COMMONWEALTH OF AUSTRALIA

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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; Personal Property Securities Bill 2008

FRIDAY, 6 FEBRUARY 2009

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Friday, 6 February 2009

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

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

Senators in attendance: Senators Barnett, Crossin, Farrell, Fisher, Marshall 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; Personal Property Securities Bill 2008

WITNESSES

Committee met at 9.04 am

CHAIR (Senator Crossin)—I formally open this public inquiry into the Senate Standing Committee on Legal and Constitutional Affairs 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 of 1992, the Age Discrimination Act of 2004, the Human Rights and Equal Opportunity Commission Act of 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 human rights legislation going to the general operation of human rights law in Australia.

We have received 34 submissions to this inquiry. All of those submissions have been authorised for publication and are available on the committee's website.

I want to remind witnesses this morning that, in giving evidence to the committee, you 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. We prefer all evidence to be given in public, but under our resolutions you may request to be heard in private session.

If you object to answering a question, you should state the ground upon which that objection is taken, and the committee will determine whether it will insist on an answer and, in doing so, will have regard to the ground which is claimed. If the committee determines to insist on an answer, you may request that the answer be given in private.

I want to remind witnesses here before me this morning 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 shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to the minister. This resolution prohibits only questions asking for opinions on matters of policy but does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted. Officers of a department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. I want to remind people also to turn off their mobile phones or put them onto silent.

[9.07 am]

ANTONE, Ms Rachel, Senior Legal Officer, Disability Discrimination, Attorney-General's Department

ARNAUDO, Mr Peter, Assistant Secretary, Human Rights Branch, Attorney-General's Department

FOX, Mr Stephen William, Principal Legal Officer, Disability Discrimination, Attorney-General's Department

CHAIR—To begin our hearing this morning into these bills, I formally welcome representatives from the Attorney-General's Department. You have not lodged a submission with us. Do you have an opening statement?

Mr Arnaudo—No, Chair. We are happy just to take questions.

CHAIR—We will start with questions. That is fine. Let's proceed that way then. I take it by now you have looked at the submissions we have had and you have been following the transcript of the different days we have had in various cities.

Mr Arnaudo—In Sydney and Melbourne, yes.

CHAIR—I am sorry, it has been a little bit patchy, because there have been some days where we have done three bills on one day, but you have probably followed that. I want to ask you about the new section 52. Can I take you to that and ask why it was drafted in this way.

Mr Arnaudo—Section 52 repeals the existing section 52 of the Disability Discrimination Act. It currently provides quite a broad exemption for acts in relation to the migration program for the Disability Discrimination Act. The existing section 52 is quite broad, and one of the recommendations of the Productivity Commission report was to try and focus the exemption only on the actual processes of migration in terms of who gets a visa to come into the country. The main recommendation there was to try and narrow the exemptions so that more of the Disability Discrimination Act would apply to the migration program. For example, if the migration department puts out a brochure only in printed form and not in braille, technically they could take advantage of the exemption under the current Disability Discrimination Act.

I think the Productivity Commission report was trying to point out that really the aim of the exemption was very much focused at migration itself and therefore it should have been narrow. What we have tried to do in the new section 52 is narrow it down to the actual provisions of the Migration Act and the legislative instruments made under that act rather than the general administration of the migration program, so that the general administration of those things will still be subject to the Disability Discrimination Act, but the actual legislative processes under the Migration Act and the regulations made under that act will be exempt under the Disability Discrimination Act, as they are at the moment.

CHAIR—You would have seen the evidence from the Human Rights Law Resource Centre. They gave evidence before us in Melbourne regarding the Migration Act exclusions.

Mr Arnaudo—Yes.

CHAIR—We have had evidence that this provision will not necessarily achieve the outcome that is described in the explanatory memorandum. People have read the explanatory memorandum and think that what ought to be done is described in that but they do not believe it has been reflected in the drafting.

Mr Arnaudo—I think it has achieved that outcome, which is very much to have an exemption in place for legislative instruments under the Migration Act that may be discriminatory and ensuring that the Disability Discrimination Act does not apply there. That is the current approach to it. I know that in recent months the issue of people with disability and their interaction with the migration system has been an issue of general public debate, and I understand the Minister for Immigration and Citizenship announced late last year that there will be another parliamentary inquiry into the broader issue as well, so there might be something that will come out of that process.

CHAIR—Are you telling me that the way this is currently drafted will not overcome the situation we had where a family was trying to become permanent residents but were refused because of their son's disability?

Mr Arnaudo—No, it maintains the current status in relation to the migration program. All it really does is try to address the concern of the Productivity Commission that the exemption was quite broad and would cover things other than the migration program itself.

CHAIR—So really this compels the department and its procedures to comply with the act.

Mr Arnaudo—Yes. For example, if the department had a building that was not accessible to a person with a disability, at the moment technically they could argue that the existing exemption under the act would cover that, because it is quite a broad exemption, but what the Productivity Commission was saying was, 'Look, that's too far and what we should try and do is make sure it's very much focused on the provisions of the Migration Act and the legislative framework.'

In relation to the issue of the child with Down syndrome, the minister for immigration late last year announced that he was going to review the whole process. I do not think a term of reference has been given to the parliamentary committee yet, but it might be very soon, that allows a whole review of that process. But this provision here does not alter that.

CHAIR—What you are essentially telling me is that, despite the fact that we are amending this legislation, if I am refused permanent residency because either I have or one of my family has a disability, these changes will not go to addressing that.

Mr Arnaudo—Because you will be refused permanent residency on the basis of a legislative instrument under the Migration Act. The exemption that exists already under the Disability Discrimination Act covers that, and what we have done is try to narrow the exemption to expand the range of things that are covered by the DDA, but it will still mean that there is an exemption for immigration decisions that are made pursuant to the act.

CHAIR—There is no proposal before us to amend the Migration Act. That would need to occur.

Mr Arnaudo—That is correct. Yes. This is not a provision that tries to change the general migration policy or the way that health requirements are applied under migration policy. That is quite a separate issue. What this exemption is trying to do is fit in with that policy basically.

CHAIR—If we had concerns about this area as a committee we would need to make recommendations about that in our report, rather than seek to amend the legislation before us.

Mr Arnaudo—That would probably be the way to do it. You could remove the exemption from the Disability Discrimination Act, but that effectively, if the policy remained in place, would mean that someone would be able to complain to the commission or ultimately to the Federal Court that the migration program was discriminatory if that exemption were not in place. The government's policy and approach to this issue is that the development of those health requirements in the migration program, based on reasonable objective criteria, are not discriminatory but they are reasonable because they have regard to the whole impact that that person's disability might have on the whole of Australia's community and a whole range of other factors.

It tries to deal with that issue in a migration context. The Disability Discrimination Act seeks to ensure that it is dealt with in that way by leaving it in that process. The issue has received a fair bit of public focus. They acknowledge that. On 26 November last year the minister for immigration issued a press statement saying that he was considering referring the issue that was raised by the Muller case to the—

CHAIR—That is right. That is what has sparked our discussion and interest about this.

Mr Arnaudo—That is right.

Senator BARNETT—I think that has occurred.

Mr Arnaudo—I am not sure that it has.

Senator BARNETT—Has it not?

CHAIR—Sorry, Senator Barnett, but I am pretty certain that, in an answer to a question without notice in the Senate chamber, Minister Evans indicated that he had used his ministerial discretion and had granted permanent residency to that family.

Mr Arnaudo—In that particular case, but in terms of the more general issue, I do not think a parliamentary committee has been asked to look at the general issue about the policy. But I think the government has indicated its intention that a parliamentary committee should look at that.

Senator BARNETT—My understanding was that the department was going to review the Muller related matters.

Senator MARSHALL—That is right.

Mr Arnaudo—I am not sure.

Senator MARSHALL—What did the media release say on 26 November?

Mr Arnaudo—I can get that media release to you.

Ms Antone—I can answer that question. It was a joint media release on 26 November last year. It may have been just a media release of the minister for immigration, but it was also a statement by the Parliamentary Secretary for Disabilities and Children's Services. The announcement was that they will ask the Joint Standing Committee on Migration to inquire into the health requirement in the Migration Act 1956 and how it impacts on people with disability.

Senator MARSHALL—So there is no internal process going on to do that?

Mr Arnaudo—Not within the Attorney-General's Department.

Senator BARNETT—Has that occurred, to your knowledge? Has that been referred? Is anybody aware of that?

Ms Antone—To our knowledge, the terms of reference are being developed at the moment, but they have not been finalised.

Senator BARNETT—We have a number of areas of discrimination legislation. Could you outline for the committee the main differences between the Sex Discrimination Act, Racial Discrimination Act and the Disability Discrimination Act in terms of the principles behind them?

Mr Arnaudo—Sure.

Senator BARNETT—We have been advised that the Sex Discrimination Act included a considerable range of exemptions and that is the main differential characteristic between it and the other two. Are there any main differences or similarities between the three? Are we trying to make them consistent and rational between the three? What is your general response to that?

Mr Arnaudo—Perhaps I can look at the last part of your question first, which was: is there a process of looking at greater consistency? The Standing Committee of Attorneys-General—I have mentioned this in other hearings of this committee—has got a project trying to harmonise in three stages the state and territory anti-discrimination laws with the Commonwealth anti-discrimination laws; so that project is under way. It is not just looking at the legislation itself but also the procedures around it, so very much the first stage that this Standing Committee of Attorneys-General working group is looking at is administrative procedures to make it a bit easier to find out what the differences are and making sure that you are in the right place if you want to take a complaint of discrimination.

In terms of your question about the differences between the acts, if you take an overview, clearly the Racial Discrimination Act was the first significant anti-discrimination law that was introduced in Australia. Its concepts, for example, are quite unique in some ways compared to the other three unlawful discrimination acts—the Sex Discrimination Act, the Age Discrimination Act and the Disability Discrimination Act. The Racial Discrimination Act has this concept of a right to equality in section 10.

When you read the provision, it does not even refer to discrimination. If there is a law that has an unequal impact on people because of their race, it seeks to try and equalise it, particularly for state and territory laws, and that is quite important—section 109 of the Constitution. That is a provision that does not exist in age, sex or disability. There is not that concept of right of equality.

In your recent inquiry into the Sex Discrimination Act I know there were submissions about having that similar concept of a right to equality in the Sex Discrimination Act. The genesis is probably in the Racial Discrimination Act as a model; perhaps that is one way of saying it. The Racial Discrimination Act is in many ways similar to the age, sex and disability ones, in that it basically prohibits certain forms of discrimination in certain areas of public life. For example, it is very similar to the disability, sex and age ones where it is unlawful to discriminate against a person in the provision of goods or services or access to accommodation, in employment and those sorts of things. There are clearly those sorts of common grounds that come across. There is a bit of harmony already there.

There is also a bit of harmony in the concept of discrimination itself. For example, all four acts have the concept of direct discrimination and indirect discrimination. There are slight differences within that as well, though, of course, and I can touch upon that. For example, in the Disability Discrimination Act there is a requirement that a person be able to demonstrate that they cannot comply with an unreasonable requirement. That does not exist in the Sex Discrimination Act. That is clearly one difference there, and something you have heard during your inquiry in recent months is whether there is still a need to continue with that compliance test

as a concept in the Disability Discrimination Act when it does not exist in similar acts like the Sex Discrimination Act.

The only other difference that really is quite striking with the Racial Discrimination Act is section 9. It is a very general provision. It basically targets any act by any person done on the basis of race that has an impact on someone's human rights. It does not have to be in the provision of goods or services or in, for example, accommodation. When you look at sex, age or disability, you often have to say, 'Am I in an employment context, am I in a voluntary association, or am I receiving goods or services?'

The Racial Discrimination Act really only has one exemption, and that is special measures, which are special measures that are intended to advance a particular group because they do not have their rights. Special measures is a concept that also exists under sex discrimination, age discrimination and disability discrimination, so it is there as well, but when you look at sex, disability and age, you will see that there are a range of other exemptions and exceptions as well. For example, the disability, sex and age acts all allow the Human Rights Commission to provide an exemption for a particular matter for a period of time. It is reviewable by the AAT. They can impose conditions and those sorts of things. The Racial Discrimination Act does not allow that process. That is clearly a difference.

In terms of the other exemptions, in disability discrimination, for example, there is this concept of unjustifiable hardship that you would not find in sex discrimination or in race or in age. The proposal in the bill here is to extend the defence of unjustifiable hardship to a wider range. There are also other concepts like defence of inherent requirements, particularly in an employment context. In the Disability Discrimination Act it is a defence to say that the person with a disability cannot perform the inherent requirements of a position. You do not see those sorts of defences available in age, sex or race, for example. So there are some differences there and, because of the nature of the discrimination that it is trying to target, there are slightly different exceptions. For example, there might be different exceptions in terms of insurance and superannuation. Combat duties clearly are in the Sex Discrimination Act but not in the others. There is a bit of variety amongst them, definitely.

Senator BARNETT—I have two other general questions before going to the specifics. The bill is drafted largely on the recommendations of the Productivity Commission. My question is: if that is the case, are there recommendations that have come out of the Productivity Commission that have not been followed through and promulgated and, if so, why?

Mr Arnaudo—I will give you some background to the Productivity Commission report. It was a 2004 report that was initially responded to by the previous government. Largely, a lot of the recommendations are similar in terms of being implemented now by the existing government. There are a range of recommendations that the Productivity Commission made that could be implemented in non-legislative matters or that the government is considering further. Perhaps rather than me reciting them all now, I could take that on notice and provide that advice to the committee in writing so it is quite clear.

The other thing to point out is that the Productivity Commission report was focused on the Disability Discrimination Act. Our bill also covers a range of other bits of legislation, so there are a range of recommendations where we have either looked at taking non-legislative action as well or taken a slightly different approach.

Senator BARNETT—Good. Thank you for taking that on notice.

Mr Arnaudo—I would be happy to do that.

Senator BARNETT—Are there any recommendations from the Productivity Commission for legislative change that have not occurred? If so, why?

Mr Arnaudo—Sorry, just off the top of my head, I am trying to remember what is in the bill and what is not.

Senator BARNETT—Do you want to take that on notice?

Mr Arnaudo—I would be happy to take that on notice. I will provide a list of all the recommendations and then indicate what the government's approach is with each one. That way you can see exactly.

Senator BARNETT—That would be excellent. I appreciate that. Has any assessment been done on the impact of cost and red tape with respect to implementing the measures that are set out in this bill? There are arguments for and against the different measures, and the Disability Discrimination Act is about implementing fairness and reasonableness for people with disabilities, but that does highlight, to some extent, a cost for let's

say business, transport services—and we will get to those in a minute in relation to the South Australian transport department. Have you done any analysis of the impact of the cost of implementing these measures?

Mr Arnaudo—We have not directly for this bill because, largely, this piece of legislation seeks to clarify existing provisions that businesses or governments would have to comply with, although I know that the Productivity Commission as part of its review in 2004 did go into that in quite some detail. Some of the recommendations that it was making, and that we are trying to pick up here as well, were to try and increase that clarity or certainty to assist in reducing some of the costs. Overall, the Productivity Commission found that the benefits of the DDA outweighed the cost implications, because clearly there are recommendations there as well.

In accordance with our usual approach to the regulatory impact of any proposal, we have gone through the process with the Office of Best Practice Regulation. That process came out to say that there was really very much a low financial impact on business and individuals.

Senator BARNETT—Have they identified the quantum?

Mr Arnaudo—No, they have not.

Senator BARNETT—That is all they have said—'a low financial impact'.

Mr Arnaudo—It is a low impact. It would probably be quite difficult to quantify that, particularly in an area where there are complaints, because our legislation is quite general and it is very difficult to say, 'In this particular circumstance, this will be what happens.'

Ms Antone—As you may be aware, the usual practice of the Office of Best Practice Regulation is that, if they assess the risk of imposing regulatory burden on business or the community as a low risk, they do not go to the next step of quantifying.

Senator BARNETT—Yes, okay. Is that part of the explanatory memorandum?

Mr Arnaudo—The regulation impact statement is on page 2. It is just a short paragraph. In terms of the Productivity Commission report, I am looking at the overview here on page 29, where it says:

The Commission—

that is, the Productivity Commission—

considers that the DDA appears likely to have produced net benefits for the Australian community to date. But care needs to be taken in the way the DDA is implemented through standards in the future …

They did a fair bit of work in that area as well.

Senator BARNETT—Thanks for that. Through you, Chair, I am happy to ask about the South Australian department's issues and get into more specifics, but I am also happy to allow other senators—

CHAIR—Senator Farrell was interested in that area.

Senator BARNETT—Sure. Yes.

Senator FARRELL—Thank you for coming along today. The committee heard from the South Australian Department of Transport, Energy and Infrastructure that the review of the disability standards in respect of transport appears to have stalled and that they have heard nothing from the department by way of outcomes. Can you comment on that?

Mr Arnaudo—Certainly. The transport standards were put in place about five or six years ago. Under the transport standards, there is a requirement for the minister for transport—but really the minister for infrastructure; today's minister is the minister for infrastructure—together with the Attorney-General, to commission an independent review into the effectiveness of those standards within the first five years. The department of infrastructure is responsible for the review of the transport standards and has commissioned an independent consultant to carry out that review.

The independent consultant went out to the transport sector, state and territory governments, groups representing people with disability and people with disability themselves; held a range of community forums; sought submissions in writing and verbally as well from people who had an interest in this area.

Senator FARRELL—When are we talking about?

Mr Arnaudo—April 2007 was when it commenced its work. There were a range of hearings. Last year, in January 2008, the draft report was released for some stakeholder comments, so there is a draft report out there. The consultant got a large number of comments back at that draft report stage and has been working with the

department of infrastructure and the Office of Best Practice Regulation to try and work through those issues so that it can provide a final report to government. That report to government is not far away.

Senator FARRELL—Just on that, do you know whether the South Australian department responded to that?

Mr Arnaudo—I am confident that they would have, yes. In fact, all the state and territory transport departments were very interested in the transport standards, given their significant responsibility for the provision of public transport. The state and territory departments have particularly been kept informed as to the status of that report. I am aware that the department of infrastructure sent out an email late last year—I think it was about October—informing them that the report was still being finalised, and that is really pretty much the status quo at the moment. We are hopeful that we will have a final report from the independent consultant in the near future that we can then put it to government to consider what changes, if any, are required in the transport standards.

Senator FARRELL—You would say that the process has not really stalled; it is just that you are still going through—

Mr Arnaudo—The process is still under way. It is the first review of a disability standard that we have had to do, that has been commissioned. As a department, we are not directly involved because it is a responsibility that the department of infrastructure has in terms of reviewing them. But we definitely have to be consulted in terms of the process of how that review is carried out. Clearly, the recommendations that come out of that might have implications for the Disability Discrimination Act generally or anti-discrimination law generally as well. So we are looking forward to getting that final report. As I said, the draft report is out and it is quite large, with a significant range of comments. Given the nature of the transport system in Australia, people have lots of views about trams, buses, trains, ferries and taxis, so it is quite a large area and a large issue with lots of stakeholders.

Senator FARRELL—Do you have a period when you think that might be released?

Mr Arnaudo—I would have to defer to my colleagues in Innovation about that, but I expect that will be in the coming months.

Senator FARRELL—All right. Is any progress being made to better define compliance with respect to the standards?

Mr Arnaudo—That is always difficult, in a sense, because the transport standards are set up in such a way that they recognise that a lot of transport issues involve infrastructure that has been in place for a long period of time—for example, railways, stations, buses. They all have life spans that you cannot change overnight. So the way the transport standards are set up, in a general sense, is basically to require compliance to be met in a percentage level for certain things. For example, by a certain date, a certain percentage of bus stops in a particular area, under the responsibility of a particular organisation, will need to be compliant or accessible. It tries to create a staggered approach to improving things, recognising that over time you will need to renew bus stops, railway platforms and those sorts of things.

The issue of compliance also applies generally to discrimination law in a broader sense. Our current scheme relies very much on individual complaints. A person with a disability, for example, may find that they are not able to access a bus or a train. They would then need to take a complaint to the commission and say, 'You're not complying with the transport standards.' The commission does not have a role in actually enforcing the standards. It does have a role in monitoring and providing guidance to transport companies and transport authorities about what could be done to improve access, but it does not have a binding role in terms of actually enforcing conduct, enforcing the standards. That issue applies generally across discrimination law and also anti-discrimination legislation generally.

One of the big advantages of the standards, though, is that they do set out a path by which organisations then have some certainty as to what they need to do in order to comply. They do not then have to wait for another complaint to come and maybe face the courts and end up with an individual decision. It is quite clear—for example, with bus stops—that, 'Over the next 20 to 30 years, this is what you will need to do in order to become compliant with the standards.' It provides a greater level of certainty that, without the standards, would not be there, because the Disability Discrimination Act would not provide that level of certainty.

Senator FARRELL—The South Australian government noted that there was no provision for the disability standards to be updated, modified or redefined. Do you see that that is a problem?

Mr Arnaudo—I do not think it is something that we need to amend in the legislation directly. What we are doing in the bill is expanding the range of things that we can make standards for should the government of the day choose to do so. At the moment, there are quite specific areas: public transport is clearly one; education; premises; and others. The Productivity Commission recommended that the standard-making power be expanded to cover all the areas that are covered by the DDA as well, to give that flexibility.

In terms of carrying out reviews, or whether they are better or not and those sorts of things, our standard practice is to incorporate within the standards themselves a regular review mechanism. For example, the education standards and the transport standards have this five-year review process, to conduct a review to ensure that they are still operating as they are meant to, and also to provide an opportunity to think about, 'Do we need to make some changes or adjustments as things develop?' The premises standards were tabled last year by the government in parliament and they also include a review process. The House of Representatives committee is examining them at the moment.

Putting it in the legislation almost puts it in concrete, in one sense. You would have to then decide: do you do it every five years, every 10 years? While there might be some sorts of standards for which you want a different time frame for review or you might want to conduct the review slightly differently, I think that, as long as you have a review process in the standards, it is a legislative obligation. A standard is law and there is a requirement or an obligation on the government or a minister to conduct that review at that point in time. I think you can achieve that same end by incorporating those sorts of things in the standards themselves rather than perhaps amending the actual Disability Discrimination Act to require that sort of process. I think it provides another layer of flexibility.

Senator BARNETT—To follow up and add to Senator Farrell's questions about the South Australian department: I am looking at their submission. On page 12 they express concern about section 54A(5) regarding assistance animals and, throughout the inquiry, I have had concern about how we legislate for people who have assistance animals. Their concern is the use of the word 'or' between paragraphs (a) and (b). Have you considered their concerns, and whether you support the use of the word 'or' or whether it should be 'and', or they have provided a form of words on page 12 which they think is more appropriate. Have you had a chance to look at that?

Mr Arnaudo—I have looked at that. Perhaps I could give you a bit of background to the current approach to assistance animals and why we have gone down this track. Under the Disability Discrimination Act at the moment, the provision that relates to assistance animals is quite general. It is a provision that refers, broadly, to animals that are trained to assist a person to alleviate the effect of his or her disability. It does not refer at all to state or territory laws that might actually accredit animals, and some states and territories are developing those sorts of systems. It also at the moment does not allow, for example, a shop owner or a restaurant owner to ask a person who is being accompanied by an assistance animal whether it is an assistance animal, because, in a sense, asking for that information could trigger off a complaint of unlawful discrimination. That places the restaurant owner and the shop owner—whoever—in an awkward situation.

On the one hand, we have this call for greater recognition of what is an assistance animal and the need to make sure that the Disability Discrimination Act is updated to reflect that. On the other hand, we also have this request for information: is it unlawful to ask someone, 'Is that an assistance animal? Is it appropriately trained?'

I think you need to look at the new section 9 on page 10 of the bill. It seeks to define, for the purpose of the Disability Discrimination Act, what is an assistance animal, and it tries to provide a bit more clarity. What it says is:

... an *assistance animal* is a dog or other animal:

(a) accredited under a law of a State or Territory that provides for the accreditation of—

assistance animals, or:

(b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph;

So we can actually prescribe certain organisations—and they are out there at the moment—that train assistance animals and we have a level of surety that they have appropriate training programs. Then (c) is to try and capture the animals that are there at the moment. You might be living in a state or territory that does not have an accreditation scheme and you might not have a training provider nearby or convenient to you, but you have trained the animal yourself, and what we have tried to do here is ensure that that animal at least has to meet certain standards of hygiene and behaviour that are appropriate for an animal in a public place.

That then takes you back to section 54A, which sets out that it is not unlawful for a person to request or require that the animal remain under the control of the person; it is not unlawful to discriminate against a person if, for example, a shop owner 'reasonably suspects that the assistance animal has an infectious disease', and—there is an 'and' there—that it is 'reasonably necessary to protect public health'.

Senator BARNETT—Sorry, what section was that?

Mr Arnaudo—That was 54A(4). It is on page 21 of the bill. Subsection (5) tries to say, 'Look, it's not unlawful to ask them to produce evidence that the animal is an assistance animal or that it's trained to meet the standards of hygiene or behaviour that are appropriate for an animal in a public place.'

Senator BARNETT—As a small business owner, let's say a shopkeeper, how can I be confident that that animal is trained to meet standards of hygiene and behaviour appropriate to a public place?

Mr Arnaudo—As it is at the moment, that is difficult. The way we will amend the act will make it a bit easier because, for example, if the animal is registered under a state scheme that allows for the accreditation of the animal, then they will have a badge or a coat, and that gives you a bit more certainty.

Senator BARNETT—But they may not.

Mr Arnaudo—That is correct. They may not, because in some states and territories they might not have that, and that is a challenge in terms of trying to provide that greater level of certainty. It is difficult, and it is ultimately a matter that might end up in the courts as to whether an animal is appropriately trained or not.

Senator BARNETT—There are two sides to this coin, and I can perfectly see where you are coming from, and that helps explain part of it. But we have had a submission from the Sydney Opera House, and they had an incident up there; we have had evidence from Mr Reynolds of the Human Rights Commission, and you have had the feedback that I have had from the general community. On one side you have dogs that are not accredited—perhaps the state does not accredit them—but nevertheless they are trained, and they may be personally trained or informally trained, and they do the job.

Mr Arnaudo—Yes.

Senator BARNETT—Their owners are happy and everybody else is happy, but they do not necessarily have accreditation to meet standards of hygiene. I think what you are saying, just going back a step, is that the definition under section 9 covers those animals and that is okay, so that is dealt with.

Mr Arnaudo—An animal cannot be an assistance animal if it is not trained to meet standards of hygiene and behaviour.

Senator BARNETT—Yes, but even if it is informally trained and it is done at home in the backyard, or whatever—however it is done—it is necessary that (1) it is trained and (2) it is done to meet standards of hygiene.

Mr Arnaudo—Yes.

Senator BARNETT—But the question is: how do you prove that?

Mr Arnaudo—And that is a challenge. In one sense, we could remove that whole provision, but then I am fairly confident we would either have people who live in a state or territory which does not have an accreditation scheme coming to us or people saying to us, 'I don't really feel I need to spend $20,000 in two years for an accredited training organisation,' whether they be assistance animals, guide dogs or whoever. At the same time we need to draw the line and say, 'Okay, if you're going to train the dog yourself, you need to demonstrate that it meets certain standards of hygiene and behaviour.'

Senator BARNETT—Okay. I am with you there. That is fine. Now you go to the other side of the coin, where you have the small business retailer and you can get back to section 54A subsection (5). Why can't they ask a person if a dog is accredited or if it is trained to meet standards of hygiene and whether they have proof? The South Australian department says that they should be required to offer proof. What do you say?

Mr Arnaudo—They can ask that question. Subsection (5) of section 54A says that it is not unlawful for a person to request a person with the disability to produce evidence that an animal is an assistance animal—in terms of a state accreditation scheme, that could be a badge or a coat or an identification card or whatever—or that the animal is also trained to meet standards of hygiene and behaviour that are appropriate for a public place.

Senator BARNETT—But they have a problem with the word 'or'.

Mr Arnaudo—The 'or' makes it an alternative. So you can ask for evidence of either or both, I would have thought.

Ms Antone—The reason behind the insertion of 'or' as opposed to 'and' there is mostly related to the onus we are placing on the person with a disability—the person with the assistance animal. If the service provider or business owner asks the person with the assistance animal for proof that that animal is accredited and they show an accreditation card, then that is fine and they have met that first limb. If they have no accreditation—as we say, either they have informal accreditation or they have an animal they have trained themselves—we go to that second limb, where the service provider or business owner can request some sort of proof that the animal is trained to meet those standards of hygiene and behaviour appropriate for a public place.

The reason why we have 'or' there is because the government feels that it would be quite onerous on the person with the assistance animal to have to prove both limbs that are in the definition of 'assistance animal' under section 9, which are not only the standards of hygiene and behaviour appropriate for an animal in a public place but also that the animal is trained to assist the person to alleviate their disability. That is a little bit more of a conceptual kind of aspect that would be quite difficult to prove. Short of providing a medical certificate, it would be quite difficult for a person to prove that a dog's training to meet certain standards of hygiene and behaviour is linked to their disability somehow or it goes further to actually assist them with their disability.

So the government decided that it was enough for the purposes of assuring the person requesting the information—the service provider or business owner—that the dog will behave itself. It suffices to ask the person with the assistance animal for proof that it will meet the standards of hygiene and behaviour in a public place.

Senator BARNETT—But that person with a disability is not required to provide a certificate or a piece of paper. They simply say, 'The animal is trained to meet the standards required—'

Mr Arnaudo—They have to produce evidence of that.

Senator BARNETT—What evidence?

Mr Arnaudo—I think you probably also have to refer to subsection (6). If the shop owner says, 'I would like you to produce evidence,' and the person with the disability does not produce that evidence, then the shopkeeper can say, 'No, you cannot come into my shop because I'm not satisfied with the evidence.' Subsection (6) covers that.

Let's, for example, put in an 'and' instead. If I have an assistance animal and I go to section 9, the definition of 'assistance animal', and subsection (2)(c), an assistance animal has to assist me to alleviate the effects of my disability and it has to 'meet the standards of hygiene and behaviour that are appropriate for an animal in a public place'. If I do not meet those two limbs, I do not have an assistance animal. I then come to 54A(5). If a shopkeeper comes to me and says, 'Prove that this is an assistance animal,' I already have to prove those two limbs, but if we have an 'and' in there, I really have to demonstrate twice that—

Senator BARNETT—Yes, that is fine. I can follow that.

Mr Arnaudo—So we have tried to design a system that covers those possibilities but provides us with a level of defence for a shopkeeper. For example, if they say, 'Look, I don't think that's evidence that this animal is trained appropriately; I will not let you into my shop,' it deals with that. It tries to bring that line in somewhere.

Senator BARNETT—That is fine.

Senator FISHER—Can I ask a supplementary question coming out of that?

Senator BARNETT—Yes, of course.

Senator FISHER—What happens if the shopkeeper accepts the evidence provided and then the animal demonstrates, by behaviour, that it is falling short of public health standards? How does the bill then deal with that?

Mr Arnaudo—We have tried to make it clear—

Senator FISHER—What is the shopkeeper to do?

Mr Arnaudo—There is subsection (7) there that says:

This part does not affect the liability of a person for damage to property caused by an assistance animal.

For example, if a dog or a cat or anything came into a shop and caused damage, clearly the shopkeeper would have a right of action against the owner of the animal or the person who was in control of the animal and could take litigation against them, for example. Also, if there are other state health laws that are relevant to the operation, they would still apply. Disability discrimination tries to fit in there and provide people with certain rights, but clearly if an assistance animal does not meet the standards of behaviour and hygiene in a public place, I do not think it will become an assistance animal, because the two limbs of assistance animal are quite clear: (1) the animal has to be alleviating the symptoms of a disability and (2) it has to be able to behave appropriately in public places.

Senator FISHER—Really you are trying to provide for the marginal cases. We are in a sensitive area, and you are dealing in a disability area with public health issues, which are not really the province of this legislation.

Mr Arnaudo—That is right. It is trying to balance those different interests and also recognising that at the moment the Disability Discrimination Act is quite general about assistance animals. What we are trying to do is provide a bit more certainty. It is not trying to remove all the uncertainty that the current act already has.

Senator FISHER—I have one more question around the same issue. To put it in layperson's speak, a service provider is able to ask these questions about a supposed assistance animal of a person with a disability. What if a person is masquerading with a disability—a potential customer with a disability—in order to bring a pet into public premises? How is the service provider protected in that scenario? The service provider is able to ask these questions of a person with a disability.

Mr Arnaudo—Yes.

Senator FISHER—Does the legislation protect a service provider who asks a person with a supposed disability, who actually does not have a disability, in relation to these issues?

Mr Arnaudo—The short answer to that is: if a person says, 'I have a disability,' but it turns out they do not really have a disability, then the Disability Discrimination Act will not apply to them and they will not be able to take a complaint under the Disability Discrimination Act. The act itself then does not make it unlawful for the shopkeeper to say, 'No, you can't come through.' Granted, it might be difficult to make that judgement if someone is at your door.

Senator FISHER—And that is exactly the situation for a small business proprietor, but I hear you, and we are dealing with the legislation.

Mr Arnaudo—Yes.

Senator BARNETT—The South Australian department also referred to the merit of co-regulatory regimes.

Mr Arnaudo—Yes.

Senator BARNETT—I have had a separate meeting with the Australasian Railway Association. They have put in a submission dated 16 January. I am not sure if you have had a chance to look at it. I met with Mr Phil Sochon, who is their deputy CEO. They have made suggestions about co-regulation in practice and they have made a recommendation in their submission. They say that section 34 of the DDA should be amended. They say:

> This will give authoritative effect to make mode specific industry Codes of Practice an additional compliance mechanism. This is to give effect to the outcome that compliance with a Code would constitute a defence, partial or complete, to obligations under the DSAPT and the DDA.

Do you have some response to that and have you had consideration of it?

Mr Arnaudo—I had a quick look at that submission last night. The Productivity Commission report made some recommendations about co-regulatory approaches as well and this bill is not actually entering that field at this stage. We are looking at that issue in a more general sense to see what scope there is. There are a range of ways in which you could bring a co-regulatory approach into the Disability Discrimination Act. It is tricky in some areas—for example, do you have a role for the commission to certify things or not? At the moment the bill does not enter that area, but it is something that we are looking at. It also might be something that comes up in the review of the transport standards.

Senator BARNETT—This is an important issue for public transport, railways, whatever, and if the Productivity Commission recommended it, why aren't you following it up?

Mr Arnaudo—We are following it up. There are a range of issues involved in the roles of the different stakeholders in terms of developing those co-regulatory approaches and how binding they could be. But it is an issue that is on our agenda to look at. It might be an issue that comes out of that transport standards review as well. I am fairly confident that the organisations that you have mentioned have made similar recommendations about it.

Senator BARNETT—Section 34 cannot easily be amended to take that into account. Is that another way of saying it?

Mr Arnaudo—The legislative amendment itself probably would not be that complicated; it is the scheme itself that it brings into it as well which will be quite tricky.

Senator BARNETT—They are talking about a voluntary code and saying, 'Look, if we've got a code of practice'—voluntary or mandatory, but in this case voluntary—'and if we are complying with it, surely this should be taken into account in terms of meeting the DDA.' They have got a pretty good argument.

Ms Antone—At the moment that will be the case. Under the Disability Discrimination Act an organisation can have a disability action plan. That action plan can be lodged with the Human Rights Commission and would be taken into account by the commission or a court later on down the track if a complaint is made.

Senator BARNETT—I am aware of that, but they are talking about a code of practice.

Ms Antone—They are. I believe what they have suggested is a code of practice that would then be certified and then they would have full immunity from the DDA, not just that it would be taken into account. That is a co-regulatory scheme that is quite complex, because obviously the sector and everyone else need to be assured that that code of practice would meet particular standards in order to have that level of immunity.

Senator BARNETT—Understood. Accepted. However, is it possible to be used now in any form to say that it should be taken into account in consideration, rather than just total acceptance? Do you know?

Mr Arnaudo—If they had a code, it would be something that would be probably taken into account by a court in determining whether something is unjustifiably hard because, in looking at whether something is unjustifiably hard, the court has to have regard to all the circumstances. In fact, we are trying to provide a bit more guidance to the courts. On page 11 of the bill there is a new section 11 which sets out unjustifiable hardship—for example, things like financial circumstances and estimated amount of expenditure. It looks at relevant action plans, as we have mentioned before, as well. So there are ways in which those things can be taken into account.

Senator BARNETT—All right.

Mr Arnaudo—My issue about the complexity is: what happens if someone thinks the code of conduct has not been complied with? Who do they complain to? How does that fit into the Disability Discrimination Act?

Senator BARNETT—Fair comment. I am sure the code would set out who they could complain to. But the association say in their last paragraph:

> Industry anticipates that a further compliance power may need to be assigned to the HRC to allow it to "recognise" Codes such as that being developed currently by the RISSB. This aligns with the type of role which the Australian Transport Council is moving to for rail safety regulation, as advised earlier.

I draw that to your attention in your ongoing deliberations regarding these concerns.

Mr Arnaudo—I think it will be an issue they will raise in the review of the transport standards as well.

Senator BARNETT—There were discussions by, I think, the Human Rights Commission and perhaps others regarding the Australian Electoral Commission.

Mr Arnaudo—Yes.

Senator BARNETT—I raised a question throughout the inquiry in terms of sight impaired or vision impaired Australians who cannot have a secret ballot like other Australians in this country. I find that cause for concern. Does the department have a view on that and are you aware of any changes or amendments to the Australian Electoral Commission act to ensure that vision impaired Australians can vote in secret like every other Australian?

Mr Arnaudo—In 2005 there were some amendments that were made to the Electoral Act to provide electronic voting trials. I might have to take it on notice to provide a more complete answer and also consult with the Electoral Commission. I know that they did conduct in the 2007 election a further expanded trial of electronic voting. That allowed people with a vision impairment to effectively carry out a secret ballot because

they could engage directly with the machine. In fact, rather than taking it on notice, the Electoral Commission told us that it was using electronic voting machines at 29 selected pre-polling centres in Australia and about 850 electors with a vision impairment made use of the voting machines.

The results of the trial were published in March 2008 in a final evaluation report. I assume that is a public report that is on the Electoral Commission website. There was overwhelming positive support, and that reflects your comments as well, that it is something that is addressing a need. Ninety-seven per cent of users stated that they were satisfied overall with the machines. While the turnout was slightly lower than predicted, that might also have had some issue with the accessibility of the buildings the polling stations were in, but I think it still demonstrated that it was quite an effective way to allow people with a vision impairment to exercise their democratic right in having a secret vote.

The Electoral Commission also has released a disability action plan for 2008 to 2011 outlining what it proposes to undertake. From their perspective, they see this very much as something that they are evolving over time and progressively, with further and further elections, they will—

Senator BARNETT—Did you say they have an action plan?

Mr Arnaudo—Yes, from 2008 to 2011.

Senator BARNETT—I can get that. That will be on their website.

Mr Arnaudo—If it is not on their website, it will definitely be on the Human Rights Commission's website, because they publish all the action plans that they receive.

Senator BARNETT—The Human Rights Commission did not mention that when we had evidence on this.

Mr Arnaudo—I am quite sure they publish their action plans.

Ms Antone—They do, yes.

Senator BARNETT—We will pursue that.

Ms Antone—For the record, the amendment to the Electoral Act was in 2007.

Mr Arnaudo—Yes. Sorry.

Ms Antone—That is okay.

Senator BARNETT—If there is anything further you want to provide on notice, let us know, but that is helpful.

Mr Arnaudo—We will definitely take that on notice.

CHAIR—I want to take you now to the definitions and, of course, the issue of the comparator element.

Mr Arnaudo—Sure.

CHAIR—You would have by now seen our report into the review of the Sex Discrimination Act, where that was also raised, and I think it is even more of an issue when we look at the Disability Discrimination Act. We heard from a wide range of witnesses that the definition of discrimination in the act and the bill is too complex. HREOC put to us that they thought that the bill was far too complex and needed to be simplified. We have also heard that the definitions unduly restrict action on the part of the people with the disabilities. My question goes to whether some thought has been given to the comparator element, whether or not you are aware of the criticisms and have given some thought to changing and varying it.

Mr Arnaudo—I am definitely aware of the criticism and concerns. As you pointed out, our bill proposes to maintain the comparator test that is currently in the Disability Discrimination Act. It is also in other laws like the Sex Discrimination Act.

CHAIR—Why have you sought to now keep it?

Mr Arnaudo—It is an issue that affects other discrimination laws as well. The government is still considering the recommendations of the Sex Discrimination Act review as well. It was tabled just before Christmas, I think—12 December.

CHAIR—That is right.

Mr Arnaudo—In one sense, it flows in in that way as well. Clearly, it is a factor in whether we amend it for just one act or for all the acts. That is something that we would have to bear in mind as well.

CHAIR—This could be a great start.

Mr Arnaudo—It could be a great start.

CHAIR—You could make history and take that bold step forward.

Mr Arnaudo—It would probably then create another point of difference that we were discussing beforehand between the Disability Discrimination Act and the Sex Discrimination Act and the Age Discrimination Act.

CHAIR—This is an argument for one equality act that you are putting forward.

Mr Arnaudo—It might be. I will not put forward that argument! Clearly, at the moment we have four different acts, with slight variances, and this would create another variance. The comparator test does add an extra requirement in terms of what you need to demonstrate that something is unlawful or is discrimination.

CHAIR—So you are at least recognising to us that it is more difficult to apply when it comes to disability?

Mr Arnaudo—I am not sure if I would say it is more difficult.

CHAIR—To prove.

Mr Arnaudo—It is clearly an element that you need to demonstrate in making a case that there has been disability discrimination. In some situations it might be a bit more difficult for a person with a disability, but it is difficult to say, because that would vary. I know from the submissions that you have received that in some situations, with some forms of disability, it is very difficult to find a comparator. I do note that the Productivity Commission examined this issue as well and they said, essentially, that they thought the comparator test was appropriate. It was finding 11.2 of the Productivity Commission report in 2004-05. They found the comparator test, in the context of the Disability Discrimination Act, was still appropriate.

CHAIR—Sure, but we have had much evidence—

Mr Arnaudo—I appreciate that.

CHAIR—not only in the Sex Discrimination Act inquiry, but even more so now, from quite a range of eminent people in this area who have a lot of knowledge and skills—

Ms Antone—That is right.

CHAIR—who are basically saying to us it is fundamentally unfair and hard to prove. I suppose what you are saying to us is that at this stage it is government policy, so this committee will need to make another very strong recommendation in its report.

Mr Arnaudo—As I said before, the bill does not propose to amend that aspect of the comparator test. The bill is removing one of the other tests—the proportionality test—that is currently in the Disability Discrimination Act. That will make it easier for people with a disability to make a claim.

CHAIR—Describe to me how that works.

Mr Arnaudo—At the moment, under the Disability Discrimination Act, a person has to demonstrate that a proportion of people without a disability would be able to meet a requirement. I think the Productivity Commission recognised that this does not really add much to the actual test requirement. The only way I can describe it is by having it in front of me. It is a process whereby basically in section 6, for example, at the moment it says a person discriminates against another person:

... if the discriminator requires the aggrieved person to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons without the disability comply or are able to comply …

In most cases it is quite easy to demonstrate that. Say, for example, the only way to get to the second storey of this building is to go up this flight of stairs. A person with a disability, in a wheelchair, comes in and you say, 'That's fine. I'm not discriminating against people in wheelchairs. Come straight through. But the requirement I'm imposing on you is that the only way to get up to the second storey is to go up those stairs.' You cannot do that in a wheelchair. A substantially higher proportion of people without the disability would be able to comply with the requirement to walk up the stairs. That is quite easy. It is quite a clear test. I think the Productivity Commission said that really that proportionality test did not assist.

CHAIR—But it is not really a comparator test, is it?

Mr Arnaudo—It is not a comparator test, no.

CHAIR—No. So it is quite different.

Mr Arnaudo—The comparator test is quite different and it is still there, but it does remove one element or step that you need to demonstrate. The bill proposes to remove that. The other test, of course, is the compliance test. That is a test that is not in the Sex Discrimination Act. It is currently under the Disability Discrimination Act, and our bill proposes to maintain it. The Productivity Commission report did not go into that in any detail. Effectively, under that test, the person with the disability has to demonstrate that they cannot comply with the requirement that has been imposed on them.

CHAIR—Is this the unjustifiable hardship?

Mr Arnaudo—No, it is not. It is different to that, but as an element of making up your claim that you have been discriminated against, at the moment under the Disability Discrimination Act you have to demonstrate that a substantially higher proportion of people without a disability can comply, and you also have to demonstrate that you yourself are not able to comply.

CHAIR—Did you give any consideration, then, to omitting the proposed section 6(1)(b), as the Human Rights Commission has suggested?

Mr Arnaudo—Yes, we did give some consideration to that issue. It is not one of the recommendations that was made by the Productivity Commission.

CHAIR—No, the Human Rights Commission are now suggesting that.

Mr Arnaudo—That is a suggestion. Removing that requirement to demonstrate that they can comply would make it easier for a person to make a complaint.

CHAIR—Yes, so is consideration being given to picking up that suggestion or are you waiting for our report to guide you?

Mr Arnaudo—We always take into account the recommendations of any parliamentary committee report in these areas and I am sure that, if that is what your committee would like to recommend, we will give it serious consideration. Clearly, the commission has a particular view about it as well. It something, though, that the Productivity Commission report did not look at. It did not look at that compliance test and did not say that.

CHAIR—Yes, I understand that, but I am trying to move on from something that the Productivity Commission might have said in 2004. What is the thought now?

Mr Arnaudo—We did not put it forward in the bill because it was not a recommendation of the Productivity Commission. Again, the bill is up for consideration. It is not to then say that we would not take account of any other recommendations.

CHAIR—Thanks. That is helpful.

Senator BARNETT—Just on the comparator test, can I ask a question?

CHAIR—Yes. I just want to ask why the model in the ACT, which was supported by a lot of submissions that came before us, has not been picked up. This is in relation to the comparator test, I think.

Mr Arnaudo—The ACT model has quite an elegant, very simply stated provision as well. The approach that we have taken is to try and overhaul the Disability Discrimination Act to some extent, in order to implement the recommendations of the Productivity Commission, but not to sort of revolutionise its approach. The ACT approach is quite different to the way the whole Disability Discrimination Act works, and I think we need to sit down and really think through what the implications are, not just for government but also for states and territories, because it does flow through to them.

Senator BARNETT—Could we go back to the comparator test and the merits of it. The Productivity Commission outlined in their report the merits of it and why it should remain: keeping it tight helps there to be a clear understanding of the definition. Once it is removed, it opens up the definition to being ambiguous; some people might say confusing. You leave it up to the courts. Can you talk about your response to that and the merits of the comparator test. There are pros and cons to a comparator test.

Mr Arnaudo—Definitely. The submissions that you have received, as well as the findings of the Productivity Commission, effectively summarise those pros and cons. As I said before, at the moment it is in the Disability Discrimination Act. It is also in other legislation, like the Sex Discrimination Act. It is a key feature. Clearly, in recent months there are suggestions and even recommendations—from this committee, for example, in relation to the Sex Discrimination Act—that it should be removed.

Senator BARNETT—From the majority report.

Mr Arnaudo—That is right. Yes.

Senator BARNETT—Not the minority report.

Mr Arnaudo—You are correct. It is from the majority report. That also demonstrates that it is still an issue that has got views on either side.

Senator BARNETT—What are some of the other reasons for maintaining a comparator test?

Mr Arnaudo—It does focus the test on what would have happened in a situation without a disability or what would have happened in a situation where a person of the opposite sex would have been considered, so it does require the court or a decision maker to focus on that element there. Some people would say that is an unnecessary element and that if you are treated unfavourably that should be sufficient to demonstrate that there is discrimination. Other people say, 'No, that's a process in which that test allows you to flesh out a few more of the issues.' That is ultimately how parliament would intend it, so to construct the definition or the concept of discrimination, and that is the process really.

Ms Antone—Another aspect is the ACT mode and, more broadly, the idea of just referring to an aspect of disadvantage also entails some level of comparison. Inherent within that idea of disadvantage is a comparator test of its own. You are absolutely right, Senator, in saying that that would leave more scope for the courts in the way in which they define that, but it also would carry some sort of comparison in it.

Senator BARNETT—Indeed. It has become subjective to the judge or to the arbiter.

Mr Arnaudo—The comparison element is almost always there anyway, I would think. Under the ACT model, you are asking, 'Was this person treated unfavourably? Were they disadvantaged?' I do not think it is too far of a step then to say, 'What would have happened had they not had that characteristic or feature?' It is quite express here and that is then seen as an element that you need to demonstrate. In the other ones, it is probably not seen as a required element, but it is clearly something that does occur in the background.

Senator BARNETT—It does provide some guidance to how the law should be implemented. That is my point and I think others would agree with that in terms of the merits of it.

CHAIR—Reasonable adjustments is the other area we have had quite a bit of evidence about and that we wanted to ask you about, particularly the view of submissions that it could be improved, primarily through separating it from the concept of unjustifiable hardship and reframing it in the positive to make it clearer. There is a bit of a distinction there. Can you give me a response to the views of the submissions and whether you have decided to endorse or not endorse that approach or make changes?

Mr Arnaudo—In terms of what the bill that is before you at the moment is trying to do, the concept of reasonable adjustments is not something new. It has been in the Disability Discrimination Act from the very beginning. It has been implicit in there. But the High Court created some doubt in the Purvis case as to whether there was a duty to provide reasonable adjustments. The view that the government has taken and that we have taken as a department, is that the concept of reasonable adjustment has always been linked to the concept of discrimination. For example, in the concept of indirect discrimination, it is unlawful to impose an unreasonable requirement on someone that has those impacts on them as a result of their disability, so if something is unreasonable there is an obligation in there to make a reasonable adjustment to avoid having an unreasonable one. It is very much something that is focused to those concepts of discrimination. That is why the approach of the bill has been to focus on incorporating and bringing out the concept of reasonable adjustments within the concept of direct discrimination and indirect discrimination. This, effectively, tries to make it clear to the courts that reasonable adjustments are a duty that people have in order to avoid discrimination. It is a minimalist approach, trying to maintain the current structure of it. The suggestions that have been made in terms of an alternative stand-alone ground—

CHAIR—Yes. Is this the one under the New South Wales Disability Discrimination Legal Centre?

Mr Arnaudo—Yes.

CHAIR—Their concern?

Mr Arnaudo—I think so. I think also the Human Rights Commission made a similar point.

Ms Antone—There are two issues.

CHAIR—Yes, okay.

Ms Antone—There is the issue of whether reasonable adjustments should be placed in a stand-alone provision rather than incorporated in sections 5 and 6 of the current DDA. The second issue was whether or

not it should be defined with respect to unjustifiable hardship or whether it should be separated from unjustifiable hardship. That latter point pertains to the reasonableness aspect of reasonable adjustments, not the duty to make adjustments more generally.

CHAIR—I see. Just help me here, because I do not have a legal background, and I am struggling to come to terms with what it all means. The New South Wales Disability Discrimination Legal Centre raised a concern that section 4, taken together with the proposed new section 11(2), might actually lay the onus to prove unreasonableness of an adjustment at the applicant, in spite of the fact that proving unjustifiable hardship could explicitly be the responsibility of the respondent. I suppose what they are saying is that there is some conflict between those two sections and the onus of proof is now on one person rather than the other.

Mr Arnaudo—I think the bill makes it clear that the onus of proof is on the person who is making the reasonable adjustment.

CHAIR—Or is not making the reasonable adjustment.

Mr Arnaudo—Sorry. Yes, is not. The way it works is: we are inserting a new definition of 'reasonable adjustment' in subsection 4(1) that says:

reasonable adjustment: an adjustment to be made by a person is a ***reasonable adjustment*** unless making the adjustment would impose an unjustifiable hardship on the person.

Then 'unjustifiable hardship' is defined in section 11. That is on page 11 of the bill. It sets out the factors of what is unjustifiable hardship—to look at all the relevant circumstances of a particular case. Then subsection 11(2) makes it clear:

For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.

So if I have decided I am not going to make a reasonable adjustment because it will impose unjustifiable hardship on me, I have to demonstrate that it would impose unjustifiable hardship on me, as I am the person who is refusing to make that reasonable adjustment. The new section 11(2) of the bill makes it quite clear that the onus of proof will be on the person who is or is not making the reasonable adjustment.

Ms Antone—I might add to that a view that was also put forward by the submission of the Human Rights Law Resource Centre. We note that this is in contrast to the views of the Human Rights Commission and the New South Wales DDLC. As the Human Rights Law Resource Centre rightly puts it, the way that we have drafted these provisions actually creates a presumption that the adjustments are reasonable and then says, 'They are already reasonable unless they impose unjustifiable hardship on the person making them.' As Mr Arnaudo pointed out, then subsection 11(2) says that the onus lies on that person to make out that defence of unjustifiable hardship.

CHAIR—Okay. But then who makes the defence that what they are asking is reasonable?

Ms Antone—That is right. The way that we have gone about it is by—

Mr Arnaudo—We have assumed that it is reasonable—

Ms Antone—That is right.

Mr Arnaudo—unless the person who says, 'I'm not going to make the adjustment,' says, 'It creates unjustifiable hardship.'

CHAIR—Okay, I understand now.

Mr Arnaudo—With the way we have tried to create it, any adjustment is reasonable unless it is unjustifiable hardship, and the person who has to demonstrate that it is unjustifiably hard is the person who is refusing to make the adjustment, not the complainant.

Ms Antone—What we are avoiding is two tests, or two hoops to jump through. Rather than providing that the complainant needs to show that it is somehow reasonable—and we have not defined what 'reasonable' is—and then looking to unjustifiable hardship, and the respondent arguing unjustifiable hardship, we have only placed one hoop to jump through and we have said, 'It's reasonable unless it imposes unjustifiable hardship.'

CHAIR—I understand. So do you think they have misunderstood the intent?

Ms Antone—They may have, or they may have a different view, but I believe they have not picked up on that nuance that the Human Rights Law Resource Centre has picked up on, and that is that we are making a presumption of reasonableness.

CHAIR—Right.

Mr Arnaudo—I know there have also been calls to make the obligation to make reasonable adjustments a stand-alone ground rather than embedding it into the concept of discrimination. That is definitely one approach that you could take, but, as Ms Antone said before, we have to be careful that we are not actually creating two hoops for people to jump through. It effectively would be creating a new ground of discrimination that is separate from the current ones. That is definitely an option that is available, but it is a different step and it is going in a different direction. That is just something to bear in mind. Our approach has been very much trying to link it in with the current approach to the definitions of 'discrimination' and making sure that we effectively overcome the doubt that was put forward by the High Court in the Purvis case.

Ms Antone—There are a number of advantages to this model that the government has proposed. It reinforces the original intention of the act and the fact that it was the original intention of the act. It provides more clarity and certainty for those who need to work out what their obligations under the act are, because it does not derogate too far from the current definitions of what discrimination is under the act. It also provides direction for the courts by allowing them to draw on the jurisprudence that has already been established with respect to both reasonable adjustments and unjustifiable hardship, particularly the jurisprudence that was developed before Purvis.

CHAIR—Did you give any consideration to amending provisions which govern standing before the Human Rights Commission or the court?

Mr Arnaudo—No, we did not. In the context of this bill, no, we have not. The whole issue is one that was looked at by the Productivity Commission. It is slightly broader than just the Disability Discrimination Act, because it has implications for other areas of litigation and also access to justice generally.

CHAIR—What about, for example, the role played by disability support groups in being party to actions? Some of the submissions we have received have said that this restricts their role.

Mr Arnaudo—I do not think the bill that is before parliament now would necessarily restrict it any further than it is at the moment. The concepts of standing are—

CHAIR—So you are saying they are restricted at the moment?

Mr Arnaudo—No, I am not.

CHAIR—And you are not going to do anything to make it easier.

Mr Arnaudo—In the current structure, effectively a person who alleges that they have been the subject of unlawful discrimination takes the complaint. In the situation of disability complaints, that is definitely a person with a disability. It is difficult in some situations for an organisation that represents people with disability, if they are not affected by that discrimination, to take the complaint.

CHAIR—I see. So the whole act is premised on an individual rather than, say, the Guide Dogs Association.

Mr Arnaudo—You can take complaints on behalf of another person, but you still need to be representing a person who has been affected by disability.

CHAIR—An individual.

Mr Arnaudo—An individual, yes. It is a concept also that ties into the broader anti-discrimination law system, because the Disability Discrimination Act does not set out what happens with complaints. They are set up under the Human Rights and Equal Opportunity Commission Act as well.

CHAIR—I have one last question. The Human Rights Law Resource Centre and, of course, the Australian Human Rights Commission—those two major bodies—have raised the issue of requests for information and have in their submission questioned whether the bill accurately implements the Productivity Commission's recommendations. In particular, I think there was concern that prohibition on seeking information:

... will not apply if evidence is produced by the employer to the effect that they did not request the information for the purpose of unlawfully discriminating against the other person on the ground of the disability.

Do you have any response to those comments or observations from the other witnesses we have heard from?

Mr Arnaudo—I do. There were no Productivity Commission recommendations in relation to the issue of requests for information. It is the recommendation of the Australian Law Reform Commission that we are implementing there in relation to genetic information. What we are trying to do is clarify what the requirements are. I know that there has been concern about the way the onus of proof is demonstrated, but the

new section 30 subsection (3) puts the onus on the person requesting the information that the purpose is not for unlawful discrimination. This effectively reverses the normal onus of proof that is on a person.

CHAIR—Sorry, can you run through that again.

Mr Arnaudo—Sure. Perhaps I should start with section 30. What section 30 does at the moment is prohibit requesting information from a person with a disability if that information is sought to discriminate against that person and it is information that would not have been requested from a person without a disability. What we are proposing to do here is implement the Law Reform Commission's recommendations in its report—essentially yours—to prohibit an employer from requesting or requiring genetic information from a job applicant, except where it is: 'reasonably required for purposes that do not involve unlawful discrimination'. So we have picked that provision up and applied it to everything. What new section 30 subsection (3) does is place an onus on the person seeking the information to establish that the purpose for which the information is sought is not for unlawful discrimination, so they have to demonstrate that.

CHAIR—Explain to me how that works practically. If I say to you, 'I'm not going to employ you—'

Mr Arnaudo—It is more perhaps: I am an employer and I decide to request information from an employee. Basically I am asking, 'Do you have a disability?' and I am going to then discriminate against you on the basis of that disability. Actually requesting that information is unlawful and prohibited by the act.

CHAIR—Why does that reverse the onus of proof?

Mr Arnaudo—Because at the moment—

CHAIR—Because at the moment the person with the disability has to prove—

Mr Arnaudo—The person with the disability would have to say, 'You're asking for that information to discriminate against me,' and of course they might find that very difficult to do that.

CHAIR—So this actually reverses that onus of proof?

Mr Arnaudo—We have reversed the onus of proof, and what we are saying is, 'If you're seeking that information, you have to establish that the purpose for which you are seeking it is not for unlawful discrimination, because you are not going to discriminate against them.' That reverses it, but what that also does is create some difficulties for the person asking for the information, because they have to basically prove a negative. They have to prove that the information was being sought not for unlawful discrimination. In order to minimise that burden, we say that they are required to provide evidence that it is within their knowledge.

If they can produce evidence that it is not for the purpose of unlawful discrimination, as long as that evidence is not rebutted by someone else, it stands basically. It is to try to rebalance it, in a sense, rather than to change it dramatically, but recognising that it is very difficult to prove a negative—you know, to prove that I really was not going to discriminate against this.

Mr Fox—In other words, it is the universe. In proving a negative, one has to disprove the universe of all possibilities; that there was no such purpose. Even though one of my purposes might not have been discriminatory, I would have to prove all of my purposes. There was no other purpose. This provision essentially allows the person to put forward that they did have a non-discriminatory purpose and, if that is unrebutted, that would stand, even though they have not actually dealt with the other universe of possibilities.

CHAIR—So why do the Human Rights Law Resource Centre and the Human Rights Commission question whether the bill accurately implements the recommendations of the Productivity Commission? Is it because your explanatory memorandum is not clear enough?

Mr Arnaudo—I was going to refer to the explanatory memorandum, because I think it actually sets out quite clearly how it works.

CHAIR—Being an ex-chair of the Scrutiny of Bills Committee, I would be very mindful of explanatory memorandums and their pitfalls.

Mr Arnaudo—I am always very mindful when I appear before this committee, and your committee as well.

CHAIR—Have they perhaps not fully understood where you are coming from?

Mr Arnaudo—I might go back to their submission and read it again and provide you with some comments in writing—

CHAIR—That would be useful then, thanks.

Mr Arnaudo—rather than attempt to remember now what they said in their submission, if that is all right with you, Madam Chair.

CHAIR—Yes, that would be fine, except we do need that by—

Mr Arnaudo—Next week.

CHAIR—Tuesday.

Mr Arnaudo—We can do that.

CHAIR—I have one last question, but we could put this on notice to you. It is quite a simple question, so we might give this one to you as well. Do you want me to read it into the *Hansard*? Would that be easier?

Mr Arnaudo—Yes, that would be great, and then we can try and tackle it by Tuesday.

CHAIR—The Australian Law Reform Commission has raised with the committee the recommendations made in its 2003 report—essentially yours; you have referred to it already. Has the department considered enacting recommendations relating to the amendment of the Human Rights and Equal Opportunity Act and regulations to specifically identify genetic predisposition?

Mr Arnaudo—Yes.

CHAIR—You do not have to answer it now, unless the answer is simply, 'No.'

Mr Arnaudo—I will take it on notice. I think the answer is going to be, 'Yes,' but we will take it on notice and see how we go. It is probably directed at regulations rather than the Disability Discrimination Act , which is probably another project.

CHAIR—All right. We will wait for your answer then.

Mr Arnaudo—But, definitely, I will take that on notice.

Senator FISHER—I have two questions around unjustifiable hardship.

Mr Arnaudo—Yes.

Senator FISHER—The person claiming it has to prove it—change No. 1.

Mr Arnaudo—Yes.

Senator FISHER—Secondly, it is proposed that there be a revised definition, including:

(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned,

Does 'any person concerned' include the person alleging discrimination, the complainant?

Mr Arnaudo—Yes, it definitely does. That is in new section 11(1)(a), 'any person concerned'. Then the example says:

One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

So it definitely includes the person with a disability, but the community as a whole.

Senator FISHER—Okay. Am I understanding it correctly that this bill places more of the onus on the person alleging the unjustifiable hardship?

Mr Arnaudo—It does, yes.

Senator FISHER—I know this is quite complex. In making that transition, what does the bill do to appropriately balance what will inevitably be the practical tension between you in your example, Mr Arnaudo, trying to prove unjustifiable hardship, when some of the factors to be taken into account relate to perhaps matters arguably internal to the person alleging discrimination, be it direct or indirect; in other words, you, Mr Arnaudo, might be trying to prove unjustifiable hardship but relying on information that has or may rest with the complainant. How is the person alleging unjustifiable hardship supposed to deal with that in a practical way?

Mr Arnaudo—The way unjustifiable hardship is developed is to try and say that you have to consider all the relevant circumstances of the particular case. The things that we have put out under (a), (b), (c), (d) and (e) are effectively things that you would include, but you do not necessarily have to have regard to all those sorts of things.

Senator FISHER—But a court could.

Mr Arnaudo—Definitely. But they have to have regard to all the relevant circumstances of a particular situation as well. It is always going to be a matter of the evidence that a person can provide to be able to bring that into play basically. If we were to make it more restrictive, it would be a bit more difficult to then say, 'Well, the court should have account of this factor,' or it should not have. It ultimately is a matter for the court to take into account.

Ms Antone—I might add a couple of points to Mr Arnaudo's explanation. Firstly, the case law that has already developed on unjustifiable hardship already places the legal onus on the respondent to establish their defence, because it does actually work as a defence throughout the act. So we are not changing the status quo, we are clarifying it, because there is no express provision at the moment in the DDA.

Senator FISHER—Thank you.

Ms Antone—Secondly, I believe in practice the court holds that the legal onus does lie on the respondent, but the court does take evidence from the claimant as well, in the process of determining whether unjustifiable hardship has been proven.

Mr Arnaudo—For example, if I am a business owner and I say, 'Well, this will lead to unjustifiable hardship because my turnover is only 50,000 a year and the adjustment that I've been asked for is 70,000 a year. That's stuff I know about. I appreciate it creates a detriment to me, my turnover and those sorts of things, but I realise it might create a detriment to other people in the community.' It is bringing all those sorts of things to the table so that the court can then make a decision as to whether something is unjustifiable or not.

On the other side, you could have the complainant saying, 'But it does create a detriment to me quite significantly, and these are the sorts of things that it means.' That is attempting to bring that evidence as well. It brings all the facts to the table so that the decision maker, the court, can make the ultimate decision.

Senator FISHER—Thank you. Of course, part of the dilemma is that the intent of legislation like this, presumably, is to assist the community so that they do not get to the steps of the court or, indeed, in the court. Sorry, that is not a question. My second question is: in extending the definition of 'unjustifiable hardship' to include the financial circumstances of the first person, does that mean that it is going to be easier for the first person to demonstrate unjustifiable hardship if they are running a battling business versus the first person who may be running a very successful business?

Mr Arnaudo—I do not know if I would place it in that sense. Clearly, the nature and the size and the financial resources of the discriminator would be something that would be taken into account. For example, if you are a very large company, or even a government perhaps, running a major project, those are things that would be taken into account, compared to, say, a small business. I do not think the courts have actually looked at the way a company is managed as a factor. I think they very much look at the evidence of the financial circumstances in a particular situation.

Senator FISHER——Surely with this amendment the courts would now be given liberty to look at exactly that—the internals of a business.

Ms Antone—It would be very confusing from the face of the bill, because what the drafter has done is just pulled out the old section 11 and substituted a new section 11, but in fact many of those elements under subsection (1) of section 11 already exist, and one of those is, indeed, the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship. So that already exists under the definition of unjustifiable hardship.

Senator FISHER—Is there any change in a drafting sense in pulling these provisions together that would lead a court to go, 'Well, the legislators have changed the language; therefore—'

Ms Antone—No.

Mr Arnaudo—In terms of financial circumstances, it is exactly the same words. There is no change there. The only change is that we made it a 'first person' to make it a bit easier to read, and there is a new paragraph (b), which is the availability of financial and other assistance for the first person. That is not there at the moment. We have introduced that as a new category.

Senator FISHER—Then I am not sure that Ms Antone's answer stands in a practical sense.

Mr Arnaudo—But paragraph (c), which is the financial circumstances and the estimated amount of expenditure required to be made by the first person, is exactly the same as existing section 11(c), except for that drafting change of the first person claiming the unjustifiable hardship. Those two concepts have remained exactly the same. We have introduced the availability of financial and other assistance to the first person.

Ms Antone—The idea behind the government's introduction of that paragraph (d) is not so much to affect that single person's financial circumstances—although it is in a sense to affect that single person's financial circumstances—but in the past the court has not necessarily had a look at government funding that is available to a small business, or organisations that endeavour to supplement people with disabilities in employment with some funding, for example. The government is bringing into that the exercise of balancing all the finances; the aspect that there could be some funding available to the person involved.

Senator FISHER—Chair, I will place my final question on notice, because I know we want to move on.

CHAIR—Thank you.

Senator FISHER—What limitations are placed or will be placed either by the bill or, in the department's view, by the courts, on the definition of 'other assistance' in new section 11(d)?

Mr Arnaudo—We will definitely take that on notice.

Senator FISHER—Thank you.

CHAIR—Mr Arnaudo, Ms Antone and Mr Fox, that concludes our public hearings into this bill. We would need, though, those responses back by close of business Tuesday. I thank you so much for being so well prepared today. I do not know if we often compliment public servants in matters here, and it is probably not right that I do that, but can I just say thank you for anticipating what we were going to ask you and being well prepared to engage with us for the period of time that you did. It is much appreciated.

Mr Arnaudo—Thank you.

Proceedings suspended from 10.49 am to 11.02 am

GRAY, Mr Geoffrey, Special Counsel, Attorney-General's Department

LEWIS, Ms Eleanor, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

CHAIR—I resume this public inquiry of the Senate's Standing Committee on Legal and Constitutional Affairs. This is a resumption of our 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 for report by 20 February 2009. This bill primarily amends the Federal Court of Australia Act 1976. 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.

We have received six submissions for this inquiry, which have been authorised for publication and are on our website. I want to remind witnesses, and I am sure you all know, that, in giving evidence to this committee, you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as 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. If you want to request that you give evidence in private, you can do that, but I suspect that that is not going to happen.

I want to remind you also that, in your capacity as an officer of a department of the Commonwealth, you will not be asked to give opinions on matters of policy and you should be given reasonable opportunity to refer questions asked of you to superior officers or to the minister. A resolution of the Senate 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.

I welcome representatives from the Attorney-General's Department. We do not have a formal written submission from you. That is quite okay, but I am wondering if you wanted to make a short opening statement; otherwise, we will go directly to questions.

Mr Gray—I do not want to make an opening statement as such. I think the length of the bill is self-evident, and I just noticed this morning while we were waiting out there that the explanatory memorandum runs for 94 pages, so there is a fair bit of material already before the committee and we do not want to add to that.

I would, though, just by way of introduction say that one of the issues that obviously is of concern to the committee and of interest in the submissions is the pre-trial disclosure regime. I was listening to the evidence of Mark Weinberg yesterday and I know he made some comments in relation to that which, not surprisingly, I fully endorse. There was one thing, though, that he did not mention that I would like to put on record up-front, which is this: that the pre-trial disclosure provisions are there as a package and it is not possible to pull bits out of it and to delete paragraphs, as has been suggested in some of the submissions, and not affect the material that remains.

Could I very briefly explain to the committee what I mean by that. Under section 23CD the court has a discretion to make an order for pre-trial and ongoing disclosure. If the court makes that order, 23CE requires the prosecution to prepare a notice of the prosecution case, and the things have to be in there as set out. Under section 23CF, which is the provision which has attracted interest, the accused's response must include 'a statement setting out, for each fact set out in the notice of the prosecution's case', that the accused agrees with it, or the accused takes issue. Then there is the next bit, which are the words which have attracted interest:

... if the accused takes issue with the fact, the basis for taking issue;

If we take those words out of this bill, what we are left with is an obligation on the accused to do one thing only: to say whether or not the facts set out in the prosecution case are agreed or not. There would be nothing in these provisions which would prevent the accused from simply saying, 'Everything in the prosecution case is in dispute,' as a one-line response. That is why those words are in there and that is why they are significant.

By way of background and a bit of history on this, for the first drafts of this bill we actually used the New South Wales model for pre-trial disclosure. We had meetings with the Law Council and they told us—and the committee, so I am not giving anything secret away—that the New South Wales provisions are not working effectively, and the Victorian provisions are. On that basis, accepting their advice and because it seemed to be right and sensible, we picked up the Victorian model, and these words are taken from the Victorian model.

We are now being told, and the committee is being told, by the Law Council that those provisions are potentially unjust. They then say they are not causing injustice in Melbourne; people have found ways to work with them in the Victorian system. On the basis of those comments which they made to us that they are

working in Victoria, that the courts in Victoria have found ways to work with these provisions and make the pre-trial disclosure regime work, that is a good reason for leaving the words in.

If you take those words out, then really there is not a pre-trial disclosure regime. There have been references also to reviews, recommendations and reports in relation to pre-trial, and it is suggested we should take suggestions and recommendations into account, which is very difficult when all they are at this stage is reviews and recommendations and possible amendments to legislation. So the only model we are left with, effectively, if we do not use these Victorian provisions, is the New South Wales provisions, which we have been told by the Law Council—and it is consistent with information we have received from other areas—are not working.

That is why those words are there and why I was very encouraged to hear what Mark Weinberg said about those words from the perspective of the court, saying that he does not think that those words will in fact create unfairness. I have not got his words before me, as I have not got a copy of the transcript yet. It would be nice to have that to quote.

CHAIR—Are these the words 'basis for taking issue'?

Mr Gray—Yes, those are the words.

CHAIR—That is your explanation for them remaining within the bill?

Mr Gray—That is right.

CHAIR—Modelled on the Victorian legislation.

Mr Gray—Modelled on the Victorian legislation, on the basis that we are told the Victorian provisions are working and on the basis that, if we take those out, we then run into this section 23 problem. Sorry, I did not want to divert the committee on to this.

CHAIR—23CM?

Mr Gray—If we go to 23CE, 'Disclosure of case for the prosecution', that puts a very high onus on the prosecution to provide an outline of the prosecution, setting out:

... the facts, matters and circumstances on which the prosecution's case is based;

That is not something the prosecution does at the moment; that is an additional obligation. We have certainly had high-level discussions with DPP about the reasonableness of that obligation. Is the quid pro quo for putting that obligation on the prosecution that there is an obligation now on the defence? To respond sensibly is all we are really aiming to do. The EM says that these provisions are not designed to compel the accused to outline their defence. It is not the purpose. There have been suggestions that it could be read that way. Our response to that is: they have not been read that way in Victoria.

CHAIR—Mr Gray, can I just ask you about that, then.

Mr Gray—Sure.

CHAIR—You say that it provides a greater onus on the prosecution to outline their case if these words are removed. I have had discussions with a number of very senior legal people outside of our evidence, when I have tried to get a broader view about this, and they say that Victoria is the only place where this is happening.

Mr Gray—Yes.

CHAIR—And they do not believe that, on balance, this is fair for the accused, because the accused must state their case then and there, essentially.

Mr Gray—The response to that is that, yes, this is the Victorian model and, yes, it has not been adopted anywhere else, but we are told, as I say, by the Law Council themselves that the Victorian model is working. That is the model that we were pointed towards as the only one that is working.

CHAIR—Has there been any evidence that it actually disadvantages the accused?

Mr Gray—The evidence for that would be from the Law Council. They have quite clearly said it does not disadvantage the accused. They did say, in fairness to them, that because the provision is not being enforced—

Senator TROOD—That seemed to be the point they were making to us. I think they acknowledge that these provisions are in the Victorian legislation, but they occur, in the Victorian legislation, in the context of a well-established set of practices with regard to criminal trials. Those provisions are—and I have no idea why, and this is their argument—almost never relied upon, and that is why it works, because, by some kind of acceptance of the criminal jurisprudence that exists, neither the prosecution nor the accused relies upon that

particular clause. As I understand the argument that the Law Council is making, it is that we are now looking at the establishment of a criminal jurisdiction in another court, and they will not have the same kind of jurisprudence and, therefore, they will perhaps rely upon it in a way which might not have been the case in Victoria. What is your response to that argument?

Mr Gray—I heard that argument, and I could make a couple of comments in reply. Mark Weinberg has the perspective of a judge, and I thought his perspective was very interesting and slightly different. I come from a different perspective—policy and legislation development—but my perspective is that, because those words are in there, the courts may not be saying to the accused, 'Well, you haven't actually complied word for word with this.' If they get a one-line response in Victoria—everything is denied—the court has the power to come back to them and say, 'That's not acceptable. You've got to comply.'

What we were told by the Law Council was that the system works well when the judges make it work. In order to do that, they need the powers to make it work, and that is why the sanctions in this bill are quite important and why these provisions are important. The fact that the Victorians have developed a jurisprudence which allows them to apply these principles without impacting adversely on the fairness of the trial process, I would have thought, is a great comfort. I do not see any reason why courts and lawyers in other jurisdictions are not going to be able to apply the same approach and the same jurisprudence.

If we are dealing with cartel offences—and that is what we are dealing with at the moment—there are going to be well-resourced defendants. They are going to have QCs—one, two, three—and the DPP is going to have similar representation. The suggestion that somehow those high-powered, skilled lawyers are not going to be able to draw the lessons from Victoria and interpret these provisions in the same way I just do not think is realistic. I think there was an element in there of saying, 'Well, the Victorians have been able to find ways around it, but we can't trust other jurisdictions, other lawyers in other places, to do the same.' How can that be?

The Australian legal profession is not so disparate and so different that they cannot learn the lessons from different places, and of course the Federal Court will have judges sitting who have sat in Victoria, who have heard cases and had dealings with other judges. We have given them a single jurisdiction. We have told them the single procedure. We have given them the explanatory memorandum. There is no doubt that these provisions are based on Victoria. When they come to interpret and apply them, tell them to have regard to Victorian jurisprudence.

Senator TROOD—You allude to the sanctions, and that of course exercises the Law Council as well—

Mr Gray—Yes.

Senator TROOD—since they are not included in the Victorian legislation, and they can be quite onerous. If the conduct of the accused in relation to the trial is not broadly cooperative—I will use that word—then things follow from it, and I think it is in this context that there is a very high premium placed on an accused to act in a fashion which might not otherwise be the case in other jurisdictions and certainly is not the case, as I understand it, in the Victorian jurisdiction.

Mr Gray—23CM with the sanctions is taken almost word for word from New South Wales. There might be differences, but it is actually the New South Wales precedent. As has been said at various times, the bill takes the best features from different jurisdictions. We have taken the pre-trial provisions from Victoria and married them with the sanctions regime from New South Wales, because in our opinion that sanctions regime was better.

Victoria does have sanctions. The suggestion there are no sanctions is not right. They have provisions in there—Eleanor will correct me if I get this wrong—where there is power to address the jury. If there is a failure to comply, the judge or a party, with leave from the court, can address the jury on that failure to comply. We did think about having a provision like that in this bill and decided that that has greater potential unfairness than any of this, because there is also a provision saying that the comment to the jury cannot suggest the defendant failed to comply because of a consciousness of guilt.

You look at that and think, 'Well, what other form could the comment take?' So there is a non-sanction in there—a sanction which cannot be used, which was pointed out to us by some judges of the Federal Court—which in fact carries with it a danger. If you put that sanction in there, then there is an implication there will be cases where it should be used. The concern was that a judge, seeing that sanction, would say, 'Well, I'm allowed to make a comment,' and will do it at the end of six months, eight months, of a trial. The view we came to was that the best course was to leave that sanction out, which meant we then had to find some other

sanction, and I come back to the defence because that is the crunch issue. You can control the conduct of the prosecution in a criminal trial by staying the case; dismissing the charges. How do you control the conduct of the defence? If the defence thumbs its nose at the pre-trial regime—and I am assuming for the moment here that people accept there should be a pre-trial regime, and I am quite happy to talk about that—

Senator TROOD—I do not think that point is in contest.

Mr Gray—Excellent. If we have a pre-trial regime, the real crunch issue is: how do you ensure that the defence plays the game? For every defendant who is happy to cooperate and participate in getting the issues narrowed, there will be at least one, possibly more, whose instructions to their counsel will be, 'Contest everything; drag the thing out,' in the hope that the case will fall over. It is a sad fact that if you drag any prosecution out long enough—and sometimes it has been decades—eventually the case collapses.

This whole process is designed to bring the parties together before the trial commences and get as much as possible sorted out as can be sorted out, without going so far as to require the defendant to disclose the defence and without producing an unfair result—that is the balancing act—but there have to be sanctions. These sanctions, of course, are all subject to the interests of justice and fairness to the defendant. The ultimate responsibility on the trial judge is to ensure that there is a fair trial.

If an accused has failed to comply with an obligation and the prosecution point that out—'You didn't disclose this witness when you should have,' or, 'You didn't indicate this point was in dispute when you should have'—then the defendant will be called upon to explain. No trial judge is going to prevent the defence from calling evidence that may acquit a person who is potentially innocent, and that is part of the problem with these sanctions. The fact that they exist is perhaps of greater value than the fact that they might be applied in a particular case. Nobody is going to be satisfied with the outcome of a trial if the defendant was prevented from calling a crucial witness. Clearly, there would be grounds of appeal, and the prosecution is not going to be able to say, 'I should have been given notice; you can't call that witness even though that witness could potentially exculpate you.'

That of course is also the relevance of the amendments to the Crimes Act sentencing provisions. It is designed to ensure that there is a potential reward or a potential disadvantage—in fact, the way the sentencing provisions are structured, you do not get a reward for cooperating, because everybody is supposed to cooperate. All you are doing is complying with your legal obligations, but you do avoid the potential of getting less of a reduction in other areas, and that is sort of the flavour of the amendments that we were proposing to the Crimes Act sentencing provisions.

Senator TROOD—Thank you.

Mr Gray—I am sorry, that was a longer answer than I meant to give. I apologise for that.

Senator TROOD—Part of your response to the proposition that has been raised about this is that these are provisions in the New South Wales legislation. Is that right?

Mr Gray—That is right.

Senator TROOD—Are they adopted virtually as is, or have you tampered with them, as it were?

Mr Gray—If we have tampered with them, it is for drafting reasons and constitutional reasons. What we have tried to do here is to stick to those provisions. It has been a while since I have looked at them, so I really cannot answer off the top of my head. What is the section, Eleanor? Have you got that?

Senator TROOD—Let's not be held up on that. Perhaps you can just advise the committee.

Mr Gray—Yes, we can certainly come back to you.

CHAIR—Senator Trood, do you want to keep going?

Senator TROOD—Yes, I can do that.

CHAIR—All right.

Senator BARNETT—Let me just check from you, Chair: is Senator Trood pursuing section 23CF regarding (a) and (b) and the basis for taking issue?

Senator TROOD—That is what we have just disposed of.

Senator BARNETT—I am not disposed of it.

Senator TROOD—I do not have anything more about that.

Senator BARNETT—Can I pursue that?

Senator TROOD—Yes.

CHAIR—Yes, you can.

Senator BARNETT—Because I have heard Mr Gray's response and I have read again the Law Council's submission to us, and we are aware of their evidence that they are very concerned about a breach of what some would say is a fundamental right to silence of an accused and this principle being breached by including these words 'the basis for taking issue' in (a) and (b) of section 23CF.

I have heard what you said in answer to some of these questions, and I am still not convinced. You say that it is consistent with the Victorian legislation. We had evidence from not just the Law Council but other witnesses that were very strong in expressing concern about the inclusion of those words, because it does force the accused to set out, at least to some degree, their arguments in favour of their position. I thought that some of the evidence in terms of the Victorian legislation was that, yes, it has been included but that it has not really been tested. We are setting a precedent here and, once it is tested, the courts may interpret it in a different way. Focusing on those words, can you provide a response to those concerns.

Mr Gray—There are a couple of points that I would make. To come to your last comment first—the suggestion that the provision has not been tested—it is being applied by the courts on a daily basis, presumably, trial by trial in Victoria and we say it has been tested and that the proof is in the pudding that the procedures are working in Victoria; they are working without causing injustice; they are working without a great outcry from the Law Council.

Until we put them in this bill, there did not seem to be any suggestion from the Law Council that they had problems with the provisions in Victoria. Presumably, as a result of now looking at these provisions, they do have problems with them in Victoria. I have to say that. So the first point is that I think those provisions have been tested, they have been made to work in Victoria and we really cannot see any reason why the judges of the Federal Court cannot apply the same approach and the same level of intelligence.

Senator BARNETT—With respect, the way I understood the evidence from the Law Council, and indeed others in Victoria, was that, yes, it is going through. It has not been an issue as yet for the various accused's representatives in each case, but there probably will be a time where it will be an issue. They are saying it has not been litigated as yet; you are saying it is going through quite happily. I think they indicated that could be the case, but it has not been litigated as yet. We are now going to be setting a precedent and, frankly, it is a very dangerous precedent, where we are going to be denying an accused, at least potentially, the right to remain silent, which has been a fundamental proposition of Australian law for decades.

Mr Gray—The first point was that it is being used in Victoria. The other point was, to reinforce the comments made by Mark Weinberg, that if you look at this provision it does not say that the accused has to outline what their defence is. It does not say that. It says they have to set out the basis for taking issue. I thought Mark Weinberg made an interesting comment in response to one of the questions, and this is a judge looking at it, in that you would comply with that provision by setting out the general basis. How that will work in a particular case is interesting, but the EM says that the provision does not require the defendant to outline their defence. Here we have a provision that, if it does have to be interpreted by the courts, the courts will interpret in light of what is in the explanatory memorandum.

Senator BARNETT—I draw your attention to the Law Council's submission at page 4, where they say the bill goes too far:

> ... in requiring the defence to disclose the details of its case and not just the nature of the issues which are in dispute with the prosecution or the general nature of the defence.

They are pretty blunt about it. They do not like it and they say we should consider the New South Wales proposals further as an alternative to what is currently contained in the bill and also have regard to the Queensland and Victorian reviews. I am not sure exactly what reviews are taking place in those states, but they are very strong about this. They say that the accused has a right to remain silent. They say that the onus of proof is on the prosecution:

> ... and must discharge this burden with respect to every element of the offence.

That includes the pre-trial disclosure.

Mr Gray—I disagree with their interpretation of the way this provision will work. They have taken a worst-case scenario. You have a provision here which is open to interpretation, and I agree that readily.

Senator BARNETT—You would agree with that?

Mr Gray—It is a provision which is open to interpretation. At one extreme you could say this requires the defendant to go into detail about facts, matters and circumstances which disclose their defence, and that is the view of the Law Council. They are saying there is a risk the court may interpret it that way. I am saying there is another extreme and there is a position in the middle, and the position in the middle is that what it requires us to do is to indicate in general terms the basis of taking issue. The defendant cannot just get away with saying, 'All facts are in dispute.' They need to say why they are in dispute.

Senator BARNETT—Yes.

Mr Gray—You are allowed to do that, because the EM says it. The provision will be interpreted in light of the EM and in light of all those principles you have articulated. The Federal Court comes into a structure of hundreds of years of legal development. They will interpret these provisions in light of those principles you have articulated. What this requires the defence to do is to indicate the basis on which they take issue, in a way which does not disclose their defence.

As I mentioned before, in the cartel offences we are dealing with high-paid silks and experienced barristers. The people who are appearing before you representing the Law Council are the sort of people who are going to be running these cases. It is not beyond their capacity to work out ways of complying with this provision in a way which does not require the accused to disclose their case.

Senator BARNETT—That is almost hypothetical. In fact, you are actually agreeing with the argument. You are saying that it may very well be argued this way and may very well be argued that way, but you have also said that it is open to interpretation.

Mr Gray—I am not saying that at all.

Senator BARNETT—You just said it is open to interpretation.

Mr Gray—I said it is open to interpretation. In my opinion, it will be read in the way that I have outlined.

Senator BARNETT—Mr Gray, you have said that it is open to interpretation. Correct?

Mr Gray—Yes, but so is every other provision in this and every other piece of legislation that has ever been passed by this parliament.

Senator BARNETT—We are talking about this provision that is before us. That is what we are discussing at the moment, and it is highly controversial and of great concern to a range of witnesses, including some members of this committee.

Mr Gray—Yes.

Senator BARNETT—If it is open to interpretation, why don't we remove the doubt and amend it or, in fact, remove it so that we fit with the traditional law of this land, which is to provide for the courts to be in control of proceedings and to manage proceedings in accordance with decades of jurisprudence in this area?

On the one hand we have what you might say is just a potential concern. I think it is a concern. But on the other hand we have a government that is going down the line of pursuing what some are concerned about, and this is the charter of rights, which is meant to be putting into law or into some sort of concrete form the human rights of various Australians. This right to remain silent has been a fundamental human right for decades in this country, and now we get a bill which is at least open to interpretation and is abusing that particular right and infringing on it.

Mr Gray—I have a couple of comments to make in response. You are right, I have said this provision is open to interpretation. I would say that about a lot of these provisions that will require the courts to construe them, and I think this is one of the points that Mark Weinberg made in his evidence. He said that every provision in this act is going to be examined minutely and argued over and, unfortunately, I think that is right.

Senator BARNETT—Indeed.

Mr Gray—With this provision, we can take a view as a lawyer about how the courts are likely to interpret and apply it. My view differs from that of the Law Council. I think they have taken an extreme version of the possible interpretation. That flies in the face of what is in the explanatory memorandum, it flies in the face of all those hundreds of years of judicial development and, I would add, it flies in the face of what has happened in Victoria, where those provisions have not been read and are not applied as having that effect.

Senator BARNETT—But it has not been litigated yet in Victoria. Correct?

Mr Gray—Then it is a successful provision, if it has not been litigated and it is working. If the process is working and has not been litigated—

Senator BARNETT—But it is new.

Mr Gray—It is not new in Victoria. But the other point that I would make is this: you have talked about removing or amending. Of those two, there is no fundamental objection to amending provisions in this bill to meet the concerns of the committee or to better achieve the purpose; clearly not. Removing these provisions, which is the reason for my opening comments, would be very significant. It is not just taking a few words out of this bill, it is undermining the whole pre-trial disclosure regime. I do not quite know what we can put in its place.

Senator BARNETT—Why can't it be removed and left to the courts?

Mr Gray—Because the court would then have no power. What would happen under this legislation is that the prosecution would have to put in their notice of case; the defence would have to say how much was in dispute and how much was not. The defence would be fully entitled to say, 'Everything is in dispute, full stop.' If the defence did that, and something did not appear in this bill, there would be absolutely nothing the court could do. You cannot compel a defendant to do anything unless there is legislation that gives the court power to do that.

Senator BARNETT—But isn't that what has been occurring for the last many decades? That is how the courts have been handling these matters for decades.

Mr Gray—That is why we have criminal trials which last six months, 10 months, a year. That is why the legislatures around Australia and the world have looked for ways to strengthen the pre-trial process and to see if there are ways of narrowing the issues to identify those matters which are in dispute and those which are not. How are these provisions going to be interpreted? If an accused were to come back and say, 'I take issue with that fact, because my defence depends on that fact and that is the key to my defence'? no court, no judge, is going to say, 'You have to say what your defence is so I can assess that.' These provisions are designed to help the court to narrow the issues, not to require the defendant to disclose their defence.

Senator BARNETT—We know what it is designed to do. We are concerned about what the unintended consequences may be. That is where we are going. We know what the objective is.

Mr Gray—Can I refer you to the New South Wales model, which we were initially attracted to. It does not require the defence to do this but it requires the defence to disclose an intention if they propose to raise a number of defences. That is section 35 of the Criminal Procedure Act.

CHAIR—The issue that the three of us have raised this morning is the protection of the accused and the rights of the accused, rather than making it simpler and easier for the court.

Mr Gray—The rights of the accused are clearly important. Nobody is arguing about that or disputing it, and I think Mark Weinberg made some comments yesterday. It is in nobody's interest, including the accused's, to have a criminal trial lasting for a year. Say you have a court tied up for a year—12 possibly 15 jurors sitting there for a year hearing evidence, defence counsel, prosecution counsel, the resources which go into running this case—and at the end of the year, when the defence goes into evidence or presents their case, you find out that 90 per cent of all that evidence that was called went to issues which were not in dispute. That is the concern which has led to the introduction of pre-trial procedure provisions.

You talked about—and I have not yet responded to the question—the reviews under way in Victoria, New South Wales and Queensland. There is nothing unusual in having a pre-trial regime in legislation. As I said, we picked this up from Victoria. As a result of those reviews, there is a recognition that more needs to be done and that the systems need to be improved.

I understand there has been some sort of report presented in New South Wales. The problem we have is that we are not party to that process, have not seen it and do not know what is being recommended. If we knew what was being recommended, it would not necessarily help, because the New South Wales legislature has had far more experience than we have in criminal procedures. Unless and until the New South Wales parliament endorses the procedures or decides that the procedures should have some weight, it is difficult to know for this exercise how much weight we should give to proposals made in other jurisdictions.

Senator BARNETT—I am finished on that matter.

Senator TROOD—This is a convoluted way of treating this issue, because on the one hand it seems as though a party is required not to have any regard to the right of legal professional privilege and then later on

the section says it does not abrogate that right. It looks to me to be very clumsy drafting, Mr Gray. I assume you are not taking personal responsibility for that, but perhaps you could explain what you are trying to achieve here because, whatever it is, it is a very confused outcome, I think, and that seems to be widely agreed.

Mr Gray—This provision refers to legal professional privilege and that obviously attracts attention. It is a very limited provision which does a very limited thing. It is an avoidance of doubt provision. The problem that it addresses is simply this: that you have disclosure obligations on the prosecution and the defence to disclose material. The material which is going to have to be disclosed is the primary material, like witness statements and expert reports. Those documents, being documents which came into use for use in litigation, are covered by legal professional privilege. So if we do not say anything about LPP, that leaves open the argument that could be raised that LPP still applies and that the disclosure obligations do not override it. This provision is designed to address that question.

There has been some suggestion that it would work unfairly to the accused. The reason why it will not and cannot work unfairly to the accused is because, if you go back and look at what the accused has to disclose under the disclosure regime, all the accused ever has to disclose is copies of witness statements they propose to rely on at trial and, if they propose to lead alibi evidence or evidence of mental capacity, then they have to disclose that material. So the suggestion that it is going to require the accused to disclose legal opinions or instructions to counsel or material that they have obtained from other witnesses is just not right. It will not have the effect and it will not operate that way.

So if we leave it blank—we say nothing about LPP—it raises the question of, 'Do those obligations override LPP or not?' This says, 'Yes, they do.' This then goes on to say, 'But it doesn't override LPP for any other reason,' simply and solely to make it clear that that overriding of LPP is for that very limited purpose. Then, for the sake again of avoidance of doubt, paragraphs 2 and 3 make it clear that other privileges and immunities continue to apply.

Then section 23CL(1)(b) is designed to address an issue that was raised during the course of discussions, which we did not quite know how else to address: what happens if somebody comes up with a disclosure regime—and it could be the prosecutor—and identifies something—a priest privilege or some sort of privilege that we do not know about or the documents have come from overseas and are subject to some sort of esoteric privilege?

We do not know how the law is going to develop or how these laws are going to be applied. The court is going to be sitting in different jurisdictions. It is hard to see every possible privilege and immunity which might be raised. So we thought the appropriate thing was to give the court power to decide whether or not privilege can be claimed if there were something inventive that a party came up with. That is what (b) is designed to do now. I agree with you that it is a long provision. It goes for a whole page. I agree that it is convoluted. I agree that it takes a fair bit of working through to come to that conclusion. That is why there is a fair bit of material in the explanatory memorandum which is designed to explain that.

Senator TROOD—Is it beyond the wit of you and the parliamentary draftsmen to clean it up?

Mr Gray—I cannot comment for the parliamentary drafter, but if that is the recommendation from this committee, of course we can take it back.

Senator TROOD—I suspect that both Justice Weinberg and some members of this committee are of the view that there needs to be a provision around legal professional privilege and perhaps that it needs to attain the end that you are seeking to attain. But you are attaining it by the most prolix and convoluted means—unnecessarily so—and it behoves virtue to try and put it in a much more succinct fashion so that the doubt that has clearly been caused about the nature of the section is removed. I do not want to press that, but it is a mess, to put it colloquially, and it could be cleaned up. It is a long while since I practised law, but I invoke the support and take sustenance from His Honour's evidence yesterday in that proposition. So could I encourage you to pay some attention to that proposition, please. I suspect the committee's report will have a view on this.

Mr Gray—I cannot offer any comment beyond what I have already said.

Senator TROOD—I do not want to press that matter, but it needs to be given some attention. Thank you.

Senator BARNETT—I have a matter regarding forum shopping or do you want to pursue anything urgently?

Senator TROOD—We need to talk about bail.

Senator BARNETT—I will let you deal with the bail matter. I will deal with the forum shopping matter. This has been an issue. It has been raised by the Victorian Law Institute, the Bar Association and I think others, in regard to the accused not having an ability to express a view with respect to the appropriate forum in which the matter may go, whether it is the Federal Court or state or territory jurisdiction. Would you like to respond to those concerns?

Mr Gray—The response is on several levels. The first is that the traditional rule is that the prosecutor chooses the venue and it has never been a case where the defence has input. The question arises quite frequently in Commonwealth cases at the moment where criminal conduct spans more than one state, and more than one state court system has jurisdiction to deal with the matter. The prosecution makes that decision and always has. We could not see a reason for departing from that traditional role of the prosecutor. It is one of those things. The prosecution decides whether to file an indictment. It decides which witnesses to call, which charges to prefer. We trust the prosecution to do all of that without review and oversight of the court. Choosing the appropriate venue for the trial is part of that continuum. Of course, the prosecutor will have to do that having regard to the interests of justice. The guiding principle for the DPP is that it will prosecute in the public interest and must take into account all of those considerations, including the logistical consequences of going in one court rather than another. So that is one thing: why change the existing rule?

The second thing is that, as Mark Weinberg pointed out quite clearly yesterday, the choice facing the DPP is between the Supreme Court of a state or territory and the Federal Court of Australia. The suggestion is that there would be unfairness or forensic advantage in going in one forum or another—I suppose in saying that there is really nothing that the defence will be able to say that will bear upon the issue—and the trial, if it is held in the Federal Court, will have to be held in the court, because of section 80 of the Constitution, in the state where the offence occurred. We cannot see that there is the need to give that right to the defence or to give overview to a court, and which court do you give it to?

The third thing is that the courts will ultimately have power to prevent a case from proceeding if they think there has been an abuse of process. If one of these courts thinks that the DPP has commenced proceedings before it when it is more appropriate to go in another court, and if the DPP has done so because it wants a forensic advantage or a logistic advantage, the court will have power to stay the proceedings. That is an inherent power. We are not proposing to interfere with that.

The fourth thing is that, if you give a right of review, you give a right of appeal. That is something we are reluctant to do. I am, again, referring to Mark Weinberg here.

Senator BARNETT—I appreciate your feedback on that, but I do draw your attention to page 5 of the submission from Mr Champion where he refers to the need for a safety valve for an accused to express a view with respect to the forum. He also expresses a view in point 20 on that page where he says, 'Further, the court should have power, as exists in the Supreme Court and County Court of Victoria, to make venue changes of its own volition, provided that the parties have the ability to appear and make submissions about the issue.' How do you respond to that second point?

Mr Gray—I will respond to the first point, the safety valve. The other point is that there was a suggestion that the defence should have a right to address the magistrate. We have looked at that. There is nothing written into the amendments that we are proposing to the Judiciary Act, but that does not mean to say that the magistrate cannot hear from both parties. The normal process before making an order is that you hear from the parties. So there is a safety valve at that stage. The defence can address the magistrate on which court the person should be committed to.

The DPP is not bound by that decision. They will have power to file the indictment in a different court if they consider it appropriate. The safety valve is that, if a party thinks there has been an abuse of process, they can apply to the court to stay the proceedings on abuse of process. I have to admit that we did look at the alternative approach, which is a case of seeing what the provisions might look like—and they become very complicated—about the status of the proceedings which have occurred to date if there is a formal referral. It is much easier and simpler to simply say to the court, if there is an abuse of process, 'Stop it.' The DPP then has to go and file a fresh indictment and start again. If there is a transfer of proceedings, you have to bear in mind that we cannot make procedural laws for the state courts and bearing in mind that there are eight state and territory courts out there.

Senator BARNETT—I appreciate that. In light of the time, we had better move to the bail issue, because that has been raised at some length during the course of the inquiry.

Mr Gray—Certainly.

Senator TROOD—On the bail issue, Mr Gray, if you have been following the evidence you will know that there have been a range of issues raised with regard to bail. The absence of a presumption of entitlement: once a bail application has been declined, an accused can only make a further application if there has been a significant change in circumstance, otherwise there needs to be an appeal from the bail. There is a question raised about the criteria under which bail might be considered. There is a question about continuation of bail from an earlier court proceeding—that is to say, if it is transferred into the Federal Court. So there are a number of issues that seem to cause concern amongst various witnesses and I would be grateful if you would not mind addressing those and explaining the nature of the intent in these provisions.

Mr Gray—Certainly. I will try and be brief. The reason why there is no presumption of bail is because, if this legislation is going to apply to the serious cartel offences, we looked at whether there should be a presumption for or against bail and thought, 'These are serious offences, 10 years imprisonment, about to be enacted. There is the need to control white-collar crime.' To then put a provision in saying, 'But there is a presumption of bail,' seemed to be slightly contrary to that message. On the other hand, of course, it has been pointed out that these are going to be long trials; people have got ties to the community. The position we came to was, 'This is the Federal Court. These bail provisions are designed to be applied by Federal Court judges.' State bail laws are applied by the whole range, from bail sergeants up to Supreme Court and Court of Appeal judges. There is not the same need for prescription and guidance. We can trust the Federal Court judges to consider those matters and to make appropriate orders. So the decision was to not have a presumption for or against bail. I know comments have been made and different people can take different views on that, but that is the policy that was underpinning that decision.

Senator TROOD—Arguably, no crime is greater than murder, but in the exercise of criminal jurisdiction in those cases, there is a presumption of bail if you can make a case, as far as I understand it. It may be difficult, I acknowledge that—and also in relation to what used to be capital crimes. Of course, that is no longer the situation. But it seems to me that the case needs to be perhaps a stronger one than you have put for not including the presumption in favour of bail.

Mr Gray—If there are capital crimes—and I know you are dealing with different state jurisdictions and the laws vary—I think you will find that in at least some jurisdictions in offences of that seriousness there is a presumption against bail. Generally what happens is: with a minor crime, presumption for bail; crimes in the middle, presumption against bail; crimes at the extreme, a presumption against bail, unless there are exceptional circumstances. That is the hierarchy. So you have to decide where these offences fit in. The assessment that we made was somewhere in the middle—no presumption for or against bail. That was the decision and, obviously, if the committee takes a different view on where these offences fit into the hierarchy, then that is the committee's assessment. It comes down to a matter of judgement.

The significant and material circumstances: the provision is simply designed to prevent repeated applications for bail, and all states have got mechanisms to prevent that. The defendant has to pass a threshold, if they have been denied bail. The threshold that we have come up with is 'significant change of circumstances'. I think it has been suggested that it should be 'material change of circumstances'. Quite frankly, I think those two terms are interchangeable. If it is not significant, then the matter will not be reconsidered. If it is significant, the matter can be reconsidered. It seems to me that that is a matter of terminology, which has no substance.

Senator TROOD—Thank you for that. I understood that part of the thrust of the evidence that we had received was that 'significant' had a measure of jurisprudential baggage around it, which creates an onerous burden on an accused. It is higher than it perhaps should be in these circumstances.

Mr Gray—Firstly, I am not sure that there is jurisdictional baggage and, if there is, jurisdictionally it would not be another provision of—

Senator TROOD—Sorry, not jurisdictional; jurisprudential baggage.

Mr Gray—Jurisprudential. I am not sure that there is, but these are provisions dealing with bail. We have talked about whether there should be a presumption for bail. Another comment that has been made is that you do not have to have a presumption of bail because the courts come from that starting point: that people who have not been convicted of a crime are entitled to their liberty. So putting presumption for bail in is really stating the obvious. It is not necessarily a reason not to do it, but it is fairly obvious. Also, if somebody applies for bail and they have been refused but there has been a change in their circumstances, it is highly unlikely that

a court is going to say, 'Well, yes, there's a change in your circumstances, a material change, but it's not a significant change.' I fail to see how it could be argued that there is a difference in this context between a material change in circumstances and a significant change in circumstances. That is why those words appear there: it is meant to give effect to that concept. That is the explanation.

Senator FARRELL—Are you saying that the absence of those words does not take away from the fact that there is still a presumption in favour of bail? Is that what you are really saying?

Mr Gray—I am saying that that is the practical reality. A court, considering a bail application, whether it is in this bill or not, whether it is in the act, will take into account that the person appearing before them has not been convicted of any criminal offence. The court will look at the criteria: is there a risk of flight, is there a risk of suborning witnesses, and all the rest of it. But that fact—that the person is entitled to be considered innocent until proven guilty—is there as part of the common law, as part of the principles that come with the territory.

Senator FARRELL—If the legislation were changed to incorporate that presumption, that is in effect what you are saying is the current position?

Mr Gray—I do not know that I would say that necessarily.

Senator TROOD—Forgive me, Mr Gray, but I thought you said earlier, in relation to another matter, that if the provision was not in the legislation, the court could not have regard to it.

Mr Gray—That was in the context of obligations at the pre-trial stage.

Senator TROOD—Yes. Why does that principle not apply in relation to bail?

Mr Gray—Because the court has power to grant bail. When they come to grant bail, they will have to exercise their discretion. The list of matters in here is—

Senator TROOD—The legislation says, 'The court may grant bail.'

Mr Gray—Yes.

Senator TROOD—But it does not say that there is a presumption in favour of bail.

Mr Gray—Section 58DB(2). I was going to say that is not an exhaustive list. It is an exhaustive list, but item (b) is 'the interests of the accused'. The interests of the accused clearly is to be on bail pending the hearing of the case, so it is there as item (b). The first one is the flight risk and the second is the interests of the accused.

Senator TROOD—You are in 58DB. Is that right?

Mr Gray—Yes, 58DB(2), which is the criteria for bail, which was one of the other comments.

Senator TROOD—That is true. But it was put to us by the Law Council that matters that are often taken into account in relation to bail are character, antecedents, the period a person might be involved in a trial et cetera. There is a list at page 7 of the Law Council's submission. What do you say to their proposition?

Mr Gray—I say in relation to that that we have a bill which is 120 pages long. We are accused of putting too much detail in it and too much length. Here is one of the very few provisions in the whole of this bill where we have actually summarised the requirements of existing rules that are in state law and put them in a quarter of a page instead of two pages, and the suggestion is that we should lengthen it. That is the reason it is there. That list picks up every single thing which is covered by the more detailed list, I would say. The other point is the point that I made before: state laws are aimed at bail sergeants, County Court judges, magistrates—whoever issues bail—up to Supreme Court judges. These are Federal Court judges. We do not have to tell them, 'When you're considering the interests of the accused, take into account the fact that the accused might like to be at liberty pending the hearing of the trial.' That is my response. We could quite easily expand on these provisions, but to what end?

Senator TROOD—Legal economy is certainly a virtue, provided we do not do any mischief.'

Mr Gray—That is exactly right. I have read their submissions and I heard Mark Weinberg's comments. Nobody has actually said that there is anything left out there. They have just said, 'It should be longer and more detailed.' Of course, we have just had this discussion about the LPP provisions being too long and legalistic, and here we have got a provision which is nice and brief and we are getting criticised for it being too brief. I make that comment just for the sake of it.

The other one, the continuation of bail from the magistrates, we did consider. We looked at that. We have drafted provisions. The problem is that we have got eight sets of magistrates courts, eight sets of state procedure, potentially pumping defendants into the Federal Court. If you have to continue the bail orders, it gets quite complicated and difficult. There is the potentially difficult drafting of provisions; what is the status of different orders; and who do you appeal to. We thought the best way of doing that was to draw a line to say, 'At the end of the committal proceedings, the person is bailed'—assuming they are bailed—'to appear before the Federal Court.' When they appeal before the Federal Court, the Federal Court has to hear a bail application, has to consider bail afresh, and then there is no question of continuing orders. What happens if the court forgets to make the order? What happens if the papers get lost and you cannot find what the orders were? It seemed it was a lot clearer just to draw a line in the sand, so that is the policy in this bill.

Senator TROOD—I see. I think that covered the bail matters. There were some questions about juries, too, which emerged. There was one about balloting in and out. I am not sure that I want to place too much force on this proposition, but I think it is an opportunity at least to raise it.

Mr Gray—I really do not see the difference between balloting in and balloting out. It seems the same process. It is going to arise occasionally—rarely—and, again referring to Mark Weinberg, who was asked about this, he said that if somebody has been there for eight months listening to evidence and is then not allowed to go into the jury room, that is fairly significant. I really do not see that there is a huge disadvantage in taking a bit of time over that decision and allowing people to see it has been done properly. If the answer is that it might take 20 minutes instead of 10 minutes, I just think that at that time, given what the jurors have been through, taking another 10 minutes of their time is not of great moment. So this comment was made during the drafting of the thing. We just did not think it was significant enough.

Senator TROOD—There was a point about names and numbers that arose.

Mr Gray—Yes.

Senator TROOD—Do you wish to make any observations about that?

Mr Gray—The traditional rule is that the jurors are called by names unless there is reason not to. That has been varied, apparently, in Victoria. It may have been varied in other places. I have not really gone to the legislation in huge detail. My understanding is that the normal practice in most places still is that jurors are called by name. With serious cartel cases—and again Mark Weinberg was asked about this and I endorse his comments—there is unlikely to be a risk of jurors suffering harm. If there is, the court can make the order. So I think these provisions are appropriate.

Of course, it also has to be said, there is the challenging process. When we give the accused a right to challenge jurors, they do not have a lot of information to do that with. One of the few things is the name of the juror. The relevance of that is that a juror is called by name and somebody on the defence team might recognise the name and say that person could be involved in the case. If we take the name away and give them a number, then someone is going to have to recognise the person. I just think that those provisions do in fact detract from the rights of accused for no necessary purpose, given the limited nature of the offences the court is going to deal with for the foreseeable future.

Senator TROOD—I must say, on this point I think I am with you.

Mr Gray—And on any others?

Senator TROOD—Unless those engaged in cartel activities are necessarily likely to visit some kind of consequences on jurors, as distinct from other defendants, then I cannot say it is a particularly compelling proposition, given that we have been doing this for several hundred years.

Mr Gray—I suspect we are in a position, as we are with a lot of the comments that have been made—and I am not criticising the Law Council here; I was looking at some of the submissions—where people say, 'Well, this isn't the procedure we have in Victoria,' and then we will get comments from people obviously based in New South Wales, saying, 'These aren't the provisions we've got in New South Wales.' I suspect this may be one of those comments: the law has developed in Victoria, so there is a sort of presumption in Victoria that the Commonwealth should follow suit. If we do that, then we are going to be inconsistent with other jurisdictions.

CHAIR—Senator Trood, we are running behind now in terms of moving to the next bill. We were going to try and do our first witness for the Personal Property Securities Bill before 12.30.

Senator TROOD—Right.

CHAIR—My suggestion is that we put—

Senator BARNETT—That we put questions on notice?

CHAIR—Absolutely, yes. Mr Gray and Ms Lewis, we have quite a large number of questions to put on notice. For my part and on behalf of the committee as the chair, there would be at least 20 questions, I think, and I am also curious for you to go through the evidence that Justice Weinberg gave yesterday. I took notes, but in the early part of his evidence he went quite carefully through, particularly, sections 23 and 30 of the act and made specific suggestions, and I would not mind a comment back from A-G's about whether or not you accept those suggestions.

So we will need to conclude your evidence today before this committee for the purposes of our inquiry into this legislation and we will send you those questions on notice. The good news is, though, that we think you can have till close of business next Friday to provide us with the answers, because we may need to consider varying our tabling date now that we have an estimates week later. It is not a sitting week. It gives us a little bit more flexibility with the tabling date for this report. Nevertheless, if we send you all these questions—and I have asked for a response to Justice Weinberg's suggestions of last night—could you get them to us by close of business next Friday?

Mr Gray—Yes, I had made notes. I was just looking at them briefly and, yes, there is certainly no problem responding to those.

CHAIR—I am sure we would have liked to have spent more time with you, but we still have another bill to deal with today.

Mr Gray—I am sorry, some of my answers were lengthy. I apologise for that.

CHAIR—All right. I thank you very much for your time today and for the evidence that you have provided to us. We look forward to your responses on the other matters.

[12.09 pm]

RICH, Ms Nicole, Director, Policy and Campaigns, Consumer Action Law Centre

CHAIR—The Senate Standing Committee on Legal and Constitutional Affairs now moves to hearing evidence for its inquiry into the exposure draft of the Personal Property Securities Bill 2008. This bill was referred to the committee by the Senate on 12 November 2008 for report by 23 February 2009. It 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. The government 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 32 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 today they are protected by parliamentary privilege and it is unlawful 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.

We have as our first witness today the Consumer Action Law Centre by teleconference. Good morning, Ms Rich, and welcome to our inquiry.

Ms Rich—Thank you.

CHAIR—The centre has lodged a submission with us, which is No. 20. Before I invite you to make a short opening statement or talk to that submission, do you have any changes or amendments you want to make?

Ms Rich—No, that is fine, thanks.

CHAIR—If you want to, make a brief statement, and then we will go to questions. Thanks.

Ms Rich—Thank you. I would like to first say that the centre appreciates very much the opportunity to give evidence today. This bill is quite a significant one. It primarily deals with interests that will affect business-to-business transactions, but there will be an impact on individuals and consumers, and it is quite a difficult bill for, I think, the general community to get their head around, given its length and complexity. We have tried to do our best to represent the interests of some members of the community that may find it difficult to engage in the process and, given that there have not been a lot of groups that have been able to do that, we do appreciate the opportunity to talk to you directly about the bill today.

Our concerns at the centre, about the bill, could be split into two. But before I talk a little bit about that, I would like to put on the record that we are not opposed to the reforms being proposed by the bill. We actually support the idea of national personal property security laws and a register that makes that work more efficiently and laws that again create certainty and efficiency in that system. The issue for us is that it is a significant bill and there are all sorts of effects. While it is probably going to be too difficult to get everything perfect, there are probably some improvements that could be made just to improve protections for, particularly, consumers who are not the primary subject of the bill but are affected by it.

That is really the perspective that we are approaching the bill from. As I said, our concerns can probably be broadly divided into two groups. The first group would be concerns about privacy impacts of the proposed legislation and the second group would be concerns about other impacts of the proposed legislation around the actual working of the register and the rules set out in the bill.

I am conscious of the time and I know that you will have seen the submission. In summary, we are not a privacy advocacy organisation—we are a group that represents consumers—but in reading the bill, it was clear to us that there were significant privacy issues that we could not ignore, and that is why we have made submissions on that issue. We think that, although it will be difficult to get things perfect, there are some improvements that could be made. In particular, some of the important protections, such as keeping addresses of individuals off the register, should probably be enshrined in the legislation, not subject to change in regulations.

We think that the bill would benefit from a privacy impact assessment and also a review, post implementation of the legislation, to see what the actual privacy effects are, if any. We think the bill suffers from a lack of a regulator and sanctions to deal with privacy concerns and that perhaps a regulator such as the

Australian Securities and Investments Commission should be responsible for some aspects of the bill. We do have concerns about things like data mining, and by that we mean that it is clear under the bill that companies could access the register to assist them with marketing of credit to consumers, and that is not really what the purpose of the register should be about, so we would like some protections around that.

In the submission there are a number of other issues around the impact of the bill on consumers but, when it boils down to it, there are a couple of ways that they could probably be solved. One would be to expand the registrar's powers to deal with entries on the register that probably should not be there. At the moment the registrar still has reasonably limited powers to deal with frivolous or vexatious entries, but probably the registrar should also be able to remove registrations of, for example, security interests that are void under the Consumer Credit Code. While we understand that putting them on the register does not actually validate those sorts of security interests, the fact is that the sorts of consumers that give those are vulnerable consumers—often low income—and they are not likely to understand that, and creditors would potentially use registration statements as part of the way that they pressure consumers in those situations. So the registrar should be able to take those sorts of entries off.

Again, we think that there is room for actual sanctions in the bill for not complying with the obligations under the bill—for example, the registrar has no direct contact with debtors or grantors. Debtors rely on the lender or security holder to do the right thing by them in obeying the bill's obligations—for example, sending them notices of things—but there is no sanction if you do not comply. We think there need to be sanctions and a regulator to enforce those sorts of obligations, and those sanctions should probably be civil penalties, not just criminal ones, because it is really not going to be cost effective or sensible for a regulator to take criminal court action over those kinds of breaches.

Finally, there are a few technical things, like the definition of 'consumer property', that could probably be tightened up to ensure that the intention of having that category actually flows through to the practice.

CHAIR—Thanks, Ms Rich. That is most appreciated.

Senator BARNETT—Thanks very much, Ms Rich, for your submission and your evidence today. It is very much appreciated, and you have obviously put a lot of thought into both your submission and your presentation. I want to go, firstly, to the privacy issues that you have raised. I have looked at the submission and you have referred to identity theft as one of the concerns that you have and I wanted to flesh out your concerns regarding privacy. Could you outline for us your most serious concerns regarding privacy.

Ms Rich—Sure. When we looked at the original draft bill, amongst the first things that stood out were problems particularly for women and children fleeing domestic violence situations, because it was originally proposed that addresses of individuals would be allowed to be kept on the register. I think that that concern was heard, and that is one of the reasons for the proposal that the regulations do not allow addresses to be kept on the register.

Senator BARNETT—So you support that?

Ms Rich—We do, in the sense that it does deal with probably the most significant privacy issues that the original draft bill had raised. The concern with that is that it is quite vulnerable to reversal, particularly because I am aware that there are other stakeholders that have not unjustifiable grounds for arguing that addresses should be on the register. I am not sure I agree with them, but I could not say that it is a totally unjustifiable argument. Thus it is subject to the potential for reversal and, being in regulations, the protection is just not strong enough in that regard.

I think that if that is the way that the bill is going to end up going in terms of making sure that that issue is covered off—that individuals' addresses are not available on the register—it really needs to be in the legislation, not in the regulations. I think it is serious enough for that to be the case.

In terms of identity theft, again the risk is reduced by not having addresses, but I think having names and dates of birth together remains an issue. There are various ways that you could deal with that. I think the risk is always going to be there with creating a huge repository of personal information, like this is going to do, and we are not going to be able to completely fix those issues but we can do a few things. One is to be careful about the sorts of information that might be returned in searches. You might have date of birth information on the register, but I know, for example, some of the state privacy commissioners have argued that you should have a layered search result approach, so that when you first search you only get back the information that you need, and it is only if there is a conflict of names on the register that maybe you are then provided with the

date of birth to make sure you have the correct entry coming back. Something like that, I think, has merit to protect those sorts of issues.

At the moment there are not really any measures in the legislation to prevent unauthorised access. We have measures that say, 'You're not allowed to access the register unless it's for an authorised purpose,' but of course there is no way of checking that beforehand. The sanctions involved are really not enough to discourage anybody that is intent on doing that from doing it. The sanctioning is that you can be sued—highly unlikely for an individual to sue—and, if it is a large organisation or a government agency that does it, they could be subject to a complaint to the Privacy Commissioner. But even if that occurred, the sanctions available at the end of that process are fairly limited.

We do not think there is any significant deterrence built into the legislation, and we believe that that is one aspect that could be improved. We think that sanctions are necessary for certain obligations, including that the register should not be accessed in the first place unless it is for an authorised purpose. That is why we think there need to be not only sanctions but a regulator to enforce them. The only regulator we could think of is ASIC, because that is not necessarily the role of the Privacy Commissioner, and we certainly do not believe that the registrar should have those kinds of functions.

Senator BARNETT—I wanted to ask you about the regulator. You have recommended a separate independent regulator, and you have just then suggested ASIC. Obviously, the Privacy Commissioner could still have a role. What terms of reference would you give the regulator? How much power and what sorts of things would they do? Could you expand on that?

Ms Rich—Generally we view the regulator's role as administering and enforcing various provisions of legislation. There is certainly a role for the federal Privacy Commissioner in terms of all of the privacy issues, but the privacy commissioners are not really there to enforce any sanctions that might be subject to a civil or criminal penalty, for example, and there are none in the bill anyway. So that is not really an issue at the moment, but we think one of the flaws in the bill is that there are no sanctions for not complying with the obligations under the bill.

There are already obligations, so you do not need to insert specific obligations. You just need to insert an additional provision that says that not complying with this obligation is an offence or is potentially liable to a civil penalty, for example, or is potentially liable to court action under X section of the bill. You then give the regulator that you choose responsibility for enforcing those particular provisions. You do not have to change any of the substantive content of the bill, but you can insert provisions that allow for a regulator to take action to enforce obligations or to sanction somebody for not complying with their obligations. Does that make sense?

Senator BARNETT—Yes, it does. You have made a whole range of recommendations in here, and we will not have time to go through them today, but I appreciate that. Some of those, particularly with respect to privacy, we can pick up and ask the Attorney-General's Department about later today and give consideration to them. Thanks again.

CHAIR—Ms Rich, we are pressed for time here today, but we appreciate your perspective on the bill and your submission. Thank you very much for making yourself available to talk to us.

Ms Rich—Thank you, Senators. It is much appreciated.

Proceedings suspended from 12.24 pm to 1.07 pm

DUCKWORTH, Mr Colin Robert, Senior Policy Officer, Motor Trades Association of Australia

McGILVRAY, Mr Phillip Richard, Executive Director, Motor Trades Association of ACT

CHAIR—Welcome, Mr Duckworth and Mr McGilvray, to our public hearing. Thank you very much for making time today. I formally resume our public hearing into the exposure draft of the Personal Property Securities Act, and I welcome representatives from the Motor Trades Association of Australia. We have got a submission from your association which is No. 18 for our purposes. Before I invite you to talk to that submission, do you need to make any changes or amendments?

Mr Duckworth—No.

CHAIR—Would you like to provide us with an opening statement or talk to the statement?

Mr Duckworth—I will provide an opening statement, if I may.

CHAIR—Then we will go to questions.

Mr Duckworth—Yes, certainly. The MTAA is delighted to have this opportunity to assist the committee with this inquiry into the Personal Property Securities Bill. The MTAA is a federation of the various state and territory motor trades associations, as well as the New South Wales based Service Station Association and the Australian Automobile Dealers Association. MTAA also has a number of affiliated trade associations which represent particular subsectors of the retail motor trades, ranging from motor vehicle body repair to motor parts recycling.

As the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry, MTAA is well positioned to make comments as to the manner in which it anticipates the proposed PPS regime will operate in a practical sense. MTAA understands that in jurisdictions where national PPS registers similar to that proposed to operate in Australia by this bill are in operation, that motor vehicle connected securities comprise roughly half of all those registered. MTAA has, therefore, a significant interest in the development of the proposed PPS regime.

The association acknowledges the enormity of the task that the reform of Australia's personal property security law represents and sees a number of benefits that might be derived from the construction of the national PPS register, particularly from the integration within that register of the various state and territory registers of encumbent vehicles—or REVs—and the National Exchange of Vehicle and Driver Information Service—or NEVDIS. From that perspective, MTAA supports the PPS law reform process.

Nevertheless, the association does have some concerns in connection with the draft bill and its potential operation. The association needs to ensure that the operation of a regime arising from its adoption does not require any change in the operations of retail motor trades businesses that lead to an increase in their administrative or compliance burden. At the same time, the association acknowledges that the matters canvassed by the PPS reform process can be inordinately complex and broad in scope, and that as such this complexity will also be reflected in the bill.

The association search, therefore, for a clearly defined illustration or sense of just how the practical day-to-day operations of the PPS regime as proposed will look is challenged by that reality. In that regard, MTAA and the Commonwealth Attorney-General's Department continue to work cooperatively on the matters of concern to the association in an effort to secure satisfactory outcomes. MTAA is also represented on the Commonwealth Attorney-General's Consultative Group for Personal Property Security Law Reform, and it is through engagement with that process that the association has been assiduous in its efforts to evaluate all aspects of the proposed PPS regime from a perspective of practicality as distinct from what might be considered a theoretical or purely legal perspective.

Understandably, MTAA has made a number of submissions to the Commonwealth Attorney-General's Department as part of the reform process leading up to the bill that is the subject of this inquiry. From an analysis of those submissions, it might be understood that a number of issues, in the association's view, need to be acknowledged as being of significant importance in determining the final form and operation of the regime.

It must be noted that the characteristics of the retail motor trades, particularly in the area of vehicle sales, render it unique in comparison to other areas of retailing. First, the manner in which motor vehicle dealership financing is arranged and that financing's characteristics are particular to that sector. These are characteristics that have developed to such an extent as to be highly sophisticated and specific to dealership operations. This

aspect of a typical motor vehicle dealer's operations is sufficient in itself to make it reasonable to consider dealings in that sector as distinctive from virtually every other area of retail sales activity in the market.

Second, a typical new motor vehicle dealership is much more than just a vehicle retail outlet. That aspect of the business might be thought of, however, as the front-of-house component of the operations. Invariably, though, a dealership will also operate a service and spare parts operation. Indeed, the need to operate a customer service provision in that manner will invariably be an imperative of the franchise agreement that exists between the dealer and the manufacturer or supplier. Those service and spare parts aspects of the business might be thought of as the back-of-house component of the operations. Third, a motor vehicle dealership's profitability and therefore sustainability, especially in more recent times, is highly sensitive to a variety of factors; not the least of these factors is any excessive administrative burden and the costs associated with either compliance with regulation or an imposed compulsion to perform actions that are in the best interests of the business.

It might at this point also be worth the committee noting some of the characteristics of a typical average motor vehicle dealership. I apologise if these are details of which the committee is already aware. Motor vehicle dealerships are generally family owned and operated franchise businesses. Their stockholding of vehicles is generally facilitated by floor plan financing arrangements in which the vehicles are owned by a financier that then bails the vehicles to the dealer for sale.

These are capital intensive businesses of modest returns when comparison is made to other retail sectors, where the investment made by the proprietorship in the dealership property itself can be, and usually is, in the many millions of dollars. A typical mid-size urban new vehicle dealership may have an annual turnover in the order of $100 million, which may realise a gross profit in the vicinity of only one to two per cent. Additionally, a typical dealership would need to average vehicle sales of somewhere in the vicinity of 30 to 40 units a month, in order to realise the capacity to service its financial obligations. Its most profitable aspects will invariably be its back-of-house service and spare parts departments in which, despite some consumer scepticism, profit margins on activities conducted therein remain only consistent with the majority of the broader retail sector. My colleague Mr McGilvray is well placed to provide the committee with greater detail on typical dealership characteristics than I am able, but in the main these might be summarised as I have just indicated.

Given the issues and characteristics that I have described, MTAA and its member body AADA are, therefore, perhaps understandably vigilant over any proposal that may have the potential to impact in a deleterious manner upon motor vehicle dealers and other retail motor trades. At the same time, however, the association is also vigilant over any proposal that may have the potential to impact in a positive manner not just upon motor vehicle dealers but upon retail motor traders generally and the community at large. The association is of the view that the proposed PPS regime appears likely to be of that latter category but it, nevertheless, continues to seek confirmation of that view. We will be happy now to take any questions that you might have.

CHAIR—Thank you. In your submission, just a little bit further on from where you have finished your opening statement, you talk about not so much concerns in connection with the PPS regime that is proposed but with the possible regulations made under it.

Mr Duckworth—That is right.

CHAIR—In respect to what areas, though?

Mr Duckworth—There are some definitions that will be contained in the regulations where we are still uncertain about what they will be. One, for instance, is the definition of 'motor vehicle'. The association has advocated for some time that the definition of 'motor vehicle' ought to be not dissimilar to that that is in the Sale of Motor Vehicles Act ACT, which is along the lines of, if I can distil it down, 'Does it have motor power and wheels?' If it does, then it is a motor vehicle. So far we have seen definitions from the department that are a little broader than that and a little more convoluted and a little more complex.

CHAIR—So a motorised scooter would be a motor vehicle?

Mr Duckworth—Yes.

CHAIR—Under your definition or under the department's?

Mr Duckworth—Under the ACT definition, yes.

CHAIR—I see.

Mr Duckworth—It could still be underneath some of the proposed definitions, but exactly where it would fit within it would be the thing that would be in question.

CHAIR—Where is the department's definition broader? Give me an example in relation to that?

Mr Duckworth—I think they were making a distinction at one stage between registrable and unregistrable vehicles, for instance, and that somehow you would have, it seemed to me, like a classification set of subsets underneath a motor vehicle: 'Well, this one is a registered vehicle and so it has slightly different identifiers,' or, 'This one is an unregistrable vehicle and it will have, again, slightly different conditions applied to it,' whereas—

CHAIR—But you can have some pretty expensive unregistered vehicles.

Mr Duckworth—Yes, exactly. Mining equipment, for instance. A lot of that, in some states, is not registrable. There is also an issue, for instance, with non-ADR-compliant motorbikes. There would not be, probably, a farmer in Australia who would not have a non-ADR-compliant motorbike of some type.

CHAIR—Antique, I suppose, as well.

Mr Duckworth—Similarly. And classic cars. Exactly. Most of those will be registrable in some form, but I am also aware of non-ADR-compliant—

CHAIR—So is there a view that only registered vehicles would go on the register?

Mr Duckworth—I am not too certain what the view is there.

Senator BARNETT—What is your view?

Mr Duckworth—If it is a motor vehicle, it ought to be on the register. If it is subject to a financing agreement, what difference does it make?

CHAIR—Registered or not.

Mr Duckworth—Registered or not.

CHAIR—Registrable or not registrable.

Mr Duckworth—Yes. Providing it—

CHAIR—Is an asset.

Mr Duckworth—It is identifiable and it is an asset, yes, exactly.

Senator BARNETT—So the farming motorbikes should be on the register.

Mr Duckworth—Exactly, because there will be those vehicles that will be subject to a financing arrangement.

Senator BARNETT—And that is your criterion, is it—if it is subject to a financing arrangement?

Mr Duckworth—Because we get to look at a definition such as 'motor vehicle' across a range of portfolios and in a range of issues, it has been our experience that the ACT definition best defines it, if you are looking for the core nub of what a motor vehicle is. It pretty much solves so many problems in so many other legislative and regulatory areas. It is the one that we continue to advocate.

CHAIR—Mr Duckworth, when you talk about the bill having a direct impact on the dealership's front-of-house operations, are you talking about the average person who would walk in through the door of a Ford dealer, purchase a car and have a financial agreement in exchange for that?

Mr Duckworth—Exactly.

CHAIR—Front of house.

Mr Duckworth—Front of house.

CHAIR—Like your shopfront, basically.

Mr Duckworth—Exactly.

CHAIR—So it will have little impact on that, you are saying.

Mr Duckworth—It will have a minimal impact.

CHAIR—Where is the greater impact going to be? Is this in second-hand cars?

Mr Duckworth—No. From what I can gather and from my understanding and interpretation of the bill—and I will admit I have no legal training, so I only look at it from my knowledge of working in the industry—

CHAIR—In the practical sense, I would say.

Mr Duckworth—The practical sense. Exactly. I can see a potential in back-of-house operations, so if you are looking at the operation of a spare parts department, for instance, and the back-of-house part of a dealership, its day-to-day dealings and what it might have to do to ensure that its interests are protected, that is where I am still not a hundred per cent comfortable that the bill is going to do what it purports to do for our members to give them surety or to make life easier for them.

CHAIR—So that those departments can keep going or so that—

Mr Duckworth—They will be able to keep trading. It will not be the end of them. But it may well mean that, if they are trying to obtain the level of comfort that they seek to protect their interests, it imposes a slightly higher administrative burden on them, which is something that many of them just are not in a position to wear.

CHAIR—I see. I understand.

Senator BARNETT—What sort of administrative burden are you thinking about?

CHAIR—Financial.

Mr Duckworth—From the perspective of protecting their interests. Phil, you might be able to back me up on the figures. An average spare parts department in a metropolitan dealer will write something like $15,000 to $17,000 worth of parts business a day, but if you are what is known as an Apex dealer—a dealer that supplies parts to other dealers—you might be writing invoices worth roughly $1 million worth of parts a day.

Senator BARNETT—Explain the administrative burden to us. Give us an example.

Mr Duckworth—If you had a spare parts invoice worth, say, $500,000 to $600,000 of 20-odd line items or 200 line items, going from an Apex dealer in Sydney to an Apex dealer in the south-east Queensland area, in a rural area, he might want to ensure that he has proper securitisation of his interest in those parts when he sends them out.

Senator BARNETT—Therefore, it would have to be registered.

Mr Duckworth—Exactly, and if it be that, in order for him to feel comfort that his interests are well and truly protected, he may well want to perfect an interest by registering each and every line item that he sends out.

Senator BARNETT—Therefore, you would be recommending online access, instantaneous results, to perfect the interest, or are you saying it is simply improbable to achieve a perfection of the interest in the appropriate time?

Mr Duckworth—Again, this is in a worst-case scenario, but I could imagine that a dealership in their spare parts area would probably be advised to employ extra personnel just to handle the protection of their interests in that regard.

Senator BARNETT—How does it work at the moment, say, in New South Wales or Victoria?

Mr Duckworth—And in Queensland, which is where my experience largely is, it works on a retention of title arrangement, where the goods go out on invoice and there is just that general understanding of seven to 14 days or whatever the account arrangements are. Mr McGilvray may be able to provide you with more detail on the way that it operates presently.

Mr McGilvray—Could I just put some more clarity into the situation. If the spare parts department sends out 10 pages of parts—and there are traditionally 10 to 12 items to a page—my understanding of the current proposal is that a dealership would be required to lodge individually for each one of those items, each one of those parts, so that they can be clearly identified within the register. Not only would they need to complete their in-house side even if it was an online application, but someone would still have to process the part number, and part numbers range from three digits to 17 digits long, and then, of course, once the invoices are paid, someone needs to remove them from the register. There is no doubt that, from the dealership side, just to protect where they currently are with their lien, they would need to employ additional staff.

CHAIR—My understanding is that this bill does not get down to that level of minutiae or detail.

Mr McGilvray—But how, without that minute detail, are those interests of the dealer protected? There seems to be nothing here other than actually to lodge that.

CHAIR—I do not think I am following you, Mr McGilvray. If I want to buy a whole lot of spare parts off you, I would do that, unless I get a loan to buy the parts off you. Is that what you are saying?

Mr McGilvray—At the moment, when the parts get sent out to a repairer, say, there is a lien, a retention of title clause, on the base of every single invoice that goes out, and that repairer, if they have an account, is embedded in that application as well. So they do not need to get down to that minute level currently. The owner of the business receiving the goods realises that title of those parts does not transfer to him until such time as the parts have been paid for.

CHAIR—I see.

Senator BARNETT—Thanks for your submission. You have raised a whole range of questions in your attached paper, in your submission, from Michael Delaney. Are you seeking specific answers to those questions from the department before you would be willing to support the bill?

Mr Duckworth—That is why we remain in close contact with the department and we continue to work on those issues.

Senator BARNETT—Yes. We have asked a number of witnesses. They have expressed concern to us and we say to them, 'Have you raised these questions with the department in the consultation phase?' and so I need to ask you that same question: whether you have raised these concerns with the department.

Mr McGilvray—Absolutely.

Senator BARNETT—What has the response been to that?

Mr Duckworth—As I said, there have been assiduous efforts on both sides. We have had issues that we have raised with the department and they have done everything they can to address them, and, as ever with these things, it is thesis and antithesis, and eventually, I imagine, we will arrive at common ground on those issues.

Senator BARNETT—You think you will?

Mr Duckworth—I would like to be positive.

Senator BARNETT—You are hopeful?

Mr Duckworth—I am hopeful, yes.

Senator BARNETT—Hopeful. All right. We have been talking about this registering and deregistering of your financial interest. You have just given an example. You have also raised this issue of registry error. What is your concern there about a registry error?

Mr Duckworth—I do not think it is so much about whether we had any real issues with registry error. It is accommodated in the bill in my understanding and reading of it. I must admit, though, that it is not an area that I have really focused on; it is one of those where I have looked at it in the bill and gone, 'That's fair enough,' and moved on.

Senator BARNETT—It is not a deep and abiding concern.

Mr Duckworth—No, not at all.

Senator BARNETT—We have noted your concerns and they are in the submission, and we will have the Attorney's department to respond to those. We appreciate that.

CHAIR—Before you go, could I ask you to take us through very briefly your concerns about the PMSI—the purchase money security interest.

Mr Duckworth—I must stress that it is, more or less, a lack of clarity around what happens in the event of the PMSI replacing the existing retention of title arrangements, which is kind of proximal to the ideas that we have around our concerns with spare parts or back-of-house operations. Currently they exist, they operate completely on the faith and trust of retention of title arrangements; that is the current abiding practice and has been the practice for many years. It is being replaced by the PMSI concept and, because of the way that it is currently expressed in the bill through the relevant sections, it is not clear to us exactly how it is going to operate. We have advice from the department that, 'It will operate this way and it's not a problem and it'll all be smooth,' and I have even seen some stuff as recently as this morning that again reflects those sentiments. But until such time as we can see explicitly in the bill that that is how it will operate, we are not going to have a great deal of comfort.

CHAIR—So it is not so much the wording of the bill but the practical application of it?

Mr Duckworth—It is how the wording of the bill might practically manifest itself in the market. I think that is the key thing.

CHAIR—You have not had that explained to you, or you are not happy with the explanation?

Mr Duckworth—We have sort of had it explained, I guess, but, as I have said, until we explicitly see it in black and white, the devil remains in the detail.

CHAIR—You are talking about the regulations?

Mr Duckworth—There is an intersection point between the wording of sections of the bill and what will appear ultimately in the regulations.

CHAIR—You are not the only witness that has raised this issue—that they are waiting for further detail in the regulations and further finetuning, I guess, of the legislation. We have noted that and we will take that on board as well in our report.

Mr Duckworth—Thank you.

CHAIR—We do not have any other questions. I thank you both very much for appearing before us today. Thank you for your submission. It is appreciated.

[1.30 pm]

BOBBIN, Mr Wayne Rodney, Principal Legal Officer, PPS Branch, Legal Services and Personal Property Securities Division, Attorney-General's Department

GLENN, Mr Richard Alexander, Assistant Secretary, PPS Branch, Legal Services and Personal Property Securities Division, Attorney-General's Department

PATCH, Mr Robert Gordon, Principal Legal Officer, Legal Services and Personal Property Securities Division, Attorney-General's Department

POPPLE, Dr James, First Assistant Secretary, Legal Services and Personal Property Securities Division, Attorney-General's Department

CHAIR—I formally welcome representatives from the Attorney-General's Department. You have lodged a submission with us which is No. 8. Before I ask you to make an opening statement, do you have any changes or amendments that you want to make to that?

Dr Popple—No.

CHAIR—I also want to remind senators, and members of the Attorney-General's Department of course, that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and should be given reasonable opportunity to refer questions asked of the officer to superior officers or in fact to the minister. This resolution prohibits only questions asking for opinions on matters of policy, but does not preclude us from asking questions about explanations of policies or factual questions about when and how policies were adopted.

I want to remind you that any claim that it would be contrary to the public interest to answer our question must be made by the minister and should be accompanied by a statement setting out the basis for the claim. That is just to clarify that and assist you with your responses. I will invite you now to make a short opening statement, if you want to do that, and at the conclusion you can anticipate that we have quite a number of questions to ask you.

Dr Popple—Thank you for the opportunity to appear today. This is an important reform. It has been identified by the Council of Australian Governments as one of its regulatory priorities, and we are very glad that the Senate referred this draft legislation to this committee for its consideration before introduction. As the Attorney-General explained in his letter to the committee in November last year, given that the text of the PPS Bill will form the basis of a referral of power from the states to the Commonwealth, it is crucial to settle the bill before it is introduced into any of those state parliaments or, indeed, into the Commonwealth parliament.

We have followed the committee's hearings these last few weeks very closely. There are a number of matters raised by those who gave evidence that we would like to address today in this opening statement. Those are amendments suggested to the committee that we will be putting to the Attorney for his consideration: privacy issues; the role and purpose of section 235; the complexity of the bill; the relevance of international precedents for the bill; the process of reform to date, including interaction with stakeholders and responses to stakeholders' concerns; and also the commencement date of the bill. I propose to touch very briefly on those before we go to questions, if I might.

CHAIR—Just to make that clear, Dr Popple, is that all right?

Senator BARNETT—I am more than happy. I think it is excellent.

CHAIR—So you are going to go through each of those areas for us now.

Dr Popple—Very briefly, and obviously respond to any further questions.

CHAIR—It might minimise the questions that we have got of you.

Senator BARNETT—I think it is a good idea.

Senator TROOD—Chair, would it be useful if we had questions about the sections that Dr Popple is dealing with? We might address them then, rather than waiting for the end.

CHAIR—All right. If you want to do a chunk, and then we will go to questions, and then do another chunk.

Dr Popple—Certainly.

CHAIR—That is probably a good way to go. Thanks, Senator Trood. Good thinking!

Dr Popple—The first thing we wanted to raise was amendments. We have identified several suggestions made by organisations that have given evidence to the committee that we believe also will improve the bill,

and we will be putting those suggestions to the Attorney-General for his consideration. They include the amendment of the definition of 'account' in section 35 so that it is more closely aligned with the corresponding definition in the US article 9. That, you will recall, was suggested by Clayton Utz.

Senator BARNETT—What was that suggestion from Clayton Utz? Are you going to give us further particulars here? I remember the Clayton Utz presentation, but can we get a little bit more clarity about that definition?

CHAIR—We can cross-reference it as well in the transcript. Is that correct?

Senator BARNETT—We can. If it is different to the Clayton Utz recommendation, or a variation of it, we would like to know.

Dr Popple—Mr Patch can give some more detail.

Mr Patch—Clayton Utz are concerned that the definition of 'account' in the bill is too broad and catches a range of transactions that they consider it should not catch. The bill follows the approach taken in New Zealand and Canada. Clayton Utz have suggested that the definition should be a narrower definition along the lines of US article 9. In broad terms, the US article 9 definition relates to what, in layperson terms, we would call accounts receivables of a business, or amounts owed to you on the sale of an asset, so it is a much clearer list. We would be looking at crafting a definition that was somewhat similar in effect, though not necessarily using the exact words in the article 9 definition, if the government were minded to move that way.

CHAIR—So section 130, 131?

Dr Popple—Yes, indeed. The proposal there would be to amend those sections to include notice requirements that prevent the value of a security interest over livestock or crops from being diminished. That was a suggestion from the Australian Bankers Association. An amendment to the table in section 227 so that it clarifies that a person may search on behalf of another person for any of the purposes listed in that table: you may recall that was a suggestion from Veda Advantage.

Senator BARNETT—This was quite an important one, 227. Was it an improvement to the definition of item 21, because that was a concern expressed on page 220? So it is not related to item 21? They were concerned about the definition of 'advise': 'to advise another person in connection with any of the purposes referred to in this table'. They were concerned about 'advise' being defined broadly and therefore that would cause grief, from their perspective. Do you have a view on that, or can you more particularly define 'advise' to alleviate their concerns?

Mr Patch—I think we are going to alleviate their concerns, but not through an amendment to the definition of 'advise'. Veda's concern is that they provide an electronic service that allows me to log on to their website on the internet and search the register. They say, quite rightly, that they are not providing advice to the person who is logging on to their website, they are providing a facility to allow someone to search the register. They say that they are not searching the register as the agent of the person who is actually at the terminal. We are looking at an amendment which is along the lines of, if you search the register on behalf of someone but not necessarily as an agent. I cannot draft it at the moment, but certainly we are looking at an amendment that would meet Veda's business needs in providing that sort of electronic facility over the internet.

CHAIR—So it is about access really?

Mr Patch—Yes.

CHAIR—Access, not advice.

Mr Patch—Yes.

Senator BARNETT—I know you are telling us that they need an assurance. Their advice to us was that they need an assurance, legally or categorically, that that is not so broad as to stop them doing what they wish to do.

Dr Popple—We agree that they ought not to be stopped from doing that and we want to make sure that the final bill does not stop them doing that.

Senator BARNETT—Maybe an amendment to the explanatory memorandum may do the trick. I do not know. But this is an area where we would like to be confident that they can do what they wish to do.

Dr Popple—Maybe in a proposed amendment to the bill itself in order to achieve that.

Senator BARNETT—There may be merit in that?

Dr Popple—That is right. The next one was an amendment to section 125 to enable a transferor to identify a contract by reference to a class, not to a particular contract. This was a suggestion by the Australian Securitisation Forum.

Senator BARNETT—Give us more details. Section 125 is an extensive section. Can you help us a bit there?

Mr Patch—Yes. Section 125 deals with:

The rights of a transferee of an account or chattel paper ... are subject to ...

Those are the opening words of the section. The Australian Securitisation Forum's members typically deal in transactions where it is not just one single account that is being transferred, but say a large tranche of accounts being transferred, like a big batch of mortgages that are being sold off to somebody. The amendment they are looking for is to make it clear that, when the bill refers to an account, it is the transferee's rights on a bundle of accounts as well. We do not have any problems with that.

Senator BARNETT—So you will amend section 125 to meet that concern?

Mr Patch—Yes.

Dr Popple—An amendment of section 149(1)(a) to exclude security interests incidental to an account transfer that does not secure payment or performance obligation and to clarify the provision's application to chattel papers: again, that was an issue that was raised by the Australian Securitisation Forum. We are also considering including choice of law provisions in the bill, with consideration being given to the Hague Securities Convention, as has been suggested by several stakeholders who have made representations to you.

Senator BARNETT—Have you got a section that is relevant there where we need an amendment?

Dr Popple—No. It is unlikely to be an amendment to an existing section.

Mr Patch—The conflict of laws provisions were included in the original May exposure draft bill. There was disagreement amongst stakeholders around the need for those provisions—not so much about the need for the provisions, but as to what they should say. The disagreement was severe. So our approach was to say, 'We'll take them out.'

Senator BARNETT—I know. You removed them and now they want them back.

CHAIR—Now they want them all back in again.

Mr Patch—Now they want them back.

Senator BARNETT—But in a different form.

Mr Patch—In a different form. We have put something in the back of the commentary which says, 'Here is a model. Would you like this?' The feedback we are getting now is, 'Yes, we would like that.' You will see from the submission from Clayton Utz that they have said, 'We would like that. We would like to discuss with you around the edges,' and we are happy to do that. So we are looking to put conflict of laws provisions back in. The conflict of laws provisions is one where it is going to be difficult to get unanimous agreement on it, but certainly we are moving towards perhaps a realisation by some people that it is better to have something than their model.

The Hague convention choice of laws rules are choice of laws rules in a very particular area, a particular kind of personal property. There is an international convention on that. So there are different processes involved in implementing legislation in that area. You would have heard from Mr Love from Australian Financial Markets Association. They strongly supported that and I think some other submissions supported that. We would not be proposing to amend the bill to implement the Hague conference on the choice of laws rules.

Senator BARNETT—You would not be?

Mr Patch—We would not be, because it is a convention and there are processes around implementing conventions. What the committee might do is recommend that the government gives serious consideration to implementing that convention or something along those lines, given the strength of stakeholder support for that.

Dr Popple—If you were minded to.

Mr Patch—If you were minded to, yes.

CHAIR—In the process of the Hague Convention, you are still under discussion with stakeholders about whether or not we should implement it? I thought there was talk, in your initial presentation, about the fact that you were still having consultations with people about that convention.

Mr Patch—Yes, we have had consultations with people about implementing the Hague Convention rules and we are looking to continue with those. The difficulty that we have with including the Hague Convention in the bill is that it was not even in the exposure draft. The normal process is that you would have an exposure draft, people would get to comment on it and then you would probably refine it.

Senator TROOD—You are right. There has to be a policy decision taken to sign up to the convention and to ratify it. My view would be that you cannot include a provision in the bill that draws in the convention without a policy decision being made on a wider basis as to whether or not Australia should be a member of the convention. I think I speak on behalf of the committee in saying we are grateful to you for your suggestion as to how we might proceed here. We might take it up.

Senator BARNETT—This was a very important issue that was raised throughout the whole process to our committee, the conflict of laws concerns, so we need to get a little bit of clarity here and I would like to flesh it out if we could. We can comment on the Hague Convention. That is a matter for the committee, and we will have to work that through. It was in the original draft, then taken out and now there is concern that we want it back in. The question is: how is it going to be framed? There were a number of witnesses who supported the model A, I think it was, which was the attachment to the regs. Other witnesses suggested modifications to it.

But we also had evidence from the intellectual property witnesses, specifically a very persuasive submission from the Independent Film and Television Alliance. They had representations from the USA, and I think you were there, Mr Patch, and you heard them via teleconference. They say that the law is different for intellectual property than it is for tangible goods with respect to the conflict of laws. Apparently a different approach is taken as to which law applies with respect to intellectual property as opposed to tangible goods. They have set that out on page 3 of their submission. They also say the applicable law is section 47, and this is the issue of using the word 'granted'. They say:

Current intellectual property law, however, uses the territorial principle, which looks to the law of the protecting country—

and that is a different matter altogether. They are looking to the law of the protecting country rather than the country in which the security interest was granted. They are basically saying the law is different for intellectual property than it is for real property. So if we suddenly adopt model A, presumably it will be consistent but maybe it is going to change the law drastically for those with an intellectual property right.

Mr Patch—The model we proposed would have different rules for intellectual property than for tangible property and for other kinds of intangible property.

Senator BARNETT—Does model A cover that?

Mr Patch—Yes.

Senator TROOD—So the independent producers' point is right? You agree with their point?

Mr Patch—We agree that the rules for conflict of laws for intellectual property should be based on the law of the jurisdiction in which the person exercises the intellectual property right. So if a person exercises an intellectual property right in Australia, then Australian law should apply to security interests in that intellectual property right, and similarly you can substitute the name of any other country where they do it.

Senator BARNETT—What you just said is consistent with what they have said in their submission, but do you concur that the conflict of laws needs to replicate what is currently the common law, or do you think there should be a change?

Mr Patch—I am not in a position to comment on what the common law is, and that is one of the difficulties behind this entire project. The common law is sometimes very complicated. What we are proposing is a model that would make the position quite clear that security interests in intellectual property are governed by the law of the jurisdiction in which the person decides the intellectual property right. So a security interest in copyright created by the Australian Copyright Act would be governed by Australian law.

Senator BARNETT—Yes, where the security interest is granted.

Mr Patch—Yes.

Senator BARNETT—That is where they differ with you. This is section 47. They say in their submission on page 3:

Current intellectual property law, however, uses the territorial principle, which looks to the law of the protecting country. This is a complex issue which is still under discussion at the international level. It may be best to await these results in crafting an appropriate rule.

Mr Patch—We are agreeing that the territorial level is the basis on which the legislation should proceed. For example, if you are publishing a book and exercising copyright in a jurisdiction, then the security interest should be governed by the law of that territory. It follows the territory.

Senator TROOD—Are you saying we are in furious agreement but we are using different terms to reach agreement?

Mr Patch—Exactly.

Senator BARNETT—They say section 47 says:

A security interest in intellectual property is determined by the law of the country where the security interest is granted.

But that is different, isn't it?

Mr Patch—Under its Copyright Act, Australia grants copyright in acts done in Australia, so the Australian Copyright Act does not deal with the publication of books in other jurisdictions. The American copyright legislation deals with people who publish books in America and the Australian act deals with people who publish books in Australia. We are saying the same thing in slightly different ways.

Senator BARNETT—All right. Anyway, I draw your attention to their concerns in their submission.

CHAIR—Let's keep going.

Dr Popple—The final point I want to raised in this section was in terms of another suggestion that we propose to make to the Attorney, which was an amendment of subsection 228(6), which would require the PPS registrar to obtain the consent of the affected individual before referring a complaint to the Privacy Commissioner, which you may recall was suggested by the Office of the Privacy Commissioner. Those were the specific amendments that I wanted to draw to your attention first.

The next part of my introductory statement refers to privacy issues. I wanted to start by assuring the committee that privacy issues are of particular concern to the department and are being given careful consideration. As you have already heard from Mr Wappett, the character of the register illustrates a positive commitment to protecting privacy. In most cases, registrations will not contain any personal information. For many individuals the only contact they will have with the register will relate to a car loan and, for consumer motor vehicles, the identity of the grantor will not be recorded on the register. Instead, the car's vehicle identification number, the VIN, will be the means of identifying the security interest.

However, in those cases where there is no other means of identifying the collateral, such as in the case of an individual operating a business as a sole trader, that person's name and date of birth will be recorded as the grantor.

In determining the level of personal information required to correctly identify an individual's details, we have sought to balance privacy needs against the need to ensure that information is correctly recorded and searchable. The register has been designed so that only limited personal information, name and date of birth will be recorded and available to be returned in a search. It will not be possible to discover an individual's name or date of birth by using the register. Searchers will need both pieces of that information before they commence a search.

You have received some evidence about the efficacy of searching by name and date of birth only and I know it has been suggested that this may result in false positives. However, there are a very small number of individuals who share the same surname and given name and date of birth. This is supported by data we have obtained from the Australian Electoral Commission. The AEC has advised us that their records indicate that there are approximately 2,000 records marked as twins in their system—that is, different people, with the same name and date of birth.

This number includes current electors and past electors who have been removed from the roll and not re-enrolled, for example, because they have died or emigrated. So we would say the number of twins is, therefore, relatively small, especially considering that there are approximately 13.5 million individuals currently on the electoral roll. I should add that the data that I have just quoted from does not appear in AEC publications but it is used by the AEC for administrative purposes.

You have also heard evidence about the desirability of a privacy impact assessment. The department has commenced a privacy impact assessment of the bill and the register and that assessment will be made publicly available.

Senator BARNETT—Can we talk about that, Chair?

CHAIR—Yes, sure.

Senator BARNETT—Let's talk about the privacy impact assessment. Can you provide more details. When did it start? How long will it take? Who is undertaking it? What are the terms and conditions of the role?

Dr Popple—For a start, it commenced, I would imagine, two or three weeks ago within the department. It has been undertaken within Mr Glenn's branch in the department. I am sorry, what was the third part of your question?

Senator BARNETT—How long will it take and what is the extent of the assessment? Can you provide the terms of reference?

Mr Glenn—I think we are aiming for it to be available in about four or five weeks. That is our goal. This is lining up with work that is being done on designing the PPS register. We need to combine it with the work that is being done there and have it basically out in the public domain before we finish that work so that the result of it can be included in the design work.

Senator BARNETT—So to make it public is part of the plan?

Mr Glenn—Yes, it is.

Senator BARNETT—In five or six weeks time.

Mr Glenn—Five or six weeks. In terms of the scope of the inquiry, we are using the guidance on how to conduct a privacy impact assessment that the Privacy Commissioner has published on its website—the methods that should be used and the questions that should be asked to guide the design of our work.

Senator BARNETT—Can you flesh that out. Are you following directly the proposal set out by the Privacy Commissioner?

Mr Glenn—I am sorry, I do not have them here with me at the moment, but there is guidance set out there by the Privacy Commissioner, which talks about the things that you would be considering and the nature of the analysis, and we would be looking to follow that.

Senator BARNETT—This is just for background. Have the people who are undertaking this done these privacy assessments before?

Mr Glenn—I do not think the people working on it have done privacy assessments before. Some are very familiar with privacy work and the operation of the Privacy Act, including myself from a previous life in the Attorney-General's Department.

Senator TROOD—Mr Glenn, does that involve consultation with outside parties?

Mr Glenn—We were not planning to have consultation with outside parties, other than perhaps the Office of the Privacy Commissioner during the course of the assessment, but of course we would be publishing the assessment at the end of it and looking for responses from people.

Senator TROOD—So your intention is to produce the assessment and then call for submissions or comments on the assessment. Is that right?

Mr Glenn—We will certainly make it available for people and we would invite people to speak to us about it if they wanted to investigate it further. To clarify, I do not think we would set up a formal consultation process and a formal submission process, but we would invite comment, and we would certainly receive comment from some of the privacy advocates that you have been speaking about. We would speak with them further about any concerns they would have about the assessment.

Senator BARNETT—You are going to do that after it has become public?

Mr Glenn—That is right.

Senator BARNETT—And you will liaise with some of those people that may have had specific concerns?

Mr Glenn—Certainly we will draw to their attention specifically that we have published the assessment and invite them to speak to it.

Senator BARNETT—This is based on the draft bill before us? You are preparing a privacy assessment based on the draft bill and based on the register being set up?

Mr Glenn—It is based on the bill, on the regulations as proposed and on some operational aspects of the register.

Dr Popple—That is the main reason we have not had an opportunity or been able to do it until now. Some of the detail, as I just related to you, has been finalised recently as a result of us working on the regulations and with the systems integrator who is building the IT system which will become the register. We think we are now in a position where we can say 'This is a practical approach to building this register. Now let's analyse and confirm that the privacy framework around that is robust.'

Senator BARNETT—How will the privacy assessment inform your setting up of the register? I assume you will use it to inform the manner in which you establish the register. Is that correct?

Mr Glenn—If the assessment were to come out with a result that said an aspect of our proposed design for the register is highly privacy invasive and is going to cause problems then we would seek to address that in the design of the register. As we are doing both simultaneously, I would expect that we will be able to—and we already have—catch any privacy issues to the extent that we can in the design, having been mindful of these issues from very early on and in the requirements definition process for the register itself. We have been looking to make sure it is as minimally privacy invasive as it can be from the outset or, to put it another way, maximum privacy protective.

Senator TROOD—Does the AEC have any figures on how many of the 2,000 twins are now a problem? You said it included people who had been on the roll and who may now have left the country. Does it have any statistics on how many are left that might create problems?

Mr Glenn—I do not think so. We can investigate that further with the AEC, but the information they have provided was as much as Dr Popple commented on.

Senator TROOD—I agree with you that 2,000 out of 13 million is a relatively small percentage. However, life being what it is, injustices might be created with that proportion of the 2,000 who still remain in the country and who have the same names. Have we got a potential solution to that problem?

Dr Popple—In an attempt to put your mind at rest, 2,000 out of 13.5 million is our estimate of the number of people out there with the same name and the same date of birth.

Senator TROOD—Yes, understood.

Dr Popple—For it to be a problem in our system, there would have to be security interests registered, where those people's information is used to describe, effectively, the only way to search to get to their particular interest that has been registered. That in itself is, we anticipate, a very small proportion of the total register base.

Senator TROOD—I understood that. I realise that it does not necessarily mean that 2,000 people are going to use the system. It could be a tenth.

Dr Popple—Further on that, the consequence of a twin finding their other twin's information already on the register is that they may be seeking some finance and will have to explain to the potential financier or convince the potential financier that that interest that is registered is not in relation to them. That is obviously an inconvenience for that person, but we would say that that inconvenience has to be balanced against an alternative—for example, finding a further identifier for all individuals, such as passport number or address. The disadvantage of that and the privacy invasiveness of going further has to be balanced against what it is that we are trying to avoid, and we would say we are avoiding a very small number of situations where some people will be slightly inconvenienced in the use of the register. That is what we would say it boils down to.

Senator TROOD—I acknowledge your point about the balance and—you are right—it is likely to be a very small proportion of people, I suspect. Have you looked at any example or experience overseas that helps at all with that problem?

Dr Popple—It is difficult to know, because most of the overseas registers have taken a more privacy invasive approach. For example, the New Zealand register, which is the most recently built and, in many ways, the most analogous with what we are doing, has much more information that is available by a simple search, which obviously makes it easier to convince someone that this John Smith is not the same John Smith.

Senator BARNETT—Go through the addresses.

Dr Popple—Yes, there is address information, for example. Mr Patch has reminded me that wildcard searching is available through their system, so you could find all the John Smiths and the John Smithsons in the same search. I do not think there are many practical examples we can point to, because we would say we are taking a much more cautious approach to the storage and accessibility of personal information. So there is no analogy that we can point to to say that there will be a particular level of inconvenience caused. The best we can do is say that, on the basis of the research we have done, we think it will be a very small proportion.

Senator BARNETT—We had advice—through you, Chair—from one of our witnesses that there was an enormous level of incorrect information that was promulgated when I think they were setting up the motor vehicle registers. I cannot remember the exact percentages. Was it 25 per cent? Yes, some 25 per cent. It is a very high level of incorrect information that gets onto the register. What about the situation here, where that can happen on a national register, and what about the privacy implications? Let's say my information goes onto the register and it is incorrect. What rights and options are there to fix that?

Dr Popple—Before we go to the rights and options, I will make the point that in our system—and that differs, I think, from the systems you were referring to—there is a very positive incentive on the people making the registration to get the information right, because if your description is not accurate then you will not be able to claim your place in the priority list once that error comes to notice.

Senator BARNETT—What, even if there is a spelling mistake?

Dr Popple—If the mistake you make is such that a reasonable search does not find it, then you lose that priority order, because how else can anyone have found your pre-existing registration? So there is an incentive on the registrant to get it right. Having said that, we also have mechanisms for correcting information.

Senator BARNETT—Can you explain those?

Mr Patch—You asked a question about the name. The proposal is that you would have to type in the person's name exactly as it is spelt to recover the registration. So misplacing one character or a simple transposition would mean you would not discover the record. So if the finance company entered the name with a transposition, the effect is that they do not get the priority. They may as well not have made the registration. It is, to some extent, to the advantage of the individual for the bank to do that.

Dr Popple—In relation to the other point, though, if a person finds information about themself which they assert is mistaken, they can approach the registrar to have that information taken off, and there will be a mechanism—

Senator BARNETT—Right.

Mr Patch—The bill has a process for doing that, and it accords natural justice to the secured party. In the ordinary course of events, you could have a correction made in less than a fortnight.

Senator BARNETT—But you have to make that application to the registrar?

Mr Patch—The process that we are looking at is an electronic register. So you would be able to go to an internet browser and say, 'This what I want to do,' you would fill out the form and it would be received by the registrar. That application is sent to the finance company. They have a period to reply, and then the registrar makes a decision on the basis of the reply received.

Senator BARNETT—All right. What about unlawful searching of the register and penalties and enforcement? We had some feedback on that, basically saying it was not adequate or stringent enough. Would you like to respond to those concerns?

Mr Glenn—In relation to the situation we have with searching the register, we have the purposes and the table in section 227 that we looked at earlier. A person needs to be searching for one of those purposes to be lawfully searching the register. This starts to get into aspects of register design. We would in the register itself be requiring people to make a statement to the registrar that they are searching for one of the permitted purposes.

Senator BARNETT—But do they have to identify themselves? I do not think they do, do they?

Mr Glenn—It depends on the nature of their relationship with the registrar. If they are an account customer, they will have been identified to the register. If they are a casual user, they will be generally paying via credit card, which is the means that the registrar would have later down the track of seeking out the identity of that person and tracking them down. So the person would be ticking a box on the screen to say, 'I am searching for one of the—'

Senator BARNETT—Can I interrupt there. Why shouldn't we have the identity of the searcher on the record so the registrar can track that person down?

Mr Glenn—I think that goes to two things. One is the privacy impact of that, where you are suddenly storing personal information about every possible customer, and these could be people who only ever interact with the register once and we have their details. The other aspect is the degree of authentication you can get around the identity of a person. Using a credit card is, I think, an easier way to be able to track down the identity of a person than to ask them to identify themselves at the beginning of the transaction, because they could write 'Mickey Mouse from Disneyland' and that data does not help us take it anywhere.

Senator BARNETT—Yes, but that data is not public. It just has to be made available to the registrar.

Mr Glenn—It is still collected by the register. There is a fairly large database of people and their activities in relation to the register, so my impression would be that the privacy people would have difficulty with us collecting that type of information. Data quality is going to be, as I say, a serious issue, because people may not be direct with us.

Dr Popple—Many of the interactions with the register, as Mr Glenn has said, we think will be with people sometimes only once or twice every couple of years. If we were to require a high level of authentication for each person, that will make the transaction very much more complex than it might otherwise be.

Senator BARNETT—I thought you just asked them for their name and address.

Dr Popple—As Mr Glenn said, we can do that, but just having a name and address, especially if someone is just about to make a search which they know, or ought to know, is not a lawful search, it is very unlikely that we will have any useful information. We figure that, if the registrar's report mechanism throws up some concern about a search or a series of searches, the registrar could then say, through its finance gateway process, 'Look, there were these 10 transactions by credit card at this particular time. Please provide us with the information, because we'd like to make further inquiries,' and that does not require those extra few steps of verification for what otherwise should be a very straightforward transaction.

Senator BARNETT—That is on the basis that they pay by credit card. What if they pay via something else?

Dr Popple—All the proposed methods of payment will be electronic for the web interface, for example, though not for accounts, and with accounts, of course, we would already have some verification of identity.

Senator BARNETT—So there are no holes?

Dr Popple—Short of credit card fraud or other transaction fraud, we believe we have no holes in that.

Senator BARNETT—Thank you.

Mr Glenn—If the person ticks a box to make the assertion that they are searching for a particular purpose and it transpires that they are not, section 137.1 of the Criminal Code is about the provision of false and misleading information given to a Commonwealth entity. If a person gives false and misleading information, it is an offence punishable by imprisonment for 12 months, so that is the sanction at the end of that exercise. We are looking to design the register around capturing people's assertions that they are doing something appropriately and we will be providing them with information on the screen itself to say, 'Giving false and misleading information is an offence. Don't do it, or do so at your peril.'

Senator BARNETT—Thank you.

CHAIR—Are we still going through the list?

Dr Popple—The next item on my list was the role and purpose of section 235. You will recall, Senators, that a number of organisations gave evidence about section 235 of the bill. Section 235 requires rights—

Senator BARNETT—Sorry, can I interpose? I think I said 25 per cent earlier, and I have just been corrected. It was 18 per cent of the surnames were entered incorrectly and 11 per cent of the first names were entered incorrectly, and that evidence was given by Veda Advantage. I wanted to correct the record. Thank you.

Dr Popple—Section 235 of the bill requires rights, duties and obligations arising under the bill or a security agreement to be exercised in a commercially reasonable manner. Concerns have been expressed to you that section 235 will create uncertainty because it does not have a settled meaning and is different to other available tests. We accept that the expression 'commercially reasonable manner' does not have a settled meaning in Australia. It appears in the US, Canadian and New Zealand legislation, and has not been

extensively litigated in those jurisdictions. It is generally considered in the US to mean conduct that no reasonable person in that person's circumstances would consider reasonable.

If section 235 were removed from the bill, the question of appropriate commercial conduct can of course still be raised and will have to be decided by the courts. We would say the question for the committee and, indeed, for government is whether secured parties should be entitled to enforce their rights under a security agreement in all circumstances, or whether their conduct should be tempered by commercial reasonableness.

Senator TROOD—Dr Popple, thank you for that. What do you say to those submitters who raise serious doubts about this? Are they unnecessarily exercised about it? Are they ignorant of the application of the laws elsewhere? I think it is fair to say that there has been a very strong series of representations on this particular matter and, for my part, they have impressed me with the concerns that they have raised.

Dr Popple—I would never suggest that any of those people were ignorant of any law. A lot of what this reform is doing is codifying and simplifying existing laws. If we say nothing about this area, there exists a body of law, if nothing else unconscionable conduct law, that could apply and is complex. It is certainly true that in some areas we may be changing the law in relation to certain transactions, but that is true across the entire gamut of this bill. I think it is fair to say that similar criticisms have been made about other areas of the bill for that very reason. We would say it remains a policy question, whether or not this is an appropriate result, and if it is considered an appropriate result, we say this was a good, clear way to achieve it.

CHAIR—Dr Popple, you are telling us that a similar concept or definition is used in the Canadian and New Zealand law.

Dr Popple—And the US as well.

CHAIR—But is yet to be tested.

Dr Popple—It has been tested, in the sense that that legislation in the US has been around for 30 years.

CHAIR—So it has been tested—

Dr Popple—Since the 1950s in the US. It has been tested in the sense that it has been on the books. I think in one of the submissions made to you by one of the law firms, they had managed to find only one case in which it had been considered—

CHAIR—I see. It has been tested, but not extensively.

Dr Popple—I would say more than that. It has not been a matter of considerable controversy.

CHAIR—Are you saying that, if we removed section 235 from the legislation, it would leave a gap?

Dr Popple—It leaves the current situation, which we would say is complex, albeit well known but complex, and, for that reason, one approach to simplify this is to take the approach that we have taken.

CHAIR—Insert a definition no-one agrees with?

Dr Popple—I would not concede that no-one agrees with it.

CHAIR—You agree then?

Dr Popple—No. A lot of submissions to you, I am sure, have raised this concern. A lot of them of course have been silent to it because a lot of people have not focused on that.

Senator TROOD—Dr Popple, does the model elsewhere have both 'honestly' and 'commercially reasonable' involved, or just 'commercially reasonable'?

Dr Popple—Mr Patch is our expert on this, as on so many things. I might ask him.

Mr Patch—The models in Canada and New Zealand, I think, use the expression 'good faith' rather than 'honestly'. So they say, 'You must exercise your duties in good faith and in a reasonably commercial manner,' and we have substituted 'honestly' for that. In the US, I could not at the moment say whether they have 'honestly' or 'good faith', but they certainly have the 'reasonably commercial manner' test.

Senator TROOD—So you think there are two tests.

Mr Patch—Certainly there are two tests, yes.

CHAIR—So you are finished going through your list of bits and pieces?

Dr Popple—I have some more, Senator. I was just pausing in case there were more questions on section 235.

CHAIR—Sorry. I do not have any more questions about 235.

Senator TROOD—I understand your position. It is a question of whether or not we accept it, I guess.

Senator BARNETT—I concur with Senator Trood. This is an incredibly sensitive matter, an important issue for a lot of witnesses, and we have had feedback on it. It is a divergence from, I think, certainly the common law and from what we would understand is the current practice in Australia. We are suddenly going to be including words such as 'a commercially reasonable manner'. It will be opening up, some might say, a Pandora's box, but certainly opening up to interpretation by the courts as to exactly what that means, and of course that could change, depending on the circumstances in each case. There are a lot of arguments that are contrary to the merit of including it in the bill.

Dr Popple—I do not think we can assist the committee any more on that, Senator.

Senator BARNETT—I realise it is a policy matter which is more relevant to the minister.

Senator TROOD—I think we will press on, Dr Popple, with your list.

Dr Popple—The next item I wanted to raise was the question of complexity. PPS is, admittedly, a highly technical area of the law and the bill reflects that complexity. Nonetheless, the bill will, if enacted, simplify current law in Australia. It will replace a multitude of existing arrangements across the states, the territories and the Commonwealth, with one set of laws that apply uniformly across Australia. The bill will make the law more accessible simply by virtue of putting it in one place.

We acknowledge the need to increase awareness in the community about the bill and how it works and make it easier to navigate. We are taking some practical measures to achieve this. For example, we are working with the Office of Parliamentary Counsel to include readers' guides within the bill. These guides will assist readers new to PPS law to understand which of the provisions are most relevant to them. The commentary on the bill that we have provided to the committee will be revised before it becomes the explanatory memorandum to the bill, and the government has also announced a national education and media campaign about the bill which will take place before the bill commences.

Over time, as business and financiers become more accustomed to the bill, and there is more resource material under the legislation, we think that the issue of complexity will be of much less concern.

Senator TROOD—Dr Popple, I have to say that I found this to be one of the most difficult areas of the bill. Consistently, there were complaints about the complexity. It seems to me there is complexity at different levels obviously. There is complexity in the inherent nature of the law, in that the whole area of these financial instruments is complex, and when you accept the existing law across the 70 bills, or whatever it is that are being amended in the various jurisdictions, and you are trying to put them into one piece of legislation, that of course is an inherently complex exercise.

But it does seem to me that you are making it rather more complex by the way in which you have adopted some of the definitions; for example, this idea of 'grantors' and the like, the resort to definitions other than simple things like 'goods'—in other words, concepts which I would have thought were readily understood and had a general meaning in both law and commonsense, if I could put it that way; not that they are necessarily mutually exclusive, but sometimes they seem to be.

Professor Duggan made this point, along with others: we seem to be going down a path where the inherently complicated and complex nature of the law is being compounded by the way in which we have approached matters of definition and, indeed, as Professor Duggan has said, in the way in which we have set out various sections of the bill. He uses, ungenerously, words like 'prolixity' et cetera. Could you comment on that and whether or not you have seriously turned your mind to the possibility that some of the more straightforward and simple definitions might be used in the bill without loss of understanding.

Dr Popple—Before I perhaps ask Mr Patch to answer the more specific part of your question, I can certainly assure you that we have spent a lot of time and effort trying to make this as simple as possible. There are also, of course, issues of Commonwealth drafting practice that the Office of Parliamentary Counsel follows and requires, and there are times when that practice necessarily means a few more words than we might otherwise imagine could be used.

Senator TROOD—I think we might get the Commonwealth drafter in here at some stage and look at the way he/she does work. Sorry, carry on.

Dr Popple—I make no comment. In relation to the specific question of definitions, maybe Mr Patch can add to that.

Mr Patch—To start off with, it might be best to outline the process we went through to draft the bill. The very first thing the Office of Parliamentary Counsel did was to write to their counterparts in New Zealand and ask them for an electronic copy of the New Zealand bill. That bill was the template bill where we started drafting from. The next step is to listen to our stakeholders and to make changes to the bill reflecting their desires for where the bill should go and what should happen. We discovered that it was not just a simple matter of making the minor tinker here or there, and doing that sort of process ended up with a bill that was very complicated. You could not just graft a few sections in the middle of the bill to try to accommodate stakeholders' needs, or the policy outcomes sought by stakeholders.

It was a very tough decision to say, 'In order to meet the needs of stakeholders in delivering this bill, to achieve the outcomes that our stakeholders were looking for, we would need to revise the structure of the bill and how it was set out in order to make it more legible than what it would have been had we proceeded down adding text into the New Zealand bill.' That was a judgement that was made on the advice of the Office of Parliamentary Counsel as to the best way to go, and we take their advice on those sorts of drafting issues. That is their specialty. We also have a responsibility to the minister, and the Office of Parliamentary Counsel considers they have a responsibility to the parliament to make sure that we understand the legislation and what it means.

We felt that there were some provisions in the New Zealand legislation that were ambiguous and needed clarification and the Office of Parliamentary Counsel felt the same in terms of their duties to the parliament in producing clear legislation. So some of the changes stem from that sort of need.

Senator TROOD—Why couldn't we have 'goods' instead of 'tangible property', for example, as Professor Duggan suggests in his evidence?

Mr Patch—We could say 'goods' certainly. We could say 'goods' and then we could say 'goods includes crops, livestock', and just substitute the definition.

Senator TROOD—I think the point Professor Duggan makes and the point I would embrace is that, if one of the desirable policy outcomes here is that the practice of law in this area might be capable of being undertaken by lawyers who are not necessarily in the large law firms with vast expertise, but that the act is serviceable to suburban solicitors and people with lesser expertise, the need to apply terms which commonly appear in legislation, like 'goods', is a virtue—unless there is a need or an issue, given the complexity of the legislation, perhaps to have another term for it.

Mr Patch—The reason that we use the expression 'tangible property' instead of 'goods' is that tangible property is defined in a way ultimately to mean things that you can touch, things that have a physical presence. So it includes things that you might not ordinarily think of as goods; for example, trees that are growing in forestation projects where you might not think of a tree as a good. You might not think of minerals as goods. You might not think of wool that is growing on a sheep's back—or any other sort of wool—as goods.

Senator TROOD—Can't you get around that problem by just saying, 'Goods in this act means', and 'things you can touch' would not be the definition you would use but—

Dr Popple—The problem there is that, by using a word that is not commonly known like 'goods', we alert the reader to the fact that we do not mean what they think they mean by goods—that they have to think, 'Okay. Tangible property.' They may have a feeling for what that means, but when they go to the definition they know it means something slightly different than 'goods'. The danger of using terms that already have a well-understood meaning to mean something slightly different is that they may not be alerted to the fact that, for example, trees are included, when they might not be included in a normal definition of 'goods'.

Can I also add in relation to that specific issue, it also of course neatly dovetails with the definition of 'intangible property', which I imagine was what was in the drafters' minds when they chose that particular formulation for those two opposite classes of property.

Mr Patch—We could use the expression 'goods' throughout the bill, but the suburban solicitor runs the risk of being misled, because in some circumstances some things are not goods.

Dr Popple—But they are tangible property.

Mr Patch—Tangible property carries the notion of something you can touch. That is essentially what the draft gets at when it uses that expression. We think the expression 'tangible property' is one that people will come to appreciate has that sort of concept.

Senator TROOD—I see what you are saying. It still seems to me that you can get around the problem by defining goods in a particular way in this act, but nevertheless you have made your point. What about this problem of 'grantor', which is a new concept for the purpose of the legislation? Some have suggested 'debtor' is the appropriate equivalent. We all understand what debtor means, but we have got to scratch our heads if we think about, 'Who is the grantor here and who isn't?' We all know what debtors are.

Mr Patch—Yes, and debtors are not grantors.

Senator TROOD—This is the same problem. Is that right, Mr Patch?

Mr Patch—It is similar. I can quickly take you through this issue. The grantor in the bill is the person whose property is securing the obligation; it is not necessarily the person who owes the money.

Senator TROOD—Sometimes it can be the same, but not always.

Mr Patch—Sometimes, but not always. The grantor is not necessarily the person who owns the property. So in a lease the lessor might own the car, but it is the grantor who has the possession of the car whom you will be registering against. You cannot use expressions that relate to ownership of the property. So we use the expression 'grantor' to mean the person who has the property that is liable to be repossessed on default and not necessarily the debtor.

We think to use the expression 'debtor' is actually misleading, because the register is not a register of debtors. It is not a register of people who owe money, it is a register of people who have assets that are liable to be forfeited upon the default by someone else's debt, or it may be their debt. In a corporate group circumstance, there might be one company that owes the money, who is the debtor, and all the other companies in the group are at risk of having their assets forfeited. All the companies in the group would be the grantor, even though only one company is the debtor.

Senator TROOD—I see the point you are making. What about this wider question of the complexity? Is that just a function of the complex nature of the law we're dealing with, or is this again the Commonwealth draftsman imposing his or her hand on the legislation?

Dr Popple—I do not want to be critical of the drafting process, but I think it is both. This is a complex and technically difficult area and there are drafting rules or conventions that also need to be applied.

Mr Patch—What I have here are the two current standard textbooks in this area of the law. For the *Hansard* record, the first one is *The Law of Securities*, Sykes, 5th edition. The second one is Gough, *Company Charges*, second edition.

Gough's *Company Charges* is a 1996 edition and *The Law of Securities* by Sykes is a 1993 edition. They are the current two textbooks that you would need to understand the law in this area. They are both more than a decade old now and I would venture to suggest that the reason that these are the two current texts is because the law is so difficult in this area that nobody is willing to risk their reputation by writing and putting their name to the current textbook. These two books are just legends in this field. The people who wrote them made reputations on these books.

This is the New Zealand one, annotated Personal Property Securities Act, by Michael Gedye and a number of other authors. You can see that it is a lot smaller. This is the corresponding Canadian textbook, *Personal Property Security Law* by Ronald Cuming and others. This one—I am sorry it is a bit tattered. You can see it has been used a bit.

Senator FISHER—Not from bedtime reading, I am sure!

Mr Patch—I confess it has been.

Dr Popple—If you suffer from insomnia, it is very good.

Mr Patch—This is the annotated article 9 produced by the American Bar Association and I am happy to concede that the print in this one is a bit smaller than the other ones, but you can see the size of the text. The law in Australia is demonstrably more complex than the law in the other places.

Senator TROOD—All of which, happily, makes my point that we ought not be proceeding down a course which makes it more complex, obviously. I know your public policy aim is to avoid that.

Mr Patch—Yes.

Senator TROOD—It is very much that, and we understood that—at least, I do. Perhaps you have explored all possibilities that can avoid any more complexity, but I would encourage you to take on board some of the submissions. Perhaps you have gone as far as you think you can go on the matter.

Dr Popple—We will continue to do our best to make it less complex, but we have certainly had those aims in our minds during this process.

Mr Patch—We have laboured very hard to try to make this as easy as possible. It is just a very difficult thing to do. We think the test here is to benchmark it against the current law, and the current law is very complex. We think this bill will make it much more transparent and less complex than the current arrangements and it represents an improvement on what we currently have. We have to acknowledge that some people will need access to other materials, as they do in the other jurisdictions, to understand it. That is the reason for these books. Realistically, very few people come to a body of law reading the statute. They come to the body of law with the textbook in the area. This act will make the task of textbook writers a lot easier.

Senator TROOD—There seems to be a difference of view on that—around the profession, anyway.

Mr Patch—Yes.

Senator TROOD—I do not want to prolong this, because I think I understand the general point you are making. I even hesitate to continue to cite Professor Duggan, but he makes this point about intermingling in his submission, citing on page 7 the Ontario legislation with regard to cakes, as he calls it. He points out that the Ontario legislation has six lines, Saskatchewan has 40 and we run to 4½ pages for what he regards as a similar kind of concept. I read, I have to say, his example and I thought the Ontario legislation was a model of clarity and seemed to evoke the same kind of principle as the others.

Mr Patch—When I first read the Canadian legislation, I was very impressed by it, because it rolls very well off the tongue and you think, 'Oh, I understand that.'

Senator TROOD—Elegance is a virtue.

Mr Patch—Elegance is a virtue. But then you go home and reflect on it for a bit and you realise that, while it is written very well, there is a lot of subtlety and complexity masked by that very clear language and some of the concepts within that language that rolls well off the tongue are quite difficult to understand. If our bill has a sin, it is that it is transparent in what those concepts are. We have sought to make it clear and to bring to the forefront some of those underlying concepts that are masked by the sweet-rolling language used overseas.

Senator BARNETT—'Sweet-rolling language'.

Mr Patch—They went to a lot of effort to have legislation that reads quite well, but what they have sacrificed in that, I think, is access to the underlying concepts.

Senator TROOD—I suppose we can argue this all day, and we will not do that, but as I read the relative elegance of the Ontario statute and this quote in relation to commingling, not only does it read reasonably well but it is readily understandable, it seems to me. Of course, I do not know the rest of the conceptual problems that may surround it, but I cite that as an example of something that might serve as a model. Clearly, Mr Patch, you have given some thought to this.

Mr Patch—Yes, considerable thought. I share your concerns about the complexity. We have tried to do what we can about it, while at the same time having transparency in the concepts, and we have tried to give primacy to transparency.

CHAIR—I have a few questions, if I may take the floor for a minute. Once the bill is enacted, what will be the process for amending?

Senator TROOD—I am sorry, Madam Chair. Dr Popple, have you finished your list?

Dr Popple—I had not, if you want me to go through it, but of course we are in your hands.

CHAIR—Keep going then. I am sorry.

Dr Popple—There is not much, I promise. The next thing I was going to mention was the extent to which we have departed in the bill from the New Zealand and Canadian precedents.

CHAIR—I thought you had covered that.

Dr Popple—We touched a little bit on this in the previous discussion, but you would be aware, of course, that some submissions have urged the committee to recommend that the bill should simply take the New Zealand and Canadian drafting. I will not add anything to what we covered in the last discussion, except to

point out that during our extensive consultation process many stakeholders argued strongly that the bill should depart from the New Zealand model in order to better reflect Australian commercial practices, and we have already given the committee some details of those departures in the international comparison paper that was co-authored by, amongst others, Professor Duggan, to whom you referred earlier, Senator.

The other point I want to mention is the timing for the commencement of the bill, if I might move to that.

CHAIR—Yes.

Dr Popple—I understand you have received several submissions regarding the proposed timetable for the bill and for PPS reform in general. We are currently on target for a May 2010 commencement, which is the date that has been set for us by COAG. Any decision to extend the time frame for PPS reform will be one for COAG and would, of course, have financial implications.

Senator BARNETT—For who?

Dr Popple—At the very least, for the Commonwealth, and maybe also for the states and the territories.

Senator BARNETT—How so?

Dr Popple—The process of developing the legislation presumably would take place over a longer time frame, and the states and the territories have their own amendments and IT changes to make, all of which take resources. It would not just be a matter of us downing tools at May 2010 and waiting until a later date to turn the register on. During that period we have a lot of data migration to implement, test and then we will ultimately make that happen, and also during that time I imagine stakeholders would take the opportunity to make further suggestions about the way the regulations might be framed and the way the register deals with those very systems. I am not suggesting that the cost would be doubled if, for example, the time were doubled, but there would be an increased cost.

Mr Glenn—The likely cost to the states and territories is geared around the idea that the states are expecting to be able to shut down their registers in May 2010. If they cannot do that, then they need to maintain that capacity over a longer period. Many of them have started to put their registers into almost a sense of stasis. They are not doing any further development work on them, because it would be cost wasted. If they had to keep them open for a longer period, they may have to start to make that expenditure for regular maintenance, improvements and so forth of their registers.

Senator BARNETT—In relation to that, we have had feedback from a range of witnesses expressing their concern about their ability to prepare for the May 2010 commencement with respect to preparing documentation and making it suitable. A key issue is the level of education and training that is required in advance of May 2010. If you would like to respond to that point, that would be useful, because we are expecting there will be substantial education and training in advance of that. If you would like to elucidate on how substantial the terms and conditions of that will be, that would be helpful.

Mr Glenn—Certainly. At the moment we are in a stage of education where we are going to any speaking engagement that will have us to speak about PPS and trying to raise awareness generally. We are also using our website to disseminate more information about PPS and releasing newsletters and those sorts of things.

Senator BARNETT—Including overseas, I understand, for a certain Mr Patch.

Mr Glenn—Indeed. Mr Patch was very lucky to be invited, and very lucky to be released! Moving forward, though, there are two main stages to our further education. Firstly, there is the idea of a stakeholder roadshow, where we would be looking to move out to stakeholders, potentially taking with us a version of the register that we can show people and give people the sense of look and feel and start to engage with them about how they might deal with the register itself. To go along with that, we are looking to reach out to training organisations so that we can provide material to those who, as part of their day-to-day business, provide training to businesses about compliance issues and how to deal with these sorts of registers.

The second major component is the formal media communications campaign, which we would expect to start in around January of 2010. We are just starting the process of moving through that media campaign development at the moment, which kicks off with some market research that we are hoping to have done over the next couple of months, which leads to the development of the campaign and its ultimate release.

I should say that one of the other important components of the market research is to start to get a consistent look and feel and consistent branding and message that we can put out into the community so that we can start to modify our website and our own material that we put out there, so that people can have a consistent sense of

who we are and what we are talking about. That, I think, will assist people to come along the journey with us as we talk about PPS.

Senator BARNETT—On that survey, you talked about marketing. Did you say survey of the different key stakeholders?

Mr Glenn—It would be market research done in accordance with the general policies for media campaigns. The first stage is to do market research to get a sense of how you might structure a campaign to be able to deal with it.

Senator BARNETT—Have you done a survey of the level of understanding of the key stakeholders out there of this and what is coming their way from May 2010?

Mr Glenn—We have not done a formal survey. We have a sense from our own engagement with stakeholders, and quite clearly there is work to be done. There is good recognition and understanding, amongst peak organisations and the types of people who make submissions to committees like this, of what we are doing, but reaching into the organisations, into businesses themselves, is another exercise. Part of the market research, we would hope, would talk to us about the level of penetration of the idea of PPS, because that structure is the strategy that you take in order to enhance that.

Senator BARNETT—My comment comes about as a result of my view, based on feedback from talking to the average Joe and Mary in the street and businesspeople and just general feedback, that a lot of this is going under the radar. You are talking with the key associations, peak bodies and the big law firms, but there are thousands of others out there that simply do not have a clue about what is heading their way. This is a major reform, so I would urge you to think about the merit of doing a survey so that you can assess who knows what is coming, and then you would need to educate those people in groups as well.

Mr Glenn—We hope that that will be part of the brief for the media research that we do first off. The other point to make is that part of the purpose of the roadshow is to get out to coalface businesses and to move ourselves in their way, so that they do not have to seek us out.

Senator BARNETT—When does the roadshow start?

Mr Glenn—In September we will be looking to start that.

Senator BARNETT—Is that all agreed with COAG? Is that in the different states and territories or is that just your proposal at this stage?

Mr Glenn—That is our proposal, but part of our funding proposal initially for the project was to have funding to conduct roadshows and to take the message out.

Senator BARNETT—Do you have a budget for all of this? If so, what is it?

Dr Popple—For the public awareness campaign?

Senator BARNETT—Yes.

Dr Popple—We do. I will see if I can find it amongst my notes.

Senator BARNETT—You can take it on notice.

Dr Popple—It was in the budget two years ago.

Mr Glenn—For the formal media campaign, the budget is $4.8 million. The roadshow is separately funded as departmental expenses for the Attorney-General's Department to provide some additional staff.

Senator BARNETT—Why don't you take that on notice? I do not want to delay the committee today. Could you provide a breakdown of the costs currently, not just for the marketing and the roadshow but the whole PPS process, and how many staff are involved. That would be appreciated.

Mr Glenn—Certainly.

Senator BARNETT—I do note that we have estimates coming up. So if it is done soon, that might be available for estimates.

Dr Popple—It has already been done. We just do not have it with us now. We can certainly provide that to you.

Senator BARNETT—That would be excellent.

Mr Glenn—One last thing I would add about marketing and reaching out to the community is that we will be doing some work with our state and territory colleagues, particularly those who are involved in consumer

affairs education, to be able to give them information about our processes about the PPS register that they can put out through their networks. For example, state consumer affairs agencies visit schools to tell students who might be thinking about buying a car how to use the REVs registers. We will be looking to tap into that and replace that REVs register information with PPS information.

Senator BARNETT—Thank you.

Senator TROOD—For there to be a May 2010 start, what assumptions are you making as to when the legislation would pass the parliament?

Mr Glenn—That would be royal assent being received in October 2009, with some of the transitional arrangements commencing in January of 2010. That is, of course, contingent on state referral legislation being passed, which we would hope to have been passed by September of 2009.

Senator BARNETT—I wanted to ask about the process, but you go first.

Senator TROOD—Perhaps if you would just clarify that constitutional process.

Senator BARNETT—We have touched on it privately, but publicly and on the record can you outline to the committee the constitutional process in relation to the referral of power. We have to pass this law, but I understand the state parliament has to pass it in advance.

Mr Glenn—What we are looking for is a text based referral of power. That requires state parliaments to have passed referring legislation that essentially attaches or refers to a canonical version of the legislation that they are referring to the Commonwealth parliament to pass itself.

Senator TROOD—Mr Glenn, is that a bill that is attached or a statute that has to be attached?

Dr Popple—It is a statute that is attached which must be the same as the bill that ultimately passes through this parliament.

Senator BARNETT—So it is an act of parliament.

Dr Popple—It is text which is in that form. The state parliaments give to the Commonwealth parliament the power to make an act in this form.

Senator BARNETT—Yes, but it must first pass a state parliament. Correct?

Mr Glenn—That is right. It needs to be introduced into a state parliament. It must pass at least one state parliament before it could be passed through the Commonwealth parliament.

Dr Popple—Just so we are clear, the thing that is passing through the state parliament is a very short bill which makes reference to a very much longer bill as an attachment, or indeed by reference to another document that might have been tabled or something else.

Senator TROOD—Do you have a candidate for the passage of the referring bill?

Mr Glenn—It needs to go through each of the state parliaments to refer from each state.

Senator TROOD—You need one.

Mr Glenn—You need one. New South Wales is looking to be the lead jurisdiction to introduce first, and we would hope they would pass it.

Senator TROOD—And you expect that in September. Is that right?

Mr Glenn—That is right.

Senator TROOD—All of them by September?

Mr Glenn—All of them by September.

CHAIR—Does it have to go through the Territory and the ACT, though? No?

Dr Popple—Not the referral, no. We will obviously involve the territory governments and their officers in this process, but we do not require any referral of power from them.

Senator BARNETT—So you are hoping for all of the states to have passed this referral legislation by September.

Dr Popple—We are hoping for that, but if only one of them has, then the Commonwealth parliament can proceed to enact.

Senator BARNETT—To get clarity: they pass the short act which has the attachment of the text, but you are hoping that the text will be this bill that we have been talking about—in that form or in the final form that everybody is happy with?

Dr Popple—That is right. After the government has an opportunity to take into account the recommendations of this committee and other stakeholder recommendations, the government in consultation with the states—because they will have to be happy with it—will settle a text which will become the basis of that referral, and then no doubt the Attorney will introduce that into the House and we hope it would pass through both houses unamended. If it were to be amended, of course, there would be the question of requiring whichever states had by that stage already referred, to amend their referral so that it was clear that the Commonwealth had the power to pass that amended legislation.

Mr Glenn—That, of course, gets to the point of the Attorney asking this committee to look at the bill at this stage because we would benefit from examination before it ends up in front of the Senate when we are in a lock-step situation with states passing their own legislation.

Senator BARNETT—Yes, I am with you. Hypothetically, if a state amends the text—

CHAIR—They cannot—

Mr Glenn—We will need to have settled the text with the states and they will all need to be in agreement before we proceed.

Senator TROOD—Are you anticipating that could pose difficulties, or, if the Commonwealth in its wisdom provides a text, are you expecting the states, generally speaking, to accept the text?

Mr Glenn—We have been working very hard with the states to achieve that. They have been with us all the way along, and they are waiting to see what the result of the committee's examination of the bill is going to be. We are already talking to them about sitting down, as soon as your report has been given, to work out how to settle the bill.

Senator TROOD—On that point, the four large law firms in their evidence to us, I understood, said that their submission was a compilation of issues that they had previously put to you and issues which had emerged from the more recent draft of the bill. My question is whether or not the issues which have emerged from the more recent draft of the bill have as yet been considered in relation to possible changes.

Dr Popple—We have certainly considered all the submissions that we have received thus far, and also we have taken the liberty of considering all the submissions that you have received and published on your website.

Senator TROOD—So all of the concerns that are in this very lengthy submission from the four big law firms have all been considered. Is that right?

Dr Popple—They certainly have. Some of them were amongst the list that I started my presentation with. It has to be said, though, that some of them, I suspect, we will not be recommending that the government take into account when it finalises the bill.

Senator TROOD—I appreciate that they have got this cutback model idea—I imagine that will not find much favour with you—but they do have some very specific suggestions which relate to definitions and technical issues.

Dr Popple—Yes.

Senator TROOD—I just wanted to know whether or not you had considered all of those, because there are pages of them in their submission.

Dr Popple—We have, yes.

Mr Glenn—Mr Patch in particular has been spending a lot of time with those firms, so I think it is fair to say that there were not too many surprises in what was put in the submission.

Senator TROOD—I see.

Mr Patch—I think at one stage one of the representatives from the law firms said that they had spent over 40 hours in meetings with representatives from the Attorney-General's Department. We met with them extensively before the last bill came out; we have met with them a couple of times since the bill came out. I hope the committee will agree that we cannot amend the bill just on their say-so. We have been trying to

accommodate their proposals consistent with the underlying philosophy of the bill, but some things we draw a line on.

Dr Popple—Perhaps if I might comment briefly on that. In preparing this legislation and, indeed, preparing the PPS register, we have been greatly assisted by input from a very large number of people and a large range of stakeholders who have engaged in our consultation process. I think it is fair to say that there is near universal agreement that PPS reform is a very good idea, but there are some aspects of that proposed reform on which reasonable people can and do differ. Although it is obviously, of course, a matter for the government to decide which of the different approaches it should take in finalising the legislation, it is certainly the case that the government has been greatly assisted by those submissions and by that stakeholder engagement, and I am sure will be similarly assisted by this committee's report.

Senator TROOD—I notice you have managed to convince Claytons of the virtues of the bill rather more successfully than you have managed to convince some of their counterpart large law firms of it.

Mr Patch—I would take issue with one of those points—that we have convinced them. Earlier on in the process, Claytons were—

Senator TROOD—Perhaps I should rephrase that, Mr Patch. They have come to a view—

Mr Patch—After talking to their clients. I think Ms Flannery gave evidence to the committee that initially she was opposed to the bill. She said she had talked to her clients and she had talked to her partners in New Zealand and had come around to the view that the bill was a good way to go. There is a philosophical point about this bill. The Clayton Utz firm has come around to accepting that there is a need to make a change in the law; some other firms are saying that they have not accepted the philosophical shift involved in the law in this area. That is why we had such a long submission from them.

CHAIR—Dr Popple, you have finished going through your list?

Dr Popple—That is the end of my introductory statement, yes.

CHAIR—It might go down as the longest one on record, I would say.

Senator BARNETT—He has finished!

CHAIR—I have four or five questions. I think they will be pretty quick to answer. Once the bill is enacted, I take it that the states give you the powers to amend it, essentially, so if it needs to be amended in the future, you do not need to go back to the states for that?

Dr Popple—Part of the referral that we are proposing is that, as well as the power to enact an Act in the form of the attached text to each of those pieces of state referral legislation, there will also be an amendment power. The drafting of that is difficult.

Mr Glenn—The operation of that amendment power is governed in a sense by the intergovernmental agreement that we have with the states and territories, and that involves in all situations that we would consult with the states and territories about a proposed amendment to the bill and, in certain circumstances, we would ask for the consent of the states and territories—consent being able to be given by three jurisdictions, at least two of whom must be states, I think is the formulation—and that is broadly consistent with the models in other intergovernmental agreements that use referral powers.

Senator BARNETT—The requirement is for three states, did you say?

Mr Glenn—Three jurisdictions, two of whom must be referring states.

Dr Popple—Of course, that does not in any way, nor could it, affect the Commonwealth parliament's power to make legislation where it has the power. We are only talking of course about amendments where the Commonwealth might not otherwise have that power and would be relying upon the referral to make amendments.

Senator BARNETT—If there were a majority of states or territories that did not support the amendment, what would occur in that situation?

Dr Popple—The legal situation is that the Commonwealth would have the power to make it because of the way the referral legislation is phrased. The states would probably have the power to withdraw the referral, at least in relation to the extent that they did not want that amendment made. But the intergovernmental agreement process that has been set up is one that allows the states to have a part in the process of deciding whether or not an amendment ought to be made.

Mr Glenn—There are processes in there to allow states, if there are a large number of states who object to a particular proposal, to effectively convene a meeting of the parties to the IGA to seek to resolve the dispute. So there is a sense of dispute resolution built in.

Dr Popple—I should say that we do not anticipate issues along those lines, but the mechanism has been set up just in case.

CHAIR—How will the bill be monitored? Are you looking at a review in three to five years time?

Dr Popple—There is no proposal at the moment to review the operation of the bill—

Mr Glenn—The IGA does have—

Dr Popple—That is right. Sorry.

CHAIR—Is there any reason then why the bill could not propose a statutory review process?

Dr Popple—Sorry, Senator. There is no proposal within the bill itself; there is no review built into the bill. But Mr Glenn has just reminded me that the intergovernmental agreement requires there to be a review within the context of that—

Mr Glenn—I think it is five years from the commencement of the scheme.

Dr Popple—Yes, that we have a review.

CHAIR—I see. But that one is not specified in the legislation?

Mr Glenn—No, but it is in the IGA.

CHAIR—I see.

Senator BARNETT—With a five-year review.

CHAIR—After five years?

Mr Glenn—After five years, yes.

Senator BARNETT—Who does the review?

Mr Bobbin—The Commonwealth in consultation with the states and territories.

Senator BARNETT—Would that be an opportunity for public input perhaps, or how would it work?

Dr Popple—There has been no more thought, I think, than what Mr Bobbin has just read out. That is from the intergovernmental agreement. I imagine that it would make a lot of sense to be a public inquiry.

Senator BARNETT—You would think so. We could consider that.

CHAIR—Senator Barnett raised the issue that the Independent Film and Television Alliance had raised in relation to the application of the bill in intellectual property rights, and your answer went to international rights. The alliance supported the general application of the bill to secured lending against intellectual property. I want to know about here, internally, where the PPS and the intellectual property laws are inconsistent. I think your answer alluded to between countries, but I want to know about internal IP rights.

Mr Patch—I am not sure I understand that question. Is the question: are Australian stakeholders who are interested in IP supportive of the bill? Or is the question: what is the impact of the bill upon secured interests in intellectual property in Australia?

CHAIR—Give me both.

Mr Patch—The answer to what do Australian stakeholders think about the bill is that initially there was a fair amount of 'If it's not broke, don't fix it,' amongst the intellectual property community. We have met with them and talked to them, and I think they now see that the bill can deliver benefits for them. The committee has before it a submission—I think it is No. 32—from the intellectual property committee of the business law section of the Law Council of Australia, in which they say:

The committee is in general agreement with the legislation and its objectives. It applauds the attempt at harmonisation of law on the subject.

It raises two issues.

CHAIR—But aren't they saying that, where there is inconsistency between the proposed PPS laws and our IP laws, the existing intellectual property laws should be deferred to; in other words, the bill should defer to existing intellectual property laws. I am asking you whether you can comment on whether that approach is practical and if there are any drawbacks.

Mr Patch—Certainly the bill does defer, subject to the committee process—

CHAIR—To existing—

Mr Patch—to existing intellectual property laws about the creation of intellectual property, when intellectual property exists and the transfer of intellectual property from one person to another person. But when it comes to the rules about the creation of security interests in intellectual property, we would be looking to harmonise that consistent with our functional approach of saying, 'Why is intellectual property different from other forms of property? If this rule works for everything else, then it should work for intellectual property. Why should the rule for intellectual property be any different?' That is the approach we have been taking, and no significant case has been made for saying intellectual property warrants a special rule in terms of creating security interests. But there are a couple of special rules, I can indicate. We have acknowledged the need for a couple of special rules for intellectual property.

CHAIR—What you are saying to me is that the bill does actually defer to existing intellectual property laws in areas where the PPS and IP laws are inconsistent.

Dr Popple—Not quite.

Mr Patch—No, not quite. In relation to the creation and the transfer—what we call the core intellectual property—the answer is yes, but when it comes to rules about creating a security interest in intellectual property, there will be some change to the law in that area.

CHAIR—To the IP law?

Dr Popple—To the law of security interests now as it relates to intellectual property.

Mr Patch—Yes.

CHAIR—I see.

Dr Popple—But we would say that is a consequence of a policy decision that this should, as much as possible, apply across all personal property.

CHAIR—From the evidence to the committee, proposed sections 233 and 234 will change the order of priority in relation to the rights of unregistered lessees. What are the advantages and disadvantages of the proposed approach?

Senator BARNETT—What is the impact of the bill on lessees?

Mr Patch—The bill says that a lease of more than 12 months is a security interest. The bill also says that any security interest that is not registered is, in effect, void on insolvency. If you are looking at a business, looking to lend to the business, and you see a lot of assets in the business—if you search the Personal Property Securities Register and discover nothing—then you can be confident that the assets there are not encumbered, at least by a lease of more 12 months. So you can be confident when you buy the business that you will get those assets.

With the current arrangements, there is nowhere, effectively, for you to check that all the assets of the business are leased. So you might buy a business or lend money to a business only to discover that there is nothing there. The bill says to people who are engaging in long-term leasing that they should register, and that means that when the enterprise becomes insolvent they will be able to claim the property, but not otherwise. It is about providing transparency for people who are dealing with businesses which operate on leased property.

Senator BARNETT—On that issue, this was very concerning to a number of witnesses before our committee in regard to the rights of lessors. You have been talking about lessees, but lessors' rights under this law would change the common law. The common law, as I understand it at the moment, is that they would maintain their right of ownership in a property, notwithstanding that a finance company might take an interest over it. So this would change that arrangement.

Mr Patch—There is no doubt that this represents a change in the existing law about the position of lessors in an insolvency. Currently in an insolvency a lessor is able to say, 'That property is mine. You've defaulted, I'm taking it back.' Under this arrangement their capacity to take the property back will be contingent on them having registered.

You have also had evidence from the big law firms. I think it was Mr Canning that said that that seemed an appropriate outcome. He would talk to his clients, and registering was a simple administrative process, and that seems a fair outcome. We agree that the success of this project is contingent on registration being a simple and efficient process that does not impede people engaging in ordinary commercial transactions.

Senator BARNETT—And we were advised of that New Zealand case that sent shivers down their spines once they all heard about it.

Mr Patch—I think that is the Portacom portaloo case.

Senator BARNETT—Yes, the portaloo case.

Mr Patch—That goes to something the committee was talking about a little while ago in terms of the education campaign. I think Mr Edwards from the Australian Finance Conference said to the committee that, whenever this is introduced, somebody does not listen to the education campaign and comes a cropper. One of the major lessons learnt by us from New Zealand implementation is the need for a strong education campaign for people engaging in leasing and that type of activity.

Senator BARNETT—We have heard different law firms with different views. One law firm put to us that they thought about it and at first thought it was terrible, then after further consideration they thought, 'Yes, this is good because it's going to make it clear.' Have you thought about any transition period in regard to these issues, because this is an area of sensitivity? Should there be a transition period of, say, 12 months in terms of getting everybody educated and trained in how the process should work? Once you start on 1 May 2010, or whenever the start date is, that is it. Have you given any consideration to the concerns expressed during the inquiry?

Mr Patch—The bill applies to new leases after 1 May next year. Existing lessees will have 24 months—actually slightly more than that—to register their existing leases.

Senator BARNETT—So if I have got a long-term lease of 10 years or whatever, then I have got to make sure that is registered by 2012?

Mr Patch—Yes. When we did the initial consultations on this bill, one of the things that stakeholders made very clear to us was the need for adequate transitional arrangements. The New Zealand implementation required people to register their existing security interest within six months of the commencement. That was seen as an incredible imposition on people's ordinary business practices. It generated lots of employment for university students to achieve that outcome. The arrangement that our stakeholders seem to be happy with is the two-year period, on the basis that over two years most businesses would review their client files once each year and that their business practice will be, as part of your client review, to make an assessment as to whether or not there should be a registration against that client. So it becomes a much more simple and streamlined process.

The disadvantage of such a long transitional period is it means that the register is not going to be 100 per cent reliable until the end of the two-year period, because you could look at a business and there could be assets there that are pre-commencement. But that is a quid pro quo.

Senator BARNETT—I understand that. Thank you.

CHAIR—Finally, following up from the Motor Trades Association, who we had before us this afternoon, what would a spare parts business in the motor trades area need to do to perfect its interest in goods currently supplied on a retention of title basis?

Dr Popple—With great respect to the witnesses you heard earlier on this afternoon, the only registration required would be once in relation to parts in relation to each dealer. There will be no need for each shipment or indeed every part to be separately registered.

CHAIR—So their understanding of the application of that bill in that respect is not correct?

Dr Popple—That is true.

Senator BARNETT—Say again. What would they need to do?

Dr Popple—It depends how they want to describe it. They could describe it as 'parts' or 'spare parts', or 'Toyota spare parts'. They would only need to do that once in relation to each of the relevant dealers, rather than in relation to each shipment for a dealer, or in relation to each part for a shipment for a dealer.

Senator BARNETT—Each of their customers.

Dr Popple—I am sorry, each customer I should say. Each customer, yes.

CHAIR—So if I was sending a pallet load of spare parts from A to B, I just need to register the pallet, rather than what is in it?

Dr Popple—In fact, if you often send parts to B. You only have to register that fact once in relation to B.

CHAIR—Okay.

Dr Popple—You will be able to make use of that registration for each of your shipments to B.

Senator BARNETT—Does that cover all the different products that are transported from A to B?

Dr Popple—It would obviously depend how the collateral was described in the registration, but there is no reason why that description could not be quite broad. After all, the aim of the registration is to alert any potential lender to the fact that you have an interest in that property. They would be so alerted if B in Senator Crossin's example was mentioned in the registration and the description of the collateral was sufficiently broad to cover the parts that have been shipped. They have identified that to us before and we have endeavoured to explain to them that we do not think this should be an issue for them at all in terms of practicalities.

There was another point that was also raised this afternoon by those witnesses. It was about the definition of 'motor vehicle' and 'registrable or otherwise'. We agree with Mr Duckworth that interests in all motor vehicles, whether registrable in the sense of being roadworthy or otherwise, should be allowed on the PPS register and the only difficulty we have about the definition of motor vehicle is to make sure it at least covers the various differing definitions in existing state legislation.

CHAIR—I see.

Dr Popple—So we take no issue at all with the points that were made this afternoon.

CHAIR—The reason why I raised the example of the motorised scooter is because that is not considered a vehicle in the Northern Territory, for example.

Dr Popple—But I think it might be in some jurisdictions because of the way 'motor vehicle' is defined in those other jurisdictions.

CHAIR—Yes. So that is where your concern would lie?

Dr Popple—Certainly we make no distinction at all, as I think Mr Duckworth was saying, between registrable and otherwise. Of course, he is talking about registrable on the road, not registrable in the sense of a personal property security interest.

CHAIR—Yes.

Mr Patch—To go to motor scooters in particular, if the regulations were to say something like, 'Anything capable of moving across the land by motor', you end up capturing very trivial things like—

CHAIR—Motorised scooters?

Mr Patch—Yes. You have unintended consequences. Some state legislation talks about scooters where their engine has more than a certain number of horsepowers or they are capable of travelling at speeds of more than 15 kilometres. We will probably end up with some sort of concept along those lines so that motorised scooters capable of travelling at less than 15 kilometres an hour or something like that will not end up on the register. The things that Mr Duckworth was concerned about—he mentioned off-road motorcycles and those sorts of things—they will be on the register.

Senator BARNETT—They will be. So motorcycles used on farms?

Dr Popple—As I said, we are not making the distinctions Mr Duckworth seems to think we propose to make about registrable and non-registrable.

Senator BARNETT—I need to ask this question, because this view was put by one of my former bosses at the Corrs law firm, Simon Begg. You may have heard his evidence so I will put it. He has criticised different aspects of the bill and you have seen that in his evidence. Specifically, he has raised this point about the bill to register the collateral rather than the security interest in the collateral. That is different from the Canadian and New Zealand approach, according to him. That is in his submission at page 4. Do you comprehend that or can you respond to that?

Mr Patch—We well understand and well comprehend the point. It has been made by a number of people. The question is whether people are registering security interests or whether they are registering collateral—whether they are registering the piece of property. Under the current arrangements and the current law, people register security interests. You have to have a company charge, you have to have an instrument. You do the deal and then you register it. So you are registering the security interests.

Under this bill it is slightly different in that you will be able to register before you have actually entered into the agreement. So what you are registering is the property. In order to have what the bill calls perfection, you

have to have the registration against the property and then you have to have a security interest against the property that you have registered. It gets back to something I said earlier about the Canadian legislation. That legislation refers to registering the collateral and so does the New Zealand legislation. You register the collateral in every jurisdiction. The difficulty we are having is that our bill makes that too plain and it has become apparent to people that you are actually registering collateral and not security interests. That is the problem they are having with it. Maybe we should have hidden that fact somehow, like they have done in New Zealand and Canada.

CHAIR—Thank you very much. I do not have any questions outstanding to put on notice, I do not think.

Dr Popple—We undertook to give some financial information.

CHAIR—Okay. We probably would need that back by next Friday.

Dr Popple—We can provide it before that, I am sure.

CHAIR—I am sure you will, too. Thank you again for your interest. I also note that we are aware that Mr Patch travelled with us, and it has been very useful to have an officer with us as we travelled, to hear the evidence firsthand. I want to commend you on that. I think it is a good process, essentially.

Senator BARNETT—I associate my remarks with those of the chair on behalf of the committee. It is very much appreciated. Having Mr Patch's presence and advice, on the record and off the record, was most beneficial.

CHAIR—Thank you very much for your evidence today. I declare this meeting of the Legal and Constitutional Affairs Committee adjourned.

Committee adjourned at 3.29 pm