the bill and they should track the conflicts provisions in New Zealand, in all the Canadian provinces and in article 9.

CHAIR—To clarify: is that so that if problems arise with international jurisdictions the bill provides some guidance other than how it works within Australia?

Prof. Duggan—That is right. The bill tells the court clearly what conflicts law to apply and it does so in a way that an Australian court will be applying the same conflicts rules to the situation as a New Zealand court would so that whether the case happens to be litigated in Australia or in New Zealand either court will say that Australian law applies or New Zealand law applies or whatever the case may be.

CHAIR—I see. We have not had a lot of submissions that deal with intellectual property rights. I know that is not mentioned specifically in your submission but I want to use this opportunity to ask you, given your expertise, about whether there are any concerns with the issue of intellectual property rights within the bill.

Prof. Duggan—I cannot answer that specifically but I can say that security interests in intellectual property rights is a real problem. It is a problem not just for Australia; it has been a big issue in Canada and also in the US. The problem has to do mainly with the interaction between the register of security interests and the register of intellectual property rights. If somebody, for example, creates a security interest in a patent, where should that be registered? Should it be registered in the PPS register? Should it be registered in the patent register? Or should it be registered in both? To avoid parties having to search in a whole lot of different registers to find what they are looking for you need some way of dovetailing the two different registration systems so that all the intellectual property registers are compatible with the personal property securities register, and the supporting IP statutes and the PPSAs are compatible with one another.

The Canadian Federal Law Commission addressed this issue in a report that was released about three years ago, I think. It is called—it is a funny name—*Levering knowledge assets*. I can supply you later with a full citation if the committee would like it; otherwise, it can be easily found online. They made some fairly carefully thought out recommendations about how Canada might deal with this issue. That report might be of some help to Australia in working through the issue.

CHAIR—I think we would appreciate it if you could provide us with a link to that. That would be quite useful. Professor, you have a view that this legislation should be almost rewritten. Consultations on this have been going for three years and most witnesses have put to us that they think there are about a dozen or so outstanding issues that need to be reworded or fined tuned.

Prof. Duggan—Yes, I know. If it were me I would say yes, start again. I understand the difficulties of doing that. But it is a question of going ahead now with this product for the sake of getting in quickly or taking a little bit of extra time, maybe going back to the drawing board, to get it right. I think in the longer term interest of everybody it is better to do the latter. What can I say about other people's views? I have glanced quickly through most of the written versions of the submissions that you have received. Very few of them come to grips with the legislation overall. Most of them just talk about particular issues. Most of them express support for the general idea of a single comprehensive national register. But none of them really engage with the detail of the legislation. Probably the only one that does is the submission from the four large law firms. When people say that they support the legislation and so far as they can see there are only half-a-dozen or so issues that need to be fixed, you really need to ask whether people who are saying this are on top of legislation of this kind and really understand the concepts and how this legislation works. It all needs to be taken with a grain of salt, I think.

CHAIR—All right. I will pass over to my colleagues and come back to you if I need to have further questions.

Senator BARNETT—Thank you, Professor, for being with us today. We very much appreciate your input and advice. Can we just get clarity on your preferred position, and that is that the bill should not proceed in its current form, it should be withdrawn and rewritten. Your preference as I read it, based on reading your submission and listening, is more of a New Zealand type approach, taking on board something along the same lines that they have done. You say they have taken on the Saskatchewan example or legislation and basically that is your recommendation. If that was the case, is it true that that would rewrite and change some of the key principles in terms of how we understand PPS law in Australia?

Prof. Duggan—Yes, that is my position, that I think Australia should do what the New Zealanders did, with the qualification I added at the end of my verbal remarks, which is that you might consider building into the legislation a provision for mandatory review at three to five years or whatever, and then appoint a committee to do the review. To answer the big question that you asked in the second part of what you put to me, in a sense that gives Australia the best of both worlds. It means that there is a reasonable guarantee that what is enacted now will not have major mistakes in it but at the same time it provides the opportunity for domestic input a little bit further down the track when everybody is a little bit more familiar with what is going on. That is my position, I suppose.

The other thing you asked was if Australia went the New Zealand route would that fundamentally change Australia's understanding of what PPSA is about. I do not think so. I would say that people who are familiar with this area would know about the New Zealand PPSA by now. I would be more worried that if the bill went ahead in its present form it is full of nasty surprises and may trigger hidden changes to the law as people understand it. That is something that is to be avoided.

Senator BARNETT—You say in your submission on page 3 that the Saskatchewan PPSA model is based on article 9. You say that close adherence to the North American model makes sense because it enables lawmakers a free ride on Canadian and US learning and experience. Some people in Australia might think we do not need to be following the US-Canadian approach and we have got precedent, we have got common law history, the British common law background, and we would prefer to do it our own way. What do you say to that?

Prof. Duggan—That is fair enough, but if this bill is enacted it is going to sweep the lot of the common law away. For example, there is a lot of learning in England and Australia on the floating charge. This bill I think abolishes the floating charge and substitutes something formally different but functionally similar in its place, and it is going to be unreliable to go back to old common law rules about the floating charge to try and inform yourself about what the legislation does. Where are you going to go to get the information? If you have adopted legislation reasonably close to, say, the Canadian model, you can just go to any one of the good Canadian textbooks. If you adopt this version, you will not be able to do that because it is so different from the Canadian model that none of the Canadian texts are going to be reliable. So basically you are going to be flying by the seat of your pants until somebody in Australia gets around to writing a carefully considered book about this new venture. That is going to take years.

Senator BARNETT—I appreciate your feedback, Professor. I am going to pass over to my colleague Senator Trood. Before doing so, I will leave you with one last question. Have you had input or feedback on the regulations? Secondly, have you had input or feedback on the process to date last year? Did you comment on the draft bill and the other exposure bill of 2008?

Prof. Duggan—I have not commented on the regulations but I put in detailed submissions on each of the three discussion papers. I also put in a submission on the original draft bill.

Senator TROOD—Professor Duggan, just on this matter of consultation, you have put in submissions to the department. Have you had any discussions with anybody in the department about your proposals?

Prof. Duggan—Pretty much no, except that I had a brief email exchange with Rob Patch after I put in my submission on the first bill. That was really to say no more than that to go back to the drawing board from their point of view was impractical. That is pretty much the sum of it.

Senator TROOD—I see. To what extent have the various proposals you have made in relation to the bill been accepted by the department? Have there been changes that you can identify as a consequence of your submissions?

Prof. Duggan—Not really. That is not to say there are not any but there is nothing that leaps out at me. On the other hand, the reverse of your question, there are things not in the bill which I strongly urged should be. For example, in the current draft there are no provisions governing security interests in fixtures, and there are all sorts of reasons why I think there should be.

Senator TROOD—Is that particular provision a characteristic of the other legislation that you have alluded to?

Prof. Duggan—Yes. New Zealand does not have these provisions but all of the other jurisdictions do. I understand that the problem with fixtures is something to do with the state land law people worrying about the personal property securities legislation trespassing on their domain. But I think this is a bit of a false fear.

Senator TROOD—My recollections of real property law are vague after some years of not having much to do with them, but I do not know that those issues are covered under the real property laws, are they, in the way which they would be covered here.

Prof. Duggan—No, they are not, and that is exactly the point. If, for example, you have a security interest in a bit of machinery and the debtor attaches it to land so that it becomes a fixture, unless there are fixtures provisions in the PPSA you are going to be forced back to the old common law fixtures rules. I do not remember them very well either but I do remember they are horrible.

Senator TROOD—Yes. You say you have pressed that issue with the Attorney-General's Department, without result. Is that right?

Prof. Duggan—Pressed in the sense that I made the point in at least one of my submissions, I think maybe two or three of them, but there was never any dialogue. The process did not really allow very well for dialogue. So what tended to happen was that I put in these submissions and it was like they went down a black hole.

Senator TROOD—I have considerable sympathy with your propositions about prolixity. It seems to me that one of the things we clearly ought to be doing is producing a piece of legislation that is readily understandable and accessible, not only for practitioners from the large law firms who have expertise in this area but also for people who might have to deal with them at a level at which they do not have the capacity to specialise in quite the way in which it might happen in the Allens of the world, for example. So I am very sympathetic to that. Can you reassure us that some progress has been made on that issue as a result of your submissions?

Prof. Duggan—No I cannot. On the contrary, I am really worried that the tendency is to forge ahead regardless.

Senator TROOD—As an example of this, you have made reference to issues of definition. There are large numbers in this bill and, as I think you point out in your submission, some of the definitions appear at times to be rather perverse in the way in which they re-characterise things that are already well understood in the law. Is that a fair summation of your position?

Prof. Duggan—Yes. I gave a couple of examples, one of which is this idea of calling the person who is doing the borrowing the 'grantor' instead of calling them the debtor. That is kind of counter-intuitive. After a while, once you get used to reading the legislation, you get the idea, but you have to put in quite an intellectual effort to keep reminding yourself who the heck the grantor is. That is just one example.

Senator TROOD—I see your point. Perhaps you can contrast this approach with the approach that has been taken in the other pieces of legislation to which you refer. What is their general legislative approach?

Prof. Duggan—On this specific issue the problem is that the security interest may be given by the debtor itself or it may be given by a third party, as in the case of a third-party mortgage, so you want whatever expression you use to cover both situations. As I understand it that is why the Australian drafters have used the expression 'grantor' as an umbrella expression, to catch both the debtor itself and the third-party giver. The other jurisdictions do it the other way around: they use the expression 'debtor', but they define 'debtor' to mean a third-party security giver where the context requires that. I think that is a better way of doing it, because it is more readily understandable to the reader.

Senator TROOD—Has that approach led to any particular difficulties in the interpretation of the legislation? For example, has it resulted in any litigation?

Prof. Duggan—Absolutely none, as far as I am aware.

Senator TROOD—What has the general experience been with regard to litigation under these examples in New Zealand and Canada, and I suppose in the United States, with regard to the extent to which there has been litigation about the clarity of terms within the legislation, not so much in relation to substantive issues that might have arisen as a result of some property dealings under the legislation but in relation to issues of interpretation? Has there been a great deal of litigation about that?

Prof. Duggan—So far as the clarity of the terms is concerned, no. There has of course been litigation on substantive issues, and I note that the four large law firms in their submission say that we should not be holding up Canada as a panacea, because there is still a lot of litigation. That ,of course, is perfectly true. But you are never going to get perfect legislation and there will always be litigation, but the object should be to minimise it in order to make sure that the litigation is about issues that matter.

Senator TROOD—Of course. In this context we have had quite a few submissions referring to section 235, which talks about the need for commercially reasonable actions. Are you familiar with that provision in the legislation?

Prof. Duggan—If I can backtrack for a moment, there are two main versions of the PPSA in Canada: one is the Saskatchewan model, which is pretty much uniform through all the common law provinces except for Ontario. Ontario is out of sync with the uniform scheme but the concept and the principles are the same; it is just different in point of detail.

The 'commercially reasonable manner' provision comes from the uniform model statute, and Ontario has no such provision. The reasons it has no such provision are exactly the same as the arguments that you are hearing in the course of this exercise—it is uncertain, productive of litigation and so on. My take on it is that this is a non-essential provision. I accept the argument that because it is open-ended it may produce uncertainty and unnecessary litigation. My inclination would be to scrap it. Doing that would not have any effect on the elements of the scheme.

Senator TROOD—That is very much the weight of the evidence that we have received, I must say. Nobody seems to be prepared to defend the clause as having any particular value—in the evidence we have received, in any event.

Prof. Duggan—It is going to be implicit anyway, isn't it? A court will imply that parties must act reasonably, so you do not need to write it in, particularly if it is going to cause you heartache.

Senator TROOD—Yes. I have heard what you have said on the matter of conflict of laws. I wonder if you are familiar with the submission of Clayton Utz, which spends some time addressing the conflict of laws provision. The general thrust of their submission is that they are more or less happy with appendix A but believe it needs some changes, some tweaking. If you are not familiar with it, I wonder whether you would have time to look at the appendix and Clayton Utz's submission and perhaps drop the committee a note as to whether you think that submission improves the appendix or you think the appendix as written is more or less acceptable.

Prof. Duggan—Okay. I am happy to do that, but maybe I should repeat what I said in response to Senator Crossin: in my view the conflict provisions should mirror, be uniform with, the conflict provisions in other jurisdictions to avoid this forum-shopping problem. To the extent that there are differences between what is in the appendix, or what Clayton Utz is proposing, and what is, for example, in the New Zealand statute, I would say go for the New Zealand statute.

Senator TROOD—I cannot answer the question as to the extent to which there are similarities or differences. I am responding to the weight of evidence we have received, which is that the legislation needs a conflict of laws provision in it and, for most of the witnesses, the appendix A proposals are acceptable. But Clayton Utz has a somewhat different take on the matter.

Prof. Duggan—I am quite happy to have a look at the question and to drop you a note if that would be helpful.

Senator TROOD—If you would not mind doing that, I would certainly be grateful. You made reference to the submission of the four large law firms, with some support. They also of course make a proposal which relates to a very substantial structural difference in the legislation. That is what they call this cutback proposal. Are you embracing that idea as well or just the concerns they raise about specific sections of the bill?

Prof. Duggan—I think the basic rule is that I only agree with them where I expressly say so. I agree with that particular proposition, and there are other bits that I agree with. But in the end I think we come out with diametrically opposed conclusions. I think their idea for some sort of cutback model raises more or less the same difficulties as the current draft exercise. Who is going to be responsible for drafting the cutback version? How can we be sure that the cutback version is going to work commercially and that it is not going to be productive of unnecessary uncertainty and litigation? Part of the problem is that article 9 and the personal property security statutes are sort of a seamless web. It is one single concept spread throughout the legislation. Once you start cherry picking you run the risk of the whole thing unravelling. If you are going to draft a cutback version, you need to be sure that whoever is doing it has the expertise to do it skilfully. It seems to me that the problem at the moment is one of expertise. I think that the proposal of the four large law firms would just perpetuate the current problem.

Senator TROOD—I would be very surprised if it found favour with either the committee or, indeed, the Attorney's department, but it is useful to have some different perspectives on it from expert witnesses in the field. There is another proposal, which we received yesterday, which was to divide the legislation and build it around two different kinds of commercial enterprises—in other words, to make parts of the legislation relevant under the Corporations Law to corporations and create a separate act which applies to non-corporate entities within the definition of the act. Do you see any merit in that proposal?

Prof. Duggan—So you would have a single register supported by two bits of legislation, one for corporate debtors and one for individual debtors? Is that the idea?

Senator TROOD—It could be that way; it could be that there would be two registers, one for corporate debtors and one for everybody else.

Prof. Duggan—That seems to be unnecessary duplication. I do not see the point of doing that.

Senator TROOD—Both of those registers, if there were to be two, would be supported by their own pieces of legislation so they would have similar rights and responsibilities with regard to corporations and with regard to the other enterprises or individuals involved. It does not recommend itself to you anyway.

Prof. Duggan—No. I do not see the sense of that at all. I may be missing something.

Senator TROOD—I wanted to ask you about timing. The proposal under this legislation, if some form of bill were to achieve passage through the parliament by the end of this year, is that a proposed start date would be May 2011, I think. Is that enough time, in your view?

Prof. Duggan—It gets back to my starting point, I suppose: it may or it may not.

Senator TROOD—That is if the legislation were to remain as it is—more or less, with changes and the cleaning up of the obvious errors and mistakes that are there, about which we have received considerable evidence. If the essential bill were to proceed through the parliament, is that enough time, do you think?

Prof. Duggan—I cannot avoid being cynical in response to that. I think I would have to say that, if the bill is enacted in its present form, no amount of lead time would be enough, so you might as well make it 18 months.

Senator TROOD—I see. What sort of experience was there in the other jurisdictions in relation to starting time et cetera?

Prof. Duggan—I am a bit rusty on that. I can say that, when Ontario enacted its first personal property securities act back in the 1970s, it was the first province to do so. That was a long lead time because it ran into some transitional difficulties with the register of floating charges. I cannot be specific at the moment about what those difficulties were, but there were problems. Beyond that, I think the transition in all jurisdictions was made very smoothly, but again I cannot give you actual dates or time lines.

Senator TROOD—But your view is that legislation of this kind is complex, this particular draft is complex and that there is a need for considerable lead time. Is that right?

Prof. Duggan—Yes, both to master the legislation and to review procedures and documents and that sort of thing.

Senator TROOD—With regard to issues of privacy and the register, one of the challenges, obviously, is designing an electronic register which preserves privacy interests. We have had some evidence—and we will probably get some later in the day—that the proposals in this legislation do not meet adequately the privacy needs of particularly individuals, who may need to approach the register. Do you have any particular views on the privacy provisions in the bill?

Prof. Duggan—I have a couple of thoughts about that. The first one is that the registration document, whatever it is called, should really be no more than a skeletal document. It should provide no more information than for a searcher to know that there might be a security interest and to make follow-up enquiries. So, really, all you need on the register is the debtor's proper name, the vehicle identification number—if you are talking about a vehicle—a very broad description of the collateral and a secure party's address so that a searcher can make follow-up inquiries. If that is all that the registration document contains and all that is on the register, I do not see, objectively, what the privacy issue is.

My second point is that if people object to that and say yes, there still are privacy concerns, I think Australia is in a unique position to avoid them. I put this point in one of my submissions to the Attorney-General's Department on the discussion papers. This depends on my understanding of the ABN system, and I am rusty on this because the ABN was introduced after I left the country. If I understand it rightly, every Australian business has a unique ABN. If that is right, you could provide for registration against an ABN rather than get a name and, as far as consumer debtors are concerned, you would not have name index registration for consumer debts at all; you would only have registration for vehicles, and that would be against the VIN. But, when you think about it, vehicles are probably by far the most important item of consumer collateral anyway, and if they are registered against the VIN that covers off that concern. So all you would need would be some

priority rules in the legislation for what happens if there is a dispute involving collateral in a case where there is no registration provision. I think that system could work, and it would make all the privacy problems go away with the stroke of a pen.

Senator TROOD—Some of the privacy problems will disappear if corporations, for example, use ACNs, and some enterprises will have ABNs as well, as you say. The particular concern seems to revolve around individuals who either do not have ACNs or ABNs. They are going to have to be identified on the register somehow or other by reference to name. The question then is: how do you get certainty of individual where, for example, there may be several people with a similar name perhaps even living at the same address? How do you then get the kind of specificity you need to ensure that you are looking at the right person with regard to a piece of property?

Prof. Duggan—And that is the acknowledged weakness in the system—problems of mismatches between the name on a person's birth certificate and the name they go by on a day-to-day basis.

Senator TROOD—How do the other jurisdictions solve that problem?

Prof. Duggan—Outside Ontario, they have enacted in the regulations a regulatory shopping list as a test of what the name is for registration purposes. For example, at the top of the list, if you are born in Canada, the name for registration purposes is the name on your birth certificate; if you are an immigrant, it is the name on your immigration papers, and so on. Further down, it may be the name on your passport.

Senator TROOD—I see.

Prof. Duggan—This is complicated and imperfect but it is probably the best you can do as long as you are sticking to the idea of a name index system. There is litigation over these sorts of questions—but not an intolerable amount of litigation, and the system still works tolerably well despite this weakness.

Senator TROOD—Good. They are all the questions I have. Is there anything in general terms that you might want to say to the committee before we sign off?

Prof. Duggan—No, I think that is pretty much it. I would just like to thank you for taking the time to listen. It has been very interesting having the conversation. Good luck with your deliberations.

CHAIR—Professor Duggan, do not run away, because I still have a question I want to ask you before we officially thank you for your presentation. It is widely recognised that this is an extremely complex area of law. I think the fact that there have been discussions in this country about this law for the last three years is probably evidence of that. Are you suggesting that it is possible to put simple legislation in place despite the fact that this is an extremely complex area?

Prof. Duggan—No, but you should avoid making it more complicated than it needs to be. I am not saying that if you picked up the Saskatchewan Personal Property Security Act and tried to read it from cover to cover you would be blown away and say, 'This is fantastic!'—it is just not that sort of legislation—but the Saskatchewan version is workable, as is the Ontario version. You can come to grips with it. You put lead in your saddle bags by drafting it in an unnecessarily complicated way. The subject matter is always going to be complicated; you do not want to make it even more complicated by the way you approach the drafting exercise.

CHAIR—So you would put to us, then, that the Canadian legislation is not significantly simpler than this model, but it is more workable than this model.

Prof. Duggan—It is simpler than this model and more workable, but I would not go the next step and say that it is simple and that it makes a riveting read. Nobody is going to make a movie out of the Saskatchewan Personal Property Security Act any time soon.

CHAIR—So, I asked you for some examples of where that model is simpler. They are the examples that you have cited throughout your submission—is that right?

Prof. Duggan—Yes, the examples in my submission give the flavour of it. The other point, I suppose, is that if you just want to take a crude quantitative approach, the Australian bill is at least twice as long as the Saskatchewan act and the New Zealand act. So just in terms of sheer volume you get a sense of what is going on.

CHAIR—Yes, and I think you have raised that with some of your examples where there are 40 lines explaining a situation as opposed to 4 ½ pages in the Australian draft.

Prof. Duggan—Yes.

CHAIR—On behalf of the Senate Standing Committee on Legal and Constitutional Affairs I thank you very much for talking to us across the thousands of miles, and for your expertise in providing your knowledge of this area to our committee process. Thank you again very much on behalf of the committee for your time.

CHAIR—It is a pleasure. Good luck with the rest of the hearings.

Proceedings suspended from 9.58 am to 10.07 am

STRASSBERG, Mr Matthew, Senior Adviser, External Relations, Veda Advantage

WALKER, Mr Matthew James, Veda Advantage

CHAIR—We have submission 7 from Veda Advantage, which we have numbered for our purposes. Before I ask you to speak to that submission or provide us with an opening statement, do you have any amendments or alterations you need to make?

Mr Walker—I do have an additional document which I would like to add to that.

CHAIR—Thank you. I will ask you to provide us with an opening statement or talk to your submission, and following that we will go to questions.

Mr Walker—Firstly, Veda Advantage would like to thank the committee for the opportunity to comment on the exposure draft and also to appear before the Senate committee today. Veda Advantage is a provider of business information, mainly to the financial sector, with the core asset being the credit bureau on individuals and companies. We also provide identity validation services across a broad range of our customers and also work with our customers on workflow processes and decision making around the provision of credit.

Speaking to our submission, there are approximately six key points which we raised in relation to the PPSR. The first and probably the key point that we feel needs to be noted is the indication around the level of identifiers that are going to be captured on the PPSR. At this point, under the exposure draft, the idea is that it is going to be name and date of birth only for those individuals that were going to be recognised on the register. Our point, given our experience with the credit bureau and the interactions that we undertake with the finance market, is that it is not enough to simply capture that information. The slide that I have provided you with in addition to our submission notes the level of matching that you achieve, given various identity elements that are present. To give you an example, if name and address are provided to the credit bureau, the strong match relationship that we get is about 70 per cent. That is with name and current address. The key point is: the more data that is provided, the higher the integrity of that match on a database that does about 80,000 transactions a day.

So we feel that it is very important to get that right to ensure that the searches that are undertaken on the PPSR have the greatest opportunity to find the right person if they have a secured interest on any of their property. We obviously recognise that personal information will not be held on serial-numbered goods, and that is fine, but there is certainly a part of the register that is anticipated to have an individual's details on it. I believe that there have been various other submissions on this particular topic and they generally concur with the fact that you need certainly more than name and date of birth to be captured.

We make the point in our submission that is not necessary to therefore then show that information in a return search. Veda often use a match, no-match structure to return information to some of its customers, and we have proposed that, in addition to address, possibly drivers licence could also be captured in that event. Again, you are just moving up that match strength to ensure that you get the highest match possible and therefore that confidence in the PPSR is as high as possible for those users that are seeking to provide secured facilities.

The other tie-in there is that the exposure draft suggests that the information held is the same as or derived from the AML/CTF information that companies obtain from their customers, and the minimum information that they obtain from their customers is name, address and date of birth. So if that logic is maintained then the PPSR should also hold that sort of information on individuals.

The second area of our submission relates to access. A couple of our points actually relate to access to the PPSR—who can use it and for what purpose. The point we are trying to get across in our second recommendation is that there should be an opportunity to gain bulk-access to both the aggregate PPSR dataset and, potentially, the historical PPSR dataset in order to undertake research into some of those characteristics which might be beneficial to, say, a credit process. The PPSR at the moment is predicated very much on transactions, so if there a secured interest—there is a one-to-one report relationship—there is potentially a lot of value in the aggregate dataset. Of course, coming from a credit bureau background, that is what Veda does: it looks for population trends and population behaviour across the entire dataset to provide value for our customers. That same mentality and that same thought process should be applicable to the PPSR.

The example I can give you is that there might be some fraudulent behaviour occurring in the finance sector of which some information on the PPSR might be highly indicative. If no-one has done that research or been

able to look at the entire PPSR dataset or even subsections of it, no-one is going to know whether or not those indicators are there. So the point we would like to get across is that we think should be some consideration as to how that could be facilitated. There is no consideration of that in the draft as it currently stands.

There are a couple of other points we make in relation to access. We suggest that the registrar should have the ability to amend the table of access rights and access purpose. We come from a credit background, where access and use is highly regulated around the credit bureau, and the ability to amend that and grant access to people who may require it for very valid reasons has been quite difficult over time. It does look like there is a real prescription in the drafting as to who can access it and for what purpose. Veda is suggesting that there should be some power given to the registrar to be able to assess anyone's application to potentially come in and use the register for a specific purpose. There is no such authority for the registrar in the drafting at the moment. We think that it would alleviate future difficulties if that power were available.

Moving on to the fourth recommendation we make: Veda Advantage sits in a position in the market where it brokers a lot of information to its customers. It goes and looks at ASIC for information on companies, for instance, and then provides that information to its customer base, within both its own reports and some straight-through processing. The relationship with users of the PPSR will be similar potentially—so we may roll it into some of our own products but we also may simply broker it to particular users. A broker relationship is envisaged in the drafting. However, the assessment of that table of access and purpose does not specifically enable a broker relationship to exist, given the access rights and purpose that are currently there.

I refer to the table in section 227 of the exposure draft. There are only two items on that table that consider a third-party relationship. One of them is item No. 1, which states that the person can access the register if they have got the consent of the other person—so there is an envisaged relationship there for a broker. The only purpose that then applies is to look for registrations on the register about that person. So, if Veda, for instance, is working for a bank then we are not really going to be searching the register for registrations about the bank that already exist. They will be looking for registrations on a particular customer or a particular vehicle of which they do not currently have a registration or an interest, because they are looking to provide one. So there is quite an issue there that the access purpose and right are not valid for a broker in that circumstance. And that circumstance will come around quite a lot in the sorts of relationships that Veda and other information brokers will seek to have with users of the register.

The only other area in that table where it is contemplated that there is a third party involved is item 21, which states that a person may access the register to advise another person in connection with other related purposes of access. In the scenario of an information broker, often they will not be providing any sort of advice whatsoever; they will simply be passing information that is sitting on the register to a potential secured financier. They will not be advising them in any capacity; they will simply be providing them with information. So there is a slight drafting issue there.

Senator BARNETT—It depends on your definition of advice.

Mr Walker—This is true. We feel that it is not clear, because Veda would often not be providing any sort of advice, and other information brokers potentially would not be providing advice—in our definition anyway.

I will move on to the fifth point that we make, on the access to maintain a credit relationship. It is very clear in the table of access rights that a person may access the register to consider the opening or the establishment of a secure facility. But it is often the case that a finance company or a bank will look to review undertakings that it has previously made. There have been similar issues around the regulation of credit bureaus, where you can access it at a particular point in time but if you are looking to maintain things then it becomes a bit of a grey area. If you have had a look at the register to open up a facility then you should also be able to look at the register if you are doing a review of your risk, for instance, which is obviously quite topical in the current environment. We think a slight drafting change there would make it quite clear that people would be able to come back into the register and have a look at the particular interests that they might have. So we are recommending a slight change in the drafting of those words.

The final point that we make in our submission is that there appears to be some difficulty as to the powers of the registrar to maintain some of the information that is in fact sitting on the PPSR. One of the examples that have been cited in the Veda recommendations is, for instance, if a stolen vehicle is identified by the register. It might have gone on to the PPSR and subsequently have been stolen, or there has been some activity in relation to that particular asset. Is it clear what the registrar should or could do in relation to those registrations or security interests that are sitting on the PPS—and, in fact, what can the registrar do in those instances? There are other examples there. We suggest that there should be more clarity in the powers of the

registrar to enhance the data that is sitting on the PPSR. They are the key points that we want to get across. We are happy to take questions.

CHAIR—Mr Strassberg, do you want to say anything in addition to that?

Mr Strassberg—One point that we have brought up is about critical identifiers. Typically, even with our credit bureau database there are significant error rates in names and dates of birth. We observe that about 18 per cent of surnames are mistyped, 11 per cent of first names are mistyped and about four per cent of dates of birth have transposed digits. Human error is a major cause of a pretty significant rate of error.

Senator BARNETT—Can we get clarity on that? What is that data based on? Eighteen per cent of surnames are mistyped, 11 per cent of first names are mistyped and four per cent of dates of birth are mistyped. What scenario is that based on? What is your source for that?

Mr Strassberg—That is within our consumer credit database. Typically, what you might find is that someone makes a credit inquiry for a guideline but leaves off a T or there is transposition of the date of birth digits. Normally it is human error. The data entry person—

Senator BARNETT—But where do you get that information from? Is from your own internal observations?

Mr Strassberg—That is correct. We have about 14½ million credit files.

Mr Walker—It is the interactions from the financial market to the credit bureau. The errors are derived from analysis of those transactions.

Senator BARNETT—Does it surprise you that it is such a high amount? That is nearly one in five getting the surname wrong. That is a huge proportion.

Mr Walker—Veda has highly developed matching algorithms that accommodate those types of errors. So, even if the T is left off the name, we have sufficient other identifiers so that the scoring of that inquiry means that you will still find your file. It will still get the right information back to the customer. I do not know whether 18 per cent is high or not. On any database that has 100,000-odd transactions a day there is a lot of information flowing backwards and forwards and you can imagine that different financiers with different databases all have different issues around maintenance of their quality.

Senator BARNETT—Have you considered what sort of numbers would be on this national register? Have you done an assessment of that? We can ask the Attorney-General's office. What sort of numbers, say, after 12 months will be on this register and how many transactions will be conducted per day and that sort of thing? Have you got any ideas on that?

Mr Strassberg—Not specifically, no.

Mr Walker—I cannot give you numbers but, given that a direct transition is REVS to begin with, you would have to make some assessment around how much other activity is going to be out there on other non-secured or non-serial numbered goods. It is certainly going to be nothing like the credit bureau transactions.

Senator BARNETT—But there is still a significant level of risk which needs to be combated somehow.

Mr Walker—Yes, combated. We suggest that you need additional identifiers to be able to triangulate and ensure that a missing 't' does not impact on the response.

Senator BARNETT—That is a very good point. Have you got any other evidence that can help us on that, perhaps from the Australian Bureau of Statistics or some other entity, that says that people incorrectly type in the wrong surname, first name or date of birth? You can take that on notice. If you have some information—

Mr Walker—I will take it on notice. I am quite sure our data quality team will have some very interesting stats for you.

Senator BARNETT—That is very persuasive evidence, and if you have any further information to support the fact that it is open to incorrect outcomes then that would be useful. Mr Walker, you mentioned in your opening statement the figure of seven per cent. You were talking about identifiers.

Mr Walker—Seventy per cent.

Senator BARNETT—Seventy. What was that figure? Can you explain that for us.

Mr Walker—Yes. It is in relation to the slide and graph that I gave you. Again, it is talking about the interactions between our customer base. We have 5,000-odd customers that are interacting with the bureau at any one time. Where an inquiry comes to the bureau where there is no date of birth and no drivers licence and

simply a name and address, you will find an existing file on the bureau 70 per cent of the time—seven out of 10 times—if that is the only piece of information that we have available to us. Potentially the financier does not have access to date of birth or any other identifiers and that is all they will have provided us with. They will find a file on our bureau. Most people have a credit file. We have 14½ million files. If you are credit active and you are over the age of 18 then you should have a credit file because you will have had some activity; you will have applied for a credit limit or a loan or a credit card. It is for that other 30 per cent that we are creating some other files because we cannot sufficiently match details to an existing file. If you get moving down that curve right to the end, if you get name and an address plus three of the additional identifiers—they could be made up of date of birth, a drivers licence and a previous address, and they have differing levels of assistance in that matching algorithm—then we get to 96 per cent or thereabouts. The key output is that the more information you can provide obviously your match rates are going to be significantly higher.

Senator BARNETT—I have a few other questions, but can I just go back one step to Veda Advantage. Can you just tell me and the committee a bit more about Veda Advantage—what you do, who you are and how you operate.

Mr Strassberg—Sure. Veda Advantage started life as the Credit Reference Association of Australia a number of years ago. It became Baycorp and then, more recently, Veda Advantage. We predominantly do consumer credit files. In Australia they are very tightly regulated under the Privacy Act. They are having some changes foreshadowed by the Australian Law Reform Commission which no doubt will find their way before this committee. Essentially, if you have a credit inquiry, we will have that information. We will also know if someone has defaulted. We will get that information from banks. If, typically, you have not paid a bill for 180 days, it will end up on your credit file. What we can have on a credit file is very tightly prescribed, so typically on a credit file you will find previous addresses and credit inquiries going back five years. So, while we have a very broad database, it is not a very deep database.

Senator BARNETT—Are you an association or a public company or a private company? What are you?

Mr Strassberg—We are a private company. It started life as a mutual between the banks many years ago and is now a private company. We have some competitors in Australia. You might have heard of Dun and Bradstreet. There are some others. We have expertise in predictive analytics. It is not like there is a room full of files anymore. It is a bit of a misnomer calling it a file. There is not a file; it just pulls the data together when requested.

Senator BARNETT—Who owns Veda Advantage? I do not want to go into the details.

Mr Strassberg—Merrill Lynchand PEP, Pacific Equity Partners.

Mr Walker—Previously it was listed and there was a private buyout.

Senator BARNETT—Do you operate just in Australia or overseas?

Mr Strassberg—We do operate overseas, in New Zealand, and I think we have an interest in Singapore. But predominantly Australia.

Senator BARNETT—So you would be familiar with the New Zealand PPS legislation to some degree.

Mr Strassberg—There is some familiarity and we have been talking to our friends in New Zealand to try and get information on how they found the experience. I do not know if I have got a lot to be able to add on that.

Senator BARNETT—We have not had evidence on this side of things as particular as your evidence and it is appreciated that we have that input. That is why I wanted to know a bit more about where you are coming from. On the identifiers, under the current scenario you say that you have put your views to the department last year on several occasions in terms of your concerns about not having adequate identifiers. What was the response when you provided that view to them last year?

Mr Strassberg—It has been part of the submissions that we have made, but in that sense the department has not come back to us with a formal response to that criticism or concern. Certainly I noticed in the submissions to this process that they have been raised even by some of the privacy advocates who have indicated, joining with Veda in that sense, that there are not enough identifiers. In Australia, of course, is it is a sensitive area given the Australia Card debate of many years ago. It makes Australia in that sense somewhat unique, and our experience with anti-money-laundering and counterterrorism requirements is that these issues keep coming up and it is one that government will have to grasp.

Senator BARNETT—Is it improved, as far as you are concerned, from the first draft to the second draft to this bill before us?

Mr Walker—On that particular identified topic, no. It has not been amended at this point.

Senator BARNETT—So your key request is that the residential address be included. Is that your main proposition?

Mr Walker—The main proposition is at least residential address, and if you want to increase your likelihood of getting the correct information back to a user then you could potentially consider a drivers licence field as well. That is not to suggest that that is going to be returned to anyone and you need to have a model that suggests, 'Well, we are going to use that in the matching process.'

Senator BARNETT—I am with you. Moving to the privacy issues, you mentioned the office of the Privacy Commissioner is coming here today. What is your view on that in terms of getting the balance right? Once you put out the residential address, a lot of people would say it is an abuse of privacy. What is your response to that?

Mr Strassberg—If you do have a challenge-response, a match-no match, then the privacy is retained.

Mr Walker—A user will have to know an address before they will be able to get a correct match to a sufficient level. No-one will be able to scan the PPSR register to obtain new information. So a concern about, for instance, a domestic violence issue, finding someone who has had that sort of issue, really would not come up because the only thing in the register that they would be able to see would be—even if they found their name on the register, they would have to have the name, address and date of birth information as well before using the register to get anything back anyway.

So we are certainly not proposing that the residential address or date of birth be provided under a search; we are suggesting that it be used to identify those individuals that are putting secured assets onto the register. If you do not—and the privacy submissions make the point—it all comes back to the workability and usability of the register. If wrong information is being given back to an inquiry then you do have a lot of privacy issues, especially if you are not looking at the right information on an individual at a given point of time when talking about a financial instrument. The certainty issue around getting the right information back is critical. Having appropriate levels of identifiers sitting on the register, which are obviously protected, actually alleviates privacy concerns and makes sure that you have the right information being returned.

Senator BARNETT—What level of confidence can we have that that information cannot get out?

Mr Walker—There are many processes you can put in place that will ensure that that information is protected.

Senator BARNETT—Can you guarantee it?

Mr Walker—I do not know the IT specs. It cannot ever be guaranteed, realistically.

Mr Strassberg—Similarly, passport information, drivers licence information—these are all obviously areas of sensitivity.

Senator BARNETT—Have you had a look at the Australian Privacy Foundation's submission? They raise a number of concerns. We had a witness from there yesterday, and you can check the *Hansard*. They talked about errors in registration. Let's say my name is on there and they have the address wrong or they have spelt my name wrong. What right do I have to go in there and fix it? They were saying that, under the current legislation—at least the way I read their submission—that is difficult to do, if not impossible.

Mr Walker—I am not aware of their specific recommendations, but the PPSR is going to have to ensure access rights to individuals in some format to ensure that the requirements for being accurate and up to date are met.

Senator BARNETT—That is good enough. They raised the issue of function creep with us yesterday. Are you familiar with that issue?

Mr Walker—I am well aware of the function creep logic and, I suppose, the policy idea that is attached to that. It is difficult when you have innovations as with something like an AML CTF requirement that comes about and shows that registers of information that are public information can be used for purposes outside of what they were originally constructed for. There are real benefits in using some registers for purposes outside of original purposes. I believe that there is nothing necessarily wrong with function creep. If there is a real

benefit in using information in a way that is not going to be breaching privacy then, as long as there are protections around it, why is function creep such a problem?

Senator BARNETT—I am with you there. That leads to the next point. You raised the issue of section 227 on brokers' access to the register. When you say 'brokers', would you include lawyers and law firms acting on behalf of their clients as well? Would that be a fair comment? Are you talking about finance brokers?

Mr Walker—I am talking about any third party that is accessing the register on behalf of another. So, yes, I would include law firms in that.

CHAIR—Can I just ask a question on that? Isn't that covered in some of the later items like 16, the legal personal representative of an individual?

Mr Walker—Potentially that will cover the law representative. But if we get back to a pure information broker, like Veda—

CHAIR—But wouldn't you be acting, say, on behalf of one of your clients?

Mr Walker—We would not have a legal arrangement with them in that sense. We do not have a specific agency relationship.

CHAIR—So you would not be doing it on behalf of the Australian Central Credit Union, for example?

Mr Walker—We would potentially be providing them information.

Senator BARNETT—Under which section?

Mr Walker—That is right.

Senator BARNETT—That is the problem for you.

Mr Walker—That is the problem.

Senator BARNETT—You raised item 21. You are saying that is not adequate for Veda Advantage because of the definition of 'advise'. Let's say 'advise' did include passing on, referring, information—would that satisfy you?

Mr Walker—Yes, if that was defined and 'advise' did not mean—

CHAIR—So you do not think you are covered under, say, 14, 19 or any other item?

Mr Walker—We do not feel that the pure broker relationship—

CHAIR—Or even 21?

Mr Walker—People can come to our site and get information and potentially use the PPSR and we are not going to have signed off an agency relationship with them.

Senator BARNETT—So if we can have 21 fixed and defined appropriately, and you are satisfied with that, then you will be happy with that as it currently stands.

Mr Walker—Yes.

Senator BARNETT—What about people accessing it for one purpose and then using the information for another?

Mr Walker—In the context of Veda or generally?

Senator BARNETT—Generally.

Mr Walker—There need to be protections around—

Senator BARNETT—That is my question: are there adequate protections against that, as far as you are concerned? Do you have a view on that?

Mr Walker—It is difficult to control what someone uses that information for subsequent to release from the register, but that is in general—with any database that is holding information like that, any secondary use—

Senator BARNETT—This was raised by the Australian Privacy Foundation yesterday—what are people using the information for, can they on-sell it for funding or a fee and, if so, should that be stopped?

Mr Walker—We certainly would not advocate any use that would impact on privacy. I would have to take that under consideration as to how to control secondary use of a public information resource.

Senator BARNETT—While we are on section 227 and so on, you referred to access to the different entities. What about law enforcement agencies—should they have automatic access to this information, or should it be for a defined purpose based on reasonable suspicion or whatever?

Mr Walker—I do not have a current view.

Senator BARNETT—I have one final question. Why haven't Dun and Bradstreet and your colleagues, competitors or whatever in the industry made a submission? Is there an association of your organisations—not that you can respond on behalf of them—

Mr Strassberg—There is the Australasian Retail Credit Association. I cannot answer for our competitors whether or not they take an interest in PPSR and more broadly, but we have been fairly active with making submissions on a number of government processes.

Senator BARNETT—Have you had discussions with the association about these proposals?

Mr Strassberg—I think for ARCA's purposes the individual banks may have made submissions. I do not know if the industry as an industry body has made a submission.

Mr Walker—Veda talk to the Australian Finance Conference—

Mr Strassberg—Who have been very active.

Mr Walker—and to our customers, but there are no credit bureau associations in Australia. There are really only two.

Senator BARNETT—Thanks very much for that; I appreciate your feedback.

CHAIR—Thanks very much for your time this morning and for appearing before this committee. We certainly appreciate it.

Proceedings suspended from 10.45 am to 10.53 am

PILGRIM, Mr Timothy Hugh, Deputy Privacy Commissioner, Office of the Privacy Commissioner

SOLOMON, Mr Andrew Gordon, Director, Policy, Office of the Privacy Commissioner

CHAIR—Welcome. We have received your submission, which we have numbered 25 for our purposes. Before I ask you to talk to the submission or make an opening statement, do you have any changes, amendments or additional information that you want to provide to us?

Mr Pilgrim—No, we do not.

CHAIR—I invite you to speak to your submission and then we will go to questions.

Mr Pilgrim—I welcome the opportunity to offer some opening comments to the committee on the exposure draft of the Personal Property Securities Bill. The Office of the Privacy Commissioner has been consulted by the Attorney-General's Department on the development of the national personal property security proposal since May of 2006. We have provided the department with advice, and attended meetings and workshops on ways in which the register could be established in a privacy-enhancing way. The office recognises the wide-ranging commercial benefits potentially resulting from the establishment of the register, such as simplifying the law, creating legal certainty and thereby reducing costs. The office's interest is primarily in relation to the collection and use of personal information through the registration and search processes, and has provided detailed analysis in our submission to the committee and in previous submissions on the proposal. I would like to briefly outline nine key issues from our perspective.

First, the office suggests that provisions related to the scope and content of the register should be contained in the primary legislation and not necessarily left to the regulations. While the office recognises that the use of regulations can sometimes provide flexibility, the office submits that it may be preferable in this instance, given the significance of the register and its application to a very large number of Australians, that the privacy safeguards for personal information should be specified in the primary legislation.

Second, only the minimum necessary personal information required to achieve the goals of the register should be collected. Limiting the amount of personal information collected may assist in the management of that information and is a preventative measure against misuse or loss.

Third, as currently drafted the bill would appear to have the effect of creating potentially a broad scope for the register, which may encourage its expansion to include a wide range of personal information not necessarily strictly limited to security interests as they are presently known. This wide scope could potentially lead to its becoming the repository of large amounts of personal information to the extent that it may be possible to develop an extensive personal profile of an individual. The availability of extensive personal information about a large number of Australians could lead to function creep. This is a situation where the information is used for purposes other than that for which it was intended.

Fourth, the PPS register system could perform validity checks against other databases such as the National Exchange of Vehicle and Driver Information System, commonly known as NEVDIS. The office suggests that the bill should define the types of information that can be checked for validity and the databases that will be used for that purpose. To assist here the office has issued voluntary guidelines for data matching by Australian government agencies. Those guidelines, or a derivative of them, could form the basis for an appropriate privacy framework for any data matching between the register and other databases.

Fifth, generally available publications are excluded from the operation of the Privacy Act for the use and disclosure of personal information contained in such a publication. The office is not sure if the register is a generally available publication. The register's status as a generally available publication will have, for example, implications for credit reporting. Under the draft bill a person may search the register to assist in deciding whether to provide credit to, or obtain a guarantee or an indemnity from, individuals whose information may be contained on the register. The search result returned by the register may be considered a report as defined under the credit reporting provisions of the Privacy Act. In these circumstances the Privacy Act places limits on the disclosure by credit providers of personal information contained in reports relating to credit worthiness. These limits do not apply if the information is publicly available; therefore it is important to know whether the register is a generally available publication. Clarity on this issue would assist in understanding the privacy effects of the bill.

Sixth, the privacy protections will be enhanced by making sure the bill contains well defined purposes for searching, and only returns the minimum necessary information in the search result. This should lessen the

possibility of personal information being misused and of inappropriate searches of the register occurring. As well, the office supports the idea that an unauthorised search and use of the register by an organisation is an interference with privacy for the purposes of the Privacy Act. However, I note that there may be potentially a large number of small businesses, which might access the register, which are currently exempt from the Privacy Act. It may be that those businesses can be brought in under coverage of the Privacy Act for their handling of information gained from the register in a similar way that small businesses that are reporting entities under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 are brought into the Privacy Act coverage.

Seventh, in addition to coverage by the Privacy Act, the office supports additional provisions aimed at deterring inappropriate searching and use of personal information contained in the register. This could be achieved through secrecy provisions to cater for the activities of agency employees and civil remedies to penalise unauthorised access and misuse of personal information. These provisions could also be complemented with specific privacy guidance and training for agency staff who have access to the database records associated with the register in the course of their work.

Eighth, the bill allows a broad range of government agencies to search the register for purposes that relate to their powers or functions for law enforcement purposes. The office suggests that these permitted uses be clearly stated. Again, the approach adopted by the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 regarding which agencies may obtain information held by AUSTRAC may be an appropriate mechanism.

Finally, in order to properly assess the potential privacy impacts of the new proposals that include the handling of personal information, the office recommends that a privacy impact assessment be conducted to help identify and address potential privacy issues. A PIA, as they are known, allows agencies to identify and analyse a project's privacy impacts. A project that underestimates privacy impacts can place its overall success at risk by not meeting expectations of the community as to how personal information should be handled. A PIA could help to avoid such an outcome.

In these brief opening remarks I have focused on aspects of the bill which the office believes are most relevant to personal privacy. The office would like to see the bill enable the efficient use of information for all parties who will benefit from the convenience of a single register while at the same time preventing the unnecessary collection, storage, use, access and disclosure of personal information.

The office looks forward to contributing to the development of the bill and the register and participating in further consultations as these are progressed. Thank you.

CHAIR—Thank you very much. Mr Solomon, did you want to add anything to that?

Mr Solomon—No, Senator.

CHAIR—We will now go to questions, and I begin by asking one. Is a privacy impact assessment something that your office would do, or would it be done by an external agency with input from you?

Mr Pilgrim—In the normal course of events, we think it is appropriate for the agency that is handling a particular proposal to undertake or to get an independent person to undertake the PIA themselves rather than our office. We are certainly happy to be consulted on the process. I point out that we have issued a privacy impact assessment guide which outlines what a privacy impact assessment is and which gives guidance on how to undertake one and the benefits of doing that. I would be happy to provide the committee with a copy of that, if you would like.

CHAIR—I am sure that would be very useful. No doubt you have raised with the Attorney-General's Department that they should undertake this assessment?

Mr Pilgrim—We have had discussions with the Attorney-General's Department. As I said, we have been holding discussions on this since about 2006. We have put forward our view that it would be extremely useful to undertake a PIA in these circumstances, which is the same sort of advice we would give any department.

CHAIR—We will follow this up when we next see them on 6 February. What is their response to not having done it to date?

Mr Pilgrim—I am not quite sure of the actual response. I understand that they are looking to do one, but I am not sure when they will be undertaking that. Mr Solomon may have more advice on that.

Mr Solomon—Our understanding from a discussion in the last week is that they are now in the process of putting together a methodology for undertaking the PIA. They were waiting until they had some indication of how they might structure the register from a technical perspective before they wished to commence the PIA.

CHAIR—I want to clarify a couple of things. It has been put to us that people are feeling very nervous about their date of birth and address on the register. Do you believe that that would have to be included? What would be essential criteria for identifiers?

Mr Pilgrim—That is a slightly difficult question for us to respond to in terms of what is necessary. One of the things we would express as part of the consideration of how the register should be set up is for it to be clearly identified what is the minimum amount of information that is necessary for it to be able to perform its functions for people to be able to use it in a way in which it has been developed. We want to see that limited.

In terms of identity, while it is obviously essential to be able to clearly identify information on the register, it should be, again, limited to essential information. For example, we have expressed some concerns with having dates of birth and having residential addresses. In terms of the addresses, there may be a way around that by using business addresses in certain circumstances.

CHAIR—Or a drivers licence?

Mr Pilgrim—I believe that was raised in one of the submissions, and I must admit that our position at this stage, having only recently seen that, is that we are not too sure of the rationale behind using a drivers licence. One of the things that we stress is that with any database there should be a minimum set of information so that you can minimise any risk of misappropriation of the information and harm that could come from that—such as identity fraud or identity theft. With any database, the more information you put into it, the more appealing it is going to become to those people who may have malevolent uses for it. When you start getting down to using identifiers such as drivers licences you begin to make that database a more useful set of information. I have not seen and I am not aware of a strong argument for using the drivers licence information over having a non-residential address—say a business address. While we have some reservations around the date of birth, in those circumstances the date of birth might almost be preferable to going down the path of a drivers licence.

Senator TROOD—The argument seems to be that only by going to that level of detail, using a drivers licence, can you be absolutely confident that you have identified the right person. It may be one of the few ways where people can be confident of the information, that there is going to be an exact match and that they are not going to be mistaken for somebody else. Is that a persuasive argument from your perspective?

Mr Pilgrim—I would suggest that you would have to look at what type of information you are actually accessing to see what other mechanisms may be able to be built into the system. For example, in terms of some aspects of the information that is going to be on there—I believe that there is going to be a serial number—the item could be identified by. If you could start looking at it by identifying the actual property, that may be a more privacy friendly way of doing it than having to, I suppose, build up a database of individuals various IDs that they have as they go about the community. You would have to look at whether in fact using that is going to outweigh the risks that may be encountered by putting it onto a centralised national database.

Senator TROOD—Some have identifiers—bits of jet engines might have identifies; the ingredients for a cake over which there might be some security, sadly, may not. So there are clearly issues about the kinds of things you put on the register or the things that are subject to security, whether they have an identifier or not. Clearly, large pieces of machinery and things of that kind would. Motor cars obviously do, but there are a lot of goods that would fall under the act that will not have identifiers, and that seems to be the difficulty.

Mr Pilgrim—I appreciate that. We have not given a lot of direct thought to that actual aspect of it. It would be something that we would want to give a bit more thought to. I suppose our basic premise would be wanting to try and limit the amount of information on there to only to what is particularly necessary for the register to be able to function appropriately. While I am not necessarily convinced that the drivers licence would be the appropriate mechanism, it may be one mechanism. But then would you require, for example, the date of birth and some sort of address—be it a business or residential address. What we want to see, as I keep stressing, is a limitation on the amount of information there.

CHAIR—If I remember correctly, we had the Australia Privacy Foundation, and I was surprised and did not realise that the default mechanism in this act is the protection under the Privacy Act, but the Privacy Act does not cover small business and individuals. Is that correct?

Mr Pilgrim—That is correct. I would also go back to one point that I made in the opening statement. First of all, we do need to have clarification of whether or not this will be a publicly available set of information,

because that also has impacts on how and if the Privacy Act can actually do what it is intended to do in the circumstances.

CHAIR—So the interaction between this bill and the Privacy Act is still a bit unclear—is that right?

Mr Pilgrim—It is unclear in our minds because of that first question. In terms of small businesses, a small business is defined in the Privacy Act as being an organisation that has an annual turnover of $3 million or less. So, if the business has a turnover of $3 million or less, generally speaking it is not covered by the Privacy Act. However, there are some complicated things that flow under that. For example, if an organisation is a small business—meaning that it has a turnover of $3 million or less—but is providing a health service, it will be brought under the Privacy Act because of the sensitivity of health information. There are some other areas which we can provide in detail if the committee requires it, but generally speaking small businesses are not covered. Individuals are not covered by the Privacy Act; that is correct.

CHAIR—So what protection are they afforded through this legislation?

Mr Pilgrim—I think there may be some question around that—Mr Solomon might have some more information on it—but I believe there may be some mechanisms that could be put into the bill that would bring in coverage for the activities of individuals. We have suggested that it could be done, possibly, through some sort of secrecy provision. If it is misused, for example, by an employee in the agency then they could be brought in under secrecy provisions and there could be some civil penalties that flow from that. There could also be a similar mechanism brought in for the activities of individuals who access the register—say, a member of the public or a person who is a small business operator and a sole trader. There could be mechanisms brought in under the act if they are not already in the draft bill. I will just ask Mr Solomon whether he is aware if they are.

Mr Solomon—We are recommending that it be possible that all small businesses be brought in for coverage under the act so that they would be covered by the Privacy Act in the same way that reporting entities under the anti-money laundering scheme are covered by the Privacy Act in their handling of information. So, if a small business were searching the register inappropriately, it would be covered by Privacy Act provisions. In relation to individuals accessing the register who did the wrong thing, that should be dealt with through a civil penalty-type procedure. It is not appropriate to bring individuals into coverage under the Privacy Act, because the Privacy Act is based around organisations and agencies, not around individuals.

CHAIR—So you would need a consequential amendment to the Privacy Act—is that what you are suggesting?

Mr Pilgrim—In terms of bringing in small businesses, there are probably a couple of mechanisms by which it could be done. There is an amendment through consequential amendments to the Privacy Act for the Anti-Money Laundering and Counter-Terrorism Financing Act to establish that those small businesses which are reporting entities for the purposes of that act are going to be considered organisations for the purposes of the Privacy Act. So it could be done by that mechanism. I think that what Mr Solomon is saying in terms of individuals is that we do not necessarily think it is appropriate to try and bring individuals within the coverage of the Privacy Act, because it traditionally does not cover individuals. It is particularly focused on the activities of organisations and agencies, and it would be, I suppose, very new ground. The act is not necessarily constructed around dealing with the activities of individuals.

Senator TROOD—I want to ask you about your checklist of nine items, Mr Pilgrim. I assume you have been prosecuting these, as it were, with the Attorney-General's Department on a regular basis. Are you relatively comfortable that they are taking those concerns outlined on board in the legislation or are there ones that you are particularly concerned about that they are paying less attention to or no attention to?

Mr Pilgrim—We are certainly pleased with the amount of interaction we have had with the Attorney-General's Department over the course of the development of this proposal. We put in, as I said, a couple of submissions to the Attorney-General's Department as they developed various stages of it, and, as Mr Solomon said, his officers and staff met with them as recently as a week ago. I think we are generally comfortable that they are taking the issues on board, and we are still working through it with them given the status of this as an exposure draft bill. I would say that at the moment they are still open to these issues being raised with them.

Senator TROOD—Are there any outstanding issues that you think the committee needs to pay any particular attention to?

Mr Pilgrim—As I have mentioned previously, one issue is to do with needing to get clarification about whether this would be publicity available information. I think that is the key one for us. That is not to say that

we are not being listened to on that. I think it is a matter of discussion. I would say that the nine issues that we have raised are key issues for us. They are not ones that we have been told have been fundamentally opposed by anyone during the process, but they are matters which are under consideration.

Senator TROOD—Perhaps you can help me with this. In providing information, it seems the difficulty is in knowing whether or not you give priority to the accuracy of a hit on the database as distinct from the amount of information that might be needed to ensure that accuracy. It seems clear that the more information you provide then the more confident you can be that you will get accurate identification and people will not be mistaken for having done things that they have not engaged in or will not be seen to have provided securities when they have not done so. Do you have a view on where one should strike that balance? Are you more inclined to say, 'We would prefer that the balance be struck in favour of more information to make sure that people's information in the database is not mistakenly confused with that of other people?' Or do you strike the balance in the other direction?

Mr Pilgrim—It is a very difficult balance and one that quite a number of organisations are grappling with in terms of identifying the people they deal with. To start answering the question, can I say that we are always trying to ensure that when you are building up databases of information you first of all have the minimum amount that you need to do the job, the minimum amount that you need to allow it to function properly. When you are dealing with these situations you can assume that a person has provided an organisation with some information for them to go and search the register. There is going to have to be an onus on individuals to realise that if they cannot be easily identified they may have to go back and provide additional information. The balance is drawn between the efficiency of a system but not then encouraging a database to be too broad and to build up too much information. I am wavering around the point because it is not necessarily a very easy balance to get in most circumstances, but it is one that has to form a key part of the policy decision to try to prevent having unnecessary amounts of information collected into a database—because it then runs the risk, if it is inappropriately accessed, of being a much more rich data source that can be used for inappropriate behaviours. Mr Solomon may want to add something.

Mr Solomon—We are not experts in security interests or in registers as such, so I think it is a matter for the policy department to strike that balance. We are saying what our intention is in relation to limiting the collection of information. It is then more a matter for the policy department to work through how they can achieve that in the most practical way while achieving the purpose of the register.

Senator TROOD—The view of the Privacy Foundation seemed to be, in the end, when pressed, that they would prefer that more data be provided to ensure that there was not mistaken identity, rather than holding back data, because the consequences of mistaken identity might be greater than the dangers of incorrect access to the database.

Mr Pilgrim—That can be quite a legitimate issue too. You then need to start consider, if you are going to take that approach, whether you have the necessary protections and remedies, because, the more data you collect, the more you may need to have even tighter protections around how it can be used and how it can be disclosed. You then need to look at the mechanisms by which the information goes back. For example, you may have a challenge response, whereby if you have information you get a yes/no answer back. So there may be a wealth of information in the database, or the register in this circumstance. The person who is trying to access that information may have a limited amount and they could put that in, but, if one of them does not match, rather than getting a record back saying, 'Here is the closest record we can find,' they would get one back saying, 'Sorry, we can't match those records.'

Senator TROOD—I gather it is the 'no match' response that is the default or the preferred position, which of course would provide almost no data. I assume we are also here having this discussion on the basis of what might be publicly available rather than making assumptions about the insecurity of the database—so that if someone hacks into it in some way the material might then become readily available. This discussion is taking place at the level of people accessing the actual database itself in a perfectly—generally speaking—legal way.

Mr Solomon—Our discussion about limiting the collection is based around both scenarios, not just the public accessing. The more information in a database, the more security you need to make sure it is not inappropriately accessed through the back door, if you like.

Senator TROOD—Do we have many instances of inappropriate access? Are there many instances that have come to the attention of your office?

Mr Pilgrim—I suppose there is a broad range there. Are you talking about activities of government agencies that hold large databases of members of the community or are you talking about private sector organisations who are accessing, say, databases?

Senator TROOD—Perhaps I should assume that the government always acts with propriety and does not do anything that would be inconsistent with any of the obligations that it might hold! So I suppose I am thinking about private access.

Mr Pilgrim—To answer it specifically is probably difficult. Our office gets quite a number of complaints, and we undertake quite a number of investigations during the year. They cover a wide range of scenarios. Quite a number of those would be around organisations that have collected information that a complainant may feel is inappropriate or should not have been done. So we do get a number of complaints around those sorts of things. We do get other information coming to us about organisations that may have collected information from a source that they should not have, but I would have to go back and interrogate our databases to give you specific numbers on those.

Senator TROOD—That is all I have, thank you.

Senator BARNETT—I have some questions. Thank you for being here. We appreciate your submission and the recommendations. I just want to flesh out some of the views that you have expressed. I will go firstly to the privacy impact assessment. I would like to know what is involved in undertaking such an assessment and, with respect to this legislation, what would be involved, who would undertake it, how long it would take and anything else you can advise the committee about with respect to that recommendation—which is made in reasonably strong terms in the last paragraph of your submission.

Mr Pilgrim—I can give you some of that information. As I said, we have got here, for tabling, a copy of our guidelines, which actually set out in a lot more detail the answers to those sorts of questions. Initially the decision around taking a PIA, we think, is one that should be done favourably, because we think it will assist an organisation or an agency, in this case, help to do, if you like, a road map of the actual project. It is a road map in terms of the personal information use that may occur. We encourage that to be done early on in the proposal but for it not to be the only one necessarily, because it can become an iterative process.

It is one that, as I said, is like a road map. It can identify where the different sources of information are going to come from. It will identify whether they may have some sort of legislative impediment to obtaining that information, which might be cross-jurisdictional, for example. It also will start to identify some of the processes that may need to be considered down the track in terms of the technologies that may be used. So it is a really useful tool, I think, initially in the process to start mapping out some of the broader requirements or broader issues or even some of the boundaries or problems that may occur.

In terms of who should undertake it, we do not have a set of rules or guidance on that. It can be undertaken initially internally within an agency. We think there is always benefit as well in having an independent specialist, if they are available and about, to undertake the PIA, because we think this can bring a more independent light into the proposal and may also help identify issues that may not necessarily be able to be seen from within an organisation.

Senator BARNETT—There are a number of them around of a credible nature, I assume.

Mr Pilgrim—Yes, there are, I believe, a number of different organisations around that undertake PIAs. Some of these may even be law firms. Some may be other providers who specialise in work in this area, around information management and the like.

In terms of how long it will take, again that is going to be determined by the size of the project or the proposal, obviously. But, as I said, it is an iterative process, so you may do an initial PIA to sort of scope out what may be some of the areas and then, as you develop it more and start looking at legislation, you may want to undertake another one because you may start to identify other, unexpected needs for the proposal, so therefore you may need to go back and look at it. As I said, a good example may be if there is a cross-jurisdictional need to access information.

Senator BARNETT—All right. I am going to drill down a little further. So in this instance, with what we have got before us, how long would it take, roughly? What resources are required?

Mr Pilgrim—I do not think I am really best placed to answer that, because as with all proposals and projects I think they are going to vary by complexity of the process. For example, if you were going to go to

an independent person to do it, I am sure they would be putting in a tender that would map out the length of time for that particular project and the costs associated with it.

Senator BARNETT—Are we talking weeks or months?

Mr Pilgrim—Again, I would not like to try to put a time frame on it but I would imagine that months would probably be the extreme in a proposal like this. But again it depends on what stage it is at and the level of complexity.

Senator BARNETT—Okay; thank you. Just going back to this issue of clarifying the information to be held on the PPS Register and whether it is going to be a generally available publication—for the purposes of the Privacy Act and more generally. What are the issues that need to be considered when that matter is clarified—by the government, I presume. Do you think it should be generally available? Are there circumstances where you would envisage that it could be generally available, or would you not support such an approach?

Mr Pilgrim—I think that whether or not it is made available needs to be carefully considered, and again that is probably going to come down to being a policy decision. If we start looking at the type of information that is going to be on the register, what needs to be considered is what are the potential uses of that information should it be more publicly available; is there potential for greater harm to individuals if the information is freely available and can be used for purposes that the person who owns the information might not expect? They are the sorts of considerations that I think need to go into whether or not it is made available.

Looking at the current structure of the register as we understand it, I would begin to wonder whether or not it is publicly available in terms of the definition of the Privacy Act. It possibly would not be, and I think that may be an appropriate approach to take, given that it will potentially hold a lot of information and it will be information that, if it started being merged with other databases—those that are held within the private sector, for example—it could start building up bigger profiles of individuals. So, by not making it publicly available, it puts, I suppose, tighter controls around how it can be used and what the secondary uses of the information can be.

Senator BARNETT—All right. In your submission, in the dot points on page 2, the first two dot points talk about the PPS Register and ensuring 'that the information is limited to that which is necessary' and that any offence provisions cover misuse of the information, and in your opening remarks you referred to the issue of function creep. Can you just flesh out for us the sorts of concerns there are in terms of the misuse that could occur, function creep? What examples can you provide of the matters that we should be watching out for so that we can legislate to ensure that they do not occur?

Mr Pilgrim—In terms of function creep, if we are going to have a database which has information on it around a lot of the financial aspects of a person's private life then the potential for the expanded uses of that can be to build up what I touched on earlier, which is bigger profiles of individuals, and whether that information is going to be used, once it is collated into a larger database, for purposes of which the individual may not be aware. Decisions may start being made about that individual based on that information, which, if it is not taken in the right context—incorrectly, if you like—could mean that incorrect decisions are made about individuals. It is a common theme that we look at when we are dealing with expanded use of personal information.

As to whether it is publicly available information, as I touched on before it also links into the credit provisions of the Privacy Act, which have particular protections around personal financial information. I should add that surveys that our office has undertaken of public perceptions have shown that the Australian community does rate financial information in particular as the information they want most highly protected. So there are quite strong concerns in the community around ensuring that their financial information and related information is well protected.

Going back into the links into the credit provisions, the information that is on the register could be used and accessed, as we are aware, for determining a person's creditworthiness. We need to ensure that, if that is the case, that information will be given the same level of protection that it would be if it formed part of the information that falls under part IIIA of the Privacy Act to protect credit information in that there will be strict controls around its secondary uses and on-uses. We want to make sure that information like that is going to be well protected.

Senator BARNETT—Do you think in that regard that the penalties are adequate or that they should be toughened up in terms of misuse of information and onselling or whatever they are going to do with it?

Mr Pilgrim—I might ask Mr Solomon whether he has any other views on that. I think we did have some question around the range of remedies that are there. As we said originally, we think there should be civil penalties brought into play for the misuse of information. Going back a step again, and to reiterate the point, if the register is publicly available then that limits the ability of the Privacy Act to provide certain protections. But, with any specific register or database that is being built, we think it is often appropriate to enhance or strengthen protections that are there under the Privacy Act by putting in specific controls, protections and remedies through civil remedies around the use of that information as well.

Senator BARNETT—At the moment the civil penalties do not exist or are not there?

Mr Solomon—We think there need to be additional protections that are not in the act at the moment. We have set those out in our submission.

Senator BARNETT—Regarding your recommendation of the recasting of clause 228 'so that the registrar can only lodge a complaint with the Privacy Commissioner over inappropriate search or use of personal information' and the next dot point, would you provide your views and evidence in support of that recommendation?

Mr Pilgrim—Currently under the Privacy Act, the way our complaint processes work is that the act requires an individual to have initially complained to an organisation if they believe there has been a breach or a misuse of their personal information. If they are not satisfied that that has been dealt with appropriately by the organisation, they can then lodge a complaint with our office. As I understand it, the bill is currently structured so that the registrar will be able to lodge a complaint with our office if they believe there has been misuse of information under the bill. We are suggesting that, as a starting point, the individual whose information has been misused should be advised that this is happening. It is unlikely, but there may be, for example, a reason they do not want the matter to come to our office, and we believe that it should be up to the individual to determine if they want a complaint about the misuse of their information brought to us. We think the starting point for complaints to be handled should be with the registrar.

Senator BARNETT—And that is not clear yet under clause 228?

Mr Pilgrim—I am not sure that it is entirely clear, but—

Mr Solomon—Clause 228 seems to suggest that the registrar can make a complaint direct to us in their own capacity as the registrar as opposed to on behalf of the individual and as a representative complaint, if you like, of the individual. With the way the Privacy Act is currently constructed, it should really be a representative complaint on behalf of the individual if it is to follow the current scheme of the Privacy Act. That would a better way—

Mr Pilgrim—The information that is being complained about is not that of the registrar, if you like; it is about the individual. The Privacy Act is structured around an individual complaining about a breach of their own information.

Senator BARNETT—Why couldn't they just complain directly to you once they have complained to the registrar and the registrar has said, 'There's not a lot more I can do about it'?

Mr Pilgrim—They could in fact do that, Senator, yes.

Senator BARNETT—So they can do that.

Mr Pilgrim—They can come directly to us. We would undertake, I suppose, an assessment first to see either whether we believed they had tried to resolve it initially with the registrar or whether there were some circumstances in which that would not necessarily be appropriate, and then we could investigate it.

Senator BARNETT—And the guidelines you referred to in your opening statement, in the fifth last dot point, say:

Define the types of information contained on the PPS Register that will be checked for validity and the databases that will be used in the checking process ...

I think you referred to guidelines?

Mr Pilgrim—Yes. The office has functions around monitoring data-matching within the Commonwealth, for example. There are statutory data-matching guidelines and there are voluntary data-matching guidelines for Commonwealth agencies. We are suggesting here, as we would with any merging or matching of large datasets, that we think they form a good basis in this situation to provide guidance about how best to undertake

that data-matching in a privacy-enhancing way. We are happy to provide those as well if the committee would like.

Senator BARNETT—I presume they are available online.

Mr Pilgrim—Yes, they are.

Senator BARNETT—If you want to give us a link to that, that would be helpful.

Mr Pilgrim—We will do that.

Senator BARNETT—Have you had a look at the regulations and expressed a view on those as yet? Would you like to share that with the committee?

Mr Pilgrim—We saw a copy of, I think, the draft regulations and provided a submission to the Attorney-General's Department on those. That submission, as with the earlier ones on our website, I can sum up quite easily by saying that most of the issues are the same as we have raised here today and in our earlier comments. I suppose, for brevity's sake, they are pretty much the same range of issues.

Senator BARNETT—That is good. I appreciate your feedback on these matters.

Mr Pilgrim—Thank you.

CHAIR—Before you go, Mr Pilgrim, I wonder if you have a view on whether a person or an organisation seeking access to the register should have to be identified before obtaining that information. If so, how would they be identified?

Mr Pilgrim—Let me pause for a moment and think about that one.

CHAIR—You can take it on notice if you need to and get back to us about it.

Mr Pilgrim—I think I would prefer us to take that on notice and get back to you if we could.

CHAIR—I think it is a vital element here. We talk about the use of the register and how information will be stored there, but should individuals or organisations identify themselves before they want to access it? If so, how would they do it? It is pretty obvious that banks are kind of self-identified there. I guess I am talking about elements that might not be so obvious.

Mr Pilgrim—That is one we will certainly give some thought to, because I am sure there will be some fairly strong competing interests around. If you were to go down the path of wanting to identify everyone who accessed the register, obviously there are going to be compliance costs and those sorts of issues which would need to be taken into account and balanced against the issues we have been discussing here today around the need to protect the personal information they would be getting access to. I appreciate the opportunity to get back to the committee on that.

CHAIR—That would be fine. We have no further questions so I thank you both for your submission and also for your attendance at the hearing today. It is much appreciated.

Mr Pilgrim—Thank you.

[11.41 am]

CANNING, Mr John, Partner, Mallesons Stephen Jaques

LOWDEN, Mr Patrick Michael, Partner, Freehills

LOXTON, Mr Diccon John Robertson, Partner, Allens Arthur Robinson

WHITTAKER, Mr Bruce Geoffrey, Partner, Blake Dawson

CHAIR—Welcome. I know that a submission has been lodged from all four law firms. For our sake, we have numbered that 30. Before I ask you to talk to that submission, are there any changes or amendments you want to make or additional information you want to give us today?

Mr Loxton—There would be a couple of technical points, but they are technical points rather than overall additions, I think. We can give them to you in the course of questions at the end, if you like.

CHAIR—Sure. I invite you to make an opening statement and then we will go to questions. Have we got one person to speak on behalf of all of you, have we?

Mr Loxton—I am the only guilty man!

CHAIR—Thanks, Mr Loxton.

Mr Loxton—Thank you very much for this opportunity. As we have said, we are four law firms. We all have practices in this area—in the wholesale market, in consumer finance and in advising on policy. It is with people like us and our competitors and colleagues that in the end the initial interpretation of this act will rest, because people come to us and say, 'How does it work and what should we do?' So we take a keen interest in it, and I think our view in that sense is important. I do not want to oversell our capacity as lawyers, but certainly what we do in a practical sense is extremely important in the scheme of things. I should make very clear that, if the bill went through in its current form, it would be a major boon for us. All change is good, because clients come to us for the drafting of documents and for advice, and the more complex it is then the more uncertain it is, and that is the land in which we live.

CHAIR—So should we stop there?

Mr Loxton—That is a very good question! What you are seeing is something quite unique. I have been a partner for 25 years. We are all competitors, and quite often fierce competitors, and here we all are, sharing information and sharing kudos. Our main resource is time. One of your officials asked about the billable hours. We spend huge amounts of billable hours not charging anybody but just looking at the legislation, writing our submissions and attending very long—and I have to say very productive—meetings with representatives of the Attorney-General's Department. We are not here representing any particular clients' views. Our views are our own.

Then why are we doing it? If this bill is good for us, we are not making any money out of being here and we are all competitors, why are we here? There are a few reasons. I do not want to sound too pompous about it, but we think that because we have the knowledge and experience in this area we have a responsibility, effectively, to help get things right. Also, we are lawyers and we are lawyers because we love the law, and if you love the law viscerally you become involved in what is going on and you almost cannot keep away from getting involved in the exercise. So it is a duty and it is also an interest on our behalf.

Finally, we have our most fun in making sure that Australia works well as a financial centre, that the wholesale market in which we do a lot of our activity operates. We want to make sure particularly that, all of a sudden, Australia, which is in a competitive position, does not lose out as a financial centre. In that respect we have always noted that the UK, which earns a huge amount of its income from being a financial centre, has looked at this approach and has rejected it.

We are here basically because we have looked at the legislation, and the more we look at the legislation the more concerned we become. We want to make sure that whatever we do we get it right, because this is so important. It affects individual business dealings in a way that cannot be altered with a touch of the regulator's brush. It is very important for this country to get it right and we support reform as there is a plethora of state legislation.

We think that having a single electronic register is a great idea, but that is all that we think needs to occur. The problems that currently exist are problems with the legislation rather than with the underlying law, which works well. It is flexible, you can charge whatever you like and, particularly if you are a company, it is a one-

stop shop. That is why the UK rejected the approach. Things work well, but we recognise that people want to move forward with this sort of approach and therefore our interest is to make sure that, if they do so, they get it with as few wrinkles as possible. The devil is in the detail, and in our view there is an awful lot of detail.

We are worried at a professional level and at a personal level. We have been looking at it and talking about it internally, with the Attorney-General's Department and with our colleagues for hours. We have looked at long drafts, we have produced long submissions and we have read other people's submissions, but we still think that we are missing points. There are points that occur to us that we have missed and a couple that I will mention at the end, because this is a major piece of reform. It goes far beyond its stated goals. We think it could just deal with its core issues, which are regulating security interests in the sense of having a register, and having a one-stop register, without a lot of the baggage that has come on. Because what this does is take a whole lot of other reform agendas in terms of consumer affairs, enforcing security interests and looking at various aspects of commercial law, all of which can be dealt with in their own good time with a proper analysis under their own proper legislation.

In understanding why some of this baggage is there, the explanation that is occasionally given is that it is here because it is in some other bit of legislation somewhere else or there is a model for it in some other jurisdiction. I think Australia ought to be a sovereign country and, if we make a reform, we ought to make it for its own sake rather than simply because another jurisdiction has adopted something as being a useful idea. They may have done it for all sorts of good reasons in their jurisdiction and bolted it onto this legislation because it was the time to do such things. I think we have got to make our own decisions.

We are concerned that while people are focused on the overall objective of this, which is to have registration and to have a system of simplicity and priority of security interests, there is a whole lot of other stuff that really, despite all of the consultation and all the time and exposure drafts, we have not had time to look at. There are a lot of topics there which would be reform agendas on their own.

When we talk to people in the industry, this is an incredibly boring topic, because the eyes start glazing over. It is very hard to get people who have reform fatigue, who are dealing with their anti-money-laundering legislation and all the rest of it, to focus on this. The attitude of a lot of people in this industry is to wait until they see the legislation and then deal with it. Why should they spend the sorts of resources that we have been spending looking at something that may change in time? So, in discussions with industry, there are a lot of people excited by some features of it but there has not been a lot of attention to detail, and that has also got us worried. We feel there is a lot of responsibility on us and others to give the sort of feedback that we have been giving to try and get it right.

The stated goal is to increase certainty. We think it actually increases uncertainty. Obviously, the form over substance test is itself uncertain, but there are any number of areas which we have dealt with in our details, such as the question of how the accession and co-mingling provisions work, and this overall requirement to act reasonably is itself extremely uncertain.

It is also said to increase consistency. Even within the act—and Bruce has done a lot of statistical analysis of it—there are a huge number of different provisions: different treatments according to what sort of asset you are dealing with and what sort of business you are in, what the purpose of the finance is and even what the nature of the security interest is. On top of that, you still have—because this just deals with security interests—a law that deals with security interest and the old law that deals with all other forms of interest in property. While this is said to repeal the state legislation, in fact it does not. It expressly just leaves the state legislation in place and says it does not apply to things that are security interests under this bill. But the security interests under this bill exclude a whole lot of things in section 6, which are expressed as not to be security interests and are therefore subject to the old law, to the extent that it applies.

You might ask me for examples in which it does apply—I could not come up with any. Basically, we are still coming to terms with it. In practice a lot of these things only come up when you actually look at a hard example, definitely. It is said that it reduces complexity. We actually think that the current law, except for all this legislative stuff about the need to register things in every state, is very simple. There are 39 pages of priority provisions, a few rules and a whole lot of pages of exceptions—I can go on with that—and there is still legislation, as I mentioned.

It is said it reduces cost—well, it does. In many transactions, a one-stop shop will be good, but that is in terms of the initial setting up of legislation from the perspective of banks which have businesses in this area. We think there will be—particularly if the enforcement provisions are left the way they are—significant costs in the enforcement of security interests arising from the uncertainty, the need to cover all this and the fact that

second-ranking security interests have all been given greater power than they have ever had before. That is still from the point of view of people in the finance industry.

The other people that are not represented here at all are those who are creditors of each other in the normal business sense—small and medium enterprises, all of whom deal with each other as creditors, none of whom will probably go to the trouble of registering and all of whom will be subject to requirements which are now formal: to have things in writing and to have a description of the property, which just does not relate to the reality of how people deal with each other. The result is that unless they take the trouble to protect themselves they will lose out in battles with other creditors. I can go through all sorts of examples: artists effectively having to register security interests over the paintings that they give to galleries, and the like.

As I said, it is said it will take away formal requirements. What it has actually done is impose some, which are that you have a description of the collateral—it says that even if you have the need for registration. The scope of the legislation is very broad and it needs to be right. You cannot just have little rulings from ASIC or the ATO, or have the Privacy Commissioner or somebody else patching things up. It actually needs to be right, because this regulates very important relationships between people. At the moment we think there needs to be a considerable amount of work, even if you adopt the full policy proposals, in order to get it right. There are a large number of drafting issues which will take a lot of time to get fixed and we took the time to go through all our detailed proposals for the Senate. There were conflicts of law proposals in the initial draft. They have been taken out and they are now being mooted again. Conflicts of law provisions are a good idea, but we think they do not need to be as complex as they are, although we are still coming to terms with them. Whatever they need to be, they need to be simple, they need to be right and we need to make sure that they are right by the time we put this into legislation.

So, we think it could have been done a lot more simply. Even adopting the policy to have what is called an article 9 type approach, to have a register and the rules against priority, you could get to the goal that the Attorney-General's Department and the government have set themselves of having workable legislation and a workable register in a lot quicker time without a lot of the baggage that we have been talking about if we took away all these extraneous things, which really do not have much to do with the core purpose. Why is it necessary to regulate enforcement again when the government is just going through a review of consumer credit proposals and small business lending? Why is it necessary to change the rights to contracts that are not parties to this? Why is it necessary to introduce a whole new concept into the finance market, which John has been told by American colleagues is not used very often there, of having chattel paper?

We think that this could be a lot simpler. Even adopting the overall policy mix of going ahead it still should be streamlined so that those involved can actually focus on getting it right, and it should still address the issues. There is no hurry. The current law has been operating for dozens of years. If it takes another year or two to get it right then that will be a lot better. I am sorry; I have probably exceeded my allotted time.

CHAIR—Thank you. Would anyone else like to add to that?

Mr Whittaker—I would add one observation: we are also particularly concerned that government is contemplating such a radical reform of secured lending law at a time when we should be doing everything we possibly can to make it easier for banks to lend money rather than more uncertain.

Senator TROOD—Are you talking about the financial situation?

Mr Whittaker—That is correct.

Senator TROOD—That is an allusion to the rather difficult circumstances we find ourselves in at the present time.

Mr Whittaker—It is, because there is no doubt that if this legislation comes in in this form it will create a lot of uncertainty for lenders for a number of years. There will be many issues that will need to be clarified and they can only be clarified by case law. So there will be a number of years of quite substantial uncertainty where banks will not really be confident that they do actually know what rights it is that they have over an asset that they may want to take security over, and that will make them if anything more conservative in making their lending decisions.

CHAIR—That is not a position that was put to us by the banks yesterday. They want more lead-in time but they felt that with an extended lead-in time it would be okay.

Mr Whittaker—I did see some notes from the discussion yesterday. I did see that they were also concerned in part about the time frame within which the legislation was intended to be introduced. Our sense though, as

Diccon said, is that the banks have been so overwhelmed with dealing with the detail of other reform packages, such as the anti-money laundering legislation, that they have not examined the detail of this legislation in any way to the extent that we have. They are simply not alive to the difficulties that they will encounter in practice in actually trying to work under the new regime.

Mr Canning—I agree with Bruce's comment. I have spoken to a number of our clients and one thing that is in the background is the cost of implementation of this. There have been a series of reforms—financial services reform, AML—and it just gets down to the question of timing and systems costs. Echoing Bruce's thoughts on what Senator Trood just raised, the timing of this reform and the implementation costs which will affect the banks, in terms of systems, are quite large. You have to register transactions which previously have not been caught by security, such as leases and individuals. Some are under the current REVS legislation for motor vehicles, et cetera, but there are huge compliance and implementation costs which are going to be borne by the banks. I have asked a couple of banks what they think as a figure and they say that they do not know but it is quite scary. I understand that the Attorney-General's Department is looking to make it a lot easier through the implementation of an easier system. My view is that the system itself, once it comes into play, is a far better system than what we have at the moment, but it is the implementation costs and the timing.

CHAIR—We heard this morning from Professor Duggan, who is now living in Canada and has been there for some years. You may know of his work and his extensive understanding of this area. He put to us that he believed that rather than create our own legislation we should model legislation on what has happened in Canada and that would therefore make the legislation more workable. Do you have a comment about the comparison between this legislation and what has been happening in Ontario, for example?

Mr Lowden—That was the direction that the early steering of this process took and there were a lot of proponents of going down that path. The fact that we have ended up so far from it is, I think, a reflection of the issues that we and others see in following that model. It has not departed from that model on a whim; there are issues that lawyers and stakeholders here see with that model.

Senator TROOD—Do you mean with the Canadian model or an overseas model generally?

Mr Lowden—The Canadian and the New Zealand models.

CHAIR—You are saying that they are not appropriate?

Mr Lowden—Yes.

CHAIR—What about the structure of that legislation—the simplicity or the lack of cross-referencing? Is that something that should be reflected in this legislation?

Mr Lowden—We have an issue with the complex cross-referencing. In particular, the approach that has been adopted of importing concepts from other legislation—tax legislation, corporations legislation—is particularly unhelpful. You can do away with that approach but you are not going to end up with a simple bill. There will still be a lot of complexity.

Senator TROOD—The problem you seem to have, and we all seem to have in some respects, is that the general view is that we ought not just be following the precedents established by overseas jurisdictions, whether they be Canadian, US or New Zealand, and the Attorney-General's Department says that they agree with that. So what they have done—on the evidence they have given, anyway—is to adapt those pieces of legislation from those other jurisdictions to the unique Australian conditions, which is what you want. As I understand it, you are saying that there is a body of Australian law and jurisprudence which has been established over a long period of time which provides certainty, clarity, remedies and all sorts of things of that kind, and we do not want to chuck that out, for all sorts of reasons. When we put that proposition to the Attorney-General's Department they say that they agree with that. So the consequence of following your injunction, as it were, is that we get a piece of legislation like this, which is—I agree with you completely—complex. And I agree with Professor Duggan when he says in his submission that there are wide elements of prolixity in it. But it is also legislation that they have tried to reform along the way. So how do we get out of this dilemma? If we want to keep our traditional elements of jurisprudence in it, we seem to have to require a piece of legislation that looks like this.

Mr Lowden—I think we would all take issue with that. One problem with this is that it seeks to codify the law rather than just leaving the general law in place and dealing with the issues that need to be dealt with, which are essentially a registration system around which you can have a simple set of priority rules.

Senator TROOD—Is your position this: the law as it exists is essentially okay—we can tweak it and find areas where reform is required but if all we did was take the existing law in relation to all of these issues and leave it in place and yet provide a registration system with regard to it then essentially we would have the problem solved—or at least we would be better off than we would be with this legislation?

Mr Whittaker—That would be an excellent outcome, yes.

Senator TROOD—Is that what you mean by 'unblocking'—the felicitous term that you have created here?

CHAIR—We have had numerous witnesses say to us that you cannot have a registration system in place unless you codify the law upon which that registration system is based.

Mr Lowden—I think that is demonstrably incorrect. We have a registration system with companies—the Corporations Act establishes a register of charges which works quite well. The deficiency with the current charges registration regime is that it is not comprehensive—it only covers charges over certain types of property—but as a registration system and a set of priority rules around it, it works well.

Senator BARNETT—But it only covers companies.

CHAIR—But we are not just dealing with corporations here, though, are we?

Mr Lowden—No. But the principle—

CHAIR—So are you suggesting that for small business, small organisations and individuals, they should be covered by this act, and corporation should be excised and covered under the Corporations Act?

Mr Lowden—No. I think in terms of designing a registration system you could readily have a registration system operating on the same principles that the charges registration system operates on. That does not require a codification of the general law to achieve that.

Mr Canning—I think what Patrick is saying is that it is about, what, 20 or 25 pages long and it works quite well at the moment.

CHAIR—But if you went down that model then how would you know the parameters in which the registration system is going to work? How do you lay out the ground rules for having a personal property security system in this country that replaces 70 pieces of legislation and operates across nine jurisdictions unless you have some comprehensive underlying groundwork?

Mr Loxton—Quite easily, Senator. I think there are different models and you can have varying degrees of enthusiasm with which you can go down these routes. The simplest model would be simply to say that all of these sorts of things need to be registered. They do not have to have any formal requirements other than we have a system whereby if you have any of these types of arrangements they need to be registered. You would need a few provisions saying what they are and maybe something akin to a definition of security interests, perhaps not relying so much on substance and form but that is a decision that can be made at the time. Having done that, you then register them, and you can actually just do that, because that would give publicity to the world as to what these things are and would enable people to look out and would enable the general law about notices to run.

But you can take it to the next step and do, in a sense, what they have done in the Corporations Act and say, 'Okay, we have got this registration; let us put some rules of priority about what happens in order of registration.' You can do that in a fairly simple way. There are some problems with the way the Corporations Law works but in general terms it works, it talks about priority of security interests. Very simply you could just have a registration and probably you would have priority on top: a simple model.

The historical origin of this is in the 1930s. Because of Supreme Court decisions America effectively banned future charges of assets and so there was a huge plethora of asset financing that had all sorts of weird and wonderful things all designed to give security. So in order to get back to where they should have been and where everybody else really was, they introduced this thing called article 9 which said that these things are all security interests. Having done that, they said, 'We had better say what rights are,' and so they had an overall compendious approach. They said, 'We had better say what the rights are, we had better say in what circumstances you lose them and we had better say how you can enforce them, and all of this.' So they put together this whole baggage. The reason they had to do that was that they did not have any of that there. We are in a position that we have got those.

So in orders of complexity you just have the simple registration model, you can have a simple registration with priority, you can go on and deal with protection of security interest holders against other people. That is

starting to get that little bit more complex and have some of the provisions we have got here about extinguishment. You could have that. You can have rules about what does and does not happen in a liquidation as to whether the sanction should be enforceable in bankruptcies. Probably if you had a simple model that is what the sanction would be, which is the same way the Corporations Act works. And you can even go to the stage that they have got here. It would take a little bit of rewriting, and in answer to the earlier question we do agree that we should go our own way, and I will come back to the differences between us and Canada in a second. You can have even the policy approach as here, which is being prescriptive. We would like to be a lot more simple about what the priority rules are in all sorts of different situations and prescriptive about the circumstances in which you lose priority.

But you do not have to have all this stuff that says that restrictions in contracts of assignment do not work, or the things that say that if you assign a contract to somebody else, even though you do not own it any more, you can still amend it. You do not have to have all of the things that regulate enforcement. You do not have to have provisions that say whether or not security interests can secure certain sorts of liabilities or certain sorts of assets and certain sorts of provisions. There is a lot of stuff in here which you do not need to have. Enforcement and the duties of it can be left to the general law or just simply a clause that says they will have a right of sale, they will have a right to retain subject to going through the foreclosure provisions, and that is it. You can keep quite a lot of this if that is the way they want to do it and cut out a lot of the sections in it and achieve something close to a goal in the time frame.

Senator TROOD—Is part of your concern here that this is not just about securities law reform but that it trespasses into too many other areas of law like contracts, of example?

Mr Loxton—Yes, Senator. There are two sections in particular, sections 124 and 125, and it traipses across the law of negotiability too in terms of negotiable instruments.

Senator TROOD—Are you advocating a position which I suppose I could characterise as inconsequential registration? In other words, this legislation proposes to place considerable consequences on whether or not one does or does not register, and certain things follow from that—

Mr Loxton—Inconsequential registration?

Senator TROOD—What I mean by that phrase is that you could register your security but it does not necessarily have the kind of sometimes dire consequences that are proposed in this act.

Mr Loxton—I think that with the two models—and I am agnostic on this, and both of them are consequential registration—either you have a registration system in which the sanction is invalidity in a liquidation or you have a registration system under which the carrot and the stick in terms of getting it registered is an order of priority. Or you can have a combination of the two. I think that would be close to ideal in terms of having the flexibility that we currently have and having a simple approach. If that is not done and we go the path that we have gone then we think we need to do a lot more work to get it right.

Senator TROOD—Can I clarify your position with regard to consultation. There have been various iterations of this bill. This is the exposure draft. As to the specific points that you have raised about the legislation and points you have made about specific sections et cetera, are they issues that you have been pressing all along or are they consequences of the most recent draft of the bill?

Mr Loxton—There are a few that are consequences of the current bill. Most of them we have been pressing as we have gone along. As we have said in our submission, there are a large number of points that we have made in previous submissions, a significant number of which have actually been taken on board. There has been a significant amount of consultation in the exposure drafts, but there are just so many issues that it is very difficult to get through them. I could not add them up but I am sure that we would have had about 30 or 40 hours of meetings with the Attorney General's Department and we were still not able to get through some of the issues we wanted.

The other issue—and I will say this here—is something that has been apparent to me in all my years of practice when I have been putting submissions in relation to legislation. Quite often you put your submissions as to how legislation should work or be drafted to the people from the relevant department who have responsibility for carriage of it. They take on board what you have got and they go off to the Parliamentary Counsel, who is an unknown person whom you never see. They come back and say, 'No, the Parliamentary Counsel does not agree with you,' or they take on board your suggestions and the Parliamentary Counsel then changes them and, instead of having the simple model—say, you suggest a single slice of bread—all of a sudden you come back with a layered sandwich. And that has happened quite a lot as well.

There are obviously other issues. Some of the points that we have made have not been taken on board simply because the Attorney General's Department has a view of the world which it has promoted which is that this is simplicity and what we have to do at least in substance is follow these foreign models. We think these foreign models have all sorts of baggage that we do not have need to have and you can have some of them if you want to but you do not need to.

CHAIR—Can I ask a question following on from that. Has this been your view since these discussions commenced in 2006?

Mr Loxton—Yes. These are our views and have been for, I think—

CHAIR—In your submission where you talk about relying on the general law, and you say that over and over again—in other words, rely on the status quo, retain the status quo—but that has not been the fundamental policy position of either the previous government or the current government, has it? Hasn't this legislation come about because there is to be fundamental reform and changes in this area? So relying on the general law is one option but it does not align with the policy position of the last two federal governments.

Mr Loxton—I think we have been putting in submissions for—this has been an issue that occasionally has surfaced for 20 years, and I think our position has been quite consistent on it.

CHAIR—For 20 years?

Mr Loxton—Yes.

CHAIR—Right.

Mr Loxton—And that is that there is a mess of state legislation. Nothing could be better for this economy than to get rid of that state legislation. But the state legislation is things that say, 'If you want to have security interest over this asset it needs to be in this specific form and you need to have it registered in this specific register.' And some of the legislation was created in the 19th century, so it has 19th century financial concepts. We think that should be got rid of, bag and baggage.

Unfortunately that legislation is still there. It just hopefully will not apply in most cases. So we very much support that, but then there is this notion that has been brought by those who see the foreign model—by which I mean the Canadian model as opposed to the British model—as being something that is worth adopting, of going into it and having substance over form. You can even accept substance over form and extend it, but there is no need to codify things that are well understood. What is well understood is the way in which mortgagees are under a duty to exercise their power of sale. What is well understood is that at the moment they are entitled to hold it waiting for the market to develop or they are entitled to sell it now. If they sell it now they have to go through certain procedures in order to get the best price. What this legislation does is to try and codify that but it codifies that in ways in which in all sorts of unintended consequences they have actually changed it. They do not need to. There is no policy—

CHAIR—So you are saying: reform this area of law by changing and renewing but keeping some, a mixture of both as opposed to—

Mr Whittaker—I think that is correct. We support the core reform objective of doing away with the current plethora of state based legislation and replacing that with a single national register of security interests. Where we struggle, though, is with the fact that the legislation then goes on to make a whole raft of changes to related areas of law that do not need to be changed in order for that core registration process to work.

Senator TROOD—Mr Whittaker, what I am struggling with is that there is clearly a view that the 70 pieces of legislation are, in many cases, out of date and there need to be reforms, and there is a plethora of instruments out there which are no longer relevant, are complicated and have no place in a 21st century financial system, for example; so all that is clear. But the proposition that has been put to us consistently is that to go to a more modern system you have to address the underlying principles that apply to many of these former instruments; you cannot just sweep them away.

I agree with you completely that, if one of the consequences of this legislation were to be that a whole series of acts remained on the statute books, then that would be a recipe for disaster. So we ought to be thinking about repealing the legislation that needs to be repealed so that this legislation can come into place. But consistently we have been advised that, once you start doing that, you need to reconstruct some of the principles that underlie some of these instruments that were there for a long period of time. In other words, the modern instruments do not naturally replace all of the ones that were there in the past—in relation to livestock liens in Victoria, for example, or whatever the case may be. There are peculiarities in relation to different

states that have consequences that are in some respects still used. You cannot just sweep them away. If you do, you need to replace them with some other kind of instrument.

Mr Lowden—There are some very specific cases of security interests which do have a legislative rather than general law underpinning, and they are the stock liens. If you are separately charging the crops or the wool growing on the sheep's back, they do rely on legislative underpinning and, yes, in sweeping away the state laws, you would need to reflect those things under the new laws. But, for the main part, we would say you should leave the general law in place and, as part of rationalising the state laws, deal with those same specific issues that they deal with—because often there is a continuing need for them. But in most cases that is not needed. In fact, this legislation does not wrap them all up into a coherent whole. It makes very separate and specific provisions for those types of security interests.

Mr Canning—I can give one example, which Diccon touched on earlier. It is this concept of chattel paper. Chattel paper is where you have a lease or a hire purchase agreement which has attached to it a monetary obligation. On my understanding—and I have done a bit of research in the last couple of days and I have spoken to some US lawyers who I deal with and to some New Zealand lawyers and done some research of my own—it was developed primarily for floor-plan financing. There is no problem with that. I think that is a good idea if it protects those paid out of interests in floor-plan financing. But, with a lot of financing of assets—and it particularly relates to asset financing, where party A leases to party B an asset like an aircraft or a vehicle—generally what happens in this market, what is seen in this market, what has developed, is that the receivables are sold off by the lessor to obtain financing, and they keep the asset themselves.

There is just no need for that concept of chattel paper. Although it is a stated objective to develop a chattel paper market in Australia, I cannot see it developing. Speaking to a US lawyer who I do a lot of work with, I got him to speak to some of his colleagues who deal with the lower end market in terms of motor vehicle finance. He said, 'Yes, it's used a little bit in the motor vehicle finance market, but it's just not used in our practice.' Also, it can perhaps inhibit securitisation, although there is not a lot of that going on at the moment, when banks or financial institutions wish to sell off cash flows.

So you have a competing issue as to whether, under this legislation, you register the chattel paper before you send off the receivables. Also, you have to assign transfers if you have to register transfers of receivables. It just creates complexity which is not needed. I would submit respectfully that in this market we do not have a chattel paper financing market, and that is one example where we have introduced that into this legislation and it is just not needed. It is those sorts of things and issues that I think my colleagues here at the table are talking about not codifying.

Senator TROOD—I notice, Mr Canning, that you had reference to the removal of references to chattel paper. Do I take it from that that you are saying that nothing would be lost if we outlawed or basically dismissed chattel paper from the financial markets?

Mr Canning—Yes.

Senator TROOD—There are alternative instruments that can be used to achieve the same purposes.

Mr Loxton—You would not be outlawing them, Senator. They do not exist.

Senator TROOD—Well, no. I do not mean that.

Mr Canning—The registration system would provide for a registration of a lease which is covered or a hire purchase contract which is covered. The ownership is the owner of the asset—the person who is leasing it or who mortgaged it. They could register that. And if you transfer the receivable that could be registered, although we have certain concerns about transfers of receivables and the administrative issues with banks, such as transferring syndicated loans—whether they should be registerable themselves. But, yes, that is right. We are not taking anything away from the general market in terms of the financial instruments that are used in the market to raise finance but we do not think that it is necessary to register them as chattel paper.

Mr Lowden—I also make the point that in its current form the bill seems to us to be quite pointless in the way it deals with chattel paper because it assumes a legal underpinning. It assumes that the effect of dealing with a piece of paper is to transfer the rights to the equipment and to the receivable, which may be the law in the United States, it may be the law in Canada, it may be the law—although I do not think it is—in New Zealand, but it is certainly not the law in Australia. It presumes a legal underpinning which does not exist.

Senator TROOD—But the question could be whether or not it should be the law—whether that is a better law than the one we have already.

Mr Lowden—But the bill itself does not contain these provisions. It just assumes that they are there.

Mr Loxton—I do not think the financial market is clamouring for the creation of chattel paper.

Mr Whittaker—I was going to add that. I did see from the commentary that it was suggested that there was some desire to foster the development of a chattel paper market in Australia but I think none of us in our practices or our firms have ever encountered that proposition before.

Senator TROOD—It would be a unique jurisdiction in a way, if we had a chattel paper market of any significance, because the main financial markets of the world are not dealing with chattel paper. Is that accurate?

Mr Canning—Bear in mind my earlier comments that this was developed to assist floor-plan financing in the 1950s when car sales were kicking off in the United States and that it is a concept which may still be applicable to floor-plan financing but not a general concept that we here in 2009 would agree warrants separate rules as to creations of security interests and priority.

Senator TROOD—We do not want to get bogged down in the chattel paper issue.

Mr Canning—No, I was just using that as an example.

Senator TROOD—There are wider issues that we need to—

Mr Loxton—If I can just come back to the general question that you asked at the beginning, there may be some obscure thing that I cannot think of off the top of my head but of these 70 bits of legislation most of them have the effect of restricting what can be done—not facilitating what can be done but restricting it—and say that things have to be in this particular form and that if you want one you have to register it in this particular way. There are, so far as I know, two things which helped Australia's development early on in the 19th century, and they were the creation of the wool lien and the crop lien. Both of those are replicated in this legislation but still they have needed to have things to deal with them. To my knowledge, everything else—if you take a security interest over a car, a boat or a plane; the receivables of your business; the stock-in-trade, a silo full of wheat—does not require the underpinning legislation. I may have missed some legislation but in general terms what the English courts did and what the Australian courts did was to say that if you are a company or an individual you can give a security interest over anything to secure anything. That is the flexibility that we have currently, and what is happening is that a bit of legislation whose mental underpinning dates from the thirties—not from the 21st century—is actually confining that rather than expanding that. You could get rid of pretty-well all of that legislation. There may be a couple of issues that you would want to fix up in the way that it works, but you could get rid of all of that and just make it facilitative rather than to try to codify what the law is.

Senator, to answer your point about the government proposals, I think we are working at two levels here. If you ask us as lawyers, starting from scratch, what we want to do we would say that what you need is what I call this super-cut-down model. If you say that—for reasons that we disagree with—you need to have this new legislation in a particular form then we still think that you can have the new legislation without having to codify a whole lot of aspects. A lot of the complexity comes from this attempt to codify things that do not need to be codified, because they are well understood.

Senator TROOD—If the committee and the government were not persuaded to the position that you have articulated so forcefully, what do you think would be required to address this legislation? Do you think that the specific things that you have identified would make the legislation workable, excepting the structure and the assumptions based on it, or do you think there needs to be more?

Mr Loxton—Again, there are levels to that. We have raised a significant number of drafting comments in the spirit of trying to make the legislation work. We would obviously be a lot happier if they were acted on. As I said in my introduction, however, we are worried as to whether we have covered the field and whether anybody else has covered the field.

Senator TROOD—You are not unique in that respect, because it is complex. I do not think there is a witness who has come to us who has not said, 'I've looked at these parts but I'm not sure I've covered everything that potentially is going to cause problems.'

Mr Loxton—If you were to go ahead with this model then we would be much more happy if you cut out the provisions that we really think are additional, which are overregulation or regulation of enforcement, interfering with the rights of contract and changing negotiability. If that is not the decision that is made then

we think it just needs work. The longer you make the legislation and the more ambitious you make the legislation then the more work the government has created for itself and the more the parliament has to pass.

CHAIR—Can I ask you about your colleagues in New Zealand who have worked with the PPS legislation there? What is their view about that legislation? Would they rather it did not exist and they relied on their current common law? How do they find it?

Mr Loxton—There are two things about New Zealand. The first thing is that a lot of people in a lot of the areas of practice that we operate in ignore it, in a sense, because they do not have the sanction of invalidity on liquidation. The second thing is that what I hear from colleagues—and I speak to colleagues because one of my other hats is President of the Banking and Financial Services Law Association, which has Australian and New Zealand members, and we just had a committee meeting this morning—is that a huge amount of uncertainty is still being worked out.

They are in a very different type of market from the one that we are in. Also, they do not have what we have, which worries me a lot. We have had a lot of discussions about the way in which this works. In Australian jurisprudence, for good or ill, there is a very sharp focus on the difference between law and equity. There are people on the High Court who have lectured in equity. The New South Wales system kept the law and equity separate. There is a very sharp focus on the distinctions between the two and, I think, a judicial conservatism in the way that things work. It worries me as to what will happen if the types of judicial minds that we have in this country analyse those effects.

When I ask New Zealanders how it works and what happens, I do not get very satisfactory answers. What is constantly happening in New Zealand—and it is easier for them because they have a single system, not a federation—is that they are constantly making changes. They constantly have the courts testing propositions. The other thing about it is that this type of system only really gets tested when you have the financial downturn that we are now just about to go into.

Mr Whittaker—I will add to that in relation to the New Zealand experience. As Diccon says, they are still wrestling with a great deal of uncertainty as to what their legislation means. That is despite the fact that they followed very closely indeed the Saskatchewan model from Canada and they have been able to draw very heavily on Canadian case law, which has been around since the 1960s. So, despite the fact that there is over 40 years of case law supporting the legislation that they are working with, they are still having difficulty with some of its meanings.

Mr Loxton—Two other things have come up from our experience of New Zealand. The first is that it is now impossible to get a New Zealand lawyer to give you an opinion as to what the priority of a security interest is in a formal sense. The second is that, if you are dealing with a New Zealand entity and you want to find out what its financial position is or what your priority position may be, even without the sanction of invalidity there is a huge amount of noise in the register in terms of people lodging against the equivalent of BHP or a photocopier or the like. That noise probably is a necessary concomitant of having a registration system; although, hopefully we will be able to design it so that we do not have that noise. But the experience is not one of joyful clarity by any means.

Senator BARNETT—Thanks for your submission. It has alerted us to your views, obviously, which have been very strong and well-argued today and in your submission. But there seems to be a fundamental difference of opinion between yourselves and the Attorney's office with respect to the objectives. Their view is that this legislation will increase will increase certainty and consistency and decrease cost and complexity. But it appears that your view is the opposite. Can we just get clarity around that. Is that correct?

Mr Canning—Our view is not opposite. What we are saying is that we are happy for a system of registration and priority to replace the 70 statutes, but if the legislation is implemented in its current form it has the potential to raise inconsistencies and create greater costs for business. I do not think we have an opposite view to the stated policy objectives of the Attorney.

Mr Loxton—We do have a different view as to whether they have achieved all those stated objectives, particularly in certainty of costs. I have a great deal of respect and a personal liking for the people that we have dealt with from the Attorney-General's and I very much appreciate the degree to which they have consulted with us, but at a fundamental level we do have that difference. Other people who practice may have different views, but we think that our views are informed by practical knowledge of the way in which transaction works and the way in which these things are analysed and what happens in day-to-day practice.

Senator BARNETT—I appreciate that. Mr Canning, you referred earlier in your opening statement to the cost issue, I think.

Mr Canning—That relates to implementation costs. If I am a client at the moment, I will pay costs for a lawyer to fill out, say, form 309. It will take the lawyer's time and will cost $135 to lodge. That is going to be far in excess of the costs of the system to lodge a registration or a financing statement once it is up and running. I think that is going to certainly be a lot cheaper.

Mr Whittaker—I think that is correct. The day-to-day operation of the system will certainly be a lot less expensive than the current multiplicity of systems. The area where I have greatest concern around costs, though, is more in the costs that not just banks and institutions but businesses generally will need to incur to develop an understanding of what their position is under the new legislation and for the litigation that will need to be gone through in order for the courts to get some clarity as to what the legislation actually means.

Mr Lowden—Another thing it will do which, in one sense, is good for all of us is it will turn securities law into a more specialised and technical area. At the moment the law of security operates on the same principles as the law for the rest of our property, as Diccon mentioned earlier. That will change and essentially you will have security interests subject to their own code, which is fundamentally different to other proprietary interests.

ACTING CHAIR—Are you aware of the Access Economics report on the cost benefits of the legislation? If you have perused it, what is your response to that?

Mr Loxton—There was a report which came out with an initial discussion paper. I cannot remember exactly how the joke goes, but if you ask 30 economists what their opinions are you will get 31 answers.

Senator BARNETT—I thought that was a joke about lawyers.

Mr Canning—There are a lot more jokes about lawyers than economists.

Mr Loxton—You just need one lawyer to get 31 opinions. The position is that in any economic study what your conclusions are really depend on what your assumptions are, and what your assumptions are is where you really need to look at the costs. Two years ago I looked very briefly at the report, and I cannot remember the details of it. There may be savings in terms of getting rid of the registers, but there is a great deal of finance that does not rely on these registers. I do not know whether anybody at Access Economics asked anybody as to what the costs of setting it up were, or asked anybody as to what the costs of uncertainty in relation to enforcement would be, or asked anybody what the results for banks in the market generally would be because their enforcements were constrained and their recoveries were reduced, or indeed asked people in industry what would be the cost to them of having to add registration and making sure they had documents signed by their counterparties, their customers.

ACTING CHAIR—I appreciate your feedback on that. I will now move to evidence given by one witness with respect to the Corporations Law, which was touched on earlier, and the registration system, which I think is under section 2A of the Corporations Act. What is your view as to whether that could be broadened or applied across the board—obviously not just to corporations? Could those principles be applied to non-corporations, to individuals, to unincorporated associations and so on? Is that something you have considered and have a view on?

Mr Lowden—I have considered it. I see no reason why you could not do that. I think it would be preferable to what is proposed.

Mr Loxton—You would not just take it across and cross out 'company' and put 'individual', because you would want to make sure that you were covering a much wider range of things than just the narrow field of charges that is currently covered by the Corporations Act. You might want to look at the current policy of the priority provisions; but, broadly, that would work.

Mr Whittaker—That would be adopting the second of the models that Diccon was describing, which is the registration plus priority but none of the peripheral stuff model, if I can describe it that way.

ACTING CHAIR—That is what I am trying to get my head around. You have indicated a number of scenarios. You have your registration model. In this second scenario you set out the registration system at the national level, with it applying across the board. You remove all the other state and territory registrations and then you include a priority arrangement, which you would put in law. Is there anything else that we need to know about in terms of that model and how it could work?

Mr Canning—I think it depends on what the stated policy objective of converting the Corporations Law into a personal properties securities law would be. For example, you have a narrower category of security interests which are in the Corporations Law and which would not be in the personal property securities reform. So that is one thing you would need to consider. When I read the draft paper on lots of categories—and in our submission we have raised issues about some of the categories of security interests—my initial review was that a lot of them should not be recorded as security interests because the general law works fine. The Attorney would have to take a view on that.

ACTING CHAIR—Moving to a range of concerns that have been expressed by witnesses over the last few days in response to the bill before us—specifically clause 235 and operating in a commercially reasonable manner—I understand your views would be in opposition to including the words 'a reasonably commercial manner' in the bill. So I just want to talk to you about that, the issue of leasing and protecting the rights of the owner under the current bill and the issue of the conflict of laws. I want to work through those three issues with you and your views on each of them. Who would like to respond? Firstly, clause 235. Are you familiar with the exposure draft?

Mr Lowden—This is about the 'commercially reasonable manner'? I will start with that. Our view is that that should not be included. There are recognised concepts of good faith. There are obligations under the current general law on mortgagees in relation to the exercise of their power of sale that have developed over time. Banks and commercial parties are familiar with them. There is case law that says what they mean. If you throw that out and add the words 'in a commercially reasonable manner' I do not think from a regulatory perspective or from a borrower's perspective anybody can really necessarily take any greater comfort. I do not think it gives any greater certainty to them in terms of the outcome they get. What it does is create uncertainty for lenders as to how those words are going to be interpreted and applied.

ACTING CHAIR—And that would in turn, as Mr Whittaker has indicated, throw the ball into the courts' bailiwick for them to determine what is reasonably commercial in those circumstances.

Mr Lowden—Worked out over decades.

Mr Loxton—Because we are more on the commercial side of life, our object is to keep our clients out of court as much as we possibly can, and in practice what happens is a tiny percentage of disputes get into the courts. What would happen in greater reality is that to a financier who was proposing to enforce security you would have said that what you want to do is to advertise the sale or hold onto the property for a while to see whether the market was going to go up. And what would happen is, if there was a dispute or even if people just wanted to game play, if you were advising a borrower you would say, 'Okay. Have a go. I don't know what it means but have a go and allege that they failed to act in a commercially reasonable manner.' What will happen a lot of the time is they will come and get expensive advice, externally or internally, and need to make a decision as to what to do. That may involve them ending up in court. What may happen is they will say, 'Okay, if we go to court we will have to spend $100,000 on legal fees. If we settle with this bloke it will cost us $110,000, so why not just pay $110,000?' The net result is recovery goes down.

Clause 235 is actually a classic provision in terms of what our overall argument is because it is a provision which appears in the Canadian legislation and the only reason that I know of that it appears here is that we have adopted the model and therefore we have adopted this clause. It is not needed for the result. Also, in terms of adopting Canadian jurisprudence, when we first looked at the legislation I had a lawyer look at the Canadian cases on this and there were cases that indicated that people were trying to sell planes. What they had done was that they had spent months advertising the plane in every trade magazine they possibly could but the courts were still saying they were unreasonable. It definitely would be the case that if people came to us and said, 'We want to sell off something in this particular way. Should we do it or should we not?' we would say no, that they should be conservative and take these extra steps which will add to their costs, and if they are challenged we would have to say that until we have had dozens of years of litigation to find out what it means, we simply do not know.

ACTING CHAIR—That's fine. I assume you have a view that the current arrangements under the Trade Practices Act regarding unconscionable conduct and perhaps consumer credit legislation would adequately cover concerns where behaviour which is unconscionable or unreasonable would be dealt with accordingly.

Mr Loxton—Yes, and state fair trading legislation and the general law, which requires mortgagees to exercise their duties in good faith.

ACTING CHAIR—On that second matter regarding the leasing provisions, we have had witnesses expressing concerns about the rights of owners being dissipated as a result of the current wording of the legislation. Do you concur with those views and do you have similar concerns?

Mr Canning—In terms of a lease and the first threshold issue concerning whether a lease should be included in any event, the legislation itself provides that if you do not register a lease you can be trumped as an owner, effectively, upon a liquidation of a lessee if a party has a fixed and floating charge or a security over the lessee.

ACTING CHAIR—That is the point and that is what I am seeking your views on.

Mr Canning—That being my practice area, I was vehemently against that. As the bill has gone on I have got my head around that. I have spoken to a number of industry participants and they have said that that is fine. It would be interesting to know what types of institutions put a view against that. The point is that if you register you are safe. If you register your lease you will be fine. The experience in New Zealand with the portaloo case, for want of a better term, the thoroughbred case, is that if you had registered your lease—after speaking to New Zealand lawyers—it did not happen again. There has not been another case hitting the courts.

ACTING CHAIR—They got the hang of it.

Mr Canning—Yes. So I am fairly sanguine to it. I welcome the changes to the exposure draft where they are dealing with operating leases as well rather than dealing with finance leases moving forward.

ACTING CHAIR—You practise in that area, Bruce: do you have any other comment on that?

Mr Whittaker—No, I would agree with what has been said.

ACTING CHAIR—This area of conflicts of law provisions, which was in the bill and has been taken out—what is your position on that?

Mr Loxton—We did not put anything in our submission to the Senate simply because it was up in the air, and I must say that in looking at the latest draft of the legislation I missed section 75 which says that the law applies to everything everywhere basically. If you have that, therefore you need something to cut it down. I think you do need some conflicts of law provisions. We are still looking at this latest set of proposals. It is better than the initial set of proposals but it still seems to be extremely complex and going into a degree of detail that nobody else has done. If we go down the route of specifying conflicts of law principles, I have a feeling—and I could not answer off the top of my head because we are still looking at it and have been focusing on other things—that there is a much simpler model. The New Zealanders have a simpler model. I do not think that you need to codify everything. There is an assumption in the notes to the legislation that intangibles do not have a site or a place. In fact there is a large body of law which says where intangibles are situated for the purposes of law.

The other thing that worries me just on a quick look is that it tries to have too many connecting factors in terms of where Australian law might reach particularly when you are dealing with intangibles as to whether it is a grant and the like. It seems to be a very complex way of handling it.

There is one other issue, and this is more to do with drafting than anything else. At the moment the legislation says, and even the proposal says, that it will apply to all of these sorts of security interests over property in Australia. I may have got this wrong, but there are quite a lot of provisions that go on to say when it does and does not apply in relation to attachment and perfection. What it does not say is when it does and does not apply in relation to provisions on enforcement. What happens is that a large number of organisations, or even some businesses, in Australia that have assets and may have given the traditional English type of fixed or floating charge or a security that may be effective under American law simply do not bother because they have been drafted under some other law to deal with the Australian enforcement regime. If you have, as the draft legislation does, provisions that strictly regulate what you can do in enforcement but then say you can contract out of them—and this is one of the suggestions you make—you should at least be deemed to have contracted out of them if you have a foreign law document, because the foreigners have come to a deal without really thinking about whether the Australians could possibly apply to them.

ACTING CHAIR—I am not sure if you have had a look at the Office of the Privacy Commissioner's recommendations, in particular on the merit of a privacy impact assessment and on the issue of privacy generally. You are obviously sharing from your vast and longstanding experience in representing financial organisations, corporations and your client base and from your own experience in the law, but would you care to express an opinion on whether the bill has the balance right with respect to protecting consumers and

members of the public from abuse of privacy and privacy issues in general? Have you given any thought to those matters?

Mr Loxton—There is nothing that makes us choke. It has not been our main focus. I think if you have a register then you have some degree of publicity. There does not seem to be too much in the way of information that is disclosed.

Mr Lowden—I would concur. I think there is a policy decision to be made in putting things on the register. If you go down the path of having a register which discloses these things then I think you need to accept the privacy sacrifice. There are some measures and attempts to restrict the purposes for which people can access the register. As a practical matter, you cannot see them being of any real effect in mitigating a privacy concern. If information is available you need to assume that it is going to be accessed, and you are not going to be able to control the purposes for which it is accessed.

Mr Loxton—Senator, there is one more thing on the conflicts of law provisions. It is another example where, if we do have them, there needs to be a lot of work in getting them right. There are a lot of issues to be thought through.

Senator BARNETT—Thank you for that. I can assure you that the issue of privacy is very much top of mind for a number of witnesses and certainly the Office of the Privacy Commissioner, who were here this morning. So we will be looking at that pretty carefully as well. Thank you very much for your feedback today and your submission. It is greatly appreciated.

CHAIR—Mr Whittaker, I wanted to ask you whether you have looked at the implications of including intellectual property rights in the scope of the bill. We have not had a lot of evidence about the implications of this. If you have a view, concerns or comments, that would be useful.

Mr Whittaker—In the multitude of issues we have been examining in relation to the legislation, that is not an aspect that I have looked at closely. In principle, I would think that legislation that is intended to comprehensively regulate the registration of security interests in property ought to include intellectual property as well.

Mr Loxton—I have consulted my intellectual property colleagues. Obviously there will be conflicts of law issues in terms of intellectual property that may be registered or sourced elsewhere. Leaving them aside, there is no choking—to use a word I used before—from them. Also, the current position is that, subject again to the registration requirements of particular intellectual property, you can give security over anything, and we would support that. If you are going to have legislation that registers security interests over anything, anything should include intellectual property rights.

Mr Canning—The one concern which was expressed by our intellectual property department was that things that are not currently on a register and cannot be accessed may be accessible on a register in terms of intellectual property, and that may concern the creators if they themselves use that as security to raise funds.

CHAIR—But that goes to who would be able to access the register, doesn't it?

Mr Canning—Correct.

CHAIR—And whether or not that person should identify themselves and their reasons before they access it.

Mr Canning—That is right. I suppose it is just a shift—what is not public may become public, whether or not the party accessing it does so for the right purpose.

CHAIR—Thank you very much for your very comprehensive submission and for the time you have all given today. I know it is valuable time and we appreciate you being here for us. Thank you very much.

Proceedings suspended from 1.00 pm to 1.41 pm

BILLS, Mr John Maxwell, Associate Director, Australian Finance Conference

EDWARDS, Mr Stephen Mark (Steve), Legal and Market Consultant, Australian Finance Conference

HOPKINS, Mr Adam Paul, Representative of Member Company, Australian Finance Conference

CHAIR—I formally resume this public hearing of the Senate Legal and Constitutional affairs Committee, and I welcome representatives of the Australian Finance Conference. The Australian Finance Conference has sent us a submission which, for our purposes, we have numbered 9. Before I invite you to talk to that submission, do you have any changes, comments or additional information for us?

Mr Bills—There are no changes but we would like to make a few comments at the outset.

CHAIR—I invite you to do that and then Senator Barnett and I will go to questions.

Mr Bills—On behalf of AFC, thank you for the opportunity to address the hearing. The AFC represents a broad range of financial services companies specifically in relation to finance products. It is non-institutionally based, so it consists of the major banks, regional and international banks, building societies, independent financiers, manufacturer financiers and rental companies. In addition to the AFC, we have two associated associations for this hearing's purposes. One is the Australian Equipment Lessors Association, which is the association of the major equipment financiers, and the Australian Fleet Lessors Association, AFLA, which is the association of the 13 major fleet-leasing companies in Australia. Together they have about 450,000 motor cars under fleet-leasing arrangements.

Senator BARNETT—Are you representing them as well?

Mr Bills—Yes. The products our members provide are housing loans, consumer loans, bailment, leasing, hire purchase and chattel mortgage. We have experience with the existing REVS arrangements around Australia, which are for motor vehicle encumbrances, and our experience with that has been a very good one. There is a distinction between a lease, for example, and a chattel mortgage. Under the former, the financier has ownership of the goods; under the latter, the financier is taking security over the goods. That distinction, for many purposes, will be redundant under the PPS regime. Initially we were concerned about the fact that we are doing away with that distinction of ownership, but our experience with the REVS regimes around Australia and what we can see in terms of the PPS arrangements give us no reservations in that regard; we think it is a very good framework. We note that the PPS is going to replace about 17 registers and about 70 statutes. That is going to improve efficiency and it will also increase access to funding by businesses in Australia, so we are very supportive of the PPS framework and we are very supportive of the inclusion of things such as leases and hire purchase where there is that legal distinction between ownership and taking security.

My two colleagues today are Steve Edwards, our legal consultant, who will talk particularly to the legal aspects of the PPS Bill, and Adam Hopkins, one of our members who has great operational and market experience. Adam is also a lawyer but he is involved in the operational and market activities of our members.

CHAIR—Thank you, Mr Bills. I will not go through some of the specific issues in your submission because I think they are pretty evident, about the extension from five to 15 days and some of those pretty obvious suggestions.

Mr Edwards—Can I interrupt for a moment? I have a concern that it may not have come through as clear in the submission as it might, but that shift from five days to 15 days was given as an example of what happens in New Zealand. The AFC's preferred option is to take a slightly different approach to what is in the bill and to what is in New Zealand, and that is to suggest that, for the purposes of obtaining a purchase money security interest priority, a financier has five business days from when they settle or pay out the money in order to register and get the benefit of that priority interest. The rule at the moment that is in the draft bill is five business days from when the customer takes possession of—I will give the example of a vehicle—and drives it away. We have some issues around that as a starting point for obtaining the priority, and our preferred position is that it be five business days from when the financier pays out the money.

CHAIR—Thanks for clarifying that. You are also recommending that the law be subject to review after the first two years. Just before we get to that, can I talk about the implementation stage. Let us say this bill goes through the parliament before the end of this year, for example. Do you think there needs to be a longer lead-in time for businesses to train, implement, upgrade systems to accommodate the new legislation? Two years is currently in the bill. You think that is sufficient?

Mr Edwards—As we understand it, the target time for commencement is May 2010, which is only 15 or 16 months away. I would venture to say, and I think Adam will be able to support it from the operational side, but that would be a challenge without knowing this far out the exact terms of the legislation. There are also other priorities which I think Adam will touch upon about IT resources, documentation and training as well as the other things that government has on the agenda for us, such as still implementation of anti-money-laundering, privacy, transfer to the Commonwealth of credit legislation, all of which are having an impact right now.

Mr Hopkins—We have undertaken an initial assessment for our purposes in terms of what the bill would mean and we have hundreds of documents which we would need to consider based on the final terms of the bill and then obviously in terms of how from an IT perspective the interaction would happen between the register and the companies. We would obviously also need some lead time to build those systems. So certainly timing is an issue in the current sense of May 2010.

CHAIR—Do you think it needs to be pushed back?

Mr Hopkins—I think so, yes.

CHAIR—Six months, a year?

Mr Hopkins—I would say that around May 2011 is probably a more appropriate date, so pushed out perhaps by one year, to enable the businesses to be ready on time.

CHAIR—Your proposition is that from the time the bill goes through or from the time of the end of the transition period there would be a two-year review period?

Mr Edwards—From the time it becomes law. Let us assume for the purposes of today it becomes law, based on what Adam said, in the middle of 2011, so looking at 2013, just to make sure that the legislation is doing exactly as achieved, given its very important commercial role in the economy.

CHAIR—And the expert advisory committee would be part of this two-year review, or should be set up immediately to monitor the implementation of the legislation?

Mr Edwards—My view is the sooner the better. It would not be tied into the formal review but it would be an ongoing monitoring of the performance of the bill once it becomes an act. We draw examples of that from what has happened in Canada and the US, where they have ongoing reviews of their personal property and equivalent legislation, say, under the Uniform Commercial Code through their uniform commissioners structure, which we do not have here. But, given the significance of this as a piece of commercial law in this country, we believe it would benefit from ongoing expertise.

CHAIR—In the rest of your submission, you have identified 11 areas where you think the bill needs to be improved. Is it section 235 where it talks about businesses operating reasonably—is that the section?

Mr Edwards—That is the one.

CHAIR—I would like to ask you about your comments on that, that they have to act 'in a commercial and reasonable way'. You do not believe that is necessary in the legislation?

Mr Edwards—No. There are two comments about that, Senator. Firstly, this obligation that is imposed under the statute is imposed on all parties, not just secured creditors. Secondly, it seems out of place, shall we say, in a statute of this kind which is dealing with priorities and extinguishment and, at times, some quite technical rules about how and in what way you can take securities, have priority and protect and manage the risk associated with those securities. We have concerns about the concept of what is a commercial and reasonable way for parties to be dealing with each other. At the moment there are provisions in the Trade Practices Act, in the ASIC Act and so forth which already target conduct issues for parties transacting with each other, and we would suggest two things: one is that this issue is adequately covered by other statutes and the other is that, if it is to be enacted, it should be as a more general proposition in the context of trade practices market conduct rather than as a specific issue as is proposed here.

Senator BARNETT—Thank you for that, Mr Edwards. That has come up as an issue over the last few days—section 235 and what is commercially reasonable. The fact is that the courts would end up determining what is commercially reasonable in due course once the litigation flowed through, because witnesses have said, and I would agree, that it would increase the level of uncertainty about exactly what was commercially reasonable or not. So you concur with that proposition?

Mr Edwards—Yes, definitely. The statute is meant to provide certainty and this very provision takes that away.

Senator BARNETT—Just going back to this proposition you have about a two-year review; what sort of people would you have on that the expert advisory committee and who would they be reporting to? Are you talking about the federal Attorney-General, the states or who? Can you just flesh out that recommendation for us.

Mr Edwards—I would envisage it would be reporting to the Commonwealth, whether it be the Attorney-General or maybe the Treasurer or both, given the commonality of commercial and legal issues involved, rather than necessarily the states. The people involved would be from the finance sector and the banking sector, as well as those who advise and, importantly too, we need to factor in small business. Small business should be represented on that to make sure that it is working right because they take security interests in the form of title retention arrangements in particular but quite often it is customers and academics who are giving. The experience overseas seems to indicate that a broad group of experts in this particular area does continue to contribute to the ongoing development of the commercial law in this area of taking securities.

Senator BARNETT—Do you have any examples of how they operate overseas?

Mr Edwards—Yes, certainly. Canada has what I think is called a uniform commissioners body, which focuses specifically on personal property securities. Canada has province based registers. Australia is to have only one register, which is good. So that committee comprises the registrars, the academics and others from the banking and finance sectors who have a keen interest in the area. I am aware that Professor Tony Duggan from the University of Toronto has placed a number of submissions to the Attorney-General's Department and to this committee. Perhaps we could obtain some further information from him, because I am reasonably confident he is—

CHAIR—We actually heard from him this morning. We had him this morning as a witness for an hour on the phone. He was very good.

Mr Edwards—Yes.

Senator BARNETT—Secondly, as to commissioning research into the act and its policy, what particular research were you thinking of, if any?

Mr Edwards—Again, the research is to ensure that the law is staying up-to-date with developments in the finance markets and commercial markets so that the two are, as closely as possible, working in tandem rather than the law playing catch-up later on.

Senator BARNETT—Just moving to another topic area, I understand from Mr Bills's opening statements that you represent the Australian Equipment Lessors Association.

Mr Edwards—We represent the Australian Equipment Lessors Association, who are the major equipment finance providers and the Australian Fleet Lessors Association, which are the fleet leasing companies.

Senator BARNETT—Just to get it on the record, both those organisations and the others that you represent support the position that you have put to the committee?

Mr Edwards—Most definitely.

Senator BARNETT—Leasing has been an issue over the last three days; it has been raised by a range of witnesses. If you are representing equipment lessors and like organisations, perhaps you can share with us your views and their views on the change in the law that would apply under this bill, which obviously does not apply at the moment, and whether they support such a change—presumably they do—where they would then have to register their interest.

Secondly, do you conceive that there may be problems where registrations will not occur or fail to occur because people forget to register or do not register and where somebody is going to miss out? I understand there was quite a high-profile case in New Zealand. Perhaps you could flesh out for us what happened in that instance.

Mr Bills—Our members provide equipment finance, and basically there are three products: leasing, hire-purchase and chattel mortgage. Under leasing and hire-purchase, they actually own the asset, whereas under chattel mortgage they take security over the asset. From our members' point of view, they want the same rules to apply to all three products. If there were a distinction made between an asset that you own and one that you take security over, it would only be chattel mortgages that would go on the PPS register. We think that would

not be a satisfactory arrangement. The same rules should apply for all three. Equipment financiers and fleet lessors will need to put their processes in place for registering on the PPS for chattel mortgage business, which is quite a large part of the general financier's portfolio, and they would have the same procedures for leases and hire-purchase. That, of course, is the same situation we have now under the REVS, the registers of encumbered vehicles in the various jurisdictions. At the moment they are putting all these vehicles on the REVS; the only difference now is that they have a different register in every state. Under this proposal, there will just be one register, which will make it a lot easier. I think that, once these procedures are in place and it is all done electronically, there is no reason why you should be in a disadvantaged position. You will be in an advantaged position. It will be very transparent. It will be very efficient, so everyone will be working under the same rules and it will be very easy to check the register.

Senator BARNETT—But the REVS only apply to vehicles.

Mr Bills—They do, yes. We see that as a gap. Vehicles make up almost 50 per cent of equipment finance in Australia, so it already covers a big swag. The fact that this register will cover all of the vehicles which our members finance we see as a plus. At the moment, we stick on these assets, whether they are leases or chattel mortgages. There would be no distinction under the new legislation, except we would be putting on all assets and there would be only one register to put them on, so it would be a big advantage.

In terms of New Zealand, I will flesh it out. I know one situation in New Zealand that related to a horse. It was a situation where the person did not stick the horse on the register. It seemed pretty clear to us. We did not really know why this had gone to court. It seemed to be crystal clear. If it has not been stuck on the register, you have not got a security interest in that asset. I think that was what the court decided. Most commentators in New Zealand were not surprised at all with the result. It was quite appropriate that that should occur that way.

Senator BARNETT—What occurred in that instance? What is the name of the case? Can you help us with that?

Mr Bills—I cannot remember the name but, with our contacts in New Zealand, I can certainly provide that information to the committee.

Senator BARNETT—We can dig it up. I understand it is a high-profile case. In that instance, did the owner of the horse subsequently lose his or her entitlement to—

Mr Bills—Yes. I think the horse was leased. It was a reasonably bizarre situation. The horse was leased and the lessor failed to register their interest in the horse. Because of that, they lost their security interest. I think there was another case also, involving some construction sheds.

Mr Edwards—That was the Portacom case. Portaloos had been leased to a company which went insolvent. Prior to that, their bank had taken what was the equivalent to a floating charge. The owners of the portaloos sought to establish their priority because they owned them, as the lessor, but they had not registered on the Personal Property Securities Register.

Talking to others who have watched the implementation of this kind of law across the globe, each country seems to have one or two leasing or title retention cases quite early in the piece where a lessor or a supplier ends up losing out because they have not registered. That gets the message across. In fact, a number of the discussions we have had with the Attorney-General's Department over time have been about making sure that, as far as possible, business is well educated about this bill.

Senator BARNETT—I will come to that in a minute. But is there another way of protecting the rights and interests of the owner or lessor in these instances rather than having to go to court and making a big hoo-ha like in the portaloo case in New Zealand? Is there any way, perhaps a transition period in terms of leasing arrangements? We have had submissions to this committee, as you will see, which say that that should be an exempt area and that should not apply to those arrangements, including yesterday from a significant law firm.

Mr Bills—We could see no reason for excluding those assets from the framework, none at all. We just say that under the present arrangements, particularly with chattel mortgage documents, we need to register those with ASIC, and it is a very involved process and you are not too sure whether you are doing it as you should be doing it and you are not too sure what is the priority between the ASIC registration process and the REVS registration process, so if it comes to an insolvency situation there is a fair amount of uncertainty as to where everybody stands. Under this proposal, there will not be any uncertainty; it will be very clear. There will be total transparency.

Senator BARNETT—Yes, but it will be in stark contrast and different to the current arrangements, for nonvehicles at least.

Mr Bills—For nonvehicles it will be, yes. But we have 50 per cent of the assets on there at the moment.

Senator BARNETT—That means that for 50 per cent there will be a significant change in terms of the legal arrangements.

Mr Bills—Yes, but financiers are more than aware of what they need to deal with the existing assets that are affected, and it would be a very simple matter for them, I would think, to—

Senator BARNETT—I am not just thinking of financiers; I am thinking of others, like small businesses and individuals. How do we protect their interests?

Mr Bills—I think we protect them by having a register that everything is on, that everyone can go to and that everyone can see what is on there and what the priorities are.

Senator BARNETT—That leads to another issue that we have just touched on—that is, the information and education campaign and how extensive that is going to have to be, not just on this issue but across the board, because we are going to see some stark changes to the way the law operates. How extensive do you think that should be? I am thinking particularly of Australia's small business community. There are just under two million small business operators across the country, not to mention individuals, sole proprietors and unincorporated associations. It is okay for the big end of town—the big banks and the financial institutions—who have their corporate lawyers and all the help and assistance they need to look after themselves. What about the little people; what sort of information education campaign do you think will be required to ensure adequate understanding of the new arrangements?

Mr Edwards—As I mentioned earlier, it is fair to say that we have had this on our agenda with the Attorney-General's for some time. For all of the reasons that you have mentioned, we see one of the measures of success for implementation of this law as ensuring that small business and others are well aware of it. A period of time to allow that to happen over an extra year or so would be a benefit at targeting accountants or lawyers, because this does affect everybody who advises—not just the commercial lawyers or in-house counsels et cetera. We would also be contacting the various industry bodies, whether it is small business, construction, building, swimming pools or whoever. There needs to be an ongoing dialogue to get the message through that it will have an impact on them in two ways. One way is the documentation and maybe the requirements that their financiers may be making, and the other is for those who are, say, suppliers of inventory and raw materials. We need to make sure that they protect their position by registering. Bear in mind, they only need to register once. If they have an ongoing supply arrangement, they need to only register once before they start their supply and that will protect their position for the duration of their ongoing supply. That will protect them and make their position clear in any insolvency, should that event come about for their customers. In many ways it will be manageable, as Mr Bills has said. There will be a higher degree of transparency, and one of the benefits for small business will be that if they are looking to provide finance to somebody, they too will be able to check the register and establish their position as much as everybody else's position. So it will benefit business quite considerably once they know how to use it properly and what to expect of it. That is the key.

Senator BARNETT—So in terms of an information and education campaign, it will obviously be significant and substantial and in advance of the legislation coming into force as well as during that first period of time once it is underway.

Mr Edwards—Yes.

Senator BARNETT—Have you given any thought to the extent to that and how that could occur? You mentioned getting to the different groups—small businesses, accountants and lawyers.

Mr Edwards—Not in detail as yet. For us it is a priority to ensure that the legislation is implemented as well as could be.

Senator BARNETT—Okay. You mentioned the 17 registers that would be replaced. I do not have a list of those. Do you have a list?

Mr Edwards—I do. Could I provide the document, please?

CHAIR—Yes.

Senator BARNETT—Does that document include the 17 registers in the different states and territories?

Mr Edwards—It does. It includes those registers and it also highlights the differences in the way the current law treats certain types of financing transactions—whether they are lease, mortgage or hire purchase.

Senator BARNETT—The Corporations Law obviously has a register for encumbrances. One proposition that was put to us yesterday by a witness was that concept be replicated across to noncorporations—individuals, unincorporated associations et cetera. Do you have a view on that?

Mr Edwards—My initial view is that it will not bring the full benefits that this legislation is intending to present. In fact, it probably perpetuates the current complexities that are there. The company charges register does not contain all types of security interests—only company charges or mortgages. One of the objectives of this particular law is to try to break down the legal form differences as well as the different types of grantor or debtor. At the moment, of course, how, if and where you can register depends on where the customer is, whether the customer is a company or not, what type of asset is involved and where they are in the country, and I do not believe that suggestion would resolve things.

As I recall, the Australian Law Reform Commission inquiry into this subject in the late 80s and early 90s produced an interim report on this which recommended changes to the Companies Act only. Generally speaking, I think that was seen as an inadequate response to what was a far deeper problem.

Senator BARNETT—Some witnesses have put the view that we should just simply have a national register that takes on board the state and territory registers without the legislation underpinning priority and other terms and conditions that relate to those encumbrances on the register. What do you say to that?

Mr Edwards—My problem with just having a national register with nothing more underpinning it is that the register is there for a reason. A register does not exist simply to put interests on; it exists so that people can determine priorities. Indeed, when you do look at the registers at the state level, you will see that a number of them deal not only with extinguishment of interests but also with priorities. At the moment, too, in some situations where a company is involved and a mortgage is involved we have dual registration—one on a company charges register and one on whichever particular state's REVS register is applicable. So I am not enthused, shall we say.

Senator BARNETT—Okay. This document you have tabled is very helpful—thanks for that. Your last dot point about the registers says, 'Excluded from consideration are legislation and registers dealing with securities over aircraft and ships, and crops, stock and wool.' Not being an expert in this area, can you describe for the committee the types of registers that are in place? Do you know the relevant registers and legislation for aircraft, ships, crops, stock and wool?

Mr Edwards—There is at the Commonwealth level, under the Shipping Registration Act, a ships mortgage register. It focuses totally on ship mortgages—no other form of security. With aircraft, I think CASA has a register on which it notes security interests, but I do not think it goes further than simply noting that. Also, you would have the company charges register, which would be there as applicable. I think all of the states have various laws, such as the Security Interests in Goods Act here in New South Wales, which allows for security to be taken over crops, livestock and so forth registered as mortgages. Other states have equivalents such as sugar cane and so forth.

Senator BARNETT—Yes. That has been very useful and it is very much appreciated.

CHAIR—Thanks, gentlemen, for your attendance today. Senator Trood is not back and I do not have any other questions, so we thank you very much. Thanks for your submission and also for making yourselves available for us this afternoon.

[2.16 pm]

BILLS, Mr John Maxwell, Executive Officer, Institute for Factors and Discounters of Australia and New Zealand

EDWARDS, Mr Stephen Mark (Steve), Consultant, Institute for Factors and Discounters of Australia and New Zealand

GREEN, Mr Brendan Paul, Chairman, Institute for Factors and Discounters of Australia and New Zealand

CHAIR—I now welcome representatives from the Institute for Factors and Discounters. We have a submission lodged with us from the institute, and for our purposes it is numbered No. 4. Again, do you have any changes or alterations you need to make to that submission?

Mr Bills—No, we do not.

CHAIR—If you would like to provide some opening comments or talk to the submission—the same as last time—we will then go to questions again.

Mr Bills—Thank you. I will just provide a bit of background. The IFD represents the main receivables financiers in Australia. That market has grown spectacularly over the last 10 or 15 years. In 1994 it was about $3 billion per year in turnover; in 2008 it will be about $66 billion. Our members provide funds primarily for the small and medium enterprise businesses in Australia, and there has been a real transformation in our membership over the last 10 to 15 years. The main change has really been with all the major banks coming in and setting up operations for receivables finance, which they did not previously have, along with most of the regional banks and some international banks. The market has transformed in such a way that, whereas 10 or 15 years ago there were no banks directly represented in the market, today banks would account for about 90 per cent of the market, so there has been very spectacular growth. The main form of funding is invoice discounting, which continues to grow quite strongly. Factoring is a more specialised part of the business which offers a further service, and that is targeted more to various small enterprises in Australia.

We believe the framework provided by the PPS legislation will enable the receivables finance industry to continue to provide these large amounts of funding for small and medium-sized businesses in Australia, and we think it is a very good framework. We are very impressed with the process adopted by the Attorney-General's Department in putting this together. There has been plenty of consultation and it has been a very transparent process. I think our submission very much supports the approach in the bill.

CHAIR—Thank you. Do you have anything to say, Mr Green or Mr Edwards?

Mr Green—The only comment I would make is about the importance of this particular form of financing to small businesses. Perhaps in Australia small businesses have been supported too heavily against the weight of their bricks-and-mortar security and perhaps not as much as we should have against the business assets themselves. I think the growth in the appetite for this form of financing is testimony to the fact that there is an increasing appetite and requirement, particularly, I think, for the growing business. We are not necessarily talking here about particularly large businesses; they are small to medium sized businesses. It is a very important form of financing to support the growth of those businesses.

CHAIR—You mentioned some concerns with section 111—about the proposed section and about the practical effect. Do you want to take this opportunity to talk us through some of the concerns you have with that?

Mr Bills—Generally we are very supportive of the approach of section 111. We have made some comments, though, which relate to providing notice. That really relates back to section 33. I will pass over to Mr Edwards to elaborate on that.

Mr Edwards—With the way section 111 is presently constructed the inventory financier is given notice, and we agree with that proposition. We also felt that it might be appropriate to also advise any prior, existing chargeholder generally over the business of the account financing in any event—again, to keep things transparent. That was a proposal recommendation that we put forward to the department for consideration as well. At this stage, section 111 requires notice to the inventory financier only. Part of it too was to allow for an increase in efficiency, because hopefully by providing notice to the existing general chargeholder, such as those holding a floating charge, there would be less need to engage in subordination arrangements.

CHAIR—What would be the effect of your suggestion? Would you just add a section (iii) to clause4(b)? Is that how that would be amended?

Mr Edwards—I do not currently have that in front of me. You will have to excuse me because I have become used to the previous draft and, of course, those numbers are going through my brain.

CHAIR—I think it is on page 120.

Mr Edwards—Yes, that would be the case.

CHAIR—That seems fairly minor, but we will take that up with A-Gs when we see them next. The other issue you raised is the rights on transfer of account or chattel paper. Do you want to explain that to us on the *Hansard*?

Mr Bills—I think what the government is proposing to do there in terms of the anti-assignment clauses is basically to introduce world's best practice. This has happened in other jurisdictions which have modernised their law in this regard. One of the principal objectives of the PPS reform is to enable small businesses to access increased funding at a cheaper price. If there is an assignment prohibition and they are not allowed to sell their debts then they cannot access this form of finance. It is a chicken and egg thing; if they do not do it they cannot get the benefit of the debt that is being given by the legislation. So we are very much in support of that. It still enables anybody who wants to take action against these people to rely on other aspects, so it is only in relation to the assignment of those debts that this would have effect.

Senator BARNETT—I want to ask a question on section 111. Excuse my ignorance, but how does it work? You have issues regarding determining priority between an inventory financier and a receivables financier. Is that the issue?

Mr Bills—Yes, that is the issue.

Senator BARNETT—And determining priority?

Mr Bills—Yes.

Senator BARNETT—Would you please explain your proposal.

Mr Bills—The present position of the bill is that if we register before an inventory financier then we take priority. If we register after an inventory financier, if we provide the appropriate notice to the inventory financier and cross the t's and dot the i's correctly, then we preserve our security interest in the new value that we have provided to the business. The basic premise here is that if an entity or funder provides new value to a business then they should have the ability to quarantine their security interest in that new value they have provided to that business and clause 111, at the moment, does provide that.

Senator BARNETT—Going back to your opening statement regarding the importance of this legislation for small business, can you expand on its merit in protecting the interest of the small-business community in Australia for the committee?

Mr Green—There is currently a range of some 6,000 often small to medium sized businesses that use factoring and discounting throughout Australia. In Australia the growth has been tremendously strong. We had 22 per cent growth last year and, generally speaking, all the participants in the market are experiencing increased demand. One of the interesting things is that we will also see, at this is a time, property values for those small businesses potentially decline over the next 12 months, meaning that the ability of those businesses to raise funds against other assets such as property may be reduced. It puts a focus on those small businesses having the ability to use their existing assets and particularly their receivables to generate financing. That financing, of course, is used in a working capital environment, so in effect the funds that we advance against those receivables are then available to that business to meet the payment of the inventory. It is very much a chain with inventory turning into debtors turning into cash and then being returned to the inventory supplier. The value that we extend against that receivable is very important in allowing that small business to ultimately meet that payment to the inventory supplier.

My understanding of this proposal is that the inventory supplier will have much stronger rights under his retention of title than he does at the moment. He will be able to register those rights, and our expectation is that would give a lot more surety to inventory suppliers in that position. But then, of course, it would be very important from our perspective, because we are simply not going to lend if there is any thought that an inventory supplier, without registering a charge, could track securities through to the receivables. Put simply, we are not in a position where we could buy those receivables or support that business.

Senator BARNETT—Why has there been such an exponential increase—based on your submission, a tenfold increase—from $7 billion in 1998 to, as you mentioned, $66 billion last year? Why has there been such a big increase and, secondly, for someone who is not an expert in the field of receivables financing, what forms of financing are there? You mentioned factoring. Could you explain how it works?

Mr Bills—Many small businesses look at their debts. They make things and they sell them to their customers and are waiting to receive the money from the customers. They look at that as a debt, and to them that is a problem. But if you look at their balance sheet one of their biggest assets will be unpaid debts. Small business do not regard that as an asset; they regard it as a problem. Under factoring and discounting, they can turn that unpaid invoice—or 90 per cent—into immediate cash straightaway. So it is a great way for them to get immediate funding for their debtors, which then enables them to go out and perhaps do a better deal with their suppliers or whatever. There has been a growing recognition of the ability to turn these unpaid invoices into cash and therefore for a small business to use one of their largest balance sheet assets in a very productive way.

Why has it grown so quickly? I think that when we were first involved with the IFD, back in 1994-95, there were only seven companies that provided factoring and discounting in Australia. They were often private companies operating in regional locations with not a big public profile. I think that over the years, particularly with the banks coming into the market, that has increased the exposure of this product. Another aspect is that probably the banks having such a large part of the market has legitimised the product and made it much better known.

Senator BARNETT—Are there any issues now that there is a global financial crisis? With the banking sector struggling in certain areas to provide finance, is that likely to flow through into this part of the Australian economy?

Mr Bills—Small businesses, in some instances, are having more significant problems in obtaining funding. They have to look at alternative sources, and this is an alternative which they should have a really good look at. As Mr Green has said, it does not require real estate security. At the moment, with real estate prices going the wrong way, this can become a very viable option for small business.

Mr Green—I think that is right. I think there are mixed pressures. There is no doubt that lenders will be more conservative and I think they will be more conservative in debtor finance as well. Receivables financing has always been thought to be somewhat countercyclical in that, as times get harder, the requirement for cash flow finance—and particularly linked to assets other than real estate, which in these times potentially may decline in value—is brought to the fore. So a lot of businesses will look to their receivables as a source of finance but there will be some conservatism on behalf of lenders, which is probably a right and proper thing.

Senator BARNETT—Sure. I just want to follow that through. Again, help me with the difference between factoring and discounting. Let us say that you are getting a hundred grand per month on your books in terms of accounts receivable. You mentioned 90 per cent earlier, Mr Bills. Is that a usual amount that you can obtain in terms of finance?

Mr Green—For factoring that would be a typical number. For discounting somewhere between 80 to 85 per cent would be a typical advance.

Senator BARNETT—What is the difference?

Mr Green—With factoring, the factoring house provides an additional service. Not only do they fund the receivable or purchase the receivable and allow the client to draw down funds in advance but they also provide an additional service where they will deal directly with the debtor in collecting that payment. So, if you like, it is almost allowing that small business to outsource that activity which they may perhaps not be expert at.

Senator BARNETT—As opposed the discounting, where the small business does the collecting.

Mr Green—Correct. So with a discounting facility, typically with slightly larger businesses that perhaps have that expertise on tap, they would look after that directly.

Senator BARNETT—Are there any other issues that you wanted to raise with us that we have not covered?

Mr Bills—No.

Senator BARNETT—On the issue of privacy, do you think we have got the balance right under the current proposals? Have you considered the privacy impact of this legislation?

Mr Edwards—Yes, we have. I have had a look at the Privacy Commissioner's submission. Certainly privacy has been a consideration right from the beginning, to make sure that the balance is right. Generally, from talking to the member companies, we think that the balance is about right, particularly when it comes to individuals.

Senator BARNETT—The Privacy Commissioner has made a whole range of recommendations—at least a dozen or so—to our committee, including the merit of a privacy impact assessment being undertaken. Have you considered any of those views and would you support a privacy impact assessment being undertaken?

Mr Edwards—At one level I do not think I have a particular view about whether one is required or not other than to say that privacy has been at the forefront of consideration in the development of policy around this to make sure that just enough personal information is available to be confident that you are dealing with the correct debtor. That is the main thing, and that is why at times it is necessary to collect full name, date of birth and address.

Senator BARNETT—You believe that is required?

Mr Edwards—To collect. Whether it is available on the register is a different issue. In the same way, if you put in a person's name, date of birth and address and you can get a match on that then you can be reasonably confident that you have identified the correct debtor and the other security interests that they have been given. But if you put in that data and you do not get a match then you need to make further inquiries. I would not have thought that date of birth et cetera needed to be on the register, but it assists in dealing with the register for those who are searching. I will draw an analogy with that. At the moment, REVS—say, in New South Wales—does not collect individual data but is also conscious of privacy issues, so you cannot search their register on a vehicle registration number alone. You need to have three criteria—registration number, VIN or chassis number and engine number—so that you know you are dealing with somebody who at least has access to the vehicle and the registration papers, hopefully with the consent of the person involved, rather than a nosy passer-by.

Senator BARNETT—A nosy passer-by cannot access that?

Mr Edwards—That is right. In the same way, if you are dealing with non-serial-numbered goods and so forth, you do need to know the person you are dealing with, and not only that; you need to be sure that you are not invading or intruding on someone else's privacy.

Senator BARNETT—When you say 'the address', which address are you referring to? Is it business or private?

Mr Edwards—It would be their private address when you are dealing with an individual for consumer purposes. If it is a sole trader or partnership, there may well be a case for both given the way it is, but certainly I would think that their business address should be the priority.

Senator BARNETT—All right. Finally, have you looked at the regulations and do you have any view on the draft regulations that were promulgated last year?

Mr Edwards—In general, when I was responding on behalf of the Australian Finance Conference—if I could go there—we were generally supportive of where regulations were proposed and the contexts in which they were proposed, yes.

Senator BARNETT—Thank you very much.

CHAIR—Unless you have something from your reading that you want to ask questions about, Senator Trood, I think we have pretty well covered it all.

Senator TROOD—No.

CHAIR—Gentlemen, I thank you very much for this submission and for your time here this afternoon. Again, it has been very helpful and it is much appreciated. I officially thank all the witnesses we have heard from this week who have given evidence to the committee.

Committee adjourned at 2.38 pm