COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009; Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2009; Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2009; Personal Property Securities Bill 2008

THURSDAY, 29 JANUARY 2009

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 29 January 2009

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

Substitute members: Senator Ludlam for Senator Hanson-Young

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: Barnett, Crossin, Farrell, Ludlam and Trood

Terms of reference for the inquiry:

To inquire into and report on:

Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008;

Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008;

Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008; and

Personal Property Securities Bill 2008

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Committee met at 9.06 am

CHAIR (Senator Crossin)—I formally open this second public hearing of the Senate Standing Committee on Legal and Constitutional Affairs in our inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008. This inquiry was referred to the committee by the Senate on 4 December 2008 for report by 24 February 2009. This bill seeks to amend the Disability Discrimination Act 1992, the Age Discrimination Act 2004, the Human Rights and Equal Opportunity Commission Act 1986 and other legislation to implement the recommendations of the Productivity Commission in its 2004 review of the Disability Discrimination Act. The bill also implements recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs and makes various other amendments to the human rights legislation going to the general operation of the human rights laws in Australia. We have received 33 submissions to date for this inquiry; all of those submissions have been authorised for publication and are available on the committee's website.

I remind witnesses who are here 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. 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 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, a witness may then request that the answer be given in camera. Such a request may of course also be made at any other time. I remind people in the room to turn off their mobile phones or switch them to silent.

[9.08 am]

HOWIE, Ms Emily, Senior Lawyer, Human Rights Law Resource Centre

SCHLEIGER, Ms Melanie, Legal Representative, Human Rights Law Resource Centre

Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

CHAIR—Welcome. Do you have anything to say in relation to the capacity in which you appear today?

Ms Schleiger—I am here today as a legal representative of the Human Rights Law Resource Centre. I was formally on secondment at the centre for six months. I currently work in the discrimination law group at Lander and Rogers, which provides advice to individual and commercial clients across the public and private sectors.

CHAIR—We have received the submission from the Human Rights Law Resource Centre, and for our purposes we have numbered it 20. Do you want to amend it or make any changes before you give us a short presentation?

Ms Howie—Regrettably, we do have to make one small amendment, and that is to recommendation 7 as it appears on page 4. We would ask the committee to use the form of words for recommendation 7 as it appears on page 22. So delete recommendation 7 on page 4; it appears again on page 22. We will send through an amended version of the submission to the committee.

CHAIR—All right. I invite you now to make a short opening statement or talk to your submission, and following that we will go to questions.

Ms Howie—First of all, we would like to thank you for the opportunity to speak directly to the committee on the proposed amendments to the Disability Discrimination Act. Although we commend the government for its initiative to amend the act, we think some further work is required on the bill in its current form.

Today we would like to take this opportunity to talk briefly to five key areas of concern. They are: the definition of direct discrimination, the definition of indirect discrimination, the reasonable adjustments provisions, the provisions concerning requests for information and, finally, the breadth of the exemptions provided in the migration context at the moment. Melanie Schleiger will speak first to the definitions of direct and indirect discrimination and, after that, I will make a few points about the remaining three areas. Finally, we would like to make some brief comments on the need for a broader, more comprehensive review of all antidiscrimination legislation in Australia, if we might.

Ms Schleiger—The centre welcomes the amendment to the definition of disability to include behaviour that is a manifestation or symptom of the disability. However, this is a bandaid solution to a much bigger problem, which is the comparator test in the definition of direct

discrimination at section 5. This is a confounding test that is difficult to understand and apply for both lay persons and lawyers alike. The comparator test also overlooks the inability of a person with a disability to control behaviour or circumstances that are caused by their disability. The legislation allows for a comparison to be made between persons who exhibit like behaviour, regardless of whether their behaviour is wilful or beyond their control. Such an approach significantly narrows the scope of the direct discrimination provision and is problematic for people with intellectual or other non-physical disabilities.

A further problem with the comparator test is that an appropriate comparator is not always available. For example, a disability services provider can discriminate against clients on the basis of their disability with near immunity because a comparator would be a person without the disability who does not require the services in any event. The comparator test is simply inappropriate in these circumstances. The centre is currently advising a client with a rare genetic disease who is facing this very problem. A complaint of discrimination should not fail simply because a comparator cannot be found or because the comparator displays the very characteristics of the person's disability that resulted in the discriminatory treatment. Such an approach fails to ensure substantive equality for persons with a disability.

The centre recommends the complete removal of the comparator test in the definition of direct discrimination. To clarify when the right to nondiscrimination can be limited, a general limitations provisions could be included which supports the unjustifiable hardship provision.

The centre also recommends the removal of the compliance requirement in the definition of indirect discrimination. This would provide protection to persons with disabilities who, through their own effort or with the assistance of carers, managed to cope with significant disadvantage resulting from requirements or conditions that have a discriminatory effect. Disadvantageous requirements or conditions should not be acceptable simply because a person can still manage to get by despite their disadvantage. This is contrary to the principle in the Disability Discrimination Act that persons with a disability have the same fundamental rights as the rest of the community. Disadvantageous requirements or conditions should only be lawful if there is a reasonable, legitimate and proportionate justification.

Ms Howie—Further, as you know, a reasonable adjustments provision has been inserted into the bill. As a general rule, reasonable adjustments provisions are to be welcomed as promoting substantive equality and clarifying the positive obligation to make adjustments. This obligation has been in doubt since the High Court's decision in Purvis. However, we say there are four key problems with the current reasonable adjustments provisions, as set out on page 20 of our submission. These problems are also the subject of a number of other submissions to the committee, so I will not address them at this stage. As presently drafted, we think the provisions are difficult to understand and apply and that they should be redrafted.

Subject to one concern, we agree with the Human Rights Commission's proposed redrafting of the reasonable adjustments provision. We support the duty in this form because it would be a stand-alone provision—that is, it would stand separate from the definitions of direct and indirect discrimination and it would also properly introduce positive obligations to make reasonable adjustments. However, we have one concern with the commission's definition of reasonable adjustments and that is that it does not contain an assumption that adjustments are reasonable.

This assumption is currently contained in the drafting of the bill and we think if the reasonable adjustments provision is redrafted then that assumption should be retained.

We think the assumption works for three reasons. Firstly, the act would require the applicant to establish that the adjustment would alleviate a disadvantage or assist a person to have an opportunity that would not otherwise exist. So there is a relevant connection that the applicant must draw between the disadvantage and the adjustment made. Secondly, we think the unjustifiable hardship provisions provide adequate opportunity for rebutting that presumption. Finally, we think that if we are serious about putting persons with a disability at the same starting point as persons without a disability then the assumption is appropriate. The assumption would address the power imbalance and also the likelihood of disabled persons suffering a disadvantage.

We also make submissions about the request for information section, which is the proposed new section 30. The crux of our submission there is about the appropriate burden of proof that is to be applied in the circumstances. For some reason, and it is not clear on what basis this decision was made, the new provision states that an employer who requests genetic information from an employee is not required to prove that they did not have an unlawful purpose for requesting that information but are only required to produce evidence to that effect. If the evidence is not rebutted then the assumption is that the reason for which they asked for that information is lawful. We say that an employer should prove that the information is reasonably required for a purpose that does not involve unlawful discrimination, particularly given that they are asking for information of such a private nature. Given these considerations, we think there is no rationale for departing with the usual burden of proof, which is the balance of probabilities.

Finally, I might just make a couple of comments about the exemptions that are currently provided in the migration context. Our submission here is twofold. First, we think the amendments in the bill do not implement the Productivity Commission’s recommendations. The Productivity Commission recommended that the exemption only cover those provisions of the Migration Act and regulations which deal with issuing entry and migration visas to Australia. That is a very narrow class of decisions. Instead, the bill proposes an exemption for all acts permitted or required to be done by the Migration Act or those instruments.

Secondly, we query why there is an exemption provided in the migration context at all. Human rights are attached to persons on the basis of their being human. Citizens and noncitizens should therefore enjoy their rights equally subject only to reasonable limitations. A blanket exemption for migration officials and acts done under the Migration Act and regulations is clearly not a reasonable limitation. In the absence of a human rights approach in migration we have unreasonable and unjustifiably discriminatory decisions being made by the Department of Immigration and Citizenship such as the case of Dr Bernhard Moeller recently. Dr Moeller and his family were refused permanent residency because Dr Moeller’s 13-year-old son Lucas has Down syndrome. Immigration Minister Chris Evans recently intervened and overturned the Department of Immigration and Citizenship’s ruling in this case. We say that if a human rights framework had been allowed then we may have had a better decision at first instance. So the centre’s submission is that there is no need for the exemption of the application of the Disability Discrimination Act in the migration context at all.

Ms Schleiger—Finally, the centre urges the committee to conduct a comprehensive review of all existing antidiscrimination law, as recommended by the committee in its report on the Sex Discrimination Act. This review should consider, among other things, the need to harmonise federal antidiscrimination laws, the desirability of a single equality act, the scope of federal antidiscrimination laws, whether the model for enforcement should be changed, possible additional grounds for protection and whether the permanent exceptions and exemptions should be removed.

In particular, the centre considers that significant legislative reform is required to address systemic discrimination. Systemic discrimination is a major barrier to equality and is apparent even in the process of this inquiry. For example, Commissioner Innes raised the difficulty that a person with vision impairment has in accessing submissions that are published only in PDF format. Ms Fiona Given required flexibility to extend her session in order to accommodate her disability, as the usual time allocated would not allow her to fully participate in the hearing. The Disability Discrimination Act does not adequately address these systemic issues. For this and other reasons, a broader review is required.

CHAIR—Thank you. I will start with your comments about the Migration Act. I might have it wrong, but I thought that this bill was actually going to remove the exemption from the Migration Act. Have I misunderstood that?

Ms Howie—I do not think it removes the exemption. It narrows the scope of the exemption that is currently provided. At the moment there is a very broad exemption for all acts done under the Migration Act and regulations. Now they have limited the scope of that exemption to all acts that are permitted to be done or required to be done under the act or the regulations.

The Productivity Commission has suggested that it is best for only that class of decisions about entry and the grant of visas to be subject to the exemption. It seems like they have attempted to address that in the drafting, but the drafting has made it too broad. Acts done or permitted to be done under the Migration Act and regulations would include things like whether or not migration agents can be licensed or how people are treated in detention, the conditions of detention.

CHAIR—Is it not a good thing to have it broad?

Ms Howie—It is an exemption. So the Disability Discrimination Act will not apply to things like the conditions of detention and the grant of licensing to migration agents.

CHAIR—I see. So the effect of this legislation would mean that the Migration Act is not exempt when it comes to entry and visa applications. Is that right?

Ms Howie—The effect of the bill as it is currently drafted would mean that there is an exemption from the operation of the act for entry and visa decisions but also for a broader class of decisions. In our submission, on page 24, at paragraph 72, I have set out five different types of decisions that might be made by migration officials. They are as follows:

- the arrival and presence in Australia of non-citizens;
- selection criteria, application processes and compliance for all visa categories;
- migration sponsorships;

- detention of, deportation of and recovery of costs from non-citizens; and
- registration and duties of migration agents.

At the moment, all of these things are exempted. You can lawfully discriminate on the basis of disability in all those decisions. We think that the bill was intended to only cover the arrival and presence in Australia of non-citizens and visas, but because of the way that it was drafted the exemption is still covering those five areas, so you can still lawfully discriminate with regard to, say, the conditions of detention. We do not see any rationale for doing that.

CHAIR—If the intent of this legislation is to ensure that the special measures and the Migration Act exemptions from the discrimination act do not exempt general actions under the Migration Act, are you saying that you think there has been a drafting error? Or is the intent—

Ms Howie—I am assuming that the drafting is intended to reflect the Productivity Commission's recommendation. I do not think that the drafting does reflect that.

CHAIR—Okay. We might make a note of that for when we get A-Gs before us next week.

Ms Howie—Thanks.

CHAIR—I want to ask you about the comparator test. It is the same scenario, I suppose, that we used as an example when we did the review of the Sex Discrimination Act. You have to find someone in a similar circumstance who might be liable to have the same actions taken against them. That is my understanding.

Ms Schleiger—That is right. In the case of the Sex Discrimination Act, submissions were made about the complexity of the comparator test. However, in the case of persons with disabilities, the comparator test is even more complex, because at least in the case of a woman the comparator is a man. That is fairly straight forward—although there are a lot of other complexities with that test and reasons why it should be removed for sex discrimination also. But in the case of a person with a disability, it is very difficult to create a hypothetical comparator, because the point is that the person is different and may require differential treatment to ensure their equality. In the case of a person with a disability, if the comparator is a person without the disability, it is a useless comparison, because the person without the disability does not require the special treatment. They do not require the wheelchair ramp, for example, or the additional time to make submissions.

CHAIR—I see. Do you have a number of cases that you have dealt with that have not progressed to the next stage because the comparator test prohibits rather than assists their case?

Ms Schleiger—Yes. The Human Rights Law Resource Centre is currently acting on behalf of a client who has a rare genetic disease and who is facing this very issue. I can provide an outline of that case if that would assist the committee.

CHAIR—If you could do that very briefly to get to the nub of the issue that we are trying to get evidence about, which is why the comparator test should be removed, that would be good.

Ms Schleiger—This client has a genetic disease. Treatment is available for the physical component of the disease. However, the treatment is only government funded for persons who

have the non-neurological strain of the disease. The centre's client is being denied this government funded treatment because, although the disease impacts on him in the same physical way, he has a form of the disease that also causes him neurological impairment. He has been denied the treatment despite experiencing significant physical benefit from the treatment to date. Fortunately, this client currently receives the treatment gratis from the manufacturer. But there are other children in Australia who are not so lucky.

You might think that the comparator in this case is a person with the non-neurological strain of the disease who is receiving treatment for the physical aspect of the disease—they both have the same physical impairment but one person is receiving the treatment and the other, our client, is not receiving the treatment because he has the neurological strain of the disease—but that is not the case. The comparator is a person without the disease at all, and that is completely inappropriate, because a person without the disease at all does not require the treatment. So the comparator test does not assist this client and he is unable to bring a complaint of discrimination.

CHAIR—Thanks.

Senator BARNETT—What is the government's position as to why your client is not entitled to the treatment? I assume you have assessed that and considered the government's position.

Ms Schleiger—We have looked into it and we can only make assumptions on what the position of the government is.

Senator BARNETT—But have they given you reasons for not providing the treatment?

Ms Schleiger—The reasons given are unclear. Various reasons have been given. It is part of and has been assessed under the Life Saving Drugs Program. It is not clear whether it is a philosophical reason—that this person has a neurological impairment which the government thinks will continue to degrade.

Senator BARNETT—But the government believes it does not fit within the Life Saving Drugs Program criteria.

Ms Schleiger—An application has not been made specifically to have this strain of the disease fit within the Life Saving Drugs Program, so I cannot say that the government has that opinion. We can provide further information to you.

Senator BARNETT—No, that is fine. You might want to talk to one of your local members or senators and write to the relevant minister regarding the Life Saving Drugs Program to see if there could be a review of the matter.

Ms Schleiger—Those communications have already taken place.

Senator BARNETT—Great. You appeared before us in our inquiry into the Sex Discrimination Act. Firstly, thank you for your comprehensive submission. It is well thought through and well argued from your policy perspective. What are the main conceptual, policy and legislative differences between this DDA, the SDA and the RDA, as you see them? I know it is a

big question, but you are one of the few witnesses that can probably answer that question with credibility.

Ms Schleiger—Thank you for the question. It is a fairly broad question that I think deserves a comprehensive answer, which I perhaps cannot provide in oral submissions today. To approach it from the position of how those laws could be better harmonised—

Senator BARNETT—Let me just focus a little bit more. I am aware you have recommended an equality act and a more general review of our discrimination laws, as you did in the SDA inquiry. But is it not true that the DDA has a line of thinking which has an impact on cost, business and jobs and that there appear, therefore, to be more exemptions in the DDA compared to the SDA and the RDA? Would that be a fair assessment?

Ms Schleiger—I understand that there are actually more exemptions and exceptions in the Sex Discrimination Act. One of the differences between the various pieces of antidiscrimination legislation is the range of exceptions and exemptions in the statutes. That is definitely something that I think needs to be addressed, because many of the blanket exceptions and exemptions do not have an apparent justification. Another difference is that in the Racial Discrimination Act, for example, there is a provision for equality before the law which does not appear in the Disability Discrimination Act or the Sex Discrimination Act, and that is something that the centre would like to see mirrored in those acts.

Senator BARNETT—From a business perspective, have you considered the impact of this DDA and the amendments to it on the cost of business complying with the legislation? Has that been considered at all?

Ms Schleiger—The Human Rights Law Resource Centre has not done an economic assessment, and we do not see that as the role of the centre, given that the centre's priority is to promote human rights generally. Obviously, an economic assessment could be very useful because there are often economic benefits arising from greater equality in society. I understand that the Productivity Commission addressed these issues in its report, and perhaps that is the more appropriate organisation to undertake those economic assessments.

Senator BARNETT—Sure. Have you given any consideration to the issue of assistance animals and the views expressed by some of the witnesses we had in Sydney, including the Human Rights Commission and the Sydney Opera House? There was a particular example involving an assistance animal that you may be aware of.

Ms Schleiger—Yes.

Senator BARNETT—Do you have views on that matter?

Ms Schleiger—It goes also to what you were mentioning before, which is the impact on persons and organisations who need to accommodate disability, and that is something that can be taken into account either in the unjustifiable hardship provision or, the centre suggests, by incorporating a general human rights limitation provision which allows for the right to nondiscrimination to be limited in circumstances where the restriction is legitimate, proportionate and reasonable.

Senator BARNETT—So, as long as those concepts or principles apply, you think the circumstances regarding assistance animals should be able to be dealt with within that—

Ms Schleiger—Within that framework, yes. And the issue of assistance animals is not something that the centre’s submission has focused on, so we are not really in a position to make comment on that.

Senator BARNETT—No. All right. I do not know if you have had a chance to look at the views in the South Australian government’s submission regarding transport. Have you considered that? We will be hearing from them shortly.

Ms Howie—No, I have not seen that submission. I do not think Melanie has either.

Senator BARNETT—They touch on the assistance animals issue as well—trains and buses, and getting in and out—and they have recommended some amendments. I just wondered if you had had a look at it.

Ms Schleiger—In regard to that, we would simply ask that the committee bear in mind that it is important to apply a stringent limitations analysis to any exemptions proposed in the Disability Discrimination Act.

Senator BARNETT—Okay. In Sydney we had the view put to us that the Electoral Act should be amended to ensure equality in regard to secret ballots for visually impaired Australians. Do you have a similar view to those who believe that they should have an opportunity to cast their vote in secret?

Ms Howie—We would say that persons who are visually impaired would have a right not to be discriminated against and the right to equality. Assuming that being able to provide them with the opportunity to vote in secret is not an unjustifiable hardship for the government, they should be afforded that right.

Ms Schleiger—And it is important to ensure that right, to uphold the principle in the Disability Discrimination Act that persons with disabilities have the same fundamental rights as the rest of the community—and being able to cast a secret vote seems to me to be a pretty fundamental right.

Senator BARNETT—Okay. You mentioned the Moeller case, regarding the boy with Down syndrome, and your views are noted. The issue of Down syndrome brings up a range of questions. Do you have a view as to whether this legislation should apply to unborn Australians?

Ms Howie—The issue of whether or not unborn children are afforded rights has been considered to some extent in international law—certainly about the right of unborn children to life. We note that, under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, unborn children do not have the right to life. The right to life is taken to attach to persons at the moment of birth. That is not to say that, under international or comparative law, unborn children have no rights. Probably the best enunciation of it was by the European Court of Human Rights. They have said:

At best, it could be regarded as common ground between States that the embryo/foetus belonged to the human race. Its potential and capacity to become a person required protection in the name of human dignity, without making it a person with the right to life …

Senator BARNETT—Do you concur with that view as a human rights law resource centre?

Ms Howie—Given that the rights and existence of the child are so closely linked with the mother, we would say that the rights of the child should exist to some extent but we do not know that it extends to the right to life. We think that is a really difficult question.

Senator BARNETT—I understand it is a policy question, but you have raised the issue of the Down syndrome boy. We had a recent Senate inquiry which found it to be at least substantially correct that the majority of Down syndrome unborn Australians were terminated during the pregnancy, so I was just wondering if your views with respect to Down syndrome extended to unborn Australians. Thank you.

Senator FARRELL—Thank you for your very thorough report. I want to refer you to your recommendation 11(d), where you seek to take away the court’s discretion with respect to decisions. Would you like to expand upon that and upon why you are making that recommendation?

Ms Howie—Sorry—which recommendation?

Senator FARRELL—Recommendation 11(d).

Secretary—Section 4.2.

Ms Howie—What was your question?

Senator FARRELL—Currently there is a discretion vested in the tribunal, and I think your proposal here is to make it mandatory and take away that discretion. I was just inquiring as to why you believe that is desirable.

Ms Schleiger—We consider that the assumption should be shifted so that the respondent has the burden of proof in proving that they have not discriminated against the complainant, and this is due to the difficulty that many complainants experience establishing the evidence to support their complaint. Obviously there would have to be a prima facie case of discrimination, but once that element has been satisfied we think that the respondent should then carry the onus of proof. This is perhaps made apparent in, say, employment situations where an employer has employment records, policies and procedures and access to other employees and witnesses, and it can be very difficult for an employee who wishes to bring a complaint to establish the evidence necessary to prove that they have been discriminated against.

Ms Howie—I think also you have cast it in the light of the court’s discretion being taken away but, in fact, the respondent would have the opportunity to rebut the assumption and it would be at the court’s discretion whether or not to accept the evidence that the assumption had been rebutted. But if the assumption held true then the court should make the determination that there had been discrimination.

Senator FARRELL—The other question I have is in relation to page 5 of your submission, where under 8(b) you refer to additional grounds for discrimination requiring protection under Commonwealth laws. I wonder what they might be?

Ms Schleiger—That was a recommendation that came out of the inquiry into the effectiveness of the Sex Discrimination Act. In relation to persons with disabilities, given the narrow focus of our submissions, we have not given great consideration to this particular issue. However, for example, it might be something such as having 'compounded discrimination' as a grounds of discrimination. Perhaps the person was discriminated against on the basis of their disability and also because of their race or because they were a woman or that type of thing. I may need to take that question on notice.

Senator FARRELL—Sure. You are most welcome to.

CHAIR—We have no further questions, so thank you again for your energies and efforts in putting together a submission for us and your presentation here this morning. It is much appreciated.

Ms Howie—Thank you very much.

Ms Schleiger—Thanks. Do we have a time line for those questions?

CHAIR—Sometime next week would be useful. We have another hearing next Friday and we have to report by 24 February, so I would just remind you about that.

[9.47 am]

WEBSTER, Ms Heather, Executive Director, Public Transport Division, South Australian Department of Transport, Energy and Infrastructure

Evidence was taken via teleconference—

CHAIR—I would like to formally welcome Ms Webster as a representative from the South Australian Department of Transport, Energy and Infrastructure.

Ms Webster—Thank you. I have a submission which has been endorsed by the South Australian cabinet.

CHAIR—We have your submission and for our purposes it is No. 33. Before I invite you to provide some comments to your submission, I need to remind the senators who are here that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and should be given reasonable opportunity to refer questions asked of that officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted. Ms Webster, I now invite you to make an opening statement or talk to your submission and then we will go to questions.

Ms Webster—Thank you. It is our wish in the first instance to express our support for the Disability Discrimination Act, which I think has been extremely successful in helping to have a focus on public transport and its accessibility for all people. While our submission draws attention to some practical difficulties we see with the legislation, this in no way suggests that the department is not extremely supportive of the intentions of the act.

Public transport is a very practical portfolio and needs to provide the best possible outcome for the largest number of people within the funding that is available. Our intention through this submission is to try to get some improvements in the disability standards for transport which form part of the DDA legislation.

The standards have been developed for some time and were subject to a five-year review, but we remain concerned that the outcomes of that review are not yet clear and that there are issues around, shall I say, some ambiguities in those standards. But, most of all, a process by which we can ensure compliance with the standards is what we seek through this submission.

Our submission, as senators will be aware, discusses these issues and then provides some practical examples of some of the difficulties we face. In essence, really we are seeking that the standards provide for a model by which we can ensure that we comply with the standards and hence make improvements to the system possible without the uncertainty associated with the fact that this infrastructure does not comply and hence may be subject to complaint from people within the disability sector.

What we are seeking through this submission is clarity. We are seeking that some body be established that can actually certify compliance with the act. A certification process that we see that would be functional would be similar to that which operates under the Building Code. This would enable us to proceed with more certainty to make the public transport system more acceptable and more standardised for people with disabilities. As well as changes to the standards, we would like to seek a process for making changes to the standards as community expectations, technology and all sorts of things change in our system.

So certainty and a process for making changes and clarity are what we seek through this submission today.

CHAIR—Thank you.

Senator FARRELL—Thank you, Ms Webster, for your submissions. The bill aims to define action plans. Your department has an action plan in place. Do you have any view on the operation of action plans at present?

Ms Webster—I think we see action plans as a very practical way forward, but they do need to be action plans which are agreed with the disability community and with the industries that will be very involved in their implementation—for example, the bus industry and the rail industry. That is why we couched our submission in terms of a co-regulatory model which would require action plans agreed to by each of those three groups. We see the action plans as a very practical way forward, but in order to be truly effective they do need to have some status in law such that, if an action plan is agreed to by parties, compliance with that action plan is then interpreted as compliance with the act.

Senator FARRELL—On page four of your submission you write about the five-year review of the Disability Standards for Accessible Public Transport. Who administers that review, and are all states and territories involved?

Ms Webster—The review did involve states and territories. As I understand it, the review was managed by the Attorney-General's Department and is a requirement of legislation. Our concern remains that while submissions were made, the outcomes from that review are still not promulgated or clear. I think there were a large number of issues raised in this review that are still not resolved.

Senator FARRELL—Such as?

Ms Webster—There is no formal outcome from the review yet.

Senator FARRELL—Okay. Are you able to take the committee through the model of co-regulation that you would like to see adopted should the Disability Discrimination Act be further amended?

Ms Webster—Currently the standards for transport have a series of elements of the transport system. These vary from extremely large and important ones like the accessibility of vehicles—buses, trams and trains—through to the status of signage and very minor systems like waiting

areas and all the ambiguities that such a term may mean. For example, is a waiting area a bus stop or an airport lounge? So there are some difficulties in that.

At the moment, the DDA standards require us to achieve a percentage—a score, if you like—against the compliance of that infrastructure with the standards. For example, in South Australia we have 84 railway stations and a percentage score against those would mean that, say, 10 per cent of the railway stations need to be compliant. In fact, that could be interpreted as a very ineffective outcome in terms of delivering services to our customers because, of all our railway stations, almost all our passengers might go through three stations which may not be addressed by that percentage score.

Through a co-regulation model we would seek to work out a quite detailed action plan across all the elements of the public transport system with people from our disability sector. We have quite active committees, for example, our advisory committees on accessible transport have representatives from a very wide range of disability sectors. We could work with them to have a practical implementation plan for what areas are most important to people with disabilities—and hence should receive priority—and which areas are likely to benefit most people. Between us, we could then come up with practical outcomes to achieve the intentions of the DDA within an acceptable framework, rather than a simple percentage based approach by which all of those elements have equal weight. For example, achieving 25 per cent compliance with signage is seen as a similar outcome to achieving 25 per cent compliance with vehicles, yet both of those objectives have very different outcomes for people with disabilities.

I guess we see a model by which a local—that is, South Australian—system could be established with various people from the disability sector, from government and from transport providers to work together on an action plan which then could be registered with HREOC to show our commitment to that plan and then evaluate it against that plan. A group like HREOC, for example, could be enabled to say that, yes, the South Australian government is meeting its obligations under its draft action plan and hence is deemed to be compliant with the act. Similarly, while having that registration and acceptance role, if you like, presumably if we fail to deliver as a government on those expectations in the co-regulatory model, then we would be subject to sanctions under the act. At the moment there is so much ambiguity about the standards that it is in fact not helping us move forward in our changes to the system.

Senator BARNETT—Thanks very much for your submission. I wanted to ask about the third example you have given on page 12 of your submission regarding assistance animals. You have recommended some amendments to the bill and I was wondering if you could expand on the reasons for those. I assume that you are concerned about the costs to industry and the government, but you obviously have to get a balance. Could you explain to the committee in further detail the reasons for your amendments and how they would work?

Ms Webster—Assistance animals are a recognised and an important part of working with people with disabilities. We certainly have a very good record of doing that. This is not a cost issue in any way; this is an issue of ensuring that all of our customers are treated well. For example, in South Australia not only do we actively support guide dogs on our public transport system but also we ensure assistance animals are duly trained and registered. This includes not just hearing dogs but dogs that assist other people with disabilities. Our concern, as I hope is clear in that particular segment, is the onus of proof on training. That is an issue about

acceptance of a particular animal—a sort of certification process, if you like—to ensure that the animal is safe for operation around other people, rather than the person to whom the dog belongs. So it is simply the exchange of the word 'or' for the word 'and'—I think that covers our system. We have worked very actively in South Australia with the Dog and Cat Management Board to have a process by which the dog—if it is a dog, and I think all of our animals are dogs at the moment—needs to actually pass what we call a public access test. That test is to ensure that the dog is well trained and that the dog does not represent a danger to other potential travellers. So this is not a cost issue. It is simply an issue of safety and of ensuring that by allowing assistance animals on our system we do not in fact create significant problems for other travellers.

Senator BARNETT—In South Australia, what level of training do you require or request with respect to assistance animals and what procedures do you have in place? Do you accredit assistance animals? What if, for example, they have been trained at home or individually without going through an accredited agency like the guide dogs?

Ms Webster—It is not an accredited training program; it is an assessment by people who are trained to work with the Dog and Cat Management Board. So it is a functional outcome—for example, for the dog to be able to do basic behavioural things like sit and stay and behave sensibly around other people. It is not a requirement to have a costly accreditation course or a publicly trained course; it is a behavioural outcome which ensures the animal can behave appropriately in public places in close proximity to other people.

Senator BARNETT—Is that all set out in some best practice handbook? How is that known to the public?

Ms Webster—We have guidelines for that and appropriate pamphlets. We have information on our website, I think, which explains it to people. When people wish to use their animal on the system we will work individually with them to go and have the dog assessed. So it is a fairly simple process but we have found that it works extremely well. It ensures that we as operators of the public transport system are not put in a position of assessing something that we are not familiar with. We ask them to work with the Dog and Cat Management Board for those behavioural issues. We have discussed this and worked with HREOC, who have indicated support for that approach.

Senator BARNETT—Wonderful. You are really saying that if the 'or' was replaced with 'and' in part (1), 76, 54A you would be happy?

Ms Webster—Indeed.

Senator BARNETT—Thank you.

CHAIR—When are you anticipating the review of the transport system will be finished with respect of the disability compliance?

Ms Webster—My difficulty is that we have no information back. We have asked on a number of occasions but we have not been given any indication of when that might occur.

CHAIR—Wouldn't this be the job of the Australian Human Rights Commission to work with each state and territory's antidiscrimination commission to ensure they are compliant?

Ms Webster—We have all made our submissions and they have gone through the process for the Attorney-General's Department. Our difficulty is not having something come out of that process. Certainly, states have made submissions, and many people have made submissions. We understand that a consulting group was put together to access that information. We are just aware that we do not know when an outcome is expected.

CHAIR—Those are all the questions that we have for you today. Thank you for going to the trouble of making a submission to this inquiry and for making yourself available this morning. Thank you.

Ms Webster—Thank you very much. It is a process that is important to us.

[10.08 am]

BUDAVARI, Ms Rosemary, Director, Criminal Law and Human Rights, Law Council of Australia

CHAIR—Welcome. The council has lodged a submission with us, which we have numbered 17 for the committee's purposes. Would you like to make any amendments or changes to that submission?

Ms Budavari—No, other than that I think there may have been an error with the date on the front of the submission—it said 2008 rather than 2009. That is a common problem at this time of the year.

CHAIR—I now invite you to make a short opening statement and speak to your submission and then we will go to questions.

Ms Budavari—As the committee would be aware, the Law Council is the peak representative body for Australian lawyers, representing approximately 55,000 lawyers nationwide through their respective law societies, bar associations and the large law firm groups. Basically, the Law Council appreciates the opportunity to appear and make some further comments in support of the submission. As the committee would note, the Law Council is in general agreement with the intention behind the bill and its objectives, subject to some exceptions. Some of those exceptions have been canvassed already this morning by the Human Rights Law Resources Centre.

I will turn to those areas where the Law Council has concerns about the way the bill is currently drafted. Those three areas probably relate to: reasonable adjustments, inherent requirements and unjustifiable hardship. All of these areas in terms of the case law on disability discrimination have proved problematic.

The first suggestion that the Law Council has made—and I note that since we lodged our submission subsequent submissions were lodged which perhaps go even further than what the Law Council has suggested—is that the definition of 'reasonable adjustments' needs to be clarified in the bill. As the Productivity Commission observed in its report, which led to a lot of the provisions in this bill, reasonable adjustments can mean different things to different people. The Law Council would support, as we have said in the submission, an amendment to the definition in line with what has been suggested by the Public Interest Advocacy Centre, and that is that there should be some words included to the effect that an adjustment is a reasonable adjustment if it minimises to the greatest extent possible the discriminatory impact of an act, omission, requirement or condition. Such an amendment would shift the focus of that reasonable adjustment definition away from the unjustifiable hardship element that is currently within the bill and it would shift the focus—and again I think this is in line with some of the other submissions—from what is called the formal equality to the substantive equality, which is consistent with the original intention behind this legislation in that it should be beneficial legislation, it should be focused on trying to assist people with a disability and trying to avoid discrimination against those people based on that disability.

Some submissions, as I have just noted, which were lodged subsequent to ours go even further by suggesting that the reasonable adjustments provision actually not be linked to the definitions of discrimination; it should actually be a stand-alone provision. At the Law Council we have not had the opportunity to consider that but it would certainly seem to be consistent with the philosophy behind our suggested amendment.

While I am on that point about how you define reasonable accommodation and whether you include it within the definition of direct or indirect discrimination, I note that there has been some comment on the comparator test. Our submission did not address that directly, but suffice to say that we also made an extensive submission on the Sex Discrimination Act review, and that submission did point out the problems with the comparator test. We would support reviewing whether that comparator test is actually necessary in the context of this legislation as well.

The other quick comment that I wanted to make in the opening statement is that the submission commends the bill for removing the proportionality test in the 'indirect discrimination' provision. We commend that because it should in fact make it easier for complainants to establish indirect discrimination. This again is an area where there has been a lot of case law and a lot of difficulties. Again, we would note that since our submission was lodged there have been other submissions lodged which suggest probably going even further and that the definition of indirect discrimination should actually be similar to definitions at state or territory level or even in the Sex Discrimination Act itself. The focus there again is on trying to shift the emphasis to the actual unfavourable treatment that is being suffered by the person with a disability.

Finally, we also wanted to draw the committee's attention to that part of our submission which questions extending the 'unjustifiable hardship' defence to all areas under the Disability Discrimination Act. We are simply saying that there should be caution exercised here and that extending it to all the areas will actually create further differences between the Disability Discrimination Act, at the Commonwealth level, and all of the state and territory acts that deal with disability discrimination. In our submission, that is an undesirable outcome. There may be other policy reasons to justify it, but we are simply suggesting that the committee look at all of those other areas closely and whether there are policy reasons to extend the 'unjustifiable hardship' defence to all of those areas.

That concludes my opening remarks. Thank you, Chair.

CHAIR—Thank you. I will start with a question that goes to the reasonable adjustments. You are saying in your submission that the case of Purvis v New South Wales and the Human Rights and Equal Opportunity Commission is the impetus really for this change but that in fact the definition does not go far enough to assist what is meant to be achieved. Is that right?

Ms Budavari—Yes, that would be the nub of the submission.

CHAIR—In order to make this change, do you amend the definition of 'reasonable adjustment' in the proposed act?

Ms Budavari—Yes.

CHAIR—Explain to me what the effect of your additional words would be in a practical sense.

Ms Budavari—In a practical sense, it would actually shift, hopefully, the emphasis of any body which is looking at whether a reasonable adjustment has been made from looking at whether that reasonable adjustment imposed an unjustifiable hardship at the threshold level. We are not saying that whatever body is looking at this, whether it is the Human Rights Commission or, subsequently, a court, would not then be able to look at the defence of unjustifiable hardship. But, at that threshold stage of whether a reasonable adjustment had been made, the focus is actually on the discriminatory impact of the action and then on whether that constituted a reasonable adjustment or not.

CHAIR—So that becomes the threshold?

Ms Budavari—Yes.

CHAIR—It is essentially about how hard it is to make that adjustment.

Ms Budavari—Yes. It is whether the adjustment is reasonable in the context of the disability, not in the context of just the other factors which come in with unjustifiable hardship such as the cost of making the adjustment.

CHAIR—As you have not raised this matter in your submission I am going to take a liberty and ask you about the proposed changes to the Migration Act. Have you had a look at those at all?

Ms Budavari—No. Unfortunately we have not had the opportunity to do that. There are various committees within the Law Council that look at various aspects of the law. We do in fact have a migration lawyers committee. For whatever reason it has not had the opportunity to look at this. I could certainly take that on notice.

CHAIR—Yes, please. In the short time that we have got left could it have a look at the proposed changes to the Migration Act under this? This morning the Human Rights Law Resource Centre put to us that they did not believe that the proposed changes actually reflected the intent of the explanatory memorandum. I think a view from the Law Council—from your people who are dealing with this on a more regular basis—would be quite useful for us.

Ms Budavari—I can certainly take that on notice.

CHAIR—Have a look at the transcript for today and also at comments made in Sydney last week. A view from your people would be helpful. Senator Barnett, do you have some questions?

Senator BARNETT—Yes, thank you, Chair. I want to go to the matter of the comparator test. It has created some debate. It is quite an issue in this inquiry. One could say you have sidestepped the issue to some degree without wanting to have a firm view one way or the other. Just before we go into that, would you describe to the committee the arguments in favour of the test and the arguments against the test? Are you able to assist?

Ms Budavari—I am not sure that I am able to assist with the former to any great extent. Presumably those arguments were put forward at the time the legislation was passed. In relation to the latter issue of the disadvantages of the comparator test, I think they were referred to very well in the presentation by the Human Rights Law Resource Centre this morning. Having practised in the ACT, where there is no comparator test and a test is simply looking at whether someone was treated unfavourably because of the particular ground of discrimination—in this case, disability—I know it is simply a more straightforward test to apply. The difficulty with the comparator test is always what is the precise nature of the comparator. That will always be an issue. There may in fact not be a comparator in some cases, whereas the focus of our submission in this area of discrimination legislation is on looking at how the legislation is actually addressing the ground of discrimination that the person is suffering.

Senator BARNETT—And the official position of the Law Council is that you do not have a position other than that it be reviewed or considered carefully?

Ms Budavari—I would actually have to check our submission on the Sex Discrimination Act. I am fairly confident that, in the submission we made, we made some unfavourable comments about the comparator test.

Senator BARNETT—But on this bill?

Ms Budavari—In the one on this bill we have not addressed it. I could certainly take that on notice and take it back and come back to the committee with either a view on that or—

Senator BARNETT—I am not trying to press you one way or the other. I am getting clarity in terms of the position—which is a nonposition at the moment, and that is fine and is not a problem. I am drilling in a little bit to try to get to the bottom of this. You mentioned in your introductory remarks the concerns you have about case law being problematic. Isn't that the case with almost all antidiscrimination legislation? Otherwise, is it the case with just this DDA legislation that you are referring to?

Ms Budavari—In the DDA probably more than in other antidiscrimination legislation the issues of reasonable adjustment, inherent requirements and unjustifiable hardship feature more prominently. So it is all highlighted in this particular piece of legislation.

Senator BARNETT—So you are referring to the Purvis case and, I presume, other cases?

Ms Budavari—Yes. Even with matters which have not gone to court, any practitioner who practises in this area is aware that with matters which simply go through a conciliation process there are always arguments about whether an employer in most instances has made reasonable adjustments to allow the person with the disability to perform the work, about whether that person can fulfil the inherent requirements of the work and about whether making adjustments would cause unjustifiable hardship. For lawyers who practise in this jurisdiction that is their bread and butter. Every day there will be arguments about those three issues.

Senator BARNETT—Moving to unjustifiable hardship, I note your council's submission to us that there are concerns that the defence of unjustifiable hardship be extended to all unlawful discrimination on the ground of disability. You are concerned about that because that will

highlight the differences between the states and the Commonwealth. Putting that to one side for the moment, the concept of having a defence across the board sounds sensible and reasonable, so if we proceeded along the lines as drafted perhaps the states should reconsider their legislation for it to come into line with the Commonwealth’s so that there is consistency across the board. I note your concerns about the inconsistency if the bill goes ahead as drafted. But that does not mean we should not always be trying to improve our legislation to make it fair and balanced. There seem to be some strong arguments in favour of extending that defence across the board. I cannot understand, notwithstanding the fact that the states may have a different approach in some instances, why you would not wish to. What is your response to that?

Ms Budavari—I think the response is really that there is nothing in the explanatory memorandum that actually justifies, with respect to each particular area of discrimination covered in the Disability Discrimination Act, why the unjustifiable hardship defence should be extended to each of those particular areas, being areas that it does not cover at the moment.

To give you one example, one of the areas covered under the Disability Discrimination Act is government programs and functions. I suppose there is some argument that unjustifiable hardship would apply or could be utilised as a useful defence by the private sector but that perhaps when it comes to government there should in fact be some limitation on that. We are not saying that there cannot be a policy that supports the extension of that defence to government functions as well but that it just might need to be looked at and the justification for that argued clearly.

Senator BARNETT—All right. That is noted, and I appreciate your views on that. You have not touched on the issue of the assistance animals and the appropriate views on that. You perhaps heard the discussion we had with the previous witness. Do you have a view on improving the legislation in that regard, removing the ‘or’ and replacing it with an ‘and’ or insuring an appropriate training regime is in place as part of the criteria for saying that an assistance animal is appropriate in the circumstances?

Ms Budavari—Unfortunately, we do not have any of our members we have access to who have expertise in that area, so I think we would have to leave that to other witnesses.

Senator BARNETT—All right. I will finish there. Thank you again for your submission.

CHAIR—I do not think we have any further questions about this piece of legislation.

Senator BARNETT—Sorry, Chair, I have missed a question I wanted to ask. Ms Budavari, you submitted your support in general for the implementation of the Productivity Commission’s 2004 report and recommendations. Are you aware of any recommendations that are not picked up by the legislation?

Ms Budavari—No, not off the top of my head, but I could certainly take that on notice.

Senator BARNETT—If you are happy to, I think it is an important question that needs to be reviewed. We do not have a lot of time to review the bill and to go through the Productivity Commission recommendations, and if there are recommendations that are not picked up by this

legislation then obviously that is of note and should be acknowledged. If you are able to assist, that would be great.

Ms Budavari—Yes.

CHAIR—Thank you very much, Ms Budavari, for your submission and for your time this morning on this bill in the first instance. The committee will take a short recess and when we resume we will move to the criminal jurisdiction bill.

Proceedings suspended from 10.33 am to 11.12 am

BUDAVARI, Ms Rosemary, Director, Criminal Law and Human Rights, Law Council of Australia

GAME, Mr Tim, SC, Co-Chair, National Criminal Law Committee, Law Council of Australia

NEAL, Mr David, SC, Member, National Criminal Law Committee, Law Council of Australia

ODGERS, Mr Stephen, SC, Member, National Criminal Law Committee, Law Council of Australia

PRIEST, Mr Phillip Geoffrey, QC, Member, National Criminal Law Committee, Law Council of Australia

Evidence from Mr Game and Mr Odgers was taken via teleconference—

Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008

CHAIR—I declare open the committee's inquiry into the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008. This inquiry was referred to the committee by the Senate on 4 December 2008, to report by 20 February 2009. This bill amends the Federal Court of Australia Act 1976 and the Judiciary Act 1903. Its purpose is to establish a procedural framework allowing the Federal Court of Australia to exercise the indictable criminal jurisdiction which will be given if the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 is enacted. The bill will give the Federal Court the full range of powers it will need, including being able to conduct jury trials and deal with appeals. The bill also includes provisions dealing with pre-trial proceedings, bail, the empanelling of juries and sentencing. In certain circumstances the conduct of committal proceedings will be affected by the bill.

We have received six submissions for this inquiry. They have been authorised for publication and are available on the committee's website. In beginning our hearing today I remind all 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 the 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. I remind witnesses that the committee prefers all evidence to be given in public, but of course you have the right to request to be heard in camera and we will consider any requests made. I welcome witnesses appearing before the committee. Mr Odgers, can I ask if you are related to the *Odgers* that guides our life in the Senate?

Mr Odgers—Very distantly.

CHAIR—I would still claim it if I were you! It is a great publication. Do witnesses have any comments to make on the capacity in which they appear?

Mr Odgers—I am the Chair of the Criminal Law Committee of the New South Wales Bar Association.

Mr Priest—I am a member of the Victorian Bar Council.

CHAIR—The Law Council has provided us with a submission, which we have numbered No. 5 for our purposes. I invite you to make a short opening statement or to talk to the submission, and then we will go to questions.

Mr Game—I will make a short statement. Thank you for giving us the opportunity to make a submission and to give evidence. Please do not think that we are intending to be overly critical of any aspect of this, but we are alive to the wider implications of it. We are also alive to what might be described as the inevitable trend towards federalisation of crime. To give you but one example, we see that in drug legislation moving not simply to importing but also to trafficking in the context where one has major concerns about international drug offences.

In this opening statement, I would like to give you our perspective and explain how we see this legislation falling within that process and the sorts of issues that we would like to draw to your attention. First, we support very much the federalisation of crime project in which one looks towards uniformity, consistency and relative parity of provisions in offences and uniform criminal procedure, including criminal appeals. We understand well why cartel offences are being put in the Federal Court of Australia Act and why it is necessary to create a procedure for the hearing of those cases in the Federal Court, but overall we see limited prospects for the Federal Court to be a trial court of federal crime. We say that for a number of reasons.

Mainly, state superior courts have the experience and have been exercising jurisdiction in crime for 70 years. Federal courts do not have that experience and are really courts of review. We understand why cartel offences might be viewed differently. Most importantly, there is a constitutional consideration which limits the prospects of the Federal Court exercising criminal jurisdiction—that is, that you cannot vest the Federal Court with state jurisdiction. As things currently stand, in most federal prosecutions there are state offences, particularly state dishonesty offences. If you federalise, move towards more creation of federal offences, the problem might dissipate, but people are not going to start cases in the Federal Court when they cannot have state dishonesty fraud type offences, which is the norm, for example, in corporations and tax type prosecutions. That is our general take on how we see the process. We think that, in a sense, this should be seen as a work in progress, but one should work towards a future in which there is a federal criminal procedure act and a federal criminal appeal act.

In an earlier form, this bill included a provision for the federal criminal appeal act which was innovative and, we thought, got away from some of the difficulties of the existing criminal appeal acts, which are common form provisions. The final version has really gone back to a modern language version of the criminal appeal acts, which have taunted and troubled courts since 1912. But I do not think that it is necessarily the case that that is the end of the section on that. The issue of federal criminal appeals is something that will have to be revisited in the future. It is the federal criminal procedure that we have some concerns about. I will put it, very briefly, this way: obviously it was necessary for you to pick up a federal procedure in the federal court act for these cartel prosecutions. But what you have done, broadly, is pick up mainly Victorian provisions, and some New South Wales provisions, at a time when the Victorian

provisions—and David Neal will say something about this shortly—are themselves the subject of intense review and when a report in New South Wales has just been made in respect of amendments to pretrial disclosure which have some innovative changes. For example, the New South Wales ones get away from the idea of making the defence of anything in particular, but create a procedure whereby the judge can in fact order that evidence be taken by way of summaries in situations where there is no genuine dispute about that evidence. We think that kind of process would cut down on a lot of time and not cause any unfairness. It is a different approach from that taken on paper, at least in Victoria—although I understand David Neal would say that is not how it works in practice—and in your legislation.

So that is our broad perspective. We do understand that the whole thing is there in the immediate term to deal with cartel offences, but we do see the focus ultimately moving in a different way, which is progress in extending criminal prosecutions. We have tax, corporations, foreign affairs, foreign trade and commerce, customs and so forth—all powers for criminal legislation. We see that as being inevitable. We see this, importantly, as being the first stage and we feel that we can have an input in, as it were, how that progresses. That is really what I want to say in opening. Thank you.

CHAIR—Thank you, Mr Game. Are there any comments?

Mr Neal—Mr Game foreshadowed that I might talk about in particular the pretrial procedure provisions which are in subdivision C and about the precedents upon which they seem to be based. I was actually in the Victorian Attorney-General's department when Victoria's first criminal trials legislation was passed. It ended up being passed in 1993. That piece of legislation was a response to prosecution in serious fraud cases. There had been a lot of discussion about that and it was thought that in serious fraud cases, in particular those involving commercial fraud, a better pretrial procedure where issues might be identified was desirable. There was a lot of debate about it and there was a report. The essential regime Victoria now has was initiated in its 1993 legislation, which was called the Crimes (Criminal Trials) Act 1993. That act was reviewed and renewed in 1999 as the Crimes (Criminal Trials) Act 1999. Since then Victoria, as Mr Game foreshadowed, has been undertaking a very large review of criminal procedure in Victoria. In fact, just before Christmas Victoria introduced a criminal procedures bill which essentially and with very little variation incorporates the pretrial disclosure provisions from the two previous criminal trials acts. There is no substantial difference. What Mr Game said about the pretrial disclosure regime in the federal bill is true up to a point, but the federal criminal procedure bill goes very significantly beyond that in respect of the consequences for nondisclosure. That is a matter of some very serious concern.

Perhaps I should take the committee to the particular provisions which seemed to us to be problematic. I can take you to proposed section 23CF, which is the accused's response provision. In section 23CF(a), the defence is required to provide a response to the prosecution. The part I want to take you to is on page 14 of the copy of the bill that I have. Perhaps it would help if I explained—

CHAIR—I think you can keep going, because it is outlined in your submission.

Mr Neal—It is.

CHAIR—If you keep going I think we will be right to track it.

Mr Neal—The critical words of it—and these critical words are repeated a number of times—are that if the accused takes issue with a fact asserted by the prosecution they must state that and the ‘basis for taking issue’.

CHAIR—This is in the pretrial procedure?

Mr Neal—It is, yes. What happens after committal is that the case comes on in Victoria for what is called a case conference and then subsequently, closer to trial, a directions hearing. At the case conference stage the defence is required to file a response to the prosecution’s opening statement. Essentially the prosecution says, ‘These are the things that we rely on in order to establish our case.’ The defence is required to file a response to that.

Senator BARNETT—So there is no right to remain silent?

Mr Neal—That is the $64,000 question or, in the case of a cartel, maybe it is a $64 million question.

CHAIR—Very good!

Mr Neal—It is said that these provisions do not require the defence to disclose its defence, which would alter things like the right to remain silent, obviously, and the burden of proof being on the prosecution. The words which we just basically disagree with are the words which are the basis for taking issue.

It is said in the explanatory memorandum that this does not require the defence to disclose its defence. We think that that is wrong. It is true that these words are in the Victorian legislation but neither of us, each of whom have extensive experience in trials and in the monitoring of this legislation, have heard a judge insist on the statement of the basis for taking issue. Basically, what happens in practice is that the defence says: ‘In relation to these matters, (1), (2), (3) and (4), no issue is taken. We do not require the prosecution to prove those matters. However, in relation to (5), (6) and (7), we do.’ For tactical purposes, the defence may or may not then state a reason as to why.

The problem arises if, for instance, at committal one of the prosecution witnesses is assessed by the defence as someone who is—if I can use a technical term—a dodgy witness. That witness establishes a fact. Is the defence supposed to tell the prosecution at that stage—that is, at the stage of the defence response—‘We think this witness is a dodgy witness and we want to put these things to them to expose that,’ thus telegraphing what they are going to cross-examine about. If the prosecution has a defect in its case, does the defence have to point that out, thus allowing the prosecution to plug the holes in its case?

Although these words do appear in the Victorian Criminal Trials Act, they do not operate in the way that they appear to in terms of what the basis for the objection is. It is unclear what the term might mean. ‘What is the basis for your objection to that fact asserted by the prosecution?’ ‘We don’t believe the prosecution can prove it, and therefore we want to put them to their proof.’ Would that be a sufficient basis, or do you have to go further? That is all unclear.

If you go back to the explanatory memorandum and the policy behind this bill, it has been said to me that the bill aims to identify at an early stage of the proceedings the issues that are in conflict. Going that far, we have no disagreement with that. In fact, it is a very sensible measure. But these words, 'the basis for taking issue', are problematic. They have not proved in practice to be problematic in Victoria, but that is because no-one has pushed the issue.

The second reason for being concerned with this in relation to the federal bill is because of the consequences that attach to it. Those consequences are set out in section 23CM. These are a series of penalties which fall on both sides but which are going to fall much more heavily on the defence if there is a departure from either of the two criteria established in defence disclosure. If you do not take issue at the time of the pre-trial, the fact will be taken to be admitted and/or if you do not state the basis for taking that issue, the penal consequences set out in section 23CM will follow. That includes the fact that, if you do not take issue with it at the time, at the trial the judge can say, 'You're not going to be allowed to take issue with it now.'

Senator TROOD—Are those consequential provisions in the Victorian legislation?

Mr Neal—They are not. The Law Council had discussion with the Attorney-General. It is apparently in the drafting stages of this bill. The Victorian sanctions for inadequate or non-disclosure is that the trial judge may make comment on that to the jury and say that there is a divergence. Any of these sanctions would be a significant problem. But the federal bill has rejected that option in favour of this set of consequences on the basis that this set of consequences is less dire for the defendant than the comment provision. That is what they say, but I can tell you that if you were choosing the lesser of two evils you would choose the Victorian option.

Senator TROOD—Leaving the consequences aside for one moment, and I can see why they might raise some concern in your mind, if the Commonwealth legislation is essentially the same as the Victorian legislation—and correct me if it is not but I understood that you were saying that, leaving aside the consequences, they have essentially the same provisions on the expectations about disclosure—why are you apprehensive that the same kind of legal culture might not apply at the Commonwealth level as applies in Victoria?

Mr Neal—It is conceivable that may follow, I agree. But where the Victorian provision is, in effect, honoured in the breach, if it gets introduced into a new jurisdiction presumably there may well be argument about it. If indeed this is about identifying issues and that provision in the Victorian legislation is a nullity not only for reasons of practice but because of the principles lying behind the question that Senator Barnett put, why include it in the federal legislation? It just seems to be inviting trouble.

Senator TROOD—I am with you in relation to the defendant's rights on this matter, but if the practitioners that are involved in these proceedings are likely to be those, at least in Victoria, from the Victorian Bar, then they may wish to adopt a similar view.

Mr Neal—You may have heard from Mr Game's introduction that there is a certain nervousness in New South Wales about how it might pan out in New South Wales. Who knows what will happen in Perth, Adelaide and Brisbane.

Senator TROOD—Are these Victorian provisions similar to the kinds of provisions that exist in other states?

Mr Neal—I do not believe so. I do not believe that they are the same as New South Wales. I have not done a systematic study of the other jurisdictions, but because Victoria has had that long history of this I think that has obviously formed the model. Certainly the words 'and the basis for taking issue' get repeated in all three versions of the Victorian legislation. But, as I said, that does not figure in the realities of the operation of the legislation, and one can see that if the words are there in legislation, and a parliament has passed them, someone at some point is going to say 'They must have been there for a reason and we now are going to press you to state the basis of that. If you do not you or, more likely, your client will cop the consequences that flow in section 23CM.'

Senator TROOD—It would be unlike lawyers to take those points, would it not?

Mr Neal—Those lawyers present would never do that, but there are others!

CHAIR—Your submission says:

The Law Council understands that there have been issues with similar provisions in Victoria—

which implies that there must be something similar in the Victorian legislation, but you then go on to say—

which may not be being adhered to in practice.

Mr Neal—That is what I am pointing to.

CHAIR—You then go on to say that you think this piece of legislation should more reflect what is currently happening in New South Wales. Or this is the review of New South Wales?

Mr Neal—My personal preference on that would be that the words 'the basis for taking issue' be deleted wherever they appear. I think it is Mr Priest's view, and it is mine, that the Victorian legislation works well as an issue-identifying practice. As I said to you in opening, that legislation has been reviewed twice now and we were both part of the most recent review leading to the Criminal Procedure Bill 2008—the one that was introduced just prior to Christmas.

There were no substantial submissions to that review that we are aware of which say, 'This is not working,' or, 'It needs a total rewrite,' or what have you. In the bill that has now been introduced into parliament these provisions from the Criminal Trials Act have, essentially, been repeated. Our assessment is that the operation of these provisions is working well—

Senator BARNETT—The New South Wales provisions?

Mr Neal—No, the Victorian provisions that we have been involved with in developing and reviewing. They are working well. There are some marginal things that people would like to see improved, and so on. Essentially, you go before the court and the judge takes a directions

hearing. The defence is not admitting that this person was an employee—what is the basis for that? We do not want to state the basis for it, but we say, 'There is a problem with that, Your Honour, and we do require that the prosecution has to prove it.' 'What about this other witness?' 'We have got no issue with that witness, Your Honour.' The prosecution could put in a statement in relation to that matter and there are a series of agreed facts which we do not require the prosecution to prove. Here are the issues which we say are in dispute at the trial, the prosecution says what it says about that and the judge says, 'Fine—there is the basis for going forward. Off you go.' Then you try the issues which are genuinely in dispute.

I do not believe that generally it is the case that people are trying to spin cases out, because where you have private clients it costs them too much—except that we are reasonably priced, of course. But there are all sorts of other problems that go on which have to do with the resourcing of both the prosecution and the defence through all these pre-trial procedures. The early dealing with these cases presumes or aspires to having trial counsel briefed at an early stage and familiar with the issues so that they can do these pre-trial steps in an informed way. Often it turns out that both the prosecution and the defence send someone else to the early proceedings who is not familiar with the case, and that detracts from the utility of the scheme. But that is a resourcing issue rather than an issue to do with the scheme itself so that—at least it is, I think, the view of Mr Priest and myself although our New South Wales colleagues may be more sceptical—the Victorian scheme, subject to the criticisms that we have already discussed, is working pretty well as intended in order to identify issues which are genuinely the issue at trial and get on with dealing with those issues and not taking up a lot of time and resources to deal with the issues which are not genuinely in contest.

Senator TROOD—Taking up Mr Games's point about the possibility that in the future there might be a considerable expansion of the Commonwealth jurisdiction in relation to criminal law, I assume if you accept that possibility as being a real one then you will be anxious that we do not establish too many adverse or unwise precedents at the very start. Would you regard this as one?

Mr Neal—I think that the Commonwealth, in this area when it is just dipping its toe in the water, should proceed cautiously. And if there is a working precedent that seems to have been tried since 1993 which seems to be working tolerably well then why wouldn't the Commonwealth start off at that point and see how it goes? But certainly the detail of the disclosure provisions is much more detailed than the Victorian legislation. I do not want to take that up here. Something we should say is that these consequences include, by the way, as the Victorian government example does too, the possibility that sentence will be increased if you are procedurally uncooperative. We find that offensive both in Victoria and in this bill.

The idea that a defendant should serve extra time in prison because they were procedurally uncooperative seems to be foreign. And to test that: what if someone in the prosecution side was procedurally uncooperative? Could it be suggested that they might be jailed for such conduct?

Senator BARNETT—Good point.

Senator TROOD—Would you prefer that both of these elements be removed? That is to say 'the basis for taking issue' and that there be an amendment?

Mr Neal—I would delete 23CM.

Senator TROOD—And have an amendment to the consequences? Or are you happy to leave those serious consequences and just amend this particular phrase that you are concerned about?

Mr Neal—Our proposal would be to remove the phrase 'the basis for taking issue' and to take 23CM out.

Senator BARNETT—Which relate to the consequences.

Mr Game—Can I mention briefly that, when we were consulted about this, we recommended to Commonwealth Attorney-General's Department that the words 'basis for taking issue' be taken out, and what we said was not adopted, which was fine. That is what happened there. I would like to also explain that in New South Wales there is a committee, of which we were members, which has just given a report to the Attorney in which it has addressed where criminal trial procedures should go, and a different course is likely to be followed. That different course, as I said very briefly before, does not require the defence to do any thing but if the judge is of the view that no unfairness would be occasioned by the evidence in the prosecution case going in in the form of a summary then the judge can so order. That really bites in terms of cutting down on time and so forth. It is not intended to produce any unfairness and it does not stop the defence from doing anything in terms of what its evidence is. But we would expect that if that is adopted it will have a real visible effect, and it is a different kind of approach to the one that is being considered here.

As I said before—and, of course, this has not even happened yet—in terms of the toe in the water, I suppose we would like you to see carefully how these other procedures are working. At the moment, your legislation, the Federal Court Act, is likely to have application to a very small number of cases, whereas the legislation in Victoria and New South Wales will have application to hundreds and hundreds of cases. Obviously how you proceed is a matter for you, but we would think that a very careful look at how the New South Wales procedure works in the future and how the Victorian procedure works would be most important.

May I also just tell you that we have received correspondence from Mr Debus's office inviting us to take part in an ongoing committee, ordered by SCAG, in which a review of criminal procedure throughout the country is sought to be brought onto a single footing. So, obviously, this has been thought about by the minister.

CHAIR—Your submission seems to be the only one that questions the scope of the jury provisions. I want you to elaborate a little on why you are the only ones who have raised it.

Mr Game—I think Mr Neal could answer that question.

Mr Neal—To be perfectly frank, I would prefer that you did, Mr Game, because I do not remember what we said.

Mr Game—I am not sure which one of our members provided the input for that.

Senator TROOD—It was about disqualifications.

Mr Neal—I do remember. One of the issues was that someone could be disqualified from being a member of the jury on the basis that in the recent past, or in some time period, they had been found unfit to be tried or not guilty by reason of mental impairment. We think that is discriminatory against people who have suffered from mental illness. If they are unfit to be tried at the time the previous event occurred but their mental health has now been restored, or similarly if they had been found not guilty by reason of mental impairment and their health is now restored such that they are competent to be a juror, we see no principled basis for excluding such a person from jury service. I think there were some other provisions too, but I would have to refresh my memory.

Senator TROOD—There is a reference in your submission to the procedure where there is a surfeit of jurors once the trial is completed. The 12 need to be empanelled, obviously, to make the decision. Where there are more than 12 empanelled, you do a ballot. Your submission talks about balloting off rather than in. There seems to be an argument about efficiency.

Mr Priest—I think the Victorian provision is far simpler. You have 15 jurors at the beginning of the trial, and all are sworn. At the end of the trial, if you have a surfeit, you ballot off rather than ballot in. I think that has the advantage of simplicity, apart from anything else. It is probably not the most important aspect of this bill, but it is something that would aid simplicity in the trial process. I cannot really work out why anyone would want to ballot people in rather than ballot off the access, but that is what it is directed too.

Senator TROOD—We can ask the Attorney about that.

Ms Budavari—The philosophy behind the submissions that have been made is summed up in the final paragraph of that section, which states that it is important that juries are drawn from a wide pool and that their composition is reflective of the broad community. Jury composition is a topic of significant current debate, particularly at state level and particularly in New South Wales. The committee should consider the terms of the debate and the philosophical position that the jury pool should be as wide as possible, and certainly anything which might operate in a discriminatory fashion should be carefully considered.

CHAIR—Sure. Do we have other questions?

Senator TROOD—I do. You have made some important, I think, observations about the bail provisions in this bill, so I would like to hear you on that, please. I am just finding them in the submission.

Ms Budavari—If I could perhaps just start on that question. The issue of bail in the Federal Court will come up after committal, and the philosophical position is that the Law Council is concerned that the provisions in this federal legislation are quite significantly different from provisions operating at state and territory level. In particular, there seems to be no presumption in favour of bail, which generally operates at state and territory level, with a number of situations delineated where that presumption does not operate for various reasons.

Senator TROOD—If I may stop you there. It is not really your responsibility to do this, but can you see an argument as to why that provision ought not be included in the bill—the presumption in favour of bail? Why would you leave that out?

Mr Priest—There is no good argument for leaving it out, other than that it might have been assumed by the draftsperson that a court looking at the bail provisions would assume that any court would apply the common-law presumption in favour of bail. Of course, it would be much better if that presumption was enshrined in legislation, in the same way that it is recognised in Victoria: there is a presumption in favour of bail, but that right to bail is then cut down by succeeding provisions of the Bail Act itself. So, in direct answer to your question, there is no good reason why that presumption should not be enshrined and reflected in the legislation.

Senator TROOD—It seems to me there is good reason why it should be included. If we are looking at the Federal Court acquiring, essentially, a new head of jurisdiction, which might be the foundation for a jurisdiction which will expand into the future—and all the evidence suggests that will be the case—it is important that we get that principle instated at the very outset, isn't it?

Mr Neal—Yes, it is, and it is hard to see why you would not. You can see some categories of offender where you would not reverse the presumption in favour of bail, but I cannot see any basis for that in relation to cartel offenders. The only problem I could see, possibly, is that if they have got resources they might be a flight risk, which would be a normal reason why the prosecution would say, 'There is a presumption in favour of bail, but we oppose it because this and this,' and the bail condition is, 'Surrender your passport.'

Senator TROOD—I am sorry, Ms Budavari; I interrupted you. Please continue.

Ms Budavari—No, please.

Mr Neal—We were fully agreeing with what you were saying, Ms Budavari.

Ms Budavari—Really, that is the essence of the argument. There are a number of other instances that we have quoted in the submission where the federal legislation does not have any reference to, for example, prohibiting cross-examination in a bail hearing about the actual elements of the offence. So there are a number of those that we have gone through in the submission.

Senator TROOD—What about the problem of re-agitating for bail, rather than having to appeal it? Is that an unusual arrangement?

Mr Priest—It is not unusual in Victoria. You cannot make a successive bail application unless you have got new facts and circumstances.

Senator TROOD—But this says 'significant'.

Mr Priest—Significant—

Senator TROOD—There is an adjective here which makes the test rather more substantial than it otherwise would be.

Mr Priest—That is right, and that is the significant difference between what applies in Victoria and was it is intended to apply at this federal level. It does set the bar considerably higher. I think the reason why one does not have adjectives such as 'significant' attaching to the

bail provisions in Victoria—or I hope this is the reason behind it—is that it is recognised that you are dealing with the liberty of the subject and that one should only deny a person's liberty in particular circumstances. People should have a right to make bail applications so long as their circumstances have changed, albeit not significantly.

Senator TROOD—Indeed.

Senator LUDLAM—I do not believe you raised this in your submission, but the proposed section 23CL of the bill abrogates legal professional privilege in respect of the prehearing disclosure regime. I am just wondering whether any of the witnesses had any thoughts on that.

Mr Neal—I am worried about it. There is an explanation in the explanatory memorandum, which was the explanation we were provided, which is that legal professional privilege would not excuse you from providing something which you are otherwise obliged to provide but it is not a complete abrogation of it. I have some concerns that there may be implications of that that we have not yet seen. I cannot actually nominate them, though. I feel uncomfortable about it. That is not very helpful, but that is the best I can do.

Senator LUDLAM—Alright, so you do not have any specific proposals about amendment or whether it is necessary that that clause even be in there at all.

Mr Neal—The only thing I can say is this: it might profit for our committee to have a bit of discussion about that and perhaps, if we can work out something, to come back to your committee with some commentary to respond to that issue.

Senator LUDLAM—Yes, I think that would be helpful.

Mr Game—There has been some litigation about these words. I have not looked at this as closely as I might have, but there has been some litigation about these words appearing in subsection (2). A similar provision appears in the Australian Crime Commission Act. The words 'does not otherwise abrogate or effect the law relating to legal professional privilege' cause some difficulty when one asks what is meant by the 'law relating to legal professional privilege' in so far as it concerns this provision when there is some waiver effectively by disclosure. I would be grateful if we could be given an opportunity to put something in writing to you about that provision.

Mr Neal—There is nothing in the Victorian legislation to this effect. The chair has spoken and has agreed that we will do that.

Senator FARRELL—The New South Wales Attorney-General has questioned the need for the Federal Court to be invested with the criminal jurisdiction in the bill. Do you have any comments on the position that he has taken?

Mr Neal—I think Mr Game covered our position on that at the outset.

Mr Game—Our position is that, as I said at the outset, cartel offences may be in a special category because of their complexity and the likely cases that are involved apart. Let me give you an example. A corporations prosecution will often involve state charges of making a false

statement with an intention to obtain a benefit. You could not have that hearing in a Federal Court because of Re Wakim and those cases about cross vesting.

State courts have the experience and we have the constitutional device—it is not available in the United States—which has worked very well of investing state courts with federal jurisdiction. So we really see big scope for federalisation of crime, criminal procedure and criminal appeal acts, but we see that in the context of state courts exercising that federal jurisdiction. What that really means in practice is, shall I say, reversing out section 68 of the Judiciary Act so that state courts pick up federal laws, not state laws, when they apply federal cases and then they apply federal laws in fact to the state offences also heard. Although I do not particularly want to respond to what was said about cartel offences, and I do see an argument for hearing those in the Federal Court, in the long term and in the bulk of crime that is federal crime—which these days is corporations, drugs, tax, terrorism—we would see those crimes as being, importantly, crimes which should be heard in state courts not federal courts, but state courts exercising federal jurisdiction and with federal legislation dealing with all aspects of procedure. That is how we would see the thing panning out in due course. That is my response on that .

Senator FARRELL—Thank you.

Senator BARNETT—I have two further questions. You have covered pretty much the earlier concerns that I had regarding the issues you raised of pretrial disclosure and the bail matters. I have two other areas of concern. One relates to the ability of the Federal Court to determine these types of matters and the second is about the DPP and its resources, capacity and capability. I am just wondering if the council has a view as to whether it was adequately resourced currently to deal with cartels and trade practices type matters.

Mr Game—State courts in New South Wales, for example, are very strapped for cash, to say the least. I am not so sure that it is just a funding issue; it is also an experience issue and the ability of the court to deal with a criminal jurisdiction. I suppose our position is that, apart from the special instances such as cartel offences, the bulk of federal criminal jurisdiction should stay in state courts. It has worked well for 70 years and I cannot see why it would not continue to do so.

Senator BARNETT—Conversely, you are saying that this is a new area of law, a new sort of jurisdiction, a new activity for the Federal Court, so the question really is: if matters are going to it, does it have the experience and ability and capacity to handle these matters? Secondly, what about the DPP as a prosecutor?

Mr Game—I think the DPP are given a choice. My reading of this legislation is that they do have a choice. You would have to ask the director, but if I was advising the DPP, and I do regularly do prosecutions, I would be saying to them that they should put their cases in the superior court of the state involved. I would not be encouraging them to take a big prosecution to the Federal Court when it has never heard a single prosecution trial with a jury in its life. I cannot lay my fingers on the provision, but the DPP can elect where it takes the case. I am not sure that you are going to get any elections to go to the Federal Court. And if one thinks about the experience of the Federal Court and experienced criminal judges, I think of Justice Weinberg, for example, who has recently left the court and gone to the Victorian Court of Appeal.

In New South Wales there has been a strong tendency in the last 10 years for federal trials to be brought in the Supreme Court rather than the District Court, and it has worked really well. There have been a lot of corporate prosecutions in the Supreme Court and the jurisdiction has functioned, and is functioning, well. I think that, except in some kind of idealistic purity sense, there is not a lot of reason for hearing these cases in the Federal Court. Nor do I think the court has the experience.

Senator BARNETT—You are also almost putting an argument that the bill should not proceed.

Mr Game—Maybe, except that it is limited to cartels, and also there is a strong need to for an appreciation that federal jurisdiction in crime is ever expanding. The example I gave you at the beginning was trafficking, which is now picked up as a federal offence in respect of drugs. Why would you create a separate court structure in which that can be heard when the simple expediency of creating federal procedure for federal offences heard in state courts overcomes the problems?

Senator BARNETT—So you think that might be an easier solution.

Mr Game—In the longer term, I think that is the only solution.

Senator BARNETT—Okay.

Mr Neal—I will just add to what Mr Game said. Your question about the expertise in the Federal Court depends to some significant extent on the way in which the cartel provisions get framed. This committee of the Law Council and the Trade Practices Committee of the Law Council have a very different view about how that should happen. This committee believes that the cartel offence ought to be formed, like fraud offences, to include the concept of dishonestly obtaining financial benefits by virtue of a cartel provision.

The current bill, the federal bill, has gone to a much more trade practices type of orientation, without the concept of dishonesty included in it, so that the concepts at work are specialised trade practices concepts. We disagree with that approach for reasons which I suspect we may be back in front of this committee at some point to discuss. For the more specialised cartel offence in terms of its trade practices concepts, obviously there is more expertise in the federal court—which will tend not to be the case in the state courts—in relation to cartel offences. Even if it were framed in the way that we think it should be—that is, in terms of dishonestly obtaining benefits by the device of a cartel arrangement—the concept of a cartel arrangement and economic considerations do get invoked. I think that is the reason behind the thinking that says that this offence in particular is one which is suited to the Federal Court, whereas the drug offences, for instance, where there is no great expertise in the Federal Court, should stay in the state courts.

Mr Game—I guess we are saying that, at a philosophical and practical level, offences such as this should, to the extent possible, be brought within the mainstream, both in terms of defining the crime and how and where it is dealt with.

Mr Neal—That is as to the substance of the cartel offence.

Senator BARNETT—Mr Game, you have touched on the issue of the choice of forums in your evidence to date. I am interested to get the council's view as to the appropriateness of the prosecution determining the forum, moving from a committal hearing to either a state court or the Federal Court, as opposed to allowing the accused to have some input into or submission on that matter. Could Mr Game or somebody else respond to those concerns.

Mr Game—There is a difficulty in the accused having a say in the forum to this degree. Normally, after committal, there is still no case until an indictment is settled by the director. What you are envisaging is that at some point, before the court where the indictment is laid, the defence would have an opportunity to say it should be more appropriately heard in a different forum. I suppose that is a possibility.

What happens at the moment in New South Wales is that for a case to be heard in the Supreme Court the director has to ask permission of the Chief Justice, which is normally given. I had not particularly thought about the accused having an input as to the appropriate forum. I suppose you could have a provision that said that after the indictment is laid in the court the defence could be entitled to make an application that some other forum should be the appropriate forum in which it is heard. That is fine, but do not forget that one still has the cross testing problem, which is that you cannot get a case into a federal court if it has a state charge as well.

Mr Priest—I would guess that the director would choose a state court if he wanted to lay state charges for state offences together with cartel offences.

Mr Game—He would have to choose a state court.

Mr Priest—And I would guess that if he did not want to proceed with any state offences he would perhaps choose the Federal Court.

Senator BARNETT—And if there were an accompanying federal charge—fraud or something similar—then I can understand that you would go to a federal court. Should that be laid down; should it be set out that there should be some criteria for them to go one way or the other, or do you think there should be just an entire discretion in the hands of the DPP?

Mr Priest—I would be expressing a personal view, and not necessarily that of the Law Council.

Senator BARNETT—That is okay; go ahead.

Mr Priest—In practice in Victoria leaving a choice of forum in the hands of the Director of Public Prosecutions has not created any difficulties. What I am talking about in particular is that the director has a choice between the County Court and the Supreme Court in relation to a lot of offences. In practice it has not proved difficult to leave that decision in his hands without any input from the defence.

Senator BARNETT—Is there anything else that you wanted to add, Mr Game?

Mr Game—No, I do not have anything I want to add.

Senator BARNETT—Thank you very much.

Mr Game—I was just going to provide the committee with a document that deals with the abrogation of legal professional privilege. Is there a timetable? You said that you had to report by 21 February.

CHAIR—Yes. I think we would welcome it by the end of next week, if that is possible.

Mr Game—Yes, we can do that.

CHAIR—Mr Game, Mr Odgers, Mr Priest, Mr Neal and Mr Budavari, thank you for your attention to this legislation and for your submission. And thank you to the people here in Melbourne for braving the hot weather and coming to join us today—it is much appreciated.

[12.15 pm]

HINCHCLIFFE, Ms Jaala Corinne, Acting Senior Assistant Director, Commonwealth Director of Public Prosecutions

THORNTON, Mr John Edward, First Deputy Director, Commonwealth Director of Public Prosecutions

Evidence was taken via teleconference—

CHAIR—I formally welcome representatives from the Commonwealth Director of Public Prosecutions. You have lodged your submission with us, which we have numbered No. 1. I invite you to make a short opening statement or to talk to your submission. Following that, we will go to questions.

Mr Thornton—I do not really have anything to add to the submission that we have made, but I am obviously happy to answer questions. I will say at the outset that I am very grateful that the committee has agreed to let us appear via teleconference. It has certainly made things a lot easier for us—let me put it that way. I do not have an opening statement apart from what we have in our submission.

CHAIR—All right. We will go to questions.

Senator BARNETT—Thank you for agreeing to give evidence and for your submission. There are a number of areas of concern we have raised with the Law Council regarding pre-trial disclosure relating to bail, and I think Senator Trood might pursue those matters. The other two issues that I particularly wanted to ask you about are the adequacy of resources and the capacity and capability of the DPP to pursue these matters. I would like to touch base with you on that to start with. If you could perhaps respond to that, I will then go further.

Mr Thornton—Certainly. In terms of the resources, we have had some tied funding, which we got along with the ACCC. I think we have been funded for the last year as well. We have people who have been looking at some of the legal issues involved in the offences that have been drafted, and we have had input into all of that. So we have been given special funding in relation to this area of work. I do not have those figures in front of me now, but I can certainly get those to you if you would like to know exactly what the level of funding is and the basis for it. I think it is fair to say that it is going to be a challenging new area of work, both in terms of the actual offences and also, initially, in terms of the new jurisdiction in the Federal Court. But I guess they are the sorts of challenges that we have had to meet a number of times over the years in relation to the work that we do.

Senator BARNETT—Sure. Let’s just drill down a little bit there. At the moment, would it be fair to say that you are not adequately prepared to deal with the cases? If it all kicked off on 1 February or 1 March, would you need to take on board further expertise in the area of the Trade Practices Act?

Mr Thornton—No. We do have some expertise in that area already. We have resources allocated here in head office and we have been working very closely with the ACCC on some of the training for their investigators in looking at the types of conduct and the potential offences. Of course, this is all being done without the finalisation of the offence provisions. You would be aware that there has been some debate about the final form of those offences. We have had input into that as well. In terms of conducting potential prosecutions arising from investigations, I think we would be in a position to meet that.

Senator BARNETT—Just on that point, could you provide any examples or analogous incidents where you can describe the experience, skill and ability to undertake such work? This is for cartel offences; are there any analogous offences that you can describe to the committee perhaps, for example, from formulating your sentencing submissions?

Mr Thornton—The area that is looking at the cartel offences and potential prosecutions is located in our commercial area, which deals with all of the ASIC prosecutions, so we have a deal of experience in dealing with complex corporate crime, if you like, in that area. Obviously, the cartel would bring along its own challenges which would be slightly different, but in terms of a lot of the criminal investigation—putting together the evidence, working out the elements of the offences and those sorts of things—there is some commonality with a lot of the work that we currently do.

Senator BARNETT—I think the maximum penalty under the bill is in the order of 10 years, which is significant. Can you describe to the committee the types of examples where you think, under the circumstances, there may be a penalty of that order.

Mr Thornton—Sorry, I am not quite sure what you are asking. Are you are asking for examples of the sorts of conduct which may warrant a penalty closer to the maximum?

Senator BARNETT—Yes, correct.

Mr Thornton—To be perfectly frank, I have to admit that this is not my particular area of expertise. I was really looking at the federal legislation. But just generally in terms of the conduct, obviously there would be some factors which you would look at, such as the potential gravity of the offence, which would then impact on the penalty. In terms of the conduct itself, you would look at the amount of money involved, the degree of planning, the length of time in which the offending had occurred, perhaps the number of persons or organisations involved and any harm in the impact on victims, which in this case would be the public in general or the people who purchased the product which was the subject of the cartel. So there are a whole range of factors there. Then you would look at things like the background of the offenders. In this area, in all probability you would imagine that they would by and large be people who would not have any prior record of offending. So there would be factors personal to the people involved which would also impact on the sentence. Just looking at the other areas in terms of the seriousness, I guess we take some guidance from some of the civil cases which may have been run in this area and the penalties that have been imposed in those as well.

Senator BARNETT—Just moving on to another area of discussion from earlier today relating to the choice of forum and the appropriateness of the DPP and the prosecution having the right and the discretion to decide to move from a committal to a hearing in state courts or the

Federal Court. I am wondering if you could just respond to the appropriateness of that and the appropriateness of not allowing the accused to have any input into that.

Mr Thornton—As to the DPP's position, I would expect that, having set up the structure, having given the Federal Court a criminal jurisdiction and having put the resources in to gear up for the Federal Court to be in a position to hear these prosecutions, prima facie, these matters would be brought in the Federal Court. Having said that, there might be particular circumstances relating to associated offences—for example, if state offences were being prosecuted at the same time or if there were logistical reasons within a particular jurisdiction where it was not appropriate or was not able to be heard in the Federal Court—when you would look at the state court system, and that is the way we would approach it. As to the appropriateness, once the policy decision is made to provide for dual jurisdiction, it is traditional that the prosecution decides where to bring the prosecution—for example, making decisions about whether to agree to a deal with a matter summarily or to deal with it on indictment. It is a slightly unusual position to have a choice of two jurisdictions. At the moment, the way it works is that the magistrate makes an order at the committal. It is a bit hard to predict but I think that we would need a good reason as to why we would change a decision made by the magistrate.

Senator BARNETT—All right. That leads to a question regarding the constitutionality of the bill and whether you are confident in that regard. Are there any constitutional issues that may be raised by its provisions that may be problematic in the future?

Mr Thornton—I think that that is probably a matter that would be best handled by the department. I expect that they would have constitutional advice about some of the issues. That is not a matter that we have looked at.

Senator BARNETT—Thank you.

Senator TROOD—Several questions have been raised in the Law Council's submission. Have you seen that at all?

Mr Thornton—Yes, we do have a copy of that.

Senator TROOD—There are two particular issues among the several that they raise, but I want to ask about the one relating to pretrial disclosure. They are troubled that the provisions in this bill are going to adversely and unnecessarily affect the interests of the defendant and perhaps do injustice with regard to how much a defendant is required to state in pretrial proceedings. Do you have any view on their position?

Mr Thornton—I will just make a couple of comments generally and then come to that. In relation to the issue of pretrial disclosure, there has obviously been a lot of work done in a number of different jurisdictions to try and focus some of these prosecutions in terms of the amount of time and resources that it can take for all involved, including the court systems themselves. There has been a long history of looking at ways and means by which some of these large trials can be dealt with more efficiently and more effectively. Disclosure has been one of those issues, and the DPP has a disclosure policy which we have put out as to the requirements on the prosecution to deal with disclosure. It has always been a much more controversial area when it comes to imposing any sort of obligation on the defence. Whilst it is obviously

beneficial to narrow the issues, it has to be done in a way that protects the rights of the defendant as they have been traditionally looked after.

In relation to this, my understanding is that this is the provision which is modelled on the Victorian provision and I know that some people take different views as to what is required. It is interesting; I notice that the submissions from the Victorian criminal law committee of the bar do not raise issues about the way that it is working in Victoria. I am aware of the concerns of the Law Council. The courts, at the end of the day, have an overriding discretion to ensure that defence has a fair trial for the defendant and so I would expect that they would be very protective of the defendant's rights in that respect and they may adopt a similar line to what is being adopted in Victoria, which, as I understand, does not require disclosure to the extent that it would impinge on a defendant's rights.

Senator TROOD—That is true but the representatives from the Victorian Bar who have just given evidence on behalf of the Law Council have made the point that the provisions in Victoria may be similar but in fact they are issues that are generally not pressed in Victoria, notwithstanding the possibility that some issues might be taken which might be reflective of this Commonwealth provision. In other words, whatever Victorian provisions exist they work well in the Victorian context but it is largely as a consequence of the political culture that operates, where there has been a tradition of the way in which this provision operates. In the context of a new jurisdiction for the Federal Court, they are concerned that this particular provision goes against what is generally regarded as longstanding criminal trial practice.

Mr Thornton—Apart from reiterating what I said about the potential for differences in interpretation—and I accept that, as with a lot of these new provisions, there will be a settling-down period in relation to the interpretation by the courts, and that is not unusual with new legislation—it is not something that we would see as operating any differently to the way we have operated in relation to the other areas where we conduct prosecutions. So we would not be seeking for the court to interpret it more widely than what we have been dealing with. But, as you rightly point out, at the end of the day it is a decision for the court.

Senator TROOD—The Law Council also made the point that there are some very onerous provisions in the bill with regard to the consequences if there is not adequate disclosure. That is certainly not in the Victorian legislation, so were the defence seen to be unhelpful in relation to disclosure then quite severe consequences would follow. The Law Council regards that as inconsistent with the general presumption of the right to not disclose. Do you have any views on those provisions in the bill?

Mr Thornton—To go back to the context that I was trying to put it in, one of the things is there have been quite a few attempts to have some sort of regime which would enable the issues to be narrowed, and one of the issues has always been: what is the incentive or the penalty if you do not do that? I guess that is what is sought to be achieved by that part of the legislation. That is a policy question and not something that we have views on one way or the other.

Senator TROOD—May I ask you a couple of questions about these bail provisions and the presumption of entitlement to bail? Do you have any view on those provisions in the bill?

Mr Thornton—Again, I think those provisions are modelled on one particular jurisdiction, which does not come to mind at the moment. One of the things I would say about that is that the Commonwealth prosecutes in all the different state and territory jurisdictions, and we are used to dealing with lots of different provisions in relation to things such as bail and the different procedures. So normally when we see something like that it looks similar to one of the practices that we have in one of the jurisdictions. Again, I guess the big issue is whether you have a presumption in favour of bail or whether you leave it entirely neutral. At the end of the day, that is also a policy question which the department would probably be better placed to answer.

Senator TROOD—Do you as a practitioner see any difficulty in there being a provision which in fact makes it clear that there is a presumption of entitlement to bail?

Mr Thornton—As I said, in some of the jurisdictions that we operate in there is that presumption, and it works differently sometimes for different levels or different types of offences. Obviously, some offences are regarded more seriously than others in terms of criminality, and the bail conditions can change. I do not have a particular view as to whether there should or there should not be a presumption. I think the important thing in relation to bail is that the courts are well placed to make those decisions, balancing the different interests between the rights of the public and the rights of the defendant.

CHAIR—Mr Thornton and Ms Hinchcliffe, I think we have exhausted our questions of you this afternoon, so can I thank you for your submission to this inquiry and for your appearance today before the committee.

Mr Thornton—Thank you very much, Madam Chair, and thank you very much catering for us appearing by phone.

[12.37 pm]

CHAMPION, Mr John Ross, SC, Chairman, Criminal Bar Association of Victoria

CHAIR—Welcome, Mr Champion, to the Senate legal and constitutional committee inquiry into this bill. Do you have any comments to make on the capacity in which you appear?

Mr Champion—I suppose I appear in two capacities. In one sense, I am the Chairman of the Criminal Bar Association of Victoria, which is a subset association of the Victorian bar. In another sense, I also wrote a personal submission to this inquiry. If there are questions about that, then I appear in my own stead.

CHAIR—Thank you. We have taken your submission, No. 4, as the predominant one, and we were wondering if you had any changes or alterations you want to make to that before I invite you to make an opening statement.

Mr Champion—There is a change to my personal submission. I reflected on paragraph 19 overnight, and this submission, as was the other one, was written in haste over the course of the last week or so. I said in paragraph 19 of my submission that the approach seems to be taken that the Federal Court will try indictable cases that arise out of the work that is usually carried out by the court—matters concerning trade practices, corporations and bankruptcy, to name some particular examples. There clearly is not the case. I understand the position at the moment is that really the inquiry is not directing itself to anything more than simply dealing with the cartel offences, and at the moment the proposal is that the Federal Court jurisdiction will extend to that issue only and not beyond. So in that sense I had overstated the position and stated it somewhat incorrectly. That would be the only amendment that I would seek to make to my submission, and I do not seek to amend anything in respect of the Criminal Bar Association's submission of the same date.

CHAIR—Just let me clarify that. Are you actually deleting paragraph 19?

Mr Champion—It is probably easier if I delete it.

CHAIR—All right. We invite you to make an opening statement, and then we will go to questions.

Mr Champion—I had the opportunity of sitting and listening to some of the discussion this morning with colleagues from the Law Council. I might just make the observation that Mr Neal and Mr Priest are both members of my association, the Criminal Bar Association, so in that sense you have the opportunity to hear from three members of the Criminal Bar Association of Victoria, albeit that they spoke on behalf of the Law Council. Fundamentally the Criminal Bar Association does not really disagree with anything that the Law Council said in its submission. I listened to what I did this morning from the Law Council and, in essence, the Criminal Bar Association fairly much agrees with the evidence that was given this morning by our colleagues. We do not argue against anything that is raised in that submission and, if it is important to say so, then we adopt it.

There are some issues that I would just very briefly speak to. I do not propose to speak to my personal submission, because that was a submission that was made perhaps on a much more global basis, looking towards the future, and it was my own personal views, which are not, as I expressed, the views of the Criminal Bar Association. So I will perhaps sideline that personal submission and speak really only from the point of view of the Criminal Bar Association.

There are a couple of issues that I did want to raise particularly, some of which were spoken about this morning by my colleagues. The question of venue was one that I did want to raise, and there are a number of questions about that. Our association says that there should be at least the right for an accused person to say something at an appropriate stage about where a Federal Court trial might be committed to. The process in Victoria is that, at the end of a committal proceeding, mysteriously cases seem to get committed to one court or another. Either it is the County Court or the Supreme Court.

At that point, I have had the experience of making submissions to a committing magistrate about where a case ought to be committed to. We really say that that opportunity should arise within this legislation and that that right should be provided for, albeit that I do not believe there is that right enshrined in Victorian legislation at the present time but it is taken as read that those sorts of submissions can be made.

There is a later step, of course, that occurs at the point at which an indictment is preferred. Characteristically the Director of Public Prosecutions has the right to choose the venue at which the trial will be conducted. Our position is that we would like to see, at least at some stage, something able to be said by the accused as to the appropriate venue where a case ought to be sent and tried.

At the moment, in the Criminal Procedure Bill which is before the state government, there are some provisions that deal with the power to change a place of trial. Clause 337 of the Criminal Procedure Bill provides:

Court may act on application or on own motion

Unless the context otherwise requires, a power or discretion conferred on a court by or under this Act may be exercised by the court on the application of a party or on its own motion.

That effectively gives the right, according to the Department of Justice, for the accused to at least have some say, at the point at which a trial is placed before a court, so that some application can be made to change the venue. We say basically that that ought to be either enshrined, or at least read into, these provisions so that an accused has an opportunity to be able to at least have a say about where the case will be tried.

With respect to the question of bail I have heard what was said this morning about that and again we adopt the Law Council’s submission. We say there should be a presumption of bail that is included within this bill. That would be consistent with what is currently section 4 of the Victorian Bail Act, which carries with it a presumption of bail. I am not sure whether the committee is familiar with the provisions of section 4 of the Bail Act. I have a copy of it here if you would be assisted by it. It contains a presumption which is then capable of being changed, given the sorts of circumstances of cases that come before it—such as a murder case, which

would carry with it the presumption that bail would not be granted. Dug offences, for instance an importation of commercial quantities of something like heroin, would carry with them also a presumption that bail would not be granted. In both circumstances—of murder and commercial importations of heroin—bail would not be granted unless there were exceptional circumstances shown, which would allow, then, the court to grant bail, as they do every day.

There are some other issues that arise, and they might be regarded as small issues by the committee but they are things that we say really ought to be considered. I will just mention these in passing. Section 23CB of the bill speaks of pre-trial hearings. In particular, subsection (2)(d) allows for the determination of the admissibility of evidence in a pre-trial hearing. I have no problem with that but when you see and read 23CB(3) you see that that provides that once a trial starts an order or determination under subsection (1) applies for the trial 'unless the court is satisfied that to follow the order or determination would be contrary to the interests of justice.' In effect, that really means that, there having been pre-trial proceedings or any matters argued as to the admissibility of evidence and rulings given, if during the course of the trial there is then a question as to the admissibility of evidence, then effectively you need to seek the permission of the court or seek the leave of the court and convince the court that to do otherwise would be contrary to the interests of justice. We say that that is too onerous. In fact, it is impractical in the day-to-day running of criminal trials, where questions as to the admissibility of evidence are arising constantly throughout the course of the trial. There is no need for a provision like this. Effectively we say that subsection (3) could be deleted entirely from the bill and really the whole process could then be left to the criminal trial process in the normal way.

Passing on to another subject, I noted that, so far as I could see, there was no provision for the calling of additional evidence by the prosecution. This is something that frequently happens during the course of a criminal trial where the prosecution, for whatever reason, decides that it will seek to call a piece of additional evidence in the trial. In Victoria there is a process whereby a notice of additional evidence is then provided. Parties are provided with the particular statement of evidence that is sought to be adduced by the prosecution, and then at that point the defence will decide, 'We've got no problem with that evidence,' or alternatively it will complain to the judge and say: 'Well, this is all too late. It's prejudicial. We've cast our case in a particular way and it is certainly against the interests of justice for you to allow this evidence to be given.

As far as I can see, there is no provision within this bill that provides for the opportunity for the prosecution to call additional evidence. I compare that with clause 188 of the Criminal Procedure Bill 2008 (Vic), which provides the process whereby additional evidence—and it is specifically mentioned in the bill—can indeed be called at the trial by the prosecution once a notice of intention to call evidence is given and a copy of the statement of the proposed witness containing the additional evidence, or an outline of that evidence, is also given. If it is not there—and I have not been able to find it—it is a gap within the bill that could be remedied.

There are a couple of issues with empanelment that I seek to raise. Essentially, I note section 23DT of the bill provides that at the beginning of the trial the sheriff embarks on the process of giving the court a list of potential jurors on the panel and facilitates the attendance in court of those potential jurors. However, before the selection of persons to be empanelled as the jury for the trial, the court informs the parties to the trial that potential jurors whose names and/or numbers are to be called may become jurors for the trial. So far I do not have a problem, because

obviously the court is in a position to know the names, and perhaps personal particulars, of jurors, but, when you read section 23DU, in the empanelment process it says:

The Court must ensure that an officer of the Court calls:

(a) the name; or

(b) if a direction under section 23EB has modified the procedure—the number;

of a potential juror selected at random from the jury panel.

The way in which the section is structured involves, firstly, the question of the juror's name. If an order is made, then a number can be called in order to call the juror for empanelment. We would prefer to see the position the other way around, that the standard practice would be the approach where the number of a juror would be used, and perhaps an occupation. I do not see anywhere within these provisions a provision for the occupation of a person to be articulated in the empanelment process.

Anecdotally, jurors have great concerns about having their names put out in the court process, and we can all understand the reasons for that these days, with personal security being an issue that is very important. The Victorian legislation looks at it from the point of view that I am articulating—that is, essentially now the standard practice is followed whereby numbers are used, and if, on the argument of the parties, a judge decides that it is not going to be numbers, then names can be used. That somewhat reverses the position.

CHAIR—But essentially if you step up to be a juror, the judge will say, 'No. 6: nurse.'

Mr Champion—Yes. That is characteristically how it happens in Victoria, and it works fairly well. The downside to the calling of numbers—and there is a downside—

CHAIR—Is your name ever revealed in those instances?

Mr Champion—No, not publicly. And if indeed it comes to a juror giving evidence, as they do from time to time in certain circumstances, the judge will swear them in by number. The judge may well have their name, but they will use the number. Jurors are very concerned these days about security, particularly in trials that are regarded as security trials. Because of the use of mobile telephones with cameras and the like, jurors feel very much under the pump when coming and going from court. Their anonymity is being challenged in all sorts of ways. We would encourage anything that can be done to preserve the anonymity of jurors.

Senator BARNETT—Why have they proceeded down this track? You are referring to section 23DU (1), the naming of the juror. Why would they have done that? Is this unprecedented or is this something that has been done before?

Mr Champion—It used to be always the case that names were used. In my experience, it is really only in the last five years or so, with the advent of a number of gangland trials in Victoria and the serious security issues, that people have suddenly realised and become concerned about the prospect of jury tampering, which is a live prospect in certain trials. In circumstances where

they are involved in some of the big gangland trials, people feel really concerned about the exposure of anything that would indicate any way in which they could be followed home or contacted later on or put under pressure during the course of the trial. So the answer is: I do not know why they have taken this step.

CHAIR—Have you finished your opening statement, Mr Champion?

Mr Champion—There is only one other matter: rights of address. I might have missed it, but I did not pick up in the bill specifically that there was a right to an oral address in terms of a prosecutor's opening or a defence opening in response to a prosecutor's opening address. They are provisions that we know of in Victoria that are used all the time. It seemed to me that it ought to be enshrined in legislation that both prosecution and defence have the right to open their case to the jury at the beginning of the trial, with the defence being able to open their case at the beginning of the defence case. I see no reason why that could not be placed within the bill to make it clear. That is all I wanted to say at the outset.

CHAIR—I might start and pick up the issue of the venue changes. You talk about the right to have a say. Will the court dictate in the pre-trial proceedings that it will either go to the state court or to the Federal Court?

Mr Champion—By the time the pre-trial proceedings take place, the indictment is usually before the court already, so the case is in the court, whichever court it may be. There are two ways in which this could be dealt with. One, of course, is by permitting submissions to be made at a committal stage to attempt to persuade the magistrate to which court the case ought to be committed. Of course, the right always exists for the accused to communicate with the DPP and try to persuade the DPP that it ought to go to one court or another. By and large, what we see in Victoria, though, despite all of that is the local director really choosing the venue that he wants to put a case into. This has become quite topical in the course of the last 12 months.

CHAIR—Is that because the penalties are lesser, say, in the state court than in the Federal Court? What would be the advantages of choosing one over the other?

Mr Champion—That is a very good question. I will leave out the Federal Court for a moment and exemplify that by mentioning the director in Victoria. He will either choose the County Court or the Supreme Court to send the case to. If it is a murder case it has to go to the Supreme Court. There was, for instance, a very large drug case—and I use the example of the Pong Su case, involving the importation of drugs from Korea—which first of all was sent to the County Court by the committing magistrate, but the prosecution made an application to uplift the case to the Supreme Court for all sorts of reasons. One was that it was a Criminal Code case. It was a new case under the Criminal Code and the reasoning was that they really wanted a Supreme Court justice to make rulings in order to have some force behind them so that they could be applied more widely, as they have been throughout the Commonwealth, whereas the County Court rulings would not be regarded as rulings of a court of record.

So the director has the choice, but there is, of course, the safety valve of applications being able to be made to change the venue. In that case, the prosecution made the application to uplift the case. The defence were entitled to be heard about that, and I think they did say, 'No, we think it ought to stay where it is.' And so the argument is thrashed out in front of the court.

That is one path of reasoning—that is, the court is better placed to make the decisions about issues of law. On the question of penalty, so far as courts are concerned I would like to think that penalties arising out of both court systems—the County Court and the Supreme Court—ought to be the same. I know my colleagues have different views about that. Some believe that if it is in the Supreme Court then you get a bigger penalty at the end of the day than in the County Court. No, I do not tend to agree with that, so I would prefer not to see it as an issue of penalty.

CHAIR—But you put to us that under this legislation the person being accused cannot provide any argument as to why they would like the venue in a different place?

Mr Champion—There is nothing specific in the legislation, and we say: 'Why not? Why couldn't there be something that would enshrine that right so that it is clear?' The approach of the Victorian legislators was that in the current Crimes Act there is clearly the right to make submissions on a change of venue. That is going to change as a result, I think, of a submission that we made on the Criminal Procedure Bill. As I indicated, clause 337 will now, in a more general sense, allow clearly for it to be implied within the act that parties have a right to be heard on any application that is made in the court.

Senator TROOD—You have adopted the remarks of the Law Council in relation to these matters of bail et cetera. I take it that you have said—and we can regard it as being the case—that you are supportive of the whole of their submission in relation to the arguments they have made about the need for the position they have taken on bail and the objections they have raised about the pre-trial disclosure issues. I want to ask you something in relation to the bail matter. The explanatory memorandum has what purports to be a justification for the provision in clause 58DB of the bill, which is a reference to the Commonwealth Crimes Act. The point seems to be that there are no provisions in relation to bail because of the anxiety that might exist that bail might be given in relation to serious crimes under that act—terrorist offences and things of that kind. It seems to be trying to cover a situation that applies in a number of discrete circumstances, rather than putting it the other way around, which is presumably that you could put a clause in this bill saying there shall be a presumption of entitlement to bail, but for those that might apply in relation to certain criminal offences under the Crimes Act. Would that not be a satisfactory way of dealing with this problem?

Mr Champion—It seems to me it would. I think what you are suggesting tends to mirror the type of approach that occurs in the Victorian Bail Act—that, in effect, there is a presumption to bail but then legislatively over a period of time there have been qualifications to that, depending on circumstances of particular offences that then become existent or more current, such as the commerciality of importations. Clearly there is a regime set out in the Victorian Bail Act that provides for that. But it is all under the heading of a presumption of bail and the system appears to work well. I should say that there is currently a review of the Bail Act provisions. I have to say that I am not particularly familiar with those, so I cannot assist you with those. But within the next 12 months we will see a review of those provisions. I doubt very much there will be a change in the presumption of bail provision, though.

Senator TROOD—Is there any reason why that regime might not apply at the Commonwealth level as it applies in Victoria?

Mr Champion—I do not see why it could not apply in the same way that it applies in Victoria. I do not really know the reasoning why it is being provided for in this way. It has effectively reversed the onus on the accused to apply for bail and to justify the grant of bail, whereas obviously our approach here is to take the point of view that bail is granted first up, and then it is a matter for the prosecution to establish the grounds why bail ought not to be given—subject, of course, to the way in which section 4 of the Bail Act is set out; it provides legislatively that there are some circumstances where bail will not be granted.

Senator TROOD—On this point about the restriction on a reapplication for bail except for significant circumstances, is that an argument or position that you can see some value in?

Mr Champion—That is fairly onerous, and we say that it is really too onerous to use the adjective ‘significant’. In Victoria—as was explained, I think, by my colleagues earlier this morning—we have the need to show some changed facts and circumstances, and we do not have a problem with that. It may be that that will change in the course of the new bail provisions and the review, but I am not sure of that. At the moment, the way that it is working seems to be satisfactory in that regard.

Senator TROOD—What about the proposition that you have to appeal a bail application, as distinct from being able to make a second application? Is that a problem?

Mr Champion—It is expensive and in most circumstances involves, of course, an appeal to the Supreme Court—to a Practice Court judge. The argument would be: why should you put that in place when you have the ability for the same court to review the question of bail—if, indeed, there are changed facts and circumstances—or an application that has been made when someone is not represented; of course, then you get an automatic right of review if someone becomes represented. We just think it is too onerous.

Senator TROOD—There is an efficiency dimension too. It adds further to the time it is likely to take before a trial, depending on how quickly you can get a hearing et cetera. It seems to be inconsistent with some of the arguments made elsewhere in the act about the need for efficiency and being able to advance the case as rapidly as is consistent with justice.

Mr Champion—Of course.

Senator TROOD—I wanted to ask you about the matter of pretrial issues, but since you have adopted the evidence that has been provided elsewhere—

Mr Champion—In respect of the pretrial issue, I will say that I heard with interest the submissions that were made this morning and that I read the Law Council’s submission on section 23CD, particularly the ‘basis for taking issue’ argument. We acknowledge that taking issue with the facts and circumstances of a prosecution opening statement appears within the Crimes (Criminal Trials) Act, and that has been re-enacted into the Criminal Procedure Bill 2008. My colleagues went through that this morning with you on how in Victoria that really is not used. From my own experience, I have not been involved in any case where a judge has asked the question, ‘What is the basis for taking issue in respect of that piece of evidence within the Crown opening?’ So, albeit it sits there, in essence we say it really does not add very much to it and we agree with the submission that it can be deleted.

Senator TROOD—Why do you think that point is not taken in Victorian trials?

Mr Champion—You would have to ask the judges, I suppose. They are the ones that manage the Crimes (Criminal Trials) Act provisions. For a long time we have talked about this. The provisions of that act are an issue that is ongoing in Victoria. It is not characteristically used consistently throughout the whole of the Supreme Court and the County Court. For a long time the Supreme Court did not apply the provisions in its cases at all. That is changing a bit now and there is a move within the Supreme Court to apply it and to apply it judiciously. In the County Court, which is really the major trial court, with a whole dimension of different types of trials—hundreds of trials that have to be worked through—different judges take different views about how the provisions will be enforced. It is a strong act and there are consequences for not applying the provisions of the act. But again it comes down to the individual judge involved as to whether they will press the particular provisions. I have not heard of a prosecutor asking the question of the defence: 'What is the basis of taking issue with a particular part of the Crown case?' You might do it in a personal sense but in court I have not had that experience.

Senator TROOD—That is the interesting point. The possibility of raising that point is open to a prosecutor, though you are saying that that has not been done.

Mr Champion—I have never done it, and my practice is essentially a prosecuting practice. I cannot remember ever doing it. In a formal sense you might informally talk about it at the bar table.

Senator TROOD—From a prosecutorial perspective, I think your evidence is valuable, because the public policy argument, so far as there is one here, in your view, is not a persuasive one.

Mr Champion—It is not a persuasive argument to have the provision maintained within the bill; I agree.

Senator TROOD—Thank you.

CHAIR—Senator Barnett, do you have a question?

Senator BARNETT—Yes, I do, but Senator Ludlam may want to ask something.

Senator LUDLAM—No, I am okay.

Senator BARNETT—I checked to see if Senator Ludlam wanted to ask Mr Champion whether he had a view on the earlier question about professional privilege and section 23CL of the bill abrogating legal professional privilege with respect to the prehearing disclosure regime.

Mr Champion—I have read the submission of the New South Wales Attorney-General. I tend to agree with it. I must say that I have not consulted particular colleagues about it. I have trouble understanding section 23CL in its drafting but also in its purpose. It is a new provision to me. I am not familiar with it in Victorian legislation and I have not worked with anything like it before. I do not particularly understand the purpose to be served by it. I think there is no need for it. It ought to be deleted. The process works well enough as it is in terms of the court dealing

with not only legal professional privilege but also public interest immunity and those sorts of issues. There is a process in place that everyone understands as to how that type of material will be dealt with and it is dealt with every day in an efficient way.

Senator BARNETT—We do not know exactly why the department is taking this approach—we can ask them the reasons why, but we can only speculate as to whether they are trying to codify common-law practice. What you are saying is, 'There is no need for that. The judges and the courts themselves can determine the appropriateness of whether to make admissible professional privilege or not.'

Mr Champion—Yes. That is our position.

Senator TROOD—For your interest, the Law Council have taken on notice that same matter and are apparently coming back to us shortly.

Mr Champion—Yes, with a written submission.

Senator TROOD—Thank you for that. That is helpful. I want to get clarity on section 23DU regarding the name and your position. I understand that you recommend that that be deleted. We discussed it briefly earlier, regarding the empanelling of the jury. Subsection (1) says:

> The Court must ensure that an officer of the Court calls:
>
> (a) the name.

Mr Champion—Yes. I know that these cases that we are dealing with currently are going to be cartel cases. One might have thought, on first principle, that they are not likely to be of the quality of some of the gangland trials of Victoria and New South Wales. Nevertheless, anecdotally, jurors have concerns, and if they are concerned about issues and these issues about their personal security are playing on their minds then it distracts them and detracts from the whole process.

It seems to us now with legislation that we are familiar with in Victoria that the thrust of these sections ought to be primarily focused towards numbers and provisions that direct themselves towards the use of numbers, and then the exception being the use of names if the court decides in all of the circumstances that names are the appropriate way to go. I am just talking about perhaps reversing the approach, that is all, in respect that issue.

Senator BARNETT—You do not want to replace it with the juror's number; you want to leave it as a matter for the judge?

Mr Champion—Speaking in a personal way here, my own preference would be to see numbers used primarily, as the first, initial approach. But then, in certain cases where there is perceivably no security threat or no issue, the judge can make a decision and exercise the discretion to use names in any particular case where security is not an issue—just reverse the position; that is all.

Senator BARNETT—Thank you, I just wanted to get clarity around that. I want to get clarity around section 23CB(3) and your recommendation to delete subsection (3). Can you re-cap the main arguments as to why? I assume that it is, again, to give the court discretion under subsection (2) for those matters set out in (a) to (f).

Mr Champion—By deleting subsection (3) it seems to me that that would bring the issue back to a practical reality, and to the position that we currently experience in not only Victoria but also other jurisdictions—not all—which I am familiar with. It should not be a position that there should need to be an application of the trial judge to be satisfied that, in order to determine an issue, for instance, of the inadmissibility of evidence, not to would be contrary to the interests of justice. That seems to me to put a hurdle in front of everybody, not only the defence but also the prosecution—to persuade a judge that a particular piece of evidence is inadmissible. It is an impractical situation because witnesses all the time are articulating inadmissible pieces of evidence and every time a witness says something that is hearsay, for instance, you need to be jumping up and saying to a judge, ‘I object’ and the judge saying, ‘You need to satisfy me.’ It is unnecessary.

Senator BARNETT—Your argument applies to (2)(d) as it would to (2)(a), (b), (c), (e) and (f).

Mr Champion—Yes.

Senator BARNETT—You have just picked out (d) to make the point?

Mr Champion—Yes, to make the point.

Senator BARNETT—I see.

Mr Champion—I do not see that any party to these proceedings ought to have to jump over a hurdle in order to argue any of these matters before a court. If there is a problem with the indictment then there is a problem with the indictment and it just ought to be raised.

Senator BARNETT—Yes, I am with you. I note that; I have a lot of sympathy for that position. Do you have a view on the constitutionality of the bill? Do you perceive into the future there being any problems regarding cases brought before the Federal Court that may be unconstitutional?

Mr Champion—You are talking to the wrong person about constitutional issues. I would not like to express an opinion, under any form of oath, about those particular issues. I would prefer not to get into that area; it is not within my field of knowledge or expertise.

Senator BARNETT—We have covered the other main areas regarding bail and the pre-trial disclosures. We have covered the New South Wales attorney’s concerns. Did you want to comment any more on or respond to the view that the New South Wales attorney has put that there is no need for the Federal Court to be invested with this jurisdictional matter?

Mr Champion—It is difficult for me to divide myself into two about this. Obviously, I have personal views that differ from the views that I could express for my association. My personal

view is that in all of the circumstances that I have articulated the Federal Court needs to own its own jurisdiction and to be interested in its own jurisdiction. It is getting increasingly complex, as I have described in the submission. That is my personal view.

Our Criminal Bar Association view is that we do not resist the current act in so far as cartels are considered. It is a complex area. It is an area that the Federal Court is experienced in, in terms of dealing with it in effect as a judge-alone issue. I do not see any difficulty ultimately in the Federal Court being invested with a jury jurisdiction. That is mechanical stuff—getting a jury together and developing a jurisprudence that surrounds all of that. We do not as an association have any difficulty with that view but once you go further and tread into other areas like bankruptcy, Corporations Law and that sort of thing you will get a diversity of personal views within our association. That is about as far as I can go.

Senator BARNETT—Sure; I do not want to push it too far. If you put on your visionary hat do you see this as a first step in what is likely to be further jurisdictional arrangements and purview for the Federal Court?

Mr Champion—I think it is undoubted that if it is successful, and there is no reason to think it should not be successful, then there will be. You will have the court itself saying they want these jurisdictions. Courts are interested in expanding their jurisdictions and their own status and prestige, and getting into all sorts of other issues.

Senator BARNETT—That being said you can at least empathise with the New South Wales attorney's view that this is pushing the boundaries and it is opening up the door for the Federal Court and perhaps lessening the significance and the importance of the state jurisdictions.

Mr Champion—I hear that. The state jurisdictions—I can speak only of Victoria—are under a high degree of pressure in terms of resourcing. There may be all sorts of financial arrangements between the states and the Commonwealth that I am not across but I can tell you from the Victorian point of view—and our association has been banging on about this for a long time—the local jurisdiction is underfunded and under resourced. It is under a lot of pressure. Commonwealth trials are extremely difficult. They are long and they move like icebergs. These cartel offences, the large drug trafficking offences or the large corporate frauds—at corporations-type level—are a big impost on the time of the local court—the County Court and the Supreme Court. They do not like them because they take a judge out of the field for three, four, five and six months—and nine months in some instances. I hear what the Attorney-General says and it may be that there are all sorts of financial arrangements that underlie those sorts of comments; I do not know.

Senator TROOD—Perhaps the New South Wales attorney is better funding his courts, Mr Champion.

Mr Champion—Anecdotally we are told that the waiting lists in their district courts are far less than a County Court here in Victoria. We are now listing cases 18 months ahead.

Senator BARNETT—I have one further question regarding resourcing. You have touched on the federal court having the ability to deal with these matter is. You are experienced in this area; in your experience, what about the DPP and its ability and capability to handle cartel and trade

practices matters? They indicated that they are going to have a budget to get further resources. Do you think they can handle it?

Mr Champion—It is a high quality organisation. I have worked for it for six years in a permanent sense, as in-house counsel. It is the sort of work I have done for the last 15 years, and I still do this sort of work for the Commonwealth DPP. It is an extremely professional organisation. It needs to keep training up, of course, and to be getting much more trial experience than they currently get but I do not see any reason why they cannot carry out these sorts of prosecutions at all.

Senator BARNETT—Thank you.

Senator TROOD—I have a question about when the intervention should be made about selection of venue. Do you have a view about how that is best handled? Ought submissions to be made on that subject during the committal proceedings, or should there be a general provision that submissions can be made at any stage of the proceedings? How do you best handle that?

Mr Champion—I see no reason why submissions cannot be made at committal stage in order to persuade a magistrate to send a case to a particular court. As I said before, submissions can be made directly to the director to indict in a particular forum. Alternatively, once the case is before a court—for instance, our Supreme Court here in Victoria—applications should be able to be made to change a venue down to the county court or indeed to the Federal Court if it is a case that someone perceives ought to be a case that is heard by the Federal Court rather than the Supreme Court. Applications can be made to that court, which is then seized of the indictment.

Senator TROOD—So you need a general provision that allows for the matter to be raised at any time during the course of the proceedings.

Mr Champion—An example of such a general provision appears to be provided within clause 337 of the Criminal Procedure Bill in Victoria. In that clause, as I explained in our submission to the Department of Justice, the department may have generalised the power to be heard on any application before the court. So it is perhaps worth having a look at that.

CHAIR—Thanks very much for your time today. Your input into the two submissions that you have contributed to is certainly appreciated. We appreciate the effort that you have gone to.

Mr Champion—I only apologise that they were done in such haste over the course of the last break.

CHAIR—We fully accept and appreciate that. The committee has now finished its inquiry into the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008. When we come back we will conduct our inquiry into the Personal Property Securities Bill 2008.

Proceedings suspended from 1.27 pm to 2.04 pm

BRENNAN, Lorin, Esquire, Legal Consultant, Independent Film and Television Alliance

CLEARY, Susan, Esquire, Vice President and General Counsel, Independent Film and Television Alliance

Evidence was taken via teleconference—

Personal Property Securities Bill 2008

CHAIR—The Senate Standing Committee on Legal and Constitutional Affairs now resumes its inquiry into the exposure draft of the Personal Property Securities Bill 2008. The inquiry was referred to the committee by the Senate on 12 November 2008 for report by 24 February 2009. The government describes the proposed new personal property securities regime as a significant micro-economic reform and considers it to be a key aspect of the deregulation agenda. It contends that PPS reform will have a number of significant benefits, including the provision of greater certainty concerning whether personal property is subject to a security interest.

The regime is designed to introduce arrangements that apply consistently and comprehensively throughout Australia thus reducing the costs associated with taking and enforcing security interests in personal property and with ascertaining whether particular property is subject to a security interest. We have received 33 submissions for this inquiry. They have been authorised for publication and are available on the committee's website.

I remind witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or discourage a witness on account of evidence given to the committee and such action may be treated by the Senate as contempt. It is also a contempt to give false or misleading evidence. I remind everyone that 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 or in camera, and if you so wish to do that then you just need to indicate to us that that is what you would like to do. For our first witnesses this afternoon I welcome representatives of the Independent Film and Television Alliance. We are actually in Melbourne and the temperature here is 40-plus degrees, which would be about 110 or 115 degrees Fahrenheit.

Susan Cleary—Enjoying the summer I see.

CHAIR—We are sweltering. You have probably just experienced a week of G'Day USA over there, have you? That is our tourism promotion over there.

Susan Cleary—Yes, we have. We are in southern California in the sunshine and proud to be American. I am a licensed attorney in both California and Washington, DC, the District of Columbia.

Lorin Brennan—I am special counsel for the Independent Film and Television Alliance with regard to dealings in security interests and I am a licensed attorney in California.

CHAIR—The alliance has sent us a submission which we have numbered 22 for our purposes. Before I invite you to actually talk to that submission, do you have any changes or alterations you want to make?

Susan Cleary—No, we do not.

CHAIR—Okay, if you would like to make a short state opening statement then when you are finished we will go to questions.

Susan Cleary—Thank you. Good afternoon, I know that it is after lunch there in Australia. I am Vice President and General Counsel of the Independent Film and Television Alliance, sometimes referred to as IFTA. I am here with Lorin Brennan, our legal consultant on intellectual property and film financing of secured interests. On behalf of IFTA and our members I would like to thank the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to speak to you today. We also thank you for the opportunity to answer any questions you might have regarding our submission, numbered submission 22, on the impact we see this bill if enacted would have on the independent film and television industry.

First, let me give you a very brief introduction of IFTA's members and the independent film industry, because that will be very relevant to what Lorin is going to outline for you. The IFTA is a non-profit trade association for the independent film and television industry world wide. Our non-profit organisation represents over 160 member companies from 22 countries, including Australia. IFTA members are independent production and distribution companies, sales agents, television companies, studio affiliated companies and financial institutions such as banks which engage in film financing.

IFTA was established in 1980 as the American Film Marketing Association and in 2004 the association formally changed its name to the Independent Film and Television Alliance to recognise its global membership and its mission to promote independent film and television throughout the world. IFTA's membership includes well-known independent film companies and institutions that provide them funding, such as Lionsgate, the Weinstein Company, Miramax and Lakeshore International and such banks as Comerica Bank and US Bank here in the United States. In Australia, IFTA members include Arclight Films, IFM World Releasing Inc and Screen Australia, which as you all know was formerly known as the Film Finance Corporation Australia. Since 1980, over one half of the Academy Award best pictures have been produced by IFTA member companies. Films such as *Crash, Million Dollar Baby,* the *Lord of the Rings* trilogy, *My Big Fat Greek Wedding* and *Bend it Like Beckham* have all been independently produced and financed.

Independent films are made at every budget range and may be mainstream, commercial or art house. IFTA does not define 'independent films' as a genre or a budget range. We define independent producers and distributors as those companies and individuals apart from the major US studios that assume the majority—more than 50 per cent—of the financial risk for the production of a film or television program and control its exploitation in the majority of the world. They are truly independent companies.

Independent films and television programs are financed primarily through sources outside the seven major US studios and they are financed individually from a number of sources picture by

picture. The number of sources includes advance commitments from local distributors called ‘minimum guarantees’. Those minimum guarantees are included in exclusive licensing agreements which are pledged to the bank. In the licensing agreements, they have contractual minimum guarantees, which are accounts receivable, that are often used as collateral on which the lenders provide funding for the production of the independent film.

This bill if enacted in its current form could impair current intellectual property lending practices for independently financed motion pictures and raises questions of potential conflict with Australian intellectual property laws. Our major concern and our members’ major concern with certain provisions of this bill is that it seeks to treat intellectual property the same as goods. This treatment could restrict the ability of financial institutions to adequately assess the risk of providing the funding for production. What we would like to do today through our submission and providing evidence is strongly recommend that the provisions that are incompatible with the established intellectual property law and the related financing practices be excluded from the scope of the proposed legislation.

Lorin will now go ahead and outline some of the incompatibilities that we see and the impact that this may have on the way that we finance intellectual property and specifically on our industry, independent films. So I will now hand over to Lorin, who has another brief summary.

Lorin Brennan—Thank you, Madam Chairman and members of the Senate. We are very pleased to have a chance to speak with you. We have prepared a statement and made a submission. I know that your time is short, so I will take a few minutes to speak extemporaneously. First, however, does anyone have any questions that they would like to ask, or would you like me to add a few points?

CHAIR—If you add a few points first, then we will go to questions.

Lorin Brennan—Thank you. What I would like to do is try to provide an overview of what is going on. We appreciate the fact that Australia is in the midst of a personal property securities reform. But this is very important and you as legislators are looking for the best way to enact the bill. We are here to give our perspective as best we can to help you in that endeavour.

I think it might be helpful to give a brief overview. The basic idea of secured financing, I think, is that you want to try to match the secured financing law to the law of the collateral so that if you are financing goods the security interest should give the secured creditor essentially the same rights as the debtor has, no more and no less. One of the things that you then have is something of a mismatch between the underlying property law and concepts in the bill and how it works for intellectual property law, and that can affect the ability both of people to get loans and of financiers to make loans.

I have spent a lot of time on this legislation and I think it might help if I were to give a general view of what the financing schemes are trying to accomplish. Forgive me if I am saying something that is obvious and, if I am, please interrupt me. I know that, when it comes to dealing with my colleagues in talking about intellectual property and secured financing, those people often say, ‘What is going on here?’—so I am trying to simplify it. Forgive me if, in doing so, I say something that is already obvious to you.

If you look at what the bill tries to do, it has this idea of a sort of universal financing device that allows all financing, and it is going to replace the current system you have—the British system—where you are floating in six charges. Essentially, the financing regime that you have, I think, is generally helping with what we sometimes call cash flow or enterprise-like financing.

The basic idea and the example we have used in these discussions—if I might interrupt myself here, I should preface my remarks by saying that I have been involved in some international discussions in this area as well—is the financing of a watch company. What happens with the watch company is that raw materials come into the company, they make watches and then they sell the watches. The idea of the lending basically is that the security interest wants to give the lender a sort of modified version of a floating charge—I use the old term ‘floating charge’, although that is not really what is happening here—over the entire enterprise. So if the enterprise gets into distress, the lender can take over the going concern value of the company. That means two things. You have assets coming in. The trade creditors who supply assets on a retentionist title basis need to be security interests. If they do not file their interest then they are junior to the lender who is covering the enterprise. By the same token, when you sell the watches and the watches go out, in the normal course of business customers who buy watches do not expect them to be subject to security interests. So the security interest law provides that the security interest might lose to the ‘ordinary’ customer, but in exchange the lender gets the accounts. And this works well.

But now what is happening in the enterprise is that you have all sorts of intellectual property, and intellectual property law works differently. I am assuming that the watches are trademarked watches made under a trademark here or they have a patent here. Well, there may be prior restrictions coming in—licence restrictions on the patent or the trademark—that have to be searched and abided for by the enterprise. And when the enterprise sells the watches, those restrictions may, in a sense, pass down to the purchaser. By the same token, 100 per cent of the accounts receivable may not be available to the lender. A portion of it needs to be paid to the intellectual property owner.

This is because intellectual property works more like—if I can use a simplistic example—financing an office building. You have a ground lease and then you have individual floors and certain restrictions on the property apply across the board. So what happens is you have the security concept that you have here for the bill—in very general terms, you need to do one type of financing that does not really work well for intellectual property. That may be too simplistic an overview but I think it sometimes helps to look at some of the specific issues that we raise.

Let me give you a couple of examples here. One of the issues is whether or not an assignment with the right to terminate is a security interest. If you look at trying to finance the enterprise, there is a lot of law about retention of title sales—conditional sales, as I think they are still called under some of your existing personal property securities law. That is when the seller retains title and if they are not paid they can take the goods back. You want to convert these into security interests for goods because when a lender goes to do a loan on business they do not want to do an inventory count and look at the inventory everywhere as it is too hard to do the checks. So you want those claims to be security interests that are filed against the debtor.

That is great for goods but it does not work that way for intellectual property. Retention of title claims or restrictions on usage are essential to our business. It is common if I am financing a

movie that I need to go to the author and find out whether the author is granted certain rights such as to make remakes and sequels. So you do not want to call an assignment with right of title—which we call, essentially, a retention of title claim—a security interest, because it is not. By the same token, you have a distinction between goods and intellectual property; they are different. The bill proposes that a security interest that covers goods would extend to related intellectual property even if the licensor really did not consider it. This is an accommodation trying to help the filing system but that is not the way intellectual property works, because the sale of goods does not pass intellectual property and vice versa, and so you need to get the collateral description separate.

There is another description in the goods about assignments. It provides that assigned contractual restrictions on assignments are invalid. That is there to help the financier. The intention is that it will deal with something called the negative pledge. If you grant a security interest and say in the security interest that ‘you, the debtor, may not grant another security interest’ and that is not recorded, you do not want that to prevent the debtor from at least granting another security interest. But so-called restrictions on assignment of transfer are what intellectual property is all about and you need to search and to find them.

A similar issue comes up when it comes to the means of perfection or how you would make the security interest effective against third parties. If you think about the enterprise loan, what it is doing is financing the debtor. Say there is a change in the ownership of the collateral outside of the ordinary course. Generally people do not think of what we sometimes call servitudes on chattels. When you buy a car you do not imagine that if two sellers up stream have said that the car cannot be painted yellow that should apply to you. So the security interest generally says that if you are going to transfer the goods then you want to make a new filing against the new debtor. That is because security interests are also indexed against the debtor, and that means somebody can find them. But with intellectual property you always have to research the prior chain of title. You search for patents and trademarks in your patents and trademarks office and for copyright you just have to do that due diligence. So I know that if I am acquiring rights to the movie I am going to have to search the prior chain of title to find prior ownerships anyway and so I am going to have to search for security interests.

Why should the bill require a lender at the senior level to make continuous filings against all junior users of the property? It does not conform to the property rules. If you look at the priority rules too, the priority rules for the security interests are sort of made to deal with goods. But they do have a different set of priority rules in patent and trademark statutes which protect bona fides purchasers. The issue that you face is that when a security interest is foreclosed it becomes a purchaser. So now you have to reconcile a priority scheme in the patent in the security interest versus one that is filed in a different place. This leads to potential conflicts here in the priority rules.

The final thing here, I suppose, is ordinary course. On the international level this has been a matter of some considerable debate. I believe you have a submission from Norman Siebrasse who is a professor in Canada. He and I conferred before we both sent in our comments and have had a lively discussion. Norman is a very helpful academic in Canada who deals in secured financing. I would say the idea of ordinary course is that when you are a consumer and you are buying a good such as a refrigerator no-one would expect that the seller’s lender could repossess the refrigerator because the seller did not pay its loan; that is not common. So the security

interest law accommodates commercial expectations and says that when you transfer the refrigerator the security interest is released because, after all, the lender gets a security interest on the payment account that comes back. So that is commercial but it does not work that way for intellectual property. There is no concept of an ordinary course exception.

There are other exceptions there—there are certain implied licences and there are certain rights to use—but they are not ordinary course exceptions; they are different. So you would like to make the security interest match how the property right is and provide that, if the licensee takes three of the intellectual property rights, then sure they should take three of the security interests. But if they do not take three of the intellectual property rights under intellectual property law then you should not put in an ordinary course rule and secured financing law that takes it free, because then two things happen: the lender loses the value of its collateral and, if there happens to be a foreclosure, the intellectual property rights may be lost. These are the areas we can look at this year. These are areas where we would hope you would do no harm, in the sense that these are areas of the law where maybe a restriction or an indication that provisions in intellectual property law would take precedence would allow the law to work with intellectual property rules without undue impact.

I will leave it there. I hope that explanation was helpful and not too pedantic. We tried to give a simplified view of what were trying to get at. We would be pleased to answer any questions.

CHAIR—Thank you. We also have attached to your submission the submission that you sent into the Attorney-General's Department, which goes to your concerns section by section—and that is quite useful. Can I start by asking you this question: if I write a book, for example, and I make some money out of it, does this legislation go to a scenario whereby I might offer up the sale of that book as collateral?

Lorin Brennan—I think there are three separate items of collateral that would be covered there. The first is the physical copies of the books themselves. We do this in the movie business. I have 1,000 copies of the book, which I am going to sell. Then there is the copyright interest in the book itself, which is the intangible right to make more copies. And then there may be some accounts receivable or royalty income stream that would come from the sale of the individual books or from licensing that intellectual property right.

CHAIR—If I put up the copyright of that book and I somehow default, does is that mean that my creditor then takes over the rights to that book in the future?

Lorin Brennan—If the security interest covers the copyright in the book, when you default, the creditor can exercise the default remedy and take over the copyright. Then there would be a transfer of the copyright to the secured creditor or to the foreclosure—

CHAIR—So you are saying that that should not be part of this legislation—that it should not be allowable or that it is not appropriate?

Lorin Brennan—No, quite the contrary. The legislation should cover it but, when that happens, one should make sure that the property rights that are transferred conform to intellectual property law. We are not saying that that should be excluded at all. I will use a film example. Assume that I have a group of DVDs. If I have a laboratory that has 1,000 DVDs and

they are holding them on consignment, granting them the security interest just in those DVDs should not automatically give them copyright in 'the related copyright' unless it was acquired. By the same token, if, when I acquired the book, it was subject to, say, a prior restriction then that prior restriction should apply. If the copyright for the book publisher is subject to a licence that says, 'restricts further licences or sublicences', the bill should not invalidate those licence terms that restrict prior sublicences. Those are the types of things that we are talking about.

CHAIR—What are the implications of this bill for your industry, the international film industry?

Lorin Brennan—What we are concerned about for the film industry here is that it is going to make it more difficult for us to obtain finances. There are going to be additional concerns from the lenders: how do I make a security interest, how do I go about perfecting it, how do I enforce it and against whom? That demands additional documentation, trying to draft around or accommodate different changes in the bill, which makes it more difficult. What happens in financing transactions is that when times are good people draft a contract and they go ahead and figure everybody will get paid. It is when times are tough that people suddenly realise that maybe their contract did not conform to exactly what the law does, and then you have a restriction on issuing finance. Unfortunately, we are in that stage now—at least, we are in this country.

Susan Cleary—I would like to add that IFTA has about 20 banks or affiliated financial institutions that provide lending to members. Entertainment lending, production lending, has a very low default rate, estimated in the last couple of years at between three and four per cent. That is a very low overall industry default rate. Anything we do right now, especially with the economic crisis spanning the globe, to add more risk in there for lenders who are already leery and make our industry less able to have such a low-risk assessment based on the default rate and on the fact that banks are able to search for and locate any of these priorities and assess the risk very definitively, is ultimately going to have a negative impact. These pictures are financed one by one by one. These are not pictures that studios order 16 of and have a round of credit they are able to use to greenlight their own pictures through their own capitalisation; these are individually cobbled together internationally with the help of local national distributors plus the banks.

CHAIR—Can I ask you both, then, how this law differs from the Canadian or New Zealand laws? Are you familiar with those?

Lorin Brennan—Yes. I am familiar with what they are trying to do in Canada and probably a little bit more familiar with the New Zealand law. Here is what happens globally and internationally, because we are participating in a process at UNCITRAL. You may be familiar with that process.

CHAIR—I am not personally, but others around this table might be.

Lorin Brennan—I have talked to members of the Australian government who have been involved. What has happened as a process is that there has been a move internationally to try to upgrade secured financing laws around the world, and the UN Commission on International Trade Law has drafted a legislative guide on how to do that. It takes concepts from the secured

financing law in the United States and some from New Zealand and Australia and incorporates them into a model law. One of the things the legislative guide says, however, is that anything in the guide that is inconsistent with intellectual property law steps back to intellectual property law. So the guide does not make any changes in intellectual property law. In the US we have a similar law, a state law, but we also have in that law a specific deference to intellectual property law and statutes. There is a process now going on at UNCITRAL to try to develop what it calls an intellectual property annex to describe areas where the intellectual property law may be inconsistent with certain recommendations in the general secured financing law and suggest how those can be adjusted or at least identify the issues.

I think the proposed bill takes some inspiration from that law as well as the laws in New Zealand and Canada. So in a global sense this is an issue where, for better or for worse, Australia gets to be something of a lead ship because I think other countries will be looking at what you are doing and looking at it in light of the processes. The UNCITRAL process is still going; there is still some work to be done on what it calls the intellectual property annex. I hope that gives you some framework, when we say we are familiar with other laws.

CHAIR—If there was a recommendation from this committee to make the PPS law in respect of intellectual property apply so long as there was consistency with IP law would that make it similar to the law in New Zealand and Canada?

Lorin Brennan—As I recall it, the law in New Zealand does not have deferenced intellectual property law, but I have not looked at that for a while. The law in the US does. The law in Canada has some deference, and one of the things that the Canadians are still trying to work out is how their law applies. I cannot tell you that I am an expert on the New Zealand law; I only read it once, about six months ago. So on that I could not tell you more. That is my memory, but I could be wrong.

CHAIR—I will just pass over to some other people for some questions.

Senator BARNETT—Thank you very much for taking the time to present evidence and provide your submission. It is much appreciated. I have a few questions. Firstly, in terms of your members can you clarify, for the record, your Australian members. Who are they? I did not hear correctly, and I may have missed it in your submission. Can you just clarify who they are.

Susan Cleary—We have three Australian members that are based in Australia. Arclight Films are based at the Fox Studios, although they are an independent company and one of our members. We also have IFM World Releasing Inc.—Tony Ginnane’s company—which is a production and distribution company in Australia but also has LA offices. Also Film Finance Corporation Australia, which has now merged with the Australian Film Commission, is a long-standing member of IFTA. They are one of our affiliated financial institutions because they provide funding for Australian productions.

Those are our Australian members. We also have five other member companies that provide finance related services. They just have offices in Australia; they are not based there.

Senator BARNETT—Can we assume that they are familiar with your submission and support it?

Susan Cleary—It is publicly noticed. We send all of our news of filings and different things out to our members—in an electronic newsletter: the IFTA *Bulletin*—so, while they may have seen it, the chances of their going and looking at the filing, and reading and commenting, is not very likely. However, I can tell you that Tony Ginnane sat on our board of directors and is very familiar with a lot of the advocacy work that we do, especially in Australia.

Senator BARNETT—Sure; thank you for that. Obviously you feel as though your submission will be advancing the cause and protecting their interests. If the bill goes ahead without taking on board your views and your recommendations—

Susan Cleary—Most definitely our Australian members also have standard licensing and financing practices that the entire worldwide industry uses.

Senator BARNETT—As I understand it, from reading your submission and listening, there is a key principle that the personal property law principles do not necessarily apply to intellectual property. In fact they do not apply, and they are different; therefore the bill before us should reflect that principle. Is that a fair assessment?

Lorin Brennan—We could not have said it better ourselves.

Susan Cleary—It is very fair.

Senator BARNETT—I am just looking at page 3 of, I think, your first submission of 15 August last year. Section 47, point 8 on page 3 is about what we have referred to in the hearings as the conflict-of-laws issue. It has been brought up pretty consistently by a number of witnesses, so it seems as if you are on the money there.

In terms of the law as you understand it—just so the committee are aware—you say:

> … a security interest in terms of intellectual property is determined by the law of the country where the security interest is "granted."

That is different to the proposal in the first draft at least of the bill, where it set out that the principle is that it looks to the law of the protecting country. In the latest bill, you may have noticed that those provisions have been removed and now there is some debate about having them put back in again, perhaps in a different form. What is your recommendation to this committee regarding what we refer to as the conflict-of-laws provisions, which are not in the bill but perhaps should be in the bill? Would you like to put forward your views as to how the bill should look.

Lorin Brennan—Sure. And I will mention to you that this issue is now a matter of some debate at the international level. It is probably going to be debated at the UNCITRAL forum here in New York in April. We have spent a lot of time looking at this with other IP experts, and I think the way it comes down is this. If you look at the security, there are three sorts of aspects. There is the creation of the security interest, which is, in broad terms, a contractual transfer. Contract type laws are usually determined by a unitary law, where the contract is made of the law of the contract. So under our conflicts duty you could say a security interest is made under the law either where the security interest is made or where the grant is made.

By the same token, enforcement is effectively a transfer, again, under certain conditions. Nobody wants to do enforcement in every country in the world and so you pretty much can say that the applicable law is the law where the enforcement occurs, and both of these are obviously subject to the laws of the forum, so if there are public policy laws that do not enforce certain contract terms or certain foreclosures because they do not meet your due process requirements, that is okay. But, when it comes to the effectiveness of the security interest against third parties and priorities, this determines how the rights are enforced. It determines who can enforce them and where they are enforced, and that has to be, at least in my view, determined by the law of the protecting country. Copyrights do not exist worldwide. They exist country by country, and it is up to the national law to determine who owns the rights and who has the ability to enforce them. Since effectiveness against third parties and priorities rules deal with enforcement of the right of the third parties, I think they need to be determined by the law of the protecting country—otherwise, you run into incredible conflicts.

I will give you an example of one conflict that comes up very simply, and this is easiest in patents. Let us assume that I am in England, I happen to be an English citizen, and I own a patent in Australia, but the patent has never been issued in England. If you use the law where the grantor is located, and I happened to grant my security interest from England—and there is no patent in England—then it would not be valid because there is no patent there, even though I have a valid patent in Australia. So, for priority and third-party effectiveness, you need to look at the law of enforcement. I hope that is not too long an answer.

Senator BARNETT—It is a bit of a stark example and probably a good one for us. I appreciate that, in that it provides further food for thought and supports the argument you make in your submission. Further down on page 3 of your submission to the Attorney-General's Department, you make some comments about section 92, priority conflicts. Could you assist the committee by explaining the arguments in support of your proposition. You said:

… the systems use different priority rules and cover a different range of transfers. … The Bill should be amended to remove such conflicts.

Can you explain the rationale for that,

Lorin Brennan—It is easiest, again, to see this in the patents and trademark area. If you look at your patent statutes, you have a priority rule that says that bona fide purchasers who record in the Patents Act take priority against those who are not recorded there. Our review of the case law would seem to indicate that a secured creditor is a bona fide purchaser. What if I have secured creditor who records in the Patents Act and then I have a secured creditor who makes a filing only under the Personal Property Securities Act? Which one prevails? The acts say two different things. What happens if the security interest is foreclosed? For our business, it is essential to search chain of title. We cannot just assume, because somebody has existing rights, that they can utilise those rights. We have to trace the rights back, in the movie business, to the initial authors or to the initial inventors to see who parties are. Therefore, if I work through that step and I see one party obtained rights by foreclosure on a security interest and one party obtained it under the other patent, I do not know who owns what.

Senator BARNETT—I appreciate your comment. I will move on, in light of the time. I want to touch on your concerns about section 38. On page 5 of your later submission, you say:

… this approach is in conflict with settled Australian intellectual property law and constitutes, in our view, a type of compulsory license incompatible with TRIPS obligations.

So you have got real problem with section 38, it seems, and its disregarding the current understanding of Australian law. Is that right and can you further elaborate?

Lorin Brennan—Thank you for quoting our advocacy. I am glad that it got your attention. It is always difficult for a lawyer to comment upon the law of another country, so I hope you take our submission as being a statement of advocacy to get attention and at the same time to indicate that we think this is an issue worth reviewing. I will of course defer to your expertise and the expertise of members of your legal community, but in our view it does seem that section 38 may well raise questions about intellectual property law. Again, this has been discussed on the international level. The idea is that there is a separation between intellectual property and goods, and gaining a possession of goods just does not give you any rights in the intellectual property. Let me be clear. Sometimes when we obtain possession or ownership of goods, we have certain rights to use those particular goods under intellectual property law. There are certain exceptions, the main one being the exhaustion doctrine: if I buy a copy of a good with the intellectual property rights exhausted—I think in the Copyright Act there you use the term 'published'—then they can no longer be exercised. We have no problem with that, but it seems like intellectual property law already deals with this question of the difference between intellectual property and goods.

Section 38 in the November draft was amended somewhat from what the Attorney-General proposed in the August draft. We are not quite sure it solved the problem. One of the concerns was that the examples given in the explanatory notes were the same examples for both drafts. The example given was that somebody has a patent and they have two robot arms, one in factory A and one in factory B. You have got a security interest on the robot arm in factory A. There is no problem with that. If a secured creditor takes it over, you would assume that they would have the continued right to use that arm under an implied licence. But the example says no—just because they have a security interest in the goods they could exercise the patent to prevent use of the robot arm in factory B, which just seems to go too far. If you are going to grant security interests in copyrights or patents or trademarks which are separate from the goods, you should say so in the financing device and there should not be an implied statement that, because you get goods, you get intellectual property.

In our business, the movie business, this could be terrible for us. Let me tell you a practical place where this is a huge problem. In the record business and the movie business we are now in the business of, many times, making our records and DVDs available on consignment—that is, we ship copies to the local retailer and they have a right to return the copies if they are unsold. We assume that shipment to the retailer is not a first sale or that a publication does not exhaust the rights so that we can get them back.

I think one of the cases your High Court considered had that with a shipment of copies of video games. Consoles were playing these video games. It does not give you the copyright. But if you now say that because somebody has shipped these DVDs and has possession they are assumed to have an intellectual property interest, and if they grant a security interest they grant related intellectual property rights, even if it does not say so, then in effect you are saying that if somebody takes a security interest or ownership of goods they are getting the intellectual

property. This does not conform to the way the intellectual property business works. Our personal feeling is that it is just unnecessary in the bill because these distinctions are so easily worked out in intellectual property law.

Senator BARNETT—So do you suggest the deletion of clause 38 or an amendment to it? You have made it clear that they are two distinct property rights: the tangible property interests and the intellectual property interests. Should they be treated separately and should clause 38 be deleted or amended?

Lorin Brennan—In our view, clause 38 should be deleted, as it is unnecessary. The drafters of the bill were concerned about your registry. They said they did not want to fill up the personal property security registry with registrations that said, 'We have a security interest in the inventory, plus the intellectual property.' But our view is that you do not need that. If you have a security interest in the inventory and the intellectual property rights have been exhausted, you do not need 38. If they have not been exhausted, all the secured creditor gets is the inventory, and if they want to cover the intellectual property then they are going to have to get a licence to cover it. So, in our personal view, 38 is unnecessary. It is covered by IP law and it will actually create more confusion than benefits.

Senator BARNETT—So your advice is that the law already takes that into account.

Lorin Brennan—Right. Intellectual property law already takes into account the distinction that 38 is trying to address.

Senator BARNETT—Okay. Thank you very much.

Senator TROOD—I want to take up the question of the overlap between intellectual property law and the provisions in this bill. I want to ask you whether your position is that the references to intellectual property in the bill should be removed altogether or whether you think that they should remain but with appropriate amendment. I am looking, for example, at your 15 August submission. On page 3, at point 8, you mention what you call 'adjustments' to the bill. That suggests that the bill could be, from your perspective, redrafted in ways which would accommodate your interests. Is that your position, or is it your position that the intellectual property concerns that you have are best accommodated by removing them from the bill altogether?

Lorin Brennan—This is going to be comprehensive legislation. To remove intellectual property would leave a gap because you would not know how to finance it. So we do think that the bill could include intellectual property. The question is: what is the best way to do it? The most recent draft, the November draft, had a deference to other professions in the national law there. It was hard for me to understand the full scope of that deference and whether or not the bill would defer to intellectual property statutes such as the Patents Act, the Copyright Act and the Trade Marks Act to the extent of inconsistencies. If that provision were included, I think it would be enormously helpful because then you would indicate that the bill does not displace intellectual property law. That in itself would almost be sufficient.

The only thing that you would have to say is that sometimes in other countries which shall remain nameless—and this is from our experience—the courts get confused about what that

difference is. So adjusting a few provisions—as we have indicated here—in the bill to indicate they would not apply to intellectual property would give clarity, we think, to courts and practitioners that those provisions are not intended to apply. Thus that would allow the bill to deal with intellectual property. Certainly there are many aspects of the bill that would be compatible with intellectual property.

Senator TROOD—So you can see some value in the need to include a reference to intellectual property in the bill.

Lorin Brennan—Sure.

Senator TROOD—I think you said it would leave a gap in the law if it were left altogether, so some of the financing arrangements that you might want to undertake using the mechanisms in this bill would be lost to you.

Lorin Brennan—Sure. If we did not have this bill one would ask, 'What mechanism would you use to finance intellectual property in Australia?' I assume that this bill is going to displace all of the local and provincial personal property laws. You would not know what to do otherwise. This is going to be a comprehensive reform that covers all forms of financing. We need to have some financing mechanisms for intellectual property.

Senator TROOD—I see. In relation to this inconsistency with TRIPS, you replied to Senator Barnett about section 38. But are there other more widespread inconsistencies that you think trespass across the arrangements and the obligations that Australia has undertaken in relation to TRIPS?

Lorin Brennan—This is an area that has now become a very interesting area in international scope. When the international treaties were drafted they were thinking in terms of property rights and they only had certain provisions that applied to the transfer and exploitation of those rights. We are now in an area of law for which worldwide it is about how we deal with commercial law aspects and their relation to the property rights in international treaties. I cannot say for certain here that we would say that there is absolutely positively this problem in this area. What we would say instead is that this is an area that we think needs careful consideration. The reason this has come up is that with some countries these laws become self-executing, although I do not think that is in place in Australia, and that has caused a number of people to raise these things and say, 'What does it mean?' So our goal here was to raise the flag in order to ask you to think about it. We hoped we would not get to there so we could use this as a way to say, 'Let's adjust these small areas of the bill so that we could make it compatible with intellectual property'.

Senator TROOD—I see. So it is more of a possibility that there is an inconsistency here which the drafters of the legislation needed to be conscious of. That is rather than it being very clear that there is a contravention of the law.

Susan Cleary—Yes. It is better to catch it now in drafting than after it has been enacted.

Lorin Brennan—Unless you are a litigator.

Susan Cleary—Yes. You have to keep the lawyers in business!

Senator TROOD—Even then it may not be clear.

Susan Cleary—True enough.

Lorin Brennan—We have to keep the judges in business as well!

Senator TROOD—I understand that; yes.

Senator BARNETT—If I could interpose for a moment, I have a question on the section 38 matter that we discussed earlier. Senator Trood has just touched on it. Just simply, does the effect of section 38(1)(c) alleviate any of the concerns that you have?

Lorin Brennan—This is in the November draft of the bill—correct?

Senator BARNETT—Correct. It says:

… the payment or obligation secured by the security interest is (in addition) secured by a security interest that is attached to the intellectual property rights.

Lorin Brennan—I remember reading this provision several times to see what it does. It is a provision that gives with one hand and takes away with the other, and it was difficult to see exactly what the revised scope does. The same example was given in the new explanatory text, and we did not know whether that was because somebody did not intend much of a change or whether it was a case of ‘People are busy and there’s only so much you can do’. Our sense of section 38 is that if you ask, ‘Why do we have section 38 in the first place?’ the problem is eliminated. There is a provision prior to 38—I think it is 36, although I cannot remember exactly—which talks about making a reasonable description of collateral. Section 38 seems to add something to the bill that only causes more confusion and does not solve the problem. It tries to solve a problem that does not exist, at least in our view, for intellectual property law.

Senator BARNETT—Thank you very much. Do you have any concerns regarding the proposed enforcement provisions in the bill, particularly as they relate to intellectual property rights?

Lorin Brennan—We looked through the enforcement provisions and I cannot think of anything in particular. The only issue that we raised on enforcement was priority with respect to enforcement of judgement, which is a rather technical issue, but I think it is important for searching chain of title. In general there are no concerns about the enforcement provisions that are unique to intellectual property.

Senator BARNETT—You have made some very forceful arguments noting the key differences in the legal principles as they apply to tangible assets and as they apply to intellectual property. I am just wondering why either your members or others in this country who are more interested in and focused on their intellectual property and involved in that commercial arena have not been more active in expressing their views and concerns. That is perhaps something it is difficult for you to comment on. We have had a lot of interest in other areas but not so much in the area of intellectual property.

Lorin Brennan—We spent a lot of time in a user trial process working on this. There are a number of intellectual property lawyers, primarily in the United States, Europe and several Asian countries near you, who have now become interested in this. What we find is that the crossover between intellectual property and secured financing is such a rarefied specialty that it is very hard to find people who have experience and understanding of both. When you talk to intellectual property lawyers in our country and mention secured financing, their eyes glaze over and they tell you they have an appointment or their root canal. If you are with secured financing lawyers and you mention intellectual property their answer is: 'Who're those people? We don't know what they do. You're off in another corner. Get into the modern world. Do it the way we do it.' It is very, very hard to get the crossover. One of the reasons for that, which you may find in your country as we have in ours, is that not enough people deal in the transactions or see where the problems are. Many lawyers just draft the contracts and figure the contracts work for what is said in the contract. They never really look at the law because they figure it sort of works. Nobody sees the disconnection until the bad times come. Unfortunately we are beginning to see, at least in the United States, some additional litigation in these areas that is showing areas of disconnection. We would encourage a preventative law process to save you some of the litigation experience that we have had.

Senator BARNETT—Thank you again.

CHAIR—Senator Trood has one last question for you.

Senator TROOD—The point I want to seek your guidance on is with regard to the Hague Securities Convention. Several of those who have appeared before the committee have urged that Australia should sign and ratify that convention, and I am wondering whether or not that is a matter of any importance to your members?

Lorin Brennan—Good question. I think that this is an answer we do not have any knowledge about. Is this the Hague Securities Convention? I am sorry I do not know what that is.

Senator TROOD—The full title is the Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary. It may not have any particular relevance to intellectual property rights, but the United States has apparently been one of the first countries to sign up to the convention and we have been encouraged to include a recommendation in our report that Australia take that path as well. Since you are one of the few people who have contributed to the committee internationally, I thought it would be useful to see whether or not this applied in your circumstances or not.

Lorin Brennan—We would be pleased to look at it because there are a number of international treaties or proposals in this area such as on the assignment of receivables in international trade. I am not sure about the Hague convention on the assignment of securities but we are familiar with some of these other international treaties that deal with financing and we would be pleased to look into that. If you would not object, we will try to provide you with some views, if we can, at a later time.

Senator TROOD—I would be grateful for that. Thank you.

CHAIR—Ms Cleary and Mr Brennan, we have come to the end of our questioning. Thank you very much for making yourselves available over there.

Susan Cleary—Thank you. We really appreciate the time that you have spent looking over our submission, asking very thoughtful questions and for obviously reviewing this extremely carefully. We appreciate your attention to these matters. We think they are serious and important for our industry, and we know you are doing your best to put this law together for your country and for the international community too, which will be utilising it.

CHAIR—Thank you very much to both of you again for your submission and your time.

[3.08 pm]

BEGG, Mr Simon William, Private capacity

Evidence was taken via teleconference—

CHAIR—I welcome you to our hearings. Do you have anything to add about the capacity in which you appear?

Mr Begg—I am a lawyer by training and have been admitted to practise as such. I have a reasonable amount of experience in the subject matter of your Personal Property Securities Bill dating back now at least 40 years. It is probably a little longer—closer to 50.

CHAIR—Thank you. We have your submission, which we have numbered 11 for our purposes. Before I ask you to speak to that submission, do you need to make any changes or alterations?

Mr Begg—No, I am happy with it as it is.

CHAIR—Would you like to talk to us about that submission very briefly? Then when you have finished we will go to questions.

Mr Begg—I can talk extremely briefly about it, because I have really said it all in there. I have detailed my lengthy experience with this, and the only thing I would add is that I had a parallel experience with the relevant credit legislation, which has a very similar history. It too should have been modelled on an American model—what is known in America as UCCC, the Uniform Consumer Credit Code—but again the draftspeople out here wanted to re-invent the wheel, so they declined to follow the American drafting, which in that particular case was extremely good, and instead they produced in 1978 or thereabouts something which was extremely bad, which became the credit legislation of 1981, and they had to redo it completely in the late eighties and early nineties, replacing it with the present Queensland legislation. This legislation looks as if it is following a very parallel path. There are extremely good models to follow—Canadian models or a New Zealand model—but the Australian draftsmen, typical of their breed, I fear, would like to re-invent the wheel. They are certain to get it wrong, and when they do it will be a very costly process to fix it. They could easily have adapted one of the Canadian models or the New Zealand model, and they would be no worse off than those people were; then they would all have been talking the same language and it would have been a lot easier to deal with. That really is my message.

I have made mistakes in the past in going along with this and hoping to fix it later, and I have found that it basically does not work. I was persuaded nearly three years ago, in 2006, not to raise these concerns when this project was first proposed and it was questionable whether the banks were going to support it or not, and much against my better judgement I, in effect, let it go through to the keeper. I was told all my concerns—nomenclature, drafting style and the like—would be addressed later, but they were not, of course.

Really that is all I can say. I just reiterate my written submission. I endorse Professor Duggan's submission because he alone among Australians has the expertise to deal with this subject matter. He is in the unique position that he knows the Australian position intimately, because he has been involved in teaching it out here, but now teaches the same subject matter in Toronto, Canada, and has also lectured in New Zealand. So he knows all these pieces of legislation from a teacher's perspective, and he is a very able teacher.

CHAIR—I will start with a question. The proposition you are putting to us is that the definitions and wording of the bill are so new and are forging such a new path that it would be better to replicate what is happening in Canada and New Zealand to avoid mistakes.

Mr Begg—Pick one of the Canadian provinces—Saskatchewan or Ontario—or New Zealand, copy it nearly word for word, see how it works and make the changes when you know how it works. When you tinker, you are certain to get it wrong.

CHAIR—You gave us an example about the registration process. As I understand it, the bill proposes to register, say, the mortgage over the land rather than the land with the mortgage. Is that right?

Mr Begg—Actually, the bill is proposing to register the property instead of the mortgage over the property.

CHAIR—I see.

Mr Begg—Whereas, if you were talking land, you would propose to register the mortgage in respect of the land. They are proposing to register the personal property in respect of the security. They have got it arse about, if you like to put it that way.

CHAIR—That is not the way it is done internationally—in New Zealand and the Canadian provinces—is that right?

Mr Begg—No, I have never seen it done that way anywhere in the world in any context. It is crazy.

CHAIR—Do you have reasons for why that model has been picked?

Mr Begg—No, other than somebody criticised it when the drafters put it up here. They had a choice to say, 'Whoops, we are sorry—we got that wrong, we'll fix it.' Or they could have said, 'We'll dig in our toes, we think it works and you can like it or lump it.' They have chosen the latter part.

CHAIR—Can you point us to any other pitfalls in the legislation or is it all premised on that?

Mr Begg—No, it is not. That is a nomenclature, a minor idiosyncrasy. The major problems are going to come out in detail when it is discovered that what they thought was replicating the same concept as was evident in Canada or New Zealand has been expressed in different words. When they discover that the words they have used produce a different outcome the problems are going to begin. By choosing to do it in fresh language instead of copying the same terminology

and language as has been used in North America, they are going to find in due course that on some occasions what they had thought they had achieved as the same meaning has turned out to have a different meaning. That is when the fun will start.

CHAIR—Yes.

Mr Begg—We do not know when that will be. That is the problem. I picked one example right at the end of my submission, related to, I think—

Senator TROOD—Section 50?

CHAIR—Section 50—I was just going to ask you about that. This is an additional—

Mr Begg—My paragraph 4, anyway—section 50. Professor Duggan has very kindly written me a little note, which I have sent in with it. That is simply an example of where this could go haywire. It probably was not meant to go haywire. In fact, likely enough it was not meant to go haywire, but it could well do so.

CHAIR—All right.

Senator BARNETT—I am not sure how your memory is, but I think we worked together for a few years in 1984, 1985 and 1986 when I started at Corr & Corr, then Corrs Chambers, Whiting and Byrne.

Mr Begg—Yes, indeed. I was at Corrs from 1957 to 2000.

Senator BARNETT—I am sorry not to see you in person today, and I understand the circumstances you are in.

Mr Begg—We do have a little difficulty—bushfires reign up here.

Senator BARNETT—Yes. Greetings to you anyway.

Mr Begg—Thank you.

Senator BARNETT—The chair has asked about some of your concerns and you have expressed some very strong views. We had some issues raised during the hearings we had in Sydney and I thought I would flag them with you. One is in relation to section 235 and the fact that negotiations should be undertaken in a ‘commercially reasonable manner’. What are your views on the inclusion of those words?

Mr Begg—I am sorry, unfortunately I do not have a copy of the bill in front of me. Section 235 addresses what?

Senator BARNETT—This is on ‘Rights and duties to be exercised honestly and in a commercially reasonable manner’. It is in part 6.2, ‘Exercise and discharge of rights, duties and obligations’.

Mr Begg—By a lender or a holder of a security interest?

Senator BARNETT—Yes.

Mr Begg—I would have expected that ought not to cause a problem. The trouble is that without reading that in detail I really do not know. What I would want to do is compare it with the exact language that is used in the North American context and what judicial history that has had if the same words have been used—and I do not know that. If this is an Australian innovation the first question you would ask—and perhaps not so much in relation to America but to a Canadian province—is: when a debtor complains or a competing security holder complains that the powers have not been exercised reasonably, what actually happens? What is the judicial history? If you do not know that, it is very hard to comment on what this proposed change would do. This is the difficulty in trying to deal with this bill.

Senator BARNETT—That is okay. A number of the witnesses have expressed strong views in opposition to the use of those words because, basically, the common law in Australia at least has not determined exactly what 'commercially reasonable manner' means. They want to allow the agreement between the two parties to determine that rather than leaving it for the courts to determine what is commercially reasonable.

Mr Begg—Okay. I am not going to express a dogmatic view on that issue because I am not sufficiently familiar with what the courts have done without those words. If the courts solved the problem in a sensible fashion without the words, you would not put them in. If you do put them in, what difference is it going to make? To make an assessment of that you really have to do a lot of legal research, therefore I cannot say what I think those words would do.

Senator BARNETT—That is okay. Can we move to the next matter that has been raised this afternoon by the Independent Film and Television Alliance. Their view is that the law applies differently to tangible property than to intellectual property.

Mr Begg—Are they suggesting this law applies differently or the law without this bill?

Senator BARNETT—They are suggesting that in Australia today the law applies differently to tangible property than it does to intellectual property and that this law does not recognise the differences. They use some examples. I am just wondering if you have a view with respect to this bill and its application to intellectual property rights and if you see that as being fair and appropriate.

Mr Begg—I am not really the right person to ask. I have never pretended to be an intellectual property lawyer. This is the sort of question you ought to ask Professor Lahore or his wife, Ann Dufty. They write the book on intellectual property law. My guess is that this law, at least in its North American application and hopefully its New Zealand application, would have the same impact on intellectual property as it would have on other tangible properties. It is likely that it is a furphy, but you really have to ask an intellectual property lawyer what the differences are.

Senator BARNETT—That is fine. Do you have a view with respect to property under lease?

Mr Begg—Yes, I do.

Senator BARNETT—We have had differing views put to the committee as to the merits of (1) leaving the bill as it is so that property under lease is covered and (2) having an exemption so that those with a leasehold interest to the owners of that property are not prejudiced in any way.

Mr Begg—I do have a view about that. The whole concept of this legislation in its original form as article 9 of the United States Uniform Commercial Code was predicated on treating interests that had the same effect as security interests or avowed mortgages in the same fashion. So it was designed to pick up things like hire-purchase, conditional sale and Romalpa clauses. The issue was that a hire-purchase is, of course, a lease—a lease with an option to purchase. The only distinction between that and a lease without an option of purchase is that the latter can be made, in effect, a lease with an option of purchase, although there is no actual option if you set the terms of the lease correctly—in effect, the lessee is forced to buy. He may not have any option to buy but there will be an expectation of a sale at the end of the lease. It becomes commercially impossible to distinguish the two transactions, but their effect is exactly the same.

On the other hand, in the case of a rental car, if you go to Avis or Budget and lease a car for a week or even a day, it is quite clear that you never intended to buy that car. There has to be some method of distinguishing a transaction like that from a transaction where you get a large piece of commercial machinery which is leased—governments lease railway stock; that sort of thing—for 10 years maybe. The reality is that those transactions bear greater similarity to a sale transaction, where the purchase price is secured, than they do to a commercial lease. Somewhere, there has to be some method of distinguishing the transactions. The accountants did it first from a taxation perspective. If you are familiar with taxation law in respect of personal property leases, you will discover that the accountants have rules as to how you distinguish the two. Eventually, the distinction has to be arbitrary. You have to draw a line somewhere. The North American model treats a lease for less than a year as being in substance like a rental car; leases for more than a year are treated as, in effect, a sale. But if you exempt all leases you might as well not bother with this law at all, because you will then discover that all ordinary car finance, that sort of thing, will all be done by lease. There will not be any other way. People who buy them will operate exactly the same as hire-purchase currently does.

Senator BARNETT—So what do you recommend is the best way to go?

Mr Begg—I would copy one of the Canadian provinces or New Zealand. You will probably find that they have done it in exactly the same way, and I would do exactly the same. This is one of the issues. Eventually, you must choose an arbitrary solution to distinguish a genuine lease from one that is really a financing. The borderline between the two is a blurred borderline. You can pick hard cases on either side of the line; you just have to draw the line somewhere. If you simply say that all leases are exempt then you are saying, in effect, that all finance of consumer durables will be by lease and no other way, because financiers will immediately pick a method to dodge the impact of the legislation.

Senator BARNETT—Finally, I do not know whether you have put your mind to the issue of privacy, whether you think we have got the balance right. Do you have a view?

Mr Begg—I am sure they haven't. The issue arises as to whether a consumer's name should be in a name-indexed register if he gives security over a vehicle. For example, if you go and finance a motor car, should you be shown as the person who granted the mortgage? Under the

proposed bill the mortgage in fact would be known. So when you search the car you discover there is a mortgage over it, but you cannot find out who gave the mortgage. I think that is a complete perversion of privacy. It has always been regarded as part and parcel of obtaining finance. If you obtain finance in respect of your house, the fact that you gave the mortgage is there on the register for everybody to search and the same should be true of the motor car or anything else. The public has an interest in knowing who granted the mortgage and they do. If you are thinking of buying this item of property or taking a security over it, it is not enough to know that somebody or other granted a mortgage before you; you want to know who that was. Before you part with your money, either to buy it or to lend somebody some money on it, you have to establish who owned it because, if you cannot do that, you get nothing. If obstacles are put in your way because of privacy then your answer ought to be, 'I'm sorry, if I can't find out who owns this item, I won't part with my money.'

Senator BARNETT—But isn't the argument that you would know who owns it because you are actually negotiating with the potential vendor?

Mr Begg—But you do not know that he owns it; that is the problem. If it is a brand new car, you assume you know who owns it, although in fact you probably do not because wholesale car finance is extremely complex—the chances are that it would never have occurred to you that General Motors Acceptance Corporation owned it, and not the dealer who is purporting to sell it. But putting that to one side, if it is a second-hand car you are buying, you do not know who owns it. You know somebody who is driving it and who says he owns it, but in fact he could be a thief or he could have been duped by somebody who was a thief.

Senator BARNETT—But doesn't the registration provide that information?

Mr Begg—Yes, but the registration is not an ownership certificate. That is really one of my points. I wanted this legislation to provide a title register in the same fashion as Torrens title does for land. And it is technically possible to do it. You could not have done it 30 or 40 years ago because the computer technology then would not have made it possible to do this cheaply, but today it is possible. A registration certificate merely says who is registered. It says nothing whatever about ownership. It makes assumptions about ownership but the person who is registered is not the owner—or not necessarily.

Senator BARNETT—'Not necessarily'; I mean, there is a prima facie view, I guess.

Mr Begg—Well, that is all it is. In order to establish ownership, you have really got to trace the title from new. It is like old-law land. The Torrens system for land is so much better than the old law for land, and this legislation could do that too. The computer technology exists to do it but nobody has chosen to take that up.

Senator BARNETT—You have made some very strong and valuable points, and we note your views about Professor Duggan as well. So thank you very much for your evidence.

Mr Begg—If you really need to hear from an expert, you should try getting him on the telephone because he is the man today who, of all Australians—20 million-odd of us—he is the man who knows the most.

CHAIR—Mr Begg, thank you. We have actually had the privilege of his submission and of hearing from him.

Mr Begg—That is good.

CHAIR—So you have just supplemented his views about this legislation.

Mr Begg—We have worked together over the years, but yes.

CHAIR—Thank you very much for giving your time for the committee this afternoon.

Mr Begg—Thank you.

[3.41 pm]

COX, Mr Berkeley Clarendon, Member, Australian Securitisation Forum

WHITTAKER, Mr Bruce Geoffrey, Member, Australian Securitisation Forum

Evidence was taken via teleconference—

CHAIR—Welcome. Do you have anything to say concerning the capacity in which you appear?

Mr Cox—I represent the Australian Securitisation Forum through its member Mallesons Stephen Jaques, of which I am a partner.

Mr Whittaker—I also represent the Australian Securitisation Forum, by virtue of being a partner of another member, Blake Dawson.

CHAIR—The forum has lodged a submission with us, which we have numbered 26 for our purposes. Before I ask you to speak to that submission, do you need to make any changes amendments?

Mr Cox—Not specifically. There are a couple of points that we could withdraw; we will go through those as we go.

CHAIR—We will ask you to do that as you provide us with a short opening statement and some comments about the submission. Then we will go to questions.

Mr Cox—Thank you very much for inviting the Australian Securitisation Forum to appear before the inquiry. We appreciate the opportunity to be consulted on this historic piece of legislation. The ASF is the peak industry body for the securitisation industry in Australia. Its members include Australian banks and offshore banks, other approved deposit-taking institutions, investment banks and specialist service providers such as trustees, rating agencies, law firms and accounting firms.

By way of background and for the benefit of members of the committee, what is securitisation? In a nutshell securitisation specifically involves the issue of debt instruments such as bonds or medium-term notes via a special purpose vehicle, the proceeds of which are then used by the special purpose vehicle to buy a pool of receivables such as mortgage loans or trade receivables in a transaction which is designed to isolate those receivables from the insolvency risk of the seller such that the recourse of the transferee, the special purpose vehicle, is to the debtor under those receivables, or to the borrower under mortgage loans. The special purpose vehicle then grants security over all of its assets to a security trustee who holds the benefit of that security for all the secured creditors including the note holders and other service providers such as hedge counterparties. So you can see that there are a number of aspects to that type of framework or transaction which are relevant in the context of PPSA.

Australia has a very developed securitisation market, one of the most developed in the world. The industry in Australia has contributed to the development of Australian financial markets by providing, historically at least, lower funding costs, greater competition, particularly in the residential mortgage sector, and, for some organisations that make use of the financing tool, diversification of funding and capital management.

While the industry has obviously worked very well under the system of law as it exists today, and, broadly speaking, it is sufficiently clear and certain for the market participants, the ASF acknowledges and appreciates the work that has been done by the Attorney-General's Department in putting together the bill and responding to our earlier submissions which, in many ways, appear designed to assist the industry. The primary advantage is recognising that a security interest includes a sale, for the purposes of the legislation, and then the ability to file a financing statement against the seller of those receivables, which is putting notice to all the world that the seller has in fact sold those receivables to the special purpose vehicle.

Our submission was consciously done in relation to securitisation-specific issues. It did not delve into broader issues raised by the legislation except where it was relevant to securitisation. If it would help the inquiry, I would be happy to walk through the key components of the submission or for Bruce or me to take questions on it.

CHAIR—From my point of view, it is pretty well set out where you have comments and concerns. You did say in your opening statement though that there were some issues you thought you would want to withdraw. Can you perhaps point us to those?

Mr Cox—Having looked at a few of these points in preparation for today, I think we could withdraw 2.2, and I can explain why if that would be helpful. I think we can withdraw 6.1 for two reasons: typically in a securitisation transaction a receiver would be appointed and a receiver knocks you out of having to rely upon the waterfall or the payment priorities in section 177, and also because the security trustee that I described earlier would be the primary creditor and a senior secured creditor under that waterfall. So if the security trustee separately agrees with its beneficiaries under the security trust what payment priorities are to apply as between those beneficiaries then we can address the concerns that we had in the drafting of the security trust deed.

Senator TROOD—I just have one question. You have referred in your submission to aspects of chattel paper. We have had submissions about this from others and there has been a suggestion that the whole matter of chattel paper be removed from the legislation. You seem to take the view that the references to chattel paper remain but the arrangements in relation to chattel paper be cleaned up to some extent. Is that an accurate description of your position?

Mr Cox—I guess we would accept the inclusion of chattel paper. We would probably not object to it being excluded. It is not a point that we have specifically discussed at the subcommittee level with the people who were responsible for the submission. The issue that has been raised in our submission relates to two questions. One is as to priority, that if chattel paper includes written instruments rather than those kept in only electronic form then, ordinarily, it is more difficult for a special purpose vehicle, as the transferee of that chattel paper, to physically take possession. I think the priority provisions in section 118 provide that if a third party takes full value without notice of the interest of, say, an SPV as transferee of that same chattel paper

then the third party will take priority. Clearly, we would prefer for the SPV in that case to take priority, provided it has perfected its security interest in the manner prescribed by the legislation.

Mr Whittaker—Perhaps if I could add a comment there, from the ASF's perspective I think the chattel paper provisions do not add to the value of the bill but, subject to the comments that are made in the submission, they do not detract from the operation of the securitisation industry either, if they can be reduced so that they only apply to electronic chattel paper rather than physical chattel paper. But I think either limiting it in that way or removing the chattel paper provisions entirely would both be acceptable outcomes for the ASF.

Senator TROOD—I see. The point that you made about the appropriate priority is a point that I assume goes to the existing situation in relation to chattel paper. Is that correct—that you want to record in the bill the arrangements that currently apply?

Mr Cox—I am not sure that the general law that exists today would deal with the situation. Let me just think about that.

Mr Whittaker—Perhaps I could comment. Chattel paper is a concept that does not currently exist under Australian law, so I think any introduction of chattel paper in this legislation is a change to the existing arrangements probably no matter how it is cast.

Mr Cox—I was heading in this direction: as between the transferee of that chattel paper and a subsequent person who acquires an interest—well, let us not talk about it in the context of chattel paper; let us just say an asset—if the transfer of a financial asset to an SPV were in turn, by virtue of mistake or fraud, transferred by the seller to a third party, it would be a question of who perfected that interest at law first. It would be who, in a sense, gave notice to the debtor. For instance, if the second sale was a sale for value without notice and it was a legal assignment—that is, that notice to the debtors was given and it was a legal assignment under the hand of the seller—then it would take priority. But ordinarily in our transactions we would set it up so that, if the warning bells were ringing in respect of the seller, the SPV would have the right to give notice to the debtors and perfect its interest and ensure that the debtors pay the SPV directly.

Senator BARNETT—Have you perused the regulations and do you have any views on them?

Mr Cox—We lodged a very small submission on the regulations. I think it was made to the Attorney-General's Department. I am sorry, I do not have that with me—but I can send it through.

Senator BARNETT—That would be of interest. We are obviously covering the bill, but that relates to the regulations of course, so that would be appreciated. On the issue of leasing, we have had views put both ways: some submissions say that the bill should cover leasing arrangements whilst other submissions say that they should be exempt to ensure that the owners of the property have their rights protected in case there is a failure to register. Does your forum have a view on that matter?

Mr Cox—We have not specifically discussed that question. I think we would fall back on the opening statement—we are comfortable that the existing system of law in Australia works in an acceptable manner but we appreciate that it at least appears that the bill is designed to assist the

industry in the context of being able to formally record the interest of a buyer in a pool of financial assets which would include leases. So we appreciate that there is value to be added by the inclusion of leases because leases are certainly a significant asset class in securitisation.

Senator BARNETT—In terms of the wholesale reform that would take place if this legislation proceeded, do you have a view with respect to the extent of the education and training that would be required not only of lawyers, accountants, financiers and financial consultants but also of others—in small businesses for example—in the community? Do you have a view on the extent of the education and training that would be required?

Mr Cox—It would be significant, but I would not think it would be in the context of small business on the basis that it would be relatively unusual for a small business to be a grantor or the seller of assets into a securitisation structure. But, for the financial institutions and others involved in this area, there would be a significant investment in time.

Senator BARNETT—Finally, do you have a view on the difference in the way the law applies to tangible property as opposed to intellectual property? Should there be a difference in approach with respect to intellectual property? We heard evidence this afternoon from the Independent Film and Television Alliance, and they expressed a view along those lines—that current understanding should at least be noted and acknowledged. I was wondering whether your members or the forum have a view on that.

Mr Cox—I am sorry; I do not have a view. Intellectual property rights are not typically, at least in Australia, the subject of securitisation transactions. Bruce, do you have anything to add?

Mr Whittaker—What you say is correct, Berkeley. In the context of securitisation I do not think there is a strong view one way or the other. As a general proposition, though—just speaking personally—I think, if we are going to introduce comprehensive reform, we should be comprehensive. Unless there is a particularly good reason to exclude intellectual property, I think my starting proposition would be that it is a good idea to include it.

Senator BARNETT—IFTA do not have a problem about being included. It is just that, like the conflict-of-laws matters that I think, Mr Whittaker, we discussed earlier this week in Sydney—

Mr Whittaker—We did, yes.

Senator BARNETT—they had strong views on that. Just on that matter, do you have views on the conflict-of-laws principles, as to whether they should be included in the legislation; and, if so, how?

Mr Whittaker—That, I think, is not an issue that the ASF working group really looked at, so I do not think we can comment on that, wearing our current hats.

Senator BARNETT—Not a problem. Thanks very much. I have appreciated your feedback and I am sure the committee has as well.

CHAIR—Mr Cox and Mr Whittaker, thank you very much for your time this afternoon—it is appreciated—and thanks for the submission from the forum.

Mr Cox—You are welcome. Thanks for the opportunity.

Mr Whittaker—Thank you.

CHAIR—Thank you both. Good afternoon. I declare this meeting of the legal and constitutional committee formally adjourned.

Committee adjourned at 3.57 pm