COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

Reference: Trade Practices Amendment (Australian Consumer Law) Bill 2009

FRIDAY, 21 AUGUST 2009

CANBERRA

BY AUTHORITY OF THE SENATE

THIS TRANSCRIPT HAS BEEN PREPARED BY AN EXTERNAL PROVIDER

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

http://www.aph.gov.au/hansard

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

SENATE ECONOMICS

LEGISLATION COMMITTEE

Friday, 21 August 2009

Members:

Senator Hurley *(Chair)*, Senator Eggleston *(Deputy Chair)*, Senators Cameron, Joyce, Pratt and Xenophon

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

Senators in attendance: Senators Brandis, Bushby, Cameron, Hurley, Pratt and Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

Trade Practices Amendment (Australian Consumer Law) Bill 2009

WITNESSES

Committee met at 8.32 am

CHAIR (Senator Hurley)—I declare open this hearing of the Senate Economics Legislation Committee inquiry into the Trade Practice Amendment (Australian Consumer Law) Bill 2009. On 25 June 2009 the Senate referred this bill to the Senate Economics Legislation Committee. The bill is a first step towards the Council of Australian Governments goal of replacing state-based legislation with a national consumer law. It introduces a national law voiding standard form consumer contracts with unfair terms and provides regulators with new enforcement powers. The committee is due to report by 7 September 2009.

These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer given in camera. Such a request may, of course, also be made at any other time. A witness called to answer a question for the first time should state their full name and the capacity in which they appear and witnesses should speak clearly and into the microphones to assist Hansard to record proceedings. Mobile phones should be switched off.

[8.33 am]

KENNEDY, Dr Steven, General Manager, Competition and Consumer Policy Division, Department of the Treasury

WRITER, Mr Simon, Manager, Consumer Policy Framework Unit, Department of the Treasury

CHAIR—Welcome. Do you wish to make an opening statement?

Dr Kennedy—Yes, Chair, a short opening statement. As noted, the Trade Practices Amendment (Australian Consumer Law) Bill amends the Trade Practices Act and the Australian Securities and Investment Commission Act and has three principal elements: the creation of a new national consumer law, to be called the Australian Consumer Law; implementation of national unfair contract terms law and implementation of new penalties for breaches of consumer law; and new enforcement powers for the ACCC and for the Australian Securities and Investment Commission to enforce these laws. This is the first of two bills intended to implement the Australian Consumer Law. The government has announced that it will introduce the second bill in 2010.

The Banks taskforce on reducing the regulatory burden on business identified inconsistent and overlapping state and territory laws as an unnecessary regulatory burden. The Australian Consumer Law will implement COAG's agreement on 2 October 2008 to create a single nationally consistent consumer law. It is based on detailed proposals announced by the Ministerial Council on Consumer Affairs on 15 August 2008, which drew on the recommendations of the Productivity Commission in its 2008 review of Australia's consumer policy framework. It will simplify and consolidate the existing range of 13 Commonwealth, state and territory generic consumer protection and fair trading laws into a single national applicable law. It will be based on existing consumer protections and fair trading provisions of the Trade Practices Act along with related administrative enforcement provisions. It draws on the existing provisions contained in unconscionable conduct, in part IVA of the Trade Practices Act, consumer protection, part V, part VA, liability of manufacturers and importers for defective goods, and part VC, offences. The law will also include some additions and amendments based on best practice in state and territory laws which are in the process of development at the moment and once agreed with states and territories later this year.

The bill amends the Trade Practices Act to insert a new part XI, which will allow for the application of the Australian Consumer Law as the law of the Commonwealth, facilitate its application as a law of each state and territory and make provision for its administration, enforcement and amendment. In terms of the national unfair contract terms law, it creates a new national unfair contracts terms law which will apply to standard form consumer contracts. Victoria is currently the only Australian jurisdiction that has an unfair contract terms law. The Victorian law commenced in 2003. However, other jurisdictions such as New South Wales have given consideration to the possibility of regulating unfair contracts and the Productivity Commission noted the risk that the absence of a national provision may lead to other jurisdictions introducing differing laws. The development of this national unfair contract terms law has been informed by the findings of the Productivity Commission, experience of Victoria in implementing and enforcing similar laws, and it draws on the application of unfair contract terms regulation in the United Kingdom in 1999 and elsewhere in the European Union.

As I noted earlier, the bill also introduces new penalties and enforcement powers in consumer redress options which will form the basis of consistent national powers to enforce the Australian Consumer Law. The bill will introduce civil pecuniary penalties and disqualification orders for the breaches of consumer protection and fair trading provisions. This will add to the existing application of civil remedies and criminal sanctions and reflect the application of a similar suite of enforcement options to that which now exists in relation to the competition provisions of the Trade Practices Act. The new administrative powers allow the ACCC or ASIC to require a person to substantiate a claim. They allow them to issue infringement notice for an alleged breach of the law and issue public warnings about conduct which may cause detriment to consumers. Such powers have existed in states and territories for some time and the introduction of consistent national powers will mean that the ACCC and ASIC will share the same enforcement options as their state and territory counterparts. The ACCC and ASIC will also be able to seek orders from the court to provide a consumer or class of consumers with redress for an identifiable loss arising from a breach of the consumer laws without having to join all affected consumers to the court action.

These new powers will be incorporated in the Australian Consumer Law and applied nationally and, as I noted earlier, will create a nationally consistent enforcement regime.

CHAIR—Thank you, Dr Kennedy. The omission of business to business unfair contract terms from the bill: could you explain a bit more about why that was so and what happened there?

Mr Writer—Perhaps I could answer that. The government took the decision to exclude business to business contracts prior to the introduction of the bill, so it was never formally part of the bill as introduced. There had been extensive consultations in February and May of this year around the issue of unfair contract terms, and one of the specific issues that came up quite a lot was business to business contracts. Minister Emerson, on coming into the portfolio, made the decision to remove business to business contracts, in the context of current parliamentary inquiry reports which have been published concerning the unconscionable conduct provisions of the Trade Practices Act and also the Franchising Code of Conduct, which the minister considered should be part of any consideration of the application of these sorts of laws to business to business transactions, given that they related quite directly to the relationships between businesses, particularly large and small businesses.

CHAIR—In terms of that, then, how effective are the unconscionable conduct provisions in addressing those business to business unfair contract terms? I think we on this committee have had some questions about how many prosecutions there have been and how effective it is.

Mr Writer—As to the number of prosecutions, that would be a matter for the ACCC and we would need to take that question on notice. In terms of the effectiveness, this committee has in fact issued a report, and the government is currently considering its response to that report, and that will be published in due course. Unconscionable conduct provisions do not relate directly to questions of contract; they are directed towards matters of conduct, which can encompass the nature of contracts and the way in which contracts are entered into by parties, including businesses. So there is scope, certainly, under those provisions and, as identified by this committee in its report, there is scope for the improvement of those provisions. Beyond that, I do not want to prejudge the government's response to the report prior to its publication.

CHAIR—The relationship between the definition of unconscionable conduct and unfair contract terms—is there a close link there? You were saying 'unconscionable conduct' refers to conduct, whereas 'unfair contract', in the context of this bill, refers to contracts. But is there a similarity between the use of the two terms?

Mr Writer—They are quite different concepts at law.

Senator BRANDIS—No, they are not. Can I pursue that, Chair?

CHAIR—Yes, certainly, but let Mr Writer say what he was going to say.

Mr Writer—They are different in the sense that unconscionability might be characterised as a subset of unfairness. So they are not entirely divorced from one another. They are certainly linked concepts. The concept of unconscionability in the Trade Practices Act relates to the common-law or equitable notion of unconscionability that exists generally, and does not seek to define it in any particular way beyond that concept which has been developed by the courts over many centuries, whereas 'unfair contract terms' relates really to a wider consideration of the nature of a term entered into by parties, and the bill sets out a definition of unfairness in this context, which is that there is a significant balance between the parties' rights and obligations arising out of the contract, and the term is not reasonably necessary in order to protect the legitimate interests of the party that would be advantaged by the term. So it does not simply pick up on the general notion of unfairness but seeks to provide some shape to it on the face of the legislation.

Senator BRANDIS—Mr Writer, I do not want to be rude, but what you have told the committee is almost entirely wrong. Can I direct you to the definition of unfairness in part 2, division 1, clause 3 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009, on page 5. Can I also take you to section 51AB of the Trade Practices Act, 'Unconscionable conduct'. With respect, it is not right to say that contract and conduct are different things, because the manner in which unconscionable conduct may be exercised can only be the way in which ultimately that conduct is embodied in the contractual terms. So, with respect, that is a false dichotomy. In the bill that we are considering here, it says:

3 Meaning of *unfair*

(1) A term of a consumer contract is unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

Then, as you would be aware, the subclauses go on to explain with more particularity the way in which those two governing concepts are to be interpreted and applied.

In section 51AB of the Trade Practices Act, under 'Unconscionable conduct', it says:

(2) Without in any way limiting the matters to which the court may have regard for the purpose of determining whether a corporation has contravened subsection (1)—

which is the prohibition against engaging in unconscionable conduct—

in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the consumer), the court may have regard to:

(a) the relative strengths of the bargaining positions of the corporation and the consumer;

(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation …

As we know, that is applied to consumers by the code. It seems to me, with respect, Mr Writer, that there is little difference between the expression in the clause 3(1)(a) 'imbalance in the parties' rights', and section 51AB(2)(a), 'the relative strengths' of the parties in the negotiation. Both address the question of the inequality of power. And there is no difference at all—linguistically there is no difference—between 3(1)(b), 'not reasonably necessary in order to protect the legitimate interests' of the advantaged party, and 51AB(2)(b), 'not reasonably necessary for the legitimate interests of the corporation'. Not only is there no difference but the expression in the statutory language is largely the same.

If you go on to the subsequent provisions of 51AB as to how those tests are to be applied, they largely mirror the provisions of subclauses (2), (3), and (4) in our bill, which indicate how that test is to be applied. Having regard to all of those considerations, can you give me an example, please, of a set of circumstances in which a contract might fall foul of the provisions of the bill we have under review today but would not fall foul of section 51AB of the existing Trade Practices Act.

Mr Writer—The response that I gave before was directed to the question of whether unfair and unconscionable were the same thing.

Senator BRANDIS—That is really where I am going too. I just wanted to give you the comfort of putting to you the actual terms of the existing act and comparing them with the bill.

Senator CAMERON—It looks as though you've put his mind right at rest!

Mr Writer—What I was perhaps attempting to explain was that unconscionability at law is perhaps regarded as a somewhat different concept to the general concept of unfairness, given that there is a large jurisprudence—

Senator BRANDIS—Narrower or broader in your opinion, Mr Writer?

Mr Writer—Unconscionability would be narrower than unfairness given the jurisprudence around the concept of unconscionability and the threshold that the court would impose in terms of applying remedies for unconscionable conduct, which is that it is conduct which is so egregious as to warrant intervention by the court.

Senator BRANDIS—That might be true when it comes to the equitable doctrines and the Blomley v Ryan sort of situation, but it is not the case necessarily once you embody that in statutory language as the parliament has done in section 51AB. My point is that the body of equitable doctrine about unconscionable dealing is quite narrow and, from a remedial point of view, it is also quite limited. I think you are right when you say that—you are certainly right. But, once those originally equitable doctrines were expressed in statutory language in section 51AB, and the remedial apparatus of the Trade Practices Act was available rather than the more limited equitable remedies, then I think it is—if I may say so, with respect—a worse than imperfect comparison to say that the comparison is between the antecedent body of equitable doctrine and the new notion of unfairness. The relevant comparison is between the current statutory notion of unconscionable conduct defined in 51AB and the apparatus of remedies now available in those cases under the Trade Practices Act and the statutory language of the bill. My problem is that I am struggling to see where the existing 51AB would not apply to a case where the proposed clause 3 would apply.

Mr Writer—I accept that. It may apply in similar circumstances.

Senator BRANDIS—You said it is broader, so give me an example of where 51AB does not apply and the definition in clause 3 does.

Mr Writer—Well, 51AB lists matters that the court may have regard to in relation to determining whether or not there is unconscionability—

Senator BRANDIS—Yes.

Mr Writer—whereas this definition of unfairness in the bill defines, perhaps with a degree of more precision, the nature of unfairness in the context of unfair consumer contracts which are standard form contracts. It is not directed to—

Senator BRANDIS—But that is just the scope of its application.

Mr Writer—That is right.

Senator BRANDIS—I am interested in the difference between the relevant legal principles. What is the conduct that this bill would catch that 51AB would not?

Mr Writer—The context of the application of section 51AB is not limited to the text of contracts. It is generally related to conduct.

Senator BRANDIS—That is because it is broader.

Mr Writer—Yes, I accept that.

Senator BRANDIS—You said before that unfairness is broader than unconscionability. You are now saying unconscionability is broader than unfairness.

Mr Writer—No, that is not quite what I am saying. What I am saying is that at law the concept of unconscionability is perhaps narrower than unfairness, but the general provision applies to unconscionable conduct, whereas this provision applies to unfair terms of contracts only.

Senator BRANDIS—But my point is that is a distinction without a difference. A 51AB issue will only arise where a party is seeking to avoid the enforcement of a contract. It really makes no difference whether you say, 'The bill is about contractual terms and 51AB is about conduct,' because 51AB issues only arise when you say, 'This contract is unconscionable.' It might be unconscionable because of antecedent conduct overbearing the will of the other contracting party, it might be unconscionable because of the express language of the terms but, nevertheless, both in the bill and in the existing 51AB of the Trade Practices Act the issue is only presented when you seek to enforce contract. Hence my enquiry as to the circumstances in which the bill would have a different operation or application from the existing terms of the act.

Mr Writer—Unconscionable conduct could embrace situations which do not relate to formal contracts. They can relate to a course of dealings between parties—

Senator BRANDIS—Sure.

Mr Writer—which may not be governed by a formal contractual relationship.

Senator BRANDIS—That is not my point. My point is whether that be so or not, and it certainly could be, the issue is only going to be presented when a party seeks to avoid the enforcement of a contract against it by pleading section 51AB.

Mr Writer—That may be so.

Senator BRANDIS—So what is the difference between the two—in a practical sense?

Mr Writer—The provisions are designed to address concerns around the existence of unfair terms in contracts entered into by consumers, and which are standard form contracts. They are designed to set up a regime to address that specific issue in relation to—

Senator BRANDIS—I know what they are designed to do. My point is that the law already does this, and this is yet another example of, potentially, legislative overreach. But anyway, that is a policy question. I suppose I cannot ask you to comment on that.

Mr Writer—It is.

Senator XENOPHON—In relation to questions asked by Senator Hurley about small businesses being excluded: I understand that Minister Bowen made an announcement on 5 June this year that the unfair contract terms and provisions of this legislation would apply to both consumers and small business. That is correct, is it not?

Mr Writer—That is.

Senator XENOPHON—You would be able to confirm that Minister Bowen had Cabinet approval for the unfair contracts terms and provisions applied to small businesses? He would not have made that announcement in the absence of that approval?

Dr Kennedy—Approval from whom?

Senator XENOPHON—Presumably it would have been signed off by Cabinet?

Dr Kennedy—I would have to take that on notice. I would have to confirm the process—I am not certain.

Senator XENOPHON—Perhaps you could take that on notice. Could you explain to the committee the chain of events that have led to small businesses now being excluded from the unfair contract provisions in this bill?

Dr Kennedy—As Mr Writer outlined, when Minister Emerson took over the responsibilities for this area he continued the consultation that Minister Bowen had been undertaking on an ongoing basis with small businesses and large businesses—a range of parties. He also brought to it his own insights from being the small business minister. As a result of those consultations, and taking into account the different nature of relationships between businesses, and between consumers and businesses in standard form contracts, he took the view that the business relationships would probably—although this is still being considered by him—best be addressed through the reforms around unconscionable conduct and also the Franchising Code of Conduct, rather than, at this stage, through including small, or businesses in general or business-to-business in this bill.

Senator XENOPHON—Perhaps you could take this on notice: there was a fairly short window of time frame between Minister Bowen's announcement and the introduction of the bill, which now excludes small businesses. Could you provide details of the nature and extent of the consultations—which businesses were consulted or which business groups were consulted? And what aspects of Minister Emerson's role as small business minister did he take with him in formulating a different policy by excluding small businesses? I am happy for that to be taken on notice at this stage.

Dr Kennedy—I am happy to approach Minister Emerson to find that information.

Senator XENOPHON—Sure. Can I just go back to the whole issue of the small business exclusion. Isn't the exclusion arbitrary? For example, if you have a mobile phone contract for consumer use then the contract is covered, but if the mobile phone is used by small business in their business then the contract is out.

Mr Writer—That is correct. In many of these circumstances small businesses may well benefit from improvements to the forms of contracts arising from the application of this legislation.

Senator XENOPHON—Won't they be excluded?

Mr Writer—They certainly will not be in a position to make applications under the legislation because the legislation applies to contracts with individuals.

CHAIR—Mr Writer, aren't you referring to the fact that this legislation relates to standard contracts, so if a standard contract is developed for an individual who does have redress then it may well flow on.

Mr Writer—It may have a flow-on effect.

Senator XENOPHON—Thanks, Chair; I think that is a good point. But a standard contract does not have to apply—you could have a standard contract for a small business as distinct from individuals, couldn't you?

Mr Writer—That is entirely possible.

Senator XENOPHON—On another issue, the unfair contract provisions require the courts to consider whether a contract term was 'transparent'. Can a contract term be transparent but still be unfair under the proposals?

Mr Writer—Yes.

Senator XENOPHON—The unfair contract provisions require the courts to consider the extent to which a contract term is likely to cause substantial detriment. Isn't detriment a difficult concept to define?

Mr Writer—Potentially, because it can take many forms; and the legislation makes it clear that detriment can embrace both financial and non-financial detriment, in recognition of the fact that, often in everyday type situations, consumers' concern is not so much with financial redress but overcoming or at least having the inconvenience that they may have been subject to recognised and other similar considerations.

Senator XENOPHON—Does detriment in this context require proof of actual loss or potential loss or damage?

Mr Writer—It requires proof of either actual detriment, whatever form it might take, or a substantial likelihood of detriment.

Senator XENOPHON—What about non-financial detriment—isn't non-financial detriment too difficult to define? Could you give any examples?

Mr Writer—It is not a particularly difficult concept to define. If I as a consumer, for example, have a contract with somebody to deliver a sofa to my house and I expect and am given the reasonable expectation that that might be delivered in two weeks and it takes eight, the detriment I might have suffered there is the lack of a sofa for six weeks. I am not necessarily going to quantify that in a financial sense with the business concerned, but the detriment is there still in that I have been compelled to sit on the floor or on my broken sofa. The provisions are simply designed to give recognition to the fact that a consumer may not want a payment. They may want recognition of that detriment. They may want an apology. They may want to some other form of recompense.

Senator XENOPHON—But isn't the question of detriment a very difficult one to define generally and so may undermine the effectiveness of the unfair contract provisions of the bill?

Mr Writer—It is purely a remedy. It does not determine unfairness. It goes to the question of what redress might be provided. The definition of 'unfair' does not refer to the question of detriment or make the existence of detriment determinative of that unfairness.

Senator XENOPHON—Dr Kennedy, on 13 August you delivered a paper, 'The future of consumer policy: should we regulate to protect homo economicus?' to the Accord Industry Leaders Briefing. You said that consumer detriment was a 'slippery concept' and:

… detriment may be difficult to identify and, certainly, to quantify.

I also note your comment:

Identifying … conduct as causing consumer detriment is not straightforward …

Dr Kennedy—Yes.

Senator XENOPHON—So if detriment is a slippery concept, as you put it, is difficult to identify and quantify and is 'not straightforward'—your words—then isn't the concept going to be a substantial or even a time-consuming hurdle to successfully relying on our fair contracts provisions?

Dr Kennedy—I certainly did say all those things in the speech, and I think the bill firstly goes to financial detriment but then has a broader sense of detriment. I agree with you—it may well be difficult to identify other forms of detriment and quantify them—but I was not arguing in that speech that that was not an important consideration and should not be taken into account. The purpose of this bill is that, in determining whether a contract term is unfair, this is something which the court may have regard to, but it does not, if you like, define unfairness; it is something it may consider. But I acknowledge that detriment, particularly non-financial detriment, can be quite a tricky concept to determine.

Senator XENOPHON—To put it in context, you said in your paper:

… this makes 'consumer detriment' as slippery a concept as the market failure which can result from it … detriment may be difficult to identify and, certainly, to quantify … Identifying this conduct as causing consumer detriment is not straightforward …

I think a lot of people would agree with you. So isn't the concept of substantial detriment as set out in this bill going to be a lawyer's picnic in the sense that there will be so much litigation, it will not be straightforward for consumers and it will create another barrier for consumers accessing the provisions of this legislation?

Dr Kennedy—As I said, a detriment is something the courts will have regard to in determining whether a contract term is unfair, and I think it is a relevant thing for them to have regard to. Frankly, it is difficult for me to see an alternative.

Senator XENOPHON—But what about just the concept of unfairness?

Senator BRANDIS—What about economic loss, Dr Kennedy? You say you cannot think of an alternative. A narrower and sharper alternative would be to confine it to economic loss.

Dr Kennedy—Financial detriment, if you like, is covered here—

Senator BRANDIS—Yes, that is right.

Dr Kennedy—which perhaps we could use interchangeably with economic losses.

Senator BRANDIS—But my point is that you could avoid the issue that Senator Xenophon is focusing on by narrowing the focus to economic loss, which is a much more familiar concept when you are talking about transactions.

Dr Kennedy—You could do that, but obviously in all of these policies it is a trade-off between having regard to a broader concept that clearly matters to consumers and the regulatory burden that might be attached to doing that. I think that in this case I would agree with it; the trade-off is that it is better to have regard to this wider sense of detriment because of the confidence it gives to consumers in these markets.

Senator XENOPHON—I just want to pursue this whole concept. What is wrong with having unfairness as a test? Senator Brandis has pointed out that that might be sharpened. I am just worried that we are opening up a Pandora's box by having the detriment test and that that will act as a significant hurdle for consumers to access justice in terms of the provisions of this bill.

Dr Kennedy—It is not a test, as I understand it; I will ask my colleague to comment on that in a moment. It is something which the courts can have regard to.

Mr Writer—That is correct.

Senator BRANDIS—But that is the problem. It is not an answer to the line of questioning we have heard from Senator Xenophon suggesting that this could benefit from being sharpened. It is not really an answer to say, 'This is something the courts can have regard to.' The whole point is that we want a little more certainty in the law here about what the courts can and will not have regard to. When one is introducing uncertainty into the law, as this incontrovertibly does—but I dare say you would say that it does so for other good policy reasons—don't you want to limit the extent of the uncertainty by having sharper statutory concepts and definitions?

Dr Kennedy—As I noted earlier, Senator, there is a trade-off to be taken in these issues to the extent to which non-financial detriment adds some uncertainty.

Senator BRANDIS—Define 'non-financial detriment' for me.

Dr Kennedy—Mr Writer talked about non-financial detriment.

Senator BRANDIS—Mr Writer, give me an example of non-financial detriment. Your sofa, for example, is not really a non-financial detriment, because there would be at least a notional cost in being deprived of the benefit of one's goods for a period of time.

Dr Kennedy—I think you raise a good point, because—to sharpen up our discussion of financial and non-financial detriment—people can place a financial cost on their inconvenience. Perhaps it is often referring to a direct, charge based penalty or some other direct financial cost. Although you are not paying a price when you are being inconvenienced, it clearly has a value for you. So when we say it is 'non-financial' we are simply saying it is not an amount of money that can be transferred, but certainly your time is valuable and if you lost time by being inconvenienced that would probably be regarded as non-financial detriment. But I agree with you—

Senator BRANDIS—The court would not regard it as a non-financial detriment. Anything that can be measured in money is not really a non-financial detriment, is it? So you must mean 'non-financial' in an economist sense rather than a lawyer sense, I suspect.

Dr Kennedy—I will rely on my lawyer colleague perhaps to explain that.

Mr Writer—Senator, you are correct; you can apply a notional cost to any form of detriment. Whether that cost is meaningful—or particularly helpful in the circumstances—is a separate issue. I might suggest that not having had the benefit of my sofa has cost me a certain amount of money, but the point of the legislation is to require courts not to arbitrate that question but simply to have regard to the fact that I may have been inconvenienced in a way that is not necessarily easy to place a cost on, such as might occur in relation to another form of contract where you could do that quite easily, for example—

CHAIR—Sorry to interrupt, but Senator Cameron has a few questions. We can go on a bit longer, I think, Senator Brandis.

Senator BRANDIS—Thanks, Chair.

Senator CAMERON—Thanks, Chair. Some of this stuff is as clear as mud to me, let me tell you—thanks, George! I am looking at section 3(1)(b) of the bill, but I do not have a copy of section 51AB of the act to look at the difference between them. As I understand it, and correct me if I am wrong, section 3(1)(b) is about unfair terms and 51AB is about unconscionable conduct. Is that your understanding?

Mr Writer—That is correct.

Senator CAMERON—So I went to the explanatory memorandum, and on page 15 it compares the key features of the new law and the current law, but I do not see where it compares the features of section 51AB of the act with those of 3(1)(b) of the bill. Am I missing something there?

Mr Writer—No, it does not. I suppose the table is designed to show that there is no current national provision dealing with unfair contract terms. There is a provision in Victoria which deals with it. But, no, it does not go into what other things might be relevant.

Senator CAMERON—The explanatory memorandum goes on to say:

The Court may take account of any consideration it thinks is relevant when determining whether a term in a consumer contract is unfair.

Right? But then it goes on to say, and this is repeated at paragraph 2.37:

However, the Court must take into account whether the term causes detriment, or a substantial likelihood thereof, whether the term is transparent, and the contract as a whole.

Now, I do not want to put words in Senator Xenophon's mouth, but I thought he spoke about 'substantial detriment' being the test. As I read it here, it is not 'substantial detriment'—

Mr Writer—No.

Senator CAMERON—it is the 'substantial likelihood' that it could cause detriment. It seems to me that is a different proposition.

Mr Writer—The test itself is set out in section 3(1) of the bill. These three factors—the existence of detriment or the substantial likelihood thereof, the extent to which there is transparency and the contract as a whole—are factors that the court must have regard to. The court can have regard to any factor. These are simply three that have been singled out as factors the court must have regard to in making that determination of unfairness.

Senator BRANDIS—What about—

Senator CAMERON—Senator Brandis, I am trying to get to this point about the difference between what is being viewed as 'substantial detriment'—if that is what Senator Xenophon said—and that being confused with 'substantial likelihood to cause detriment'.

Mr Writer—The bill does not impose any requirement to prove substantial detriment. It simply requires the court to have regard to the extent to which the term 'would cause' or 'there is a substantial likelihood that it would cause' detriment. It has regard to whether there is actual detriment or whether there is a substantial likelihood thereof. There has to be more than a hypothetical possibility of there being detriment; that is what that subsection is directed to the court looking for.

Senator CAMERON—Senator Brandis has raised 51AB(2)(b) and 3(1)(b) and put the argument—again I do not want to put words in anybody's mouth; I am trying to come to grips with this—that the unfair terms and the issue of unconscionable conduct are linked. But what comes first—the chicken or the egg? Is it defined? I think Senator Brandis has said that it is the unconscionable conduct that starts the unfair terms. Is that right?

Senator BRANDIS—I would put it this way, Senator Cameron: unconscionability and unfairness are substantially overlapping. What I was exploring and what you are now exploring is the extent to which one might apply in circumstances where the other does not. My concern, Senator Cameron, is that whenever you muddy up statutory language and create uncertainty you want to be pretty careful that you are not merely restating in different words what the law already states. Unconscionability and unfairness are overlapping. The extent to which one completely overlaps the other I think is the issue.

Senator CAMERON—I am sure when parliament has made laws they have strayed into what Senator Brandis has just outlined, creating some kind of uncertainty in terms of the outcome. Isn't that what the court is then designed to determine, and once the case law is there then that fixes it?

Mr Writer—It can do over time.

Senator CAMERON—I would not concede to Senator Brandis on these points; he has far more experience than me on these issues. I am trying to get some clarification on whether this creates such a problem that the legislation would not be in the public interest, basically. Do you see that?

Mr Writer—The government has agreed with the states and territories to introduce an unfair contract terms law, which is designed to deal with unfair contract terms in standard form contracts entered into by individual

consumers. Senator Brandis has outlined his view that that may be subsumed within the existing operation of section 51AB, although my understanding of the practical application of that provision is that it is not directed itself to dealing with individual contract terms but the entire relationship between parties, both as represented in the contract between them and also the course of dealing that occurs. This is directed to a rather more precise purpose, which is individual contract terms, which may be unfair.

Senator CAMERON—I am not a lawyer; I am a fitter. I understood that when you are dealing with law the specific overrules the generality to put it in very broad terms. Does not then 3(1)(b) which becomes specific overrule the generality of 51AB?

Mr Writer—The two provisions would have to be read together.

Senator BRANDIS—Why would they have to be read together?

Mr Writer—They sit in the same statute—

Senator BRANDIS—I see what you mean.

Mr Writer—and they need to be considered within the context of that statute. In that context, if one accepts Senator Brandis's proposition that section 51AB covers all of the matters that are covered by this legislation then, you are correct, this additional set of provisions would provide a greater degree of clarity around that particular issue rather than conflicting with section 51AB.

Senator BRANDIS—That is my real point. It would not provide more clarity because it would add superfluous language. A court faced with a case would have to say, 'There's section 51AB and then there's this new provision and the language is substantially similar.' Why do we have these two provisions in the same statute directed to largely the same issue but expressing slightly different language? That is just the very recipe for how you make the law uncertain. I could understand if you wanted to attack this by saying, 'What we'll do is we will rewrite section 51AB. We'll make these provisions a series of amendments to section 51AB so that it is within the same body of statutory language.' But you are going to have one section of the Trade Practices Act that says one thing and another section of the Trade Practices Act that says substantially the same thing but in slightly different language. A court or a lawyer advising a client faced with this is going to say: 'Where's the difference here? There must be a difference but where is it?' This is a very bad way to amend a statute, particularly when you are dealing with such extremely mobile and plastic concepts as unfairness or unconscionability.

Senator XENOPHON—Isn't there a concern that the factor of detriment will be elevated to a test that the courts will put undue emphasis on? Further to that, isn't detriment going to damages once you prove there is an unfair term? Aren't we confusing a remedy with a cause of action?

Mr Writer—The test is set out in section 3(1) of the bill. That defines what an unfair term is and that is the test that the court must apply in determining what unfairness may be. The court is then directed to have regard to any matter that it considers relevant but in doing so it needs to take account of three things, one of which is the question of detriment.

Senator XENOPHON—You do not see it being elevated by the courts? I can see the alarm bells going off in terms of the litigations that are going to ensue from this.

Mr Writer—The statute elevates the question of detriment to a matter of importance, but it does not make it determinant ever of the question of unfairness.

Senator BRANDIS—But it indicates that detriment is one of the things the court has to have regard to in arriving at a conclusion as to whether a term is unfair. If I may say so, I think Senator Xenophon's point is exactly right. Do not focus on unfairness, that is the governing concept here, he is asking you to focus on what detriment means, which is not as far as I can see itself a defined term in the bill. When Senator Xenophon has finished, I just want to explore this for a second within. Detriment itself is a very legally ambiguous notion, so you have a vague and ambiguous term 'unfairness' being defined itself by reference to a highly—in the law—controversial and ambiguous notion of 'detriment' without at least the latter even being defined.

Mr Writer—I am not sure whether that is a question.

Senator BRANDIS—Sorry, Senator Xenophon, I interrupted, but your questions are extremely relevant, if I may say so.

CHAIR—I think Senator Bushby has a question on a different aspect.

Senator BUSHBY—It is different, but it may actually provide an opportunity to throw some light on some of the things we have been discussing. I am interested in how this would actually play out. I confess to not

having read all the provisions of the bill, but I have read the *Bills Digest* and other bits and pieces. If, using your example, you ordered a sofa on a standard form contract, expecting it in two weeks, and it did not arrive for six weeks, how would you go about seeking redress for that under the provisions of this bill if it were enacted? Would you need to go to the Federal Court or the Federal Magistrates Court and take out an action, spending many tens of thousands of dollars to seek redress because your sofa did not turn up in two weeks?

Mr Writer—This will form part of a cooperative national scheme with the states and territories, and so the law will apply as a law of the states and territories as well. There is always the option, if you so choose, to go to the Federal Court and spend a lot of money to do that, but, in relation to many consumer disputes—and this occurs now—consumers have the option of taking it to a low-cost tribunal or a small claims court in their jurisdiction to deal with it.

Senator BUSHBY—So it is subject to the state based legal remedies that would apply for consumer law.

Mr Writer—That is right.

Senator BUSHBY—I agree with Senator Brandis in terms of the potential for uncertainty by having the two sections in there, but one of the advantages of what we are talking about here is that it will provide access for consumers to a simpler method than taking a full-blown unconscionable conduct action in a court.

Mr Writer—That is correct.

Senator BUSHBY—But once again, as Senator Brandis mentioned, that could have been built into the unconscionable conduct provisions.

Mr Writer—The unconscionable conduct provisions will also form part of the Australian Consumer Law, which will be applied as a law of the states and territories.

Senator BUSHBY—So people would be able to go to a small claims court and bring an unconscionable conduct action.

Mr Writer—Potentially, although that may be subject to the limitations imposed on the nature of actions brought in those forums.

Senator BUSHBY—But local dispute resolution methods are provided.

Mr Writer—Yes. That is available.

Senator PRATT—I want to turn to a different topic, and that is the issue of infringement notices. I note that breaches of the law are going to be able to be dealt with through the use of infringement notices, but it was not clear to me whether that is a new provision or whether there is access to infringement notices within current law.

Mr Writer—It is certainly a new provision in the context of the Trade Practices Act. Similar notices exist in the context of the ASIC Act, and in a number of states and territories there is access to infringement notices for breach of consumer law. These powers are designed to introduce those at the Commonwealth level and then they will form part of the Australian Consumer Law so that there is a single set of national powers that apply for all jurisdictions and for regulators.

Senator PRATT—I was interested in the aspect whereby, if someone pays their infringement notice, further action cannot be taken. That would mean that someone who has breached the law will have a choice of whether to pay a penalty or, for example, to be exposed through public notices or an internet list that advises of their breach. I am interested in how and if the law weighs up the relative impact on that business as to whether it is a fair penalty in terms of the size of the infringement versus the impact of naming and shaming publicly.

Mr Writer—Infringement notices are directed to fairly minor breaches. The size of the penalties is fairly small. The largest on the face of the bill is $6,600 for a corporation. So these would not be used to deal with major breaches that might apply in relation to, say, a national company. They are designed to provide the regulator with a means of drawing to a business's attention a potential breach to give them the option of paying the penalty, which that business is entitled not to pay. But that comes with the risk that they may be then subject to enforcement action for a civil pecuniary penalty, which may be a good deal more substantial. In terms of the way in which the regulator approaches this, there is a process under the intergovernmental agreement for the development of a memorandum of understanding between the ACCC, ASIC and the states' and territories' regulators to provide clarity around the way in which they will interact with one another and to provide guidance as to the way in which they will apply these powers on a consistent national basis.

Senator PRATT—Thank you.

Senator BRANDIS—'Detriment' is not defined in the bill, is it?

Mr Writer—No.

Senator BRANDIS—Does 'detriment' include change of position? In other words, would a person seeking to avoid their contractual obligations by pleading this provision win the case if they showed that, but for the arguably unfair term, they would have acted differently?

Mr Writer—I cannot answer that. That would be a matter for a court.

Senator BRANDIS—This is the problem. 'Detriment' has a technical meaning in law. The concept of detrimental reliance is a very well-developed concept, but it is still a very ambiguous one. There is a lot of legal opinion that says if you change your position—in other words, if you do otherwise than you would have done—that is detrimental reliance, even though it might not translate as pecuniary or non-pecuniary loss. It seems to me that if that body of principles were to be applied to this provision it would open the door to opportunistic avoidance of contractual obligations even in circumstances where there is no loss, because the party could say, 'I've detrimentally relied upon this term.' Have you or the draftsmen considered that issue?

Mr Writer—This set of provisions is directed to individual terms. A court cannot set aside a contract and it cannot undo an entire relationship between parties.

Senator BRANDIS—That is not really my point, though. What is the meaning of 'detriment', and does it mean 'change of position'?

Mr Writer—It could encompass that. A party might make a decision in relation to the terms which are offered to them on a take it or leave it basis—because we are talking about standard form contracts here—which may be to their detriment, and they may make subsequent decisions which are informed by the fact that they have been given a contract which they cannot negotiate. That potential exists.

Senator BRANDIS—That is the very point. If that is all 'detriment' means then you could very easily argue if you want to get out of a contract: 'I have made subsequent decisions on the basis of this contract. I don't have to show that I've suffered any loss. I've just made subsequent decisions different from the decisions I would otherwise have made. Therefore, I've detrimentally relied'—to use the technical language—'Therefore, I have suffered a detriment. Ergo, it is unfair.' Potentially you could set aside almost any contract if 'detriment' means that.

Mr Writer—The point I made before is that the court cannot set aside the contract. It can simply void an individual term.

Senator BRANDIS—Okay, but that really does not address—

CHAIR—Senator Brandis, I am afraid we have a very tight time frame.

Senator BRANDIS—I will just finish on this. That does not really address my point because, setting aside that term, that particular term is always going to be the term that the party seeking to avoid its obligations is going to sue on or seek to avoid, so that really does not get you anywhere. All you are doing is identifying the particular term in the contract which the party is trying to use to get out of the contract. I hope this is helpful: there is a very famous legal article by Fuller and Perdue in the 1936 *Yale Law Journal* called 'The reliance interest in contract damages: 1', which is the basis of all jurisprudence in this field. Have you looked at that?

Mr Writer—I cannot say that I have read that article.

Senator BRANDIS—I cannot emphasise enough to you how important—

CHAIR—Senator Brandis, I am going to have to wind this up.

Senator BRANDIS—Sure. I cannot emphasise to you enough, Mr Writer, how important it is that the concept of detriment be defined with specificity and defined in terms of loss, because if you do not do that then almost any contract could be avoided on the change-of-position ground, without having to show a loss.

CHAIR—That is not a question either.

Senator CAMERON—Very briefly, on this point, which is the point we have been dealing with the whole way through, I am concerned that if legislators have to delve back to 1936 legal definitions for every piece of law that we deal with then no legislation will ever be passed in this parliament. I notice that there is a later piece of law, by Dixon J in Grundt, which goes to this issue. If you are looking at legal precedents that might be one you should have a look at as well.

CHAIR—Thank you for those questions. Thank you to Treasury for appearing here this morning.

[9.37 am]

CORKE, Mr Kerry, Consultant to the Pharmacy Guild of Australia

DALTON, Ms Ann, Director, Government Relations & Policy, Pharmacy Guild of Australia

REID, Mr Patrick, Pharmacist

CHAIR—I now welcome the Pharmacy Guild of Australia. Do you have an opening statement?

Ms Dalton—The Pharmacy Guild of Australia welcomes the opportunity to address the committee on this important matter of trade practices policy. The guild proposes to address only the issue of unfair contracts; it otherwise agrees with the thrust of the proposed Australian Consumer Law.

Guild members are the pharmacy proprietors of some 4,500 community pharmacies which operate as small businesses throughout Australia. Community pharmacy makes a significant contribution to the Australian economy with an annual turnover of $13.2 billion and $200 million in tax revenue and it employs approximately 46,000 pharmacists and pharmacy assistants. However, we believe that services provided by community pharmacy to ordinary Australians are made difficult by unfair contracts that are imposed on pharmacists by larger suppliers. Mr Reid, who is a community pharmacy owner and practising community pharmacist, can offer to the committee specific examples of this sort of behaviour if required.

The guild is of the view that, when a large corporation, such as a landlord of a major shopping complex or a pharmaceutical supplier, takes advantage of the dependency the smaller trader, such as the pharmacist, has on the larger player to such an extent that hard bargaining becomes objectively unfair, the smaller trader should be able to call in to remedial legislation. Up until now, the pharmacist can only gain assistance if the relevant behaviour is considered to be unconscionable conduct. However, objectively, unfair trading behaviour does not fall within the ambit of this concept.

The guild contends that the protection offered by the unconscionable conduct provisions currently contained in the Trade Practices Act are illusory, and for that reason was pleased that the Australian Consumer Law at least proposed to cover unfair standard form business-to-business contracts when it was first circulated. Like many other small business groups, such as the Motor Trades Association of Australia, the guild is disappointed that the provision was removed at the last moment. The guild supports the view of the non-government senators expressed in the Birdsville amendments inquiry conducted by this committee, in which they called for the Victorian legislative framework for consumer transactions to be extended to cover business-to-business relationships involving small business.

The guild therefore requests that the committee recommend that the opportunity to deal with the issues of inequality of bargaining power that consumers and small businesses have with larger corporations be taken. The unconscionable conduct provisions of the Trade Practices Act should be removed, with small business and consumers being able to rely on unfair contract provisions contained in the Australian Consumer Law framed in a manner similar to section 12 of the Independent Contractors Act, which permits reviews of contracts that are generally unfair or harsh. At the very least, coverage of business-to-business standard form contracts should be reinstated into this bill.

Finally, the guild notes that the definition of 'unfair' contained in the independent contractors legislation is not defined, and takes its natural meaning. It also notes that there has appeared to be no drop off in employment of independent contractors consequential on the operation of the independent contractors legislation. It is therefore of the view that a jurisprudential concept of fairness when dealing with inequality of bargaining power between big and small business can evolve in the same way as the concept of unconscionable conduct has developed for the purposes of other areas of the law without affecting the overall dynamism of the market.

We would welcome any questions from the committee and, as stated earlier, Mr Reid, who is a community pharmacy owner, is here to give examples if it pleases the committee.

CHAIR—You said, 'drop unconscionable conduct from the Trade Practices Act and use this'. Have you had legal advice to the effect that that would benefit the kinds of circumstances you are talking about?

Ms Dalton—Yes, we have. Mr Kerry Corke has provided legal advice to the Pharmacy Guild of Australia, so we would be pleased for Mr Corke to answer any questions of that nature.

CHAIR—We had quite a long discussion about unconscionable and unfair here on the committee with Treasury. I will not put words in his mouth, but Senator Brandis argued in favour of leaving the unconscionable conduct provisions and expanding that, rather than going the other way.

Mr Corke—The concept of what is unconscionable has been fairly well discussed in the previous discussion that I heard. At the end of the day, the concept has a relatively settled legal meaning but, as a New South Wales Court of Appeal case called World Best Holdings, discussed in our submission, notes, the concept of what is unfair and what is unconscionable—as I heard Senator Brandis say previously—'overlaps but is not quite the same'. The term 'unfair' is generally taken by that case law to be a lower threshold than unconscionability, which goes to a concept of what is called in that Court of Appeal case 'moral obliqui', that is to say it must touch the conscience of the individual. It is somewhat less of a test than mere unfairness.

The view that we have taken is that the concept of unfairness and unfair contract should draw from the legislation that is in place in the independent contractors legislation, which uses the term 'unfair' unfettered by statutory extension.

Senator BUSHBY—Quite clearly, you are here arguing for something that is quite different to what the bill is proposing. You have not turned up today to argue about tiny little bits of the bill: you are saying that, in the context of the government making a policy decision to address issues that arise between two contracting parties, particularly where one appears to have an upper hand in the negotiations, there are other issues that should be looked at.

To a significant extent I think that, if there is a problem, the government needs to address it, and I am aware that there are problems in small business of the kind that the Pharmacy Guild is raising today. As I understand it, the business to business provisions were pulled out—from my reading of the submissions—primarily because they would create uncertainty within business. I do not really see why that would not also flow on to create uncertainty for consumer-to-business contracts as well, because the same things would apply.

Just to take a step back: when Treasury were here, one of the things that I was very interested in with this proposed legislation was how consumers would access the remedy. So I asked Treasury about that and, clearly, as is currently the case, if a pharmacy wanted to take action for unconscionable conduct, it would probably have to go up against a very large company with very deep pockets in a long and protracted court case ,which would make it very difficult, which is why there have not really been that many unconscionable conduct cases that have actually been fought all way through to set the precedents. But, apparently—under the way this is going to work now, under the negotiated COAG agreement—the provisions that are currently available in the Trade Practices Act will actually now flow through to state based forms of resolution which may, as appropriate, range right down to small claims courts. So you may well be able to invoke unconscionable conduct, provided you are only looking for a remedy that fits within a small claims court remedy. Do you think that, in the absence of all other changes, that one particular change—making it much easier to access the remedy—may well assist pharmacies to address the problems that they have?

Mr Corke—The forum is somewhat irrelevant if the statutory test to be played out in that forum remains sufficiently high that the likelihood of success for the applicant makes it not worth while to proceed.

Senator BUSHBY—I understand what you are saying, and we will come to the relative difference between unfair and unconscionable. My personal view is that two parties contracting on an equal basis should be able to come to the deal that they choose and the government should not interfere with what has occurred there. In this situation we are looking at parties that have particular power. We are looking at a standard form of contract in this bill. I know that you are not necessarily talking about that; you are going further than that. It is where there is an inequality of bargaining power that results in an outcome that is not equitable that government needs to interfere. On the unfairness aspect: in that case, you can get an unfair outcome, which is what I think this bill is trying to look at. But 'unconscionable' is—I am losing my way here. It is, as Senator Cameron mentioned, very complicated. Can you say what you just said before again? I have taken myself along a series of steps and I have introduced a couple of concepts and lost my way.

Mr Corke—Our view is that the lower threshold of 'unfair contract' is preferable to 'unconscionable' because, as Senator Brandis said with the previous witnesses, there is a degree of overlap between the two concepts but there are differences, the concept of 'unfair' being lower. With respect to access to the remedy: if it means merely the forum you go to, be it a federal court, a magistrate's court or a small claims tribunal, that in and of itself does not assist, unless the legal test to be applied at the end of the day—that does not change. So if the threshold is unconscionability, whilst it may well be that a more informal forum may come to an

amenable outcome between the two parties, if it really came to both sides 'standing on their dig', so to speak, there would be no change.

Senator BUSHBY—You say that, in itself, it does not assist. Are you saying therefore that there are not cases where unconscionable conduct could be argued but is not argued because currently the forum itself puts off potential litigants?

Mr Corke—That is a possibility, yes. If what you are saying is that this legislation will allow lower tribunals to apply unconscionability, then—

Senator BUSHBY—That was the evidence, as I understood it, that Treasury gave this morning.

Mr Corke—If that is the evidence then, yes, it would allow that argument to be put. But, by the same token, because unconscionability is a higher threshold generally than unfairness, I am not sure how much further it gets one.

Senator BUSHBY—As I understand it, there really are two major obstacles. One is the unfairness versus unconscionability argument in terms of the threshold, but my interaction with small business organisations—and I have had considerable interaction over the years—has also indicated that one of the problems they have is that they cannot fight these cases because of the cost and the protracted nature of taking an action in the Federal Court to try and prove a trade practices action under the unconscionability provisions. There might well be, if there were a forum that allowed an easier and less costly action where litigants were regularly bringing that forward and testing the unconscionability aspect of the act, a change in behaviour of those parties to the contract who do have a high level of bargaining power. I am not saying that the aspect of the threshold is not relevant, because it is. I am trying to establish that the change of for seems to provide a significant opportunity, regardless of the threshold argument.

Mr Reid—I would think so, in terms of applying it. The issue, though, is when you trigger that remediation or that outcome. That is where the difference between unconscionable and unfair comes in. But it would certainly give more avenues than are currently available.

Senator BUSHBY—That would certainly open the door further. But, even without that, I would have thought enabling small pharmacies or other affected businesses who feel that they have been aggrieved by being forced to go into an anticompetitive or an unfair contract of some sort because they had no choice and that having detrimental consequences—and I hesitate to use that word—may well provide them with an opportunity to seek remedies under the act. Even without a change in threshold, it may actually provide them, in a way that is cost-effective and realistic for a business of their size, with a lot more remedies than currently exist, because of the actual challenges of cost and time of mounting a challenge under the act, even if they have a good case.

Mr Corke—If the COAG agreement means a wider range of fora can hear cases, then of course that is always an advantage. Whether that leads to behavioural changes in the field because of the contingent possibility that more suits may be run because people have greater access to the law is a question that will happen only after we see what happens once the legislation proceeds.

Senator BUSHBY—Coming back to where I got lost before—and that is the unfair and unconscionable aspect and not being able to work out where I was going when I started—we had some discussion this morning about unfair and unconscionable. Senator Brandis, being a trade practices specialist, was quite technical on that. I have nowhere near that degree of expertise.

Senator CAMERON—That is probably helpful!

Senator BUSHBY—Unconscionability, as you mentioned, requires a degree of conscience. Unfair is, I presume, a test of what is reasonable in the circumstances—is that a reasonable thing to be done or not in terms of fairness? With regard to where I was going before about the two parties joining a bargain, to what extent should fairness be relevant? How do you balance the rights of two parties to negotiate a bargain, which may be to one party's advantage more than the other? Where do you draw the balance between the unreasonable power of one side of those two parties to influence an unfair bargain? You have to allow a degree of certainty in business between contracting parties, but I acknowledge that, where one party has unreasonable bargaining power, that can result in outcomes that are not equitable. How do you find that balancing point where you actually say, 'The unreasonably high bargaining power of that party that has led to an outcome which is not satisfactory and therefore the government should interfere'?

Mr Corke—The difficulty, as the discussion with the previous set of witnesses from the Treasury indicated, is that it is always difficult when you use a term of indefinite ambit to have some sort of clarity of when an action is feasible or is unfeasible. As an example, unconscionable conduct itself is a term of indefinite ambit. You only know it when you see it. So it is with the case of what is fair or unfair. Of course, the legislation is designed to assist that problem by having what is called the grey list of provisions put in place which says what courts may or may not take into consideration. Leaving aside the question of the mandatory requirement to take into account detriment, which I will park to one side, I am not necessarily sure that grey lists of things that a court may have regard to necessarily help one or not. At the end of the day, less the embellishment of detriment that was discussed with the previous set of witnesses, an unfair and unconscionable conduct remains just that. It is our view that the approach that is taken by the independent contractors legislation is the best because it relies on the ordinary English meaning of the term 'unfair'. That is objective, and of course it is, but it is no more or less subjective than a concept of unconscionable conduct. Everything is a matter of fact and degree.

Senator BUSHBY—If you have got two business parties neither of which has a stronger bargaining position but they enter into a contract which does include provisions which are unfair in the ordinary course or the natural meaning, should that be addressed?

Mr Corke—In what sense?

Senator BUSHBY—In the absence of one party having a stronger bargaining position but a business, for whatever reason, whether it did not read the contract properly or got bad advice or had some other motive that it thought it might have been to its advantage, enters into a contract that contains a provision that fits the definition of 'unfair' that you are talking about, should that fall within the ambit of this bill?

Mr Corke—That is ultimately a question for parliament. Parliament might want to deal with the mischief of dealing with objectively unfair contracts generally because of the perception that there is an inequality of bargaining power between parties. I guess it goes to the ultimate question to the committee. It is our view that an unfair contract, and here I would put one paragraph in from the case of Keldote Pty Ltd v. Riteway Transport, which was the first case of the Federal Magistrates Court that considered the concept of unfair contract in the field of independent contractors. It said that the test of unfairness involves the common sense approach characteristic of the ordinary jury member by applying standards providing a proper balance or division of advantage or disadvantage between the parties who have made the contract.

We think that probably puts best the reason why a concept of unfairness as a threshold to review an unfair contract is preferable to the higher threshold of unconscionable conduct, although it has to be said at the end of the day it all is a question of fact and degree. What are the issues between the parties and the relevant inequalities of bargaining powers are simply going to change so much in each individual case and no parliament can do much more than make decisions such as that unfair contracts should be capable of review.

Senator BUSHBY—You are saying that in assessing whether a contract is unfair you need to look at the relative bargaining power of the parties.

Mr Corke—That would be one of the issues that would be taken into account, yes.

Senator BUSHBY—Into deciding whether the contract contained unfair provisions.

Mr Corke—That is one of the concepts that would be looked at, yes.

Senator BUSHBY—What concerns me is that I would have thought that unconscionable might be an appropriate standard where the relative difference between bargaining power is not as strong as in other cases and unfair might be a more appropriate threshold where you have got a clear difference between the strength of bargaining power. If you have only got a relative difference then including unfairness in the consideration may well be too broad a threshold when the party that is suffering the detriment as a result was not that subjected to the bargaining power of the other party.

Mr Reid—I am only a simple pharmacist and from a simple pharmacist point of view the test does not necessarily pertain to size of the businesses involved. Often it can be the context in which that contract is undertaken. Pharmacy, the PBAC, the PBS is a fixed price contract between the Commonwealth and that particular provider. Our suppliers often will use that context to put us into a bargaining position which is difficult. They may be a small supplier, not necessarily large. It may be simple things like transport terms, cold chain storage of goods, where on the surface it looks like a reasonable deal but underneath there are some other provisions which may cause us heartache at the end of the day, where it becomes a loss leader. In a

fixed-price contract with the Commonwealth that can end up hurting your business quite markedly in something like prescriptions. So it is not always the size particularly.

Senator BUSHBY—I am not saying it is the size. All sorts of factors come into relative bargaining power.

Mr Reid—And it is contextual in many cases.

Senator CAMERON—In this bill the government has determined to concentrate not on business to business but on consumers. The government's view is that this will make life easier for consumers—the process will be clearer, fairer and more effective for consumers. Do you agree with that in terms of the consumers?

Mr Reid—I think that was our contention.

Senator CAMERON—So you actually want to add business to business on top of the consumer area.

Mr Corke—That is correct.

Senator CAMERON—But this bill would have your support for what the government is trying to achieve in dealing with consumers, would it?

Mr Reid—The answer to that is yes. The only point we make is that, as the committee knows, 24 hours before the bill was introduced business to business contracts were taken out of the provision.

Senator CAMERON—That is not what I am asking you. If I want to ask you that I will get there. I am asking a specific question. I do not have a lot of time, so I would ask you to concentrate on what I am asking, thanks. Mr Corke, you obviously read the explanatory memorandum and the minister's second reading speech.

Mr Corke—Yes.

Senator CAMERON—The minister in the second reading speech goes into an analysis of the process to deliver this bill: the Productivity Commission, COAG and the practical experience of the Victorian government. Are you based in Victoria?

Mr Corke—No, I am based in the ACT.

Senator CAMERON—Are you familiar with the operation of the act in Victoria?

Mr Corke—I am familiar with it to the extent that I have looked at it and see how it has operated, yes.

Senator CAMERON—So would you say that the practical experience is that it is operating effectively?

Mr Corke—To the extent that it relates to consumers in Victoria, yes.

Senator CAMERON—So because this bill is based on that, it would be beneficial to consumers, given that we have taken the Victorian experience into account?

Mr Corke—On the basis of what happened in Victoria, that is a reasonable presumption.

Senator CAMERON—I really do not want to go too far into this unfair versus unconscionable conduct. You have made your point on that. Do you agree that if there is an issue then legal precedent will be established fairly quickly arising from this act?

Mr Corke—It is certainly the case that legal precedent always develops once any piece of legislation passes the parliament. Sometimes the precedent is not what parliament may have necessarily expected, but, yes, there will of course be a precedent that flows.

Senator CAMERON—From judges?

Mr Corke—That is right.

CHAIR—As there are no other questions, thank you to the Pharmacy Guild for coming in this morning. The committee will take a short break.

Proceedings suspended from 10.04 am to 10.15 am

BOWDEN, Mr Ron, Chief Executive Officer, Service Station Association Ltd

DELANEY, Mr Michael, Executive Director, Motor Trades Association of Australia

SCANLAN, Ms Sue, Deputy Executive Director, Motor Trades Association of Australia

CHAIR—Welcome back, Mr Delaney. I think we might have a quieter time today!

Mr Delaney—It is a joy to be at an economics committee meeting on a Friday, but the stars are not here!

CHAIR—No, afraid not!

Senator PRATT—Often that's a good thing!

CHAIR—Do you have an opening statement that you would like to make?

Mr Delaney—We do. Thank you for permitting us this opportunity to appear today. The Motor Trades Association of Australia is the peak national representative organisation for the retail services and repair sector of the Australian automotive industry. The association represents the interests at the national level of over 100,000 retail motor trade businesses with a combined turnover of over $160 billion, and which employ over 308,000 people. I would also add that MTAA convenes and chairs the Fair Trading Coalition which is a group of small business organisations committed to strengthening the Trade Practices Act. I note that a number of members of the Fair Trading Coalition have made submissions to this inquiry.

Retail motor traders both as providers of goods and services to consumers and as small business consumers themselves have a substantial interest in the proposed new Australian Consumer Law framework. MTAA is not opposed to the introduction of a single national consumer law. Many retail motor traders also in their business relationships are not dissimilar from the character of consumers. Many retail motor traders operate under standard form agreements either in the form of franchise agreements or, as in the case of body repairers, where their services are acquired by a larger party under a standard form contract.

The exposure draft of the bill released by the government in May this year clearly included business-to-business conduct. We were very disappointed to discover on the tabling of this bill that the scope of the bill had been significantly narrowed by the exclusion of business-to-business contracts. MTAA believes that the government should make the necessary legislative amendments to provide for business-to-business contracts to be included in the proposed new regime. This would allow for the fair treatment of small businesses in their dealings with larger more powerful parties.

MTAA for years has argued that legislation should intervene to set a minimum standard of conduct to protect parties to franchise agreements. The inclusion of a business-to-business unfair contract terms or provisions would go some way to introducing a behavioural standard. In many of their business relationships retail motor traders have fewer rights of redress against larger stakeholders, such as franchisors, acquirers of goods and services, other suppliers and so on for harsh and unfair behaviour than do consumers against retailers and manufacturers. That is, contracts are presented as take it or leave it standard form agreements. There is often little or no negotiation on the terms of the contract without which the business can often not operate and many contain terms which are detrimental to the small business and which are in excess of what is required to protect the normal commercial rights of the larger party.

Notably, the examples provided in the bill of terms that might be considered unfair are mirrored in the agreements under which retail motor traders often operate. The government has stated its intention to consider the issue of business-to-business standard form contracts when the current reviews into the unconscionable conduct provisions of the Trade Practices Act and also the franchising code of conduct are complete. Disappointingly, time frames for the completion of these reviews have not been released by the government. MTAA submits that the introduction of an unfair contract regime which covers business-to-business contracts would encourage behaviour change and would not necessarily involve a significant number of unfair contract terms being in dispute.

One other option for the committee to consider is that it could recommend to the Senate that the legislation be amended to include an unfair contracts regime for those business-to-business dealings which are covered by codes of conduct mandated under the Trade Practices Act. However, that would be a less than perfect outcome for those small businesses not covered by a mandated code. As always MTAA believes that the issuance of guidelines by both the ACCC and ASIC on the operation of the provision would assist all parties in understanding their respective rights and obligations under the new regime.

Although MTAA is extremely disappointed that business-to-business contracts are not now included in the Australian consumer law bill, it does support the decision to reform Australia's consumer laws and the association does therefore support the introduction of a new national consumer law. We remain interested in and willing to participate in any further consultations over this policy and legislation. We would be pleased to answer any questions you might have. Thank you very much.

CHAIR—Thank you, Mr Delaney. You mentioned that the ACCC and ASIC should issue guidelines. Could you expand on that a bit more and tell us how you think they might operate?

Mr Delaney—Yes, happy to, Madam Chair. It has been our long experience, particularly in relation to the ACCC, that when there are changes to its act, the TPA, often there will be quite a gap or delay between passage of the legislation and some sort of informed, if not binding, observation from the commission, during which time there is often a lot of confusion and possibly even inadvertent breach. We also observe in our view and experience that the sooner guidelines appear the better, because often we have seen guidelines produced late in the piece that we would assert do not always seem faithful to the intention of the parliament—and I instance in particular the collective bargaining provisions under the TPA. That is the source of our observations and recommendations about guidelines.

CHAIR—In terms of the inquiries going on at the moment on unconscionable conduct and franchising, I recognise you are disappointed that they are not finished and you cannot be a part of this new legislation. But I wonder if you also acknowledge it might cause difficulties if business is included in here and we do not have a proper understanding of at what level it might be and what definitions there might be and of capturing contracts in a way that creates business uncertainty.

Mr Delaney—In response to that I would like to observe that we hope we have not abused the good nature of the committee by proposing a particular interest that is not in the bill before it, but I guess we do because we had correspondence and commitments that said it was going to be there. So that is where these observations come from, and the disappointment on account of them. As to the reasons why it is not now there, we have met with the minister and we have had a conversation with the minister and he has conveyed to us his cautions and concerns, which we have not agreed with. Our view as put to the minister is that, in effect, in business-to-business dealings uncertainty is a zero-sum game. What has been happening to us over the years, if not decades, is more and more uncertainty is remitted to us, leaving less and less to our suppliers. We simply say there needs to be some sort of rebalancing and that the unfair proposition for business to business would have done that.

I am familiar, having been in my position for a long time, with the fact that every amendment to the Trade Practices Act in the way of addressing issues for small business that has been proposed during my long service has involved a Chicken Little recitation from big business that the sky will fall in, that we will suddenly be overwhelmed by a tsunami of lack of confidence, that no bank will lend to anyone—and, strangely, the sun keeps coming up, the money keeps being lent, and business and life go on. So even in the wake, one hopes, of a global financial crisis, I am not convinced that much was going to happen to uncertainty. The fact of the matter is that every banker lives with the uncertainty on every loan always.

CHAIR—Could you give me an example of where there may be contracts that, in Motor Trades Association experience, could well be addressed under this legislation if there were business-to-business provisions?

Mr Delaney—If it were to have an unfair element? Yes, certainly. If I take the most obvious part of our membership, the car dealers—about which we have spoken before—increasingly as the months and years go by, because there is a capacity to unilaterally alter the franchise agreements, the car companies will simply intervene in the business and the affairs of the car dealer and say, 'We now want you to do this', and there is no redress. Whether it is fair or unfair, they have the right and there is nothing that we can in consequence do about it.

I can give you a particular and telling contemporary example. It arises from the transparency in pricing amendments to the Trade Practices Act, which have had a serious and particular impact on car dealers in that we are supposed to propose a single price. It is next to impossible to propose a single price, but that now is the law. That has had the effect that for most makes of car there is now no longer a capacity to have on a website an advertising and sale method, because it is not possible to put forward a single price. Some car manufacturers have proposed to get around that by telling us that we can no longer set what will be the dealer delivery fee against our real costs, that they will determine it and that they will impose it upon us under our franchise agreements as a unilateral change. That is patently unfair because it takes away the capacity for our

businesses to know what their costs are and to attempt to recover them appropriately. That is the most recent example. I think Ron can tell you of others that are equally unfair in relation particularly to petroleum.

Mr Bowden—Certainly there is still a very large proportion of the petrol-retailing industry populated by small business in a number of different formats. Those relationships can be franchises, commission agencies, lessee arrangements or, in some cases, owner-occupiers. In times gone by there has been legislative protection in terms of behaviour of contracts with an instrument called the Petroleum Retail Marketing Franchise Act, but that was repealed by the previous government some two years ago. It was replaced by an oil code, but the Oilcode concerns itself with supply not with behaviour. It talks about tenure but only about length of tenure; it does not talk about how that tenure is meant to be done. So all those classes of small business in an industry dominated by big business—oil companies, supermarkets et cetera—have no protection at all in a behavioural sense. There are cases of oil company franchises, commission agencies under brand names, where the contracts are by any measure deemed unfair. One particular supplier-commission agent-operator—and I will not mention names—has a clause in their standard form of contract that says that the clause can be terminated with 48 hours notice. Considering that you can have up to $100,000 worth of capital invested in the business, we would consider that to be grossly unfair and we think a court would too, but those commission agents—and there are literally hundreds of them in Australia—currently have no protection. They desperately need the sort of protection envisaged initially in the business-to-business provisions.

CHAIR—Has there been no thought of taking an unconscionable conduct action in those kinds of cases?

Mr Bowden—We are not aware—and I defer to my colleagues here—of any unconscionable conduct action successfully being taken with oil company and petroleum-marketing issues.

Mr Delaney—Or car dealing. The unconscionable conduct provisions have been entirely disappointing, and that is why the government is looking at them. It was an election undertaking, which we were grateful for. Mr Samuel sees it somewhat differently—that over the 10 years or so that they have been in the act the commission has taken every effort to pursue them. There have been a couple of what were thought to be landmark cases, but they have subsequently been entirely confined to circumstances that have not been replicated otherwise. To be fair, there has been some behaviour change, but what the parliament thought it would secure by those changes has just not appeared.

I should just observe that, notwithstanding ideas and issues about uncertainty and the fact that there can be a debate over uncertainty, unfairness is in Fair Work Australia, and properly so. We just cannot see how such a central concept in our industrial landscape, which is there for very good reasons and which we support, is not there in business-to-business dealings, particularly in the dealings where the small businesses are atomised. They find it very hard to have any market power to secure their rights, and in so many respects they are in a position of subservience and lack of power relative to their suppliers and acquirers not unlike that of employees. It should also be said that in the Independent Contractors Act there are also provisions for fairness, so we are not quite sure why, with this bill, there ought to be set against those precedents the difficulties that are adduced.

Senator BUSHBY—Thank you for coming along today. In your discussions with the government leading up to the withdrawal of the business-to-business provisions, and particularly at that point, was there any indication of whether they were likely to reconsider or whether it is just a temporary delay until they sort out this bill? You mentioned that they said it could possibly be dealt with under the review of the franchise code and the unconscionable conduct provisions, but was there any suggestion that, as another option, they may well be incorporated into these provisions once they have tested out the consumer review provisions or looking forward?

Mr Delaney—I do not think I would be verballing Dr Emerson from our last meeting if I were to say that he said that he would like to think further about 'unfair', that he would like to address it in the context of looking at 'unconscionable' and the franchising code and that for his part he could see 'unfair' sitting within a corpus of stuff relative to small business that he could come back to. He has proposed to us that there are probably other ways one could secure the effect that 'unfair' was to produce, so we have taken him at his word and said in response that, having been advocates for 'unconscionable', fairness and the like for very many years, we would produce a submission to him that canvassed whether there were other ways that it could be done that we would think effective.

Senator BUSHBY—So you are open to the fact that there may be more than one way to skin this cat? You are looking for an outcome rather than a particular method of achieving it, I would presume.

Mr Delaney—We certainly are. We hope we are reasonable. We do not say one way is the only way ever. But that, to an extent, is rather clouded by the amount of time that goes by while everybody is thinking about the other way.

Senator BUSHBY—But in the meantime you have small businesses that are subject to contracts which are unreasonable and place you under pressure.

Mr Delaney—Exactly. As the market changes, various of our suppliers will find themselves in an uncomfortable competitive position, so their first reaction is to pass the discomfort through to us and see if they cannot remove their uncertainty.

Senator Bushby—Particularly in uncertain times.

Mr Delaney—Exactly. We would, in the broad, say that the market power of the big businesses continues to increase inexorably, particularly against our trades and small trades, and that as a consequence small business continues to do things harder and harder and harder. We think the evidence is there for that.

Senator BUSHBY—Forgive me if you have already stated this, but maybe you could expand on it if you have. What is your understanding of the reason for the withdrawal of the business-to-business provisions?

Mr Delaney—Solely the impact on the idea or concept of uncertainty as promoted by the Law Council of Australia, Telstra, Optus and many, many other big businesses that claim that having a statutory capacity for small businesses to seek to avoid or redress unfairness consequently increases uncertainty for them in their businesses. That is all there is in the argument. There is no evidence given; there is nothing more than advocacy of the sort that says, 'But this might happen.' There is nothing demonstrated empirically. Yet, while they would say the same about business-to-consumer transactions as now governed by the uniform national consumer code proposition, they do not, to our hearing, because they are not game to look like they are against consumers' interests. How can it be that we have this dichotomy—we will have a collapse of capitalism if business-to-business uncertainty is addressed but not if consumer-to-business uncertainty is? It is hypocritical.

Senator BUSHBY—I was going to ask you about that. Do you see any fundamental difference in terms of contracting between consumers and business, and business to business, that would make these provisions any less likely to create uncertainty, as they currently stand, than if they did include business to business?

Mr Delaney—We would recognise that there are parts of business to business dealings that would need to be contractually governed in a different way than those applying to consumers. The reason for that is they may be franchising, they might be licensing, they might be a commission agent, or something of that character. But we say that fairness in business for consumers and business is a readily understood concept that the courts have known for a long, long time and have judged on. It does not necessarily carry the uncertainty that is claimed. In answer to the second part of your question, we would think that the fairness that applies to the consumer transaction ought to be available to small business—or business to business.

Senator BUSHBY—You mentioned in your submission that to some extent small business should be treated like consumers because in effect that is what they are.

Mr Delaney—That is what I was just going to say. If you look at the average small business, whether it is one of Ron's service stations or a car dealer—very many of them are very small—they are consumers as well as being purveyors. If you are a service station and you do two tanker loads of fuel a week, you are a consumer as to $100,000 worth of fuel, not to mention all the lollies and stuff in your shop. Why should you, any more than any private consumer, not be regarded as a consumer? Ultimately, retail is, of itself, a consumer, and that is because it needs to secure everything from its wholesalers.

Mr Bowden—And they have no capacity to change the conditions of the contract.

Senator BUSHBY—Are you a member of the Council of Small Business Organisations of Australia?

Mr Delaney—No, we are not.

Senator BUSHBY—Are you aware that COSBOA has stated that they would accept the removal of business to business contracts from this bill, provided that section 50 of the Trade Practices Act is amended to include these contracts? Effectively, it is another way of skinning the cat. Is that a proposal that you are aware of?

Mr Delaney—Yes, I am aware of that. Around the small business associations, there are a number of views of how it could be secured. As I said earlier, we are not an advocate of there being only one way to do anything. All I am doing is taking advantage of your assembly here, and the bill and your inquiry, to say, 'Here

is another opportunity to be an advocate for fairness in business to business dealings.' We, therefore, in our submission took quite some effort to put before the committee our view on that.

Senator BUSHBY—We had some evidence from Treasury this morning that, under the broader aspects of the bill, the remedies that are available in the Trade Practices Act—under which your members currently would need to take an action in, presumably, the Federal Court or maybe the Federal Magistrates Court, depending on the remedy—would be expensive and, usually fighting against somebody with much deeper pockets than your members would have, prohibitive. Those remedies would essentially now be available under the COAG agreement through the mechanisms that provide for dispute resolution at state level. That may work even right down to the level, depending on what remedy you are seeking, of a small claims tribunal. Are you aware of the wider fora that might be available to seek remedy under the Trade Practices Act that appear, from the evidence we received this morning, to be available as a result of the bill?

Ms Scanlan—For business to consumer transactions?

Senator BUSHBY—I am not talking about the unfair contract positions here; I am talking about the broader changes. Presumably, that would be available to small business to seek redress against large business.

Mr Delaney—If Treasury said that, it is correct on the first part about the prohibitive cost and the inaccessibility of the Federal Court or even the Federal Magistrates Court. On the second part, we would not support that at all. There is around the jurisdictions absolutely no redress whatsoever. There are no commercial tribunals or agencies that provide what Treasury seems to be referring to—

Senator BUSHBY—I did say that it will depend on what was available in each state.

Mr Delaney—There is nothing available of any sort whatsoever. The last opportunity ended up being lost on account of a High Court judgement. That was section 106 of the Industrial Relations Act of New South Wales. Jurisdiction had extended over a period of 50 years out to dealings of a business-to-business character that involved unfairness. But it is gone now. It is not alive any longer as an opportunity. In all our experience over the 21 years since MTAA was formed, we have never found a jurisdiction, a court, an occasion, a tribunal, an opportunity that I can think of anywhere—

Ms Scanlan—We are talking business to business and—

Mr Delaney—Yes.

Ms Scanlan—a small business seeking redress against a larger party.

Senator BUSHBY—I would have to clarify that. From the evidence we received from Treasury this morning, it appeared that it would make available the remedies that are currently available in the Trade Practices Act. You will be able to utilise state based fora to seek those remedies. So if you were seeking a small remedy that meets the criteria of a state based small claims jurisdiction, you could use the Trade Practices Act to seek that provided it met the—

Ms Scanlan—So you are suggesting that if we had an unconscionable conduct case, we could take it to a—

Senator BUSHBY—You might be able bring that up at a state level in a cheaper forum, one that is easier to prosecute and less prohibitive.

Mr Delaney—I think that is wishful thinking on the part of the officers from Treasury. It does not work that way.

Senator BUSHBY—I was specifically talking about unconscionable conduct when I asked him that question.

Mr Delaney—All those provisions were drawn down by the states and territories, but as far as I understand it, I do not believe that you can take a federal statute, that is, a Trade Practices Act matter, in the jurisdictions of the states.

Senator BUSHBY—You cannot currently, but under the COAG agreement where this is becoming national consumer law, apparently that is going to be how it plays out. I was not aware of it either before Treasury explained to me this morning.

Ms Scanlan—I am not across the jurisdictional—

Senator BUSHBY—Moving past the uncertainty of that, if that were at least to some extent a likely outcome, obviously that would be a welcome development because it may well remove to some degree the prohibitive cost and time involved in actually bringing actions.

Ms Scanlan—I think that cost is one issue; the threshold of the law is another issue. Unconscionable conduct presently sets a fairly high bar, if you like, in terms of proving that there has been unconscionable conduct.

Senator BUSHBY—It is.

Ms Scanlan—I do not think that necessarily removing it to a lower tribunal is going to change the threshold for the law.

Senator BUSHBY—I am not arguing with what you are saying, but you could argue that though on the basis of the cases that had been decided. But there is no doubt that cases that may well meet unconscionable conduct requirements in terms of making the case have not been brought because of the prohibitive cost and time involved. If there were more cases going through testing the law and getting a greater understanding of where it might apply, that may prove to be more useful.

Mr Delaney—Not having seen that prospect as Treasury has pointed it out, in my experience the superior courts of the states and territories are no cheaper than the Federal Court. The largest part of the effort is the representation costs and they will be the same in both jurisdictions.

Senator BUSHBY—Once again—and I do not want to misquote Treasury—they said it would depend on the dispute resolution mechanisms available in each of the state jurisdictions, some of which may well bypass the need for litigation.

Mr Delaney—May I propose that we take on notice the Treasury evidence, which I did not catch on the monitor before coming here, and very quickly write to the committee giving a reaction to—

Senator BUSHBY—We may well need to seek clarification from Treasury as well on that just to make sure of what they are talking about. Thank you.

Senator PRATT—One of the things that strikes me about the debate that we are having around this bill is that you have business to business, which is out of this bill, and consumers. It seems that the majority of this debate and discussion about the anxieties attached to it have not really addressed any of those consumer issues. There may well be grounds to make that distinction, because it appears that there is a fair amount of clarity, in a sense, around consumer issues and their suitability for this type of clause. I want to ask you about those consumer issues as they affect the MTA—clearly not the MTA as small businesses and consumers but in terms of your relationship with consumers that will be subject to this law.

Mr Delaney—We are great supporters of the COAG agenda and harmonisation. If you sell as much as we do across as wide a sample of goods in a national multiplicity of consumer laws, it is really difficult. We think having a single harmonised law is very attractive. We support it and believe there would likely be savings for the economy, consumers and business. It will be good to have circumstances where we will be able to address compliance by our businesses in a single unified law. I think it is a welcome advance, and it is not one that we are frightened of. We do not think it extends the jurisdiction in a way that is injurious to business at all. In conclusion, I think it is a win-win. Have I understood your question correctly?

Senator PRATT—Yes, in broad terms. What have been the ramifications of the multiplicity of laws across the different states in terms of your relationship with consumers?

Ms Scanlan—I think we now have more of our retail motor traders operating across borders—for example, there are car dealers operating in the ACT who also have businesses in New South Wales. In terms of consumer complaints or issues that arise—notwithstanding that I am not familiar with the detail of both regimes—there are differences in how complaints can be dealt with. In New South Wales, there is a motor vehicle industry dispute resolution tribunal. The ACT does not have the same forum. We also have businesses on the border of New South Wales and Queensland. So having a national regime will assist all of those businesses in dealing with their customers in a fair and equitable manner.

Senator PRATT—You would accept the fact that to some extent as small businesses you are consumers. In debate around that issue, people have argued that small business should not be in these particular clauses and that there still needs to be a fair bit more attention on how those should be resolved. This really does indicate that we might need to be looking at other mechanisms to resolve those issues.

Mr Delaney—Very much. We thought the business to business unfairness issues would have been well and appropriately dealt with in this legislation. But, if it is not to be, the issue is not going to go away. We really do think it needs to be addressed in some other construct and fairly smartly at that.

Senator CAMERON—Mr Delaney, your submission obviously goes to that threshold question for you, which is the business to business arrangement. I think you have argued that point succinctly in terms of your views. I come back to the issue of the consumer. This is really a different level, isn't it, than what you are talking about? You are a consumer, but a business consumer and that is what you are trying to deal with. But this bill is dealing with the ordinary retail consumer at the moment. From your perspective looking at that, do you think the bill gives the consumer a fair go in terms of what it is trying to achieve?

Mr Delaney—We certainly do. We cannot think of anything that has been left out or not properly addressed in the alternative to the state and territory regimes.

Ms Scanlan—No. The unfair terms test operates in Victoria.

Mr Delaney—We think it is a sensible and balanced outcome for consumers and those selling to consumers that has come through.

Senator CAMERON—That is it from me.

CHAIR—Any other questions? No. Thank you very much to the Motor Trades Association.

Mr Delaney—Thank you very much, Madam Chair, and your colleagues.

[10.52 am]

DEGOTARDI, Mr Mark, Head of Public Affairs, Abacus Australian Mutuals

GIJSELMAN, Mr Matt, Senior Adviser, Policy & Public Affairs, Abacus Australian Mutuals

CHAIR—I welcome Abacus to the table here this morning. Would you like to make an opening statement?

Mr Degotardi—Yes, thank you, Senator—and thank you for the opportunity once again to contribute to the deliberations of the committee in respect of the Trade Practices Amendment (Australian Consumer Law) Bill. As the committee knows, Abacus have provided a submission on the bill on behalf of our members. We represent 155 mutual financial institutions, including credit unions and building societies and also friendly societies. More than six million Australians are members of Abacus institutions.

This bill has been developed to help further strengthen the legislative protective framework for Australian consumers, and as mutuals Abacus members are committed to protecting the interests of consumers—their members—through the provision of responsible and ethical retail banking and other financial services. Abacus members are regulated to the same high standards as other authorised deposit-taking institutions and also have many other additional responsibilities as an integral part of their communities.

Whilst Abacus members support this bill in principle, standard form contracts are widespread in the Australian financial services industry, to the advantage of consumers and our members, and it is vital that we are given certainty over those arrangements. Abacus have identified a range of issues in our submission that we believe need to be addressed in the bill to give our members the certainty they need to continue to serve their communities.

Central to our submission is the fact that Abacus believes that 'detriment' must play a much more central role in the test of unfairness as envisaged by the regime. Our concerns with respect to this issue are threefold. Firstly, we believe that it is not satisfactory that detriment associated with a specific term should merely be 'taken into account', as is envisaged by the bill, but that there should be a more meaningful assessment and that detriment should be an element considered in contracts that is required to be proved. Secondly, we believe that the onus of proof of detriment should be on the claimant. This situation mirrors the fact that the respondent is obligated to prove that the term is reasonably necessary to protect their interests. Lastly, we believe that the test of detriment should be that the term, if applied or relied upon, would cause actual detriment, rather than the 'substantial likelihood of detriment', as is currently the case in the bill.

In this respect, Abacus notes the Productivity Commission's final report of its review of the Australian Consumer Policy Framework that supports this argument. As the commission noted in that report, it is not merely the existence of unfair terms but their use against consumers in an unfair way that creates unfairness.

It is logical, then, to suggest that the approach of requiring to prove actual detriment is the right approach. Of course, as discussed in our submission, the corresponding argument to this that Abacus suggests is that a court should be able to take into account consumer benefit arising from a specific term as well. The bill as it stands allows a court the capacity to take into account such matters as it thinks relevant, but then lists matters that it must take into account—and that list does not currently include consumer benefit.

Also as noted in our submission, Abacus supports the exclusion of price terms from the regime. However, we believe that there is some argument to extend the exclusion to all price terms disclosed at or before the contract begins. In our view, this would provide certainty for our members without providing detriment to consumers. Also as noted in our submission, Abacus members set and reset fees on a regular basis. These changes can affect thousands of contracts. The concept of fairness is inherently subjective, and what may be considered fair by one consumer may be thought of as unfair by another. Uncertainty around these changes will affect institutions and consumers alike.

If it is the view of the committee that price terms including fees and charges should not be excluded from the regime, then Abacus would urge consideration be given to giving further certainty to industry as to how the application of unfair contract terms will be applied. Specifically, we would argue for provision in the bill for the regulator, be it ASIC or the ACCC, to provide safe harbour guidance as to how it views fee terms. This guidance, for instance, could specify the parameters within which a fee term would not be open to challenge under the regime. Our view is that the development of such safe harbour guidance would assist in improving compliance processes and lowering dispute costs associated with the unfairness test, without which its

generality and indeterminacy will cause significant concerns for financial institutions and significant confusion for consumers.

Finally, Abacus firmly believes that the commencement date of the regime must be postponed. The government's implementation plan for the Australian Consumer Law indicates that legislation is expected to commence on 1 January 2010. Given the bill is still before the Senate and its final form is not yet known, this time frame is simply too short. Significant resources will be required to transition to the new regime. These resources include legal advice, redrafting of contracts, adjusting systems and policies, the printing of new contracts and the retraining of staff in some circumstances. Whilst unfair contracts legislation is already in place in Victoria, that regime has only recently been extended to financial services. There are important differences between that regime and the proposed Australian Consumer Law and it is also important to note that the regime applies only in one state jurisdiction. As this committee would also appreciate, the current pace of regulatory change, whilst each initiative may be supported by Abacus and its members, weighs heavily on our smaller institutions. The proposed time frame for implementation is simply not acceptable for us and will cause significant disruption in this already challenging time. We urge the committee to recommend that the regime is postponed until such time as all consumers can have confidence that their institutions can properly implement the Australian Consumer Law.

Thank you for the opportunity to provide that statement. I am happy to take any questions.

CHAIR—Thank you.

Senator PRATT—I want to ask you about the question of detriment and it being required to be proved. I imagine in arguing it that way that you are still acknowledging that for detriment to be proved it would not necessarily require the clause in that contract to have actually been exercised in some way, that detriment can occur by virtue of the existence of that clause that might prevent a consumer from acting in a number of other ways.

Mr Degotardi—We would argue that the way the clause is phrased now, that there might be 'substantial likelihood', is simply too broad. We are open to discussion about how you might narrow that application, but certainly we think there needs to be a more narrow interpretation so that there needs to be actual detriment or perhaps impending actual detriment, however that might be phrased, rather than just perhaps the 'likelihood' of some detriment at some time in the future. For us, the key point for our institutions is simply the uncertainty that that provides in terms of the way we operate and the way we serve our members.

Senator PRATT—Is there a particular reason that that is of specific interest to Abacus?

Mr Degotardi—I think so, and not specifically to Abacus but I suspect to many financial institutions. What we have seen through the Victorian operation of their legislation, for instance, is a much narrower set of circumstances in which detriment or unfairness claims can be pursued. For instance, it is through a single point of the regulator as opposed to anyone can exercise the test of unfairness. The risk that we face and the uncertainty that we must consider as a risk is that under the proposed regime anyone can bring an unfairness claim, and that means that anyone can simply say, 'I think there is a substantial likelihood of detriment.' Whether that case is subsequently proved or not, the cost for us in either defending or dealing with those claims on the uncertainty around our contracts, many of which actually have consumer benefits—we use standard form contracts. In many ways they are easily understood by consumers for the most part and they are standard terms that allow us to provide services more easily. If those contracts are being constantly subject to challenges, that is a difficulty for us. Already as a result of some of the UK challenges around unfairness and penalty fees, we saw what would we would say was speculative action by legal firms in Australia trying to take fees and charges by financial institutions, including our own, to task. We do not think that any of those claims had any merit based in Australian law and yet there are cost and uncertainty that come with them in terms of determining and defending those claims. For us as small institutions, to raise your question very specifically, the uncertainty and cost of defending what would we would call in some cases spurious claims weighs very heavily on our members.

Senator PRATT—Is that what you mean in your submission by saying that the matters that need to be taken into account need to be broadened and made more balanced? I think that might relate to a different part of the bill.

Mr Degotardi—I guess what we have argued in our submission, in response to that question, was that detriment is only one part of a test of unfairness. You can have standard form contracts that on the face of it, when you consider a single clause in that single contract, may be considered unfair. But that is a subjective

test. For one consumer it might be considered unfair; for another consumer it might be wholly reasonable. If you do not have that clause considered in the full context of the agreement and of other consumer benefits then I think you get a misshapen view of the actual detriment or actual unfairness of a particular term and it needs to be broadened out to consider consumer benefit. At the moment, as we have argued in our submission, whilst the courts can indeed consider consumer benefit as one of the things it might take into account, there is no requirement for it to do so, nor does it appear on the list of things that it will consider. So our submission is that indeed it should.

Mr Gijselman—That is in line with the Productivity Commission's recommendation on the issue too, which was suggesting that the entirety of the contract be considered in context of how that contract is actually developed in the sense that, as Mark was saying, one particular clause might be unfair for one individual but the clause in and of itself does not make it unfair, it is how that is applied.

Senator PRATT—And different consumers will be affected differently. Lastly, can you tell me about contract price terms. You have argues that they should be exempt from the bill's provisions. Why is it important to Abacus?

Mr Degotardi—Again for us it is a question of certainty. Coming as small institutions, certainty as much as other compliance costs is a big concern for us. Subject to appropriate disclosure and the fact that those terms are easily understood by consumers, that there is no deception on behalf of the financial or other institution, then when terms are fully disclosed in an appropriate way at the outset of a contract and provided there is equal or at least a certain level of understanding of both parties to the contract, it is reasonable to expect that those terms should not be subject to challenge.

Senator PRATT—Can you differentiate for us why financial services, and banking services in particular, might be different from other kinds of consumer goods for the purposes of this law? I suppose, for example, the mass and universal nature of them means that the ramifications of something found in this area in favour of the consumer might have a flow-on effect that substantially changes the operations of certain provisions in the way contracts are managed. Is that something that you are concerned about?

Mr Degotardi—I am not sure that I am qualified to compare our institutions to others. I guess that I would say to that question that certainly financial institutions have a big responsibility in that the way we do business touches everybody's existence in one form or another and obviously to varying extents. We absolutely have a responsibility to behave ethically and responsibly and to provide financial services, which are essential in many respects to consumers, in an appropriate way. Because there are so many people affected by the way that financial services do their business, it is also critical to ensure that the entirety of the service is considered rather than the individual concerned.

For example—and it is often raised in the context of unfair fees—there are what are sometimes known as termination fees or exit fees from home loans. There are clearly out in the market some terrible fees that need to be dealt with—there is no question about that. Happily, I can say that ASIC reported that in terms of our members those fees were lower than any other sector, regulated or unregulated.

But it has to be also recognised when you consider that termination fee, that there are also benefits that flow to consumers. For instance, if you enter into a fixed rate home loan, there is a benefit you get from having a fixed rate home loan and there are actually costs that the institution has. What I would be very concerned about would be this law being manipulated or used by some to eradicate those sorts of financial arrangements, which in fact have vast benefits for many people, albeit some are poorly applied and should not be in the financial services industry. So I guess in that sense that is where we are concerned. If these terms could be attacked on a stand-alone basis without due consideration to the context in which they are applied, then you would get some anomalous outcomes and poor outcomes for consumers more generally.

CHAIR—I am struggling to think of a kind of contract which might be fair to one consumer but unfair to another in the financial services industry. You are saying that a clause or a provision in a contract might be fair for one person and unfair for another. Can you elaborate on that a bit?

Mr Degotardi—Our point is that the test of unfairness is of its nature somewhat subjective. For instance, if I entered into a contract and because of my circumstances I got a certain set of interest rates and fees, and another consumer was not able to get those terms, one consumer would think that that was entirely fair and the other consumer would think that that was inherently unfair. From our point of view that worries us because of the uncertainty that creates if you are able to attack individual terms of contracts.

CHAIR—We are talking of a standard form of contract. If you had a standard contract with one person and the conditions were fair and that person signed the contract, and then that same standard form of contract was signed with someone else and the terms were deemed to be unfair, how would that still be okay in terms of the consumer? Where you have individual agreements, of course I can see that it might be fair for one individual who has maybe paid a larger deposit, but then that would not be a standard contract, would it?

Mr Degotardi—For instance, a standard contract could have some trigger terms in it where if you have a certain number of transactions you get charged certain fees or if you have certain balances you get access to a lower-fee or no-fee schedule. A consumer who does not have those balances could potentially argue that that is unfair to them, whilst a consumer who does have those balances under exactly the same contract would argue that that is entirely fair. I am not sure that is the intent of this legislation, and I do not think that is what the intent of the consumer law is, but if the courts and others are allowed to interpret it in narrow terms such that only specific terms are considered in a very subjective way that is a possible outcome, and that is the sort of thing we are trying to avoid.

Senator BUSHBY—I do not think they can actually set a contract aside under this legislation; they can only set aside specific terms and look at those.

Senator PRATT—And that would be set aside as being unfair for that particular individual, not necessarily universally.

Senator BUSHBY—And the law does do that. For instance, a law which is quite clear and general—for example, prohibition of murder—will, in assessing the intent, look quite subjectively at the individuals. If it is a doctor, they will look at the activity that was conducted. If a doctor would have been reasonably likely to know that that activity would lead to death they would be judged to a higher standard than somebody who does not have that knowledge. A court could conceivably take a similar approach to issues in respect of a standard term contract and look at the knowledge and the ability to understand the terms that the person is signing up to. So I agree with you on that. For the record, how widespread would the use of standard-form contracts be for your members?

Mr Degotardi—It is very common for us. For example, Abacus, as an industry association, provides a standard form mortgage contract that is used by many of our members for most of their mortgages. So if there were to be disruption to those sorts of contracts—we think it is a good contract—it would be very widespread.

Senator BUSHBY—The cost that you are concerned about for your members is not so much the cost of ensuring. Theoretically, if this law is passed you could sit down and say, 'What does this mean for us?' You could adjust that standard form contract that you provide and say, 'We now believe it meets all the requirements of the new law,' but that is not actually going to solve your problem. As I understand it, you are saying that that would still be open to challenge. The subjective nature of the individuals who may have signed that contract with your members may lead to them being able to challenge in the courts. You do not see there being any way forward for you to sit down and just say: 'Here's the law. Here's the new contract. You should be right.'

Mr Degotardi—That is correct. I guess we have to provide some kudos to this approach; a single consumer law across all jurisdictions is a really fantastic idea.

Senator BUSHBY—And it will save businesses money in the bigger picture.

Mr Degotardi—Yes, and in terms of the way it is broadly applied, not just in financial services. We are very supportive of that. Having said that, you are absolutely right. When we have certainty with the law as it is passed in whatever final form that gets passed, we will look at our contracts, make sure we comply and make sure we are absolutely doing the right thing for our consumers—we would argue we probably are anyway. It is at that point and following where, if those contracts are subsequently and consistently subject to challenge, the real cost and uncertainty comes into play for us. We simply do not have the resources to continually look at consumer contracts over and over again. Ultimately, we are mutual institutions; there is no other source to recoup that money. The people who use mutual institutions will end up wearing the cost of that, and that is the sort of uncertainty that we would like at least to try to narrow or minimise as best we can through the way this is constructed.

Senator BUSHBY—Presumably, no matter how consumer friendly your standard form contracts are, in the nature of the business that your members are in there will at times be people who get caught and are unable to meet their obligations under those contracts. A percentage of those will see that they have an incentive to challenge those contracts under the basis of this bill, if it becomes law, because it is in their interest to try and

escape the obligations that they have got themselves into. No matter how consumer friendly you are, the likelihood is that there will be challenges, and this provides another avenue for people to do that in circumstances where they do feel trapped.

Mr Degotardi—Yes, I think that is right.

Senator BUSHBY—Quite clearly there is a valid need to protect consumers in these circumstances, and you should be commended for taking steps to do that. We are trying to work out the best way of achieving it at the moment. Do you think there is a way that the approach or the bill could be changed so that the consumers can still be provided with the protection that they deserve but at the same time provide your members and other businesses in similar circumstances with certainty?

Mr Degotardi—Yes, we do. I outlined some of those in the opening statement and in our submission as well. Ramping up the test of detriment to more than a substantial likelihood to an actual detriment is one way of doing that. The Victorian model is also another way of avoiding what might be regarded as claims without merit, which have the effect of delaying others. As I mentioned earlier, the Victorian approach was to have a single body that can bring the tests of unfairness to court. That is one way of limiting it.

Whether that is the appropriate way for us to go now, I am not clear on that. I do not think anyone really wants to limit consumers from making valid claims, but you do want to limit those claims that are clearly without merit, or are being launched for reasons other than genuine reasons that want to test unfairness. They are the sorts of claims that cost us. From our point of view, the detriment test is a big one, and some stronger tests in the legislation requiring the court to consider both sides of the detriment and benefit that might arise from a term, and how that term fits in the broad context of the contract as a whole, in our view can be really quite simple things to put into legislation, just to strengthen the requirements for courts to consider all those terms. By doing so, you also reduce the risk that you have claims that are invalid being made for spurious reasons. It happens in our industry; there are institutions out there that try to make what we would call spurious claims to get commercial settlements out of institutions like us just so that we would avoid costly legal ramifications. The more tightly you define the legislation, and the better the court process to deal with those tests of unfairness, the less likely you make it that those claims will be successful.

Senator BUSHBY—Senator Brandis was here earlier and I think he will be back later today, but he asked some questions this morning of Treasury which highlighted the fact that the unconscionable conduct provisions currently in the Trade Practices Act theoretically should cover most of what we are talking about now anyway. He stated that an alternative approach which may work better could actually be to adjust the unconscionable conduct provisions to make it clear that they would apply to contracts in circumstances where there is an uneven degree of bargaining power in standard form contracts. Do you think that would be a preferable way that might actually provide additional certainty to your members?

Mr Degotardi—The test of unconscionability is a much higher test than the test of unfairness. If the question is, 'Would an unconscionability test provide more certainty to our members?' the answer is, 'Sure.' It is quite difficult for consumers to prove unconscionability in certain circumstances. I think the suggestion that you are making is that you would have some very prescriptive elements of when that unconscionability test might be satisfied and that they would lower what might be the unconscionability test at law. I think that would be a very useful thing to do.

Senator BUSHBY—We have also received some arguments in some of the submissions that there may be some industry segments that should be exempt from this altogether, not because they think that they should be exempt from being responsible to consumers but more because they are already regulated. Quite clearly, your members, as ADIs, are highly regulated in terms of their prudential activity. I believe you are appearing before us next week when we talk about new consumer credit laws which are also going to add additional regulation to the way that you interact with consumers. Do you think that the existing regulation or other proposed regulation that you are likely to be subject to could deliver the desired outcomes to consumers without the need for this legislation?

Mr Degotardi—If the Senate committee were to recommend that we be exempted from this legislation, I would probably be both surprised and delighted.

Senator BUSHBY—I am just testing what has been put before us; that is all.

Mr Degotardi—I think, to be fair, the real problem is that there are consumers out there across all industries who are being disadvantaged at the present time.

Senator BUSHBY—I think we all agree with that.

Mr Degotardi—Certainly the current law, as it stands—and this applies to some elements of the financial services industry—is not adequate to protect those consumers. The new consumer credit law may go some way towards assisting them—

Senator BUSHBY—What I am particularly interested in is the degree to which that legislation will render this legislation unnecessary with respect to your members.

Mr Degotardi—With respect to our members, I think the consumer credit law is a single and good law in principle and that it mirrors much of what we have voluntarily applied in our code of practice. We have already committed to issues like responsible lending in our code of practice. The fact that we now have a consumer credit law which is addressing responsible lending will indeed protect consumers to some extent. For instance, it has a capacity to repay assessment tests and a test stipulating that we must not provide products that are unsuitable. Those things are absolutely going to protect consumers. Will there be consumers who fall outside the net and need a broader consumer law? I suspect the answer is that in any legislative regime there will be some consumers that will fall outside the net.

Senator BUSHBY—That then raises the converse question: in your industry, if this legislation were put in place, would the provisions-of-contract aspect of this legislation render the consumer credit legislation redundant, given that this is broader and that it theoretically could cover unfair contract terms that relate to the lending practices of your members? Are we doubling up in any way?

Mr Degotardi—In some respects, yes, these two regimes will overlap, but I am certainly not going to sit here and argue that a consumer law would do the job of a consumer credit law. It may be that the consumer credit law will fulfil many of their responsibilities of the Australian Consumer Law as it applies to financial services and that as an industry we may not fall foul of the Australian Consumer Law in foreseeable ways because of the Australian consumer credit law. For us, the problem is the uncertainty of the consumer law. It is an unfairness test, and that is a good thing for consumers because it broadens the scope of ways that they can bring claims against people who are treating them poorly, but it needs to be balanced with the uncertainty issue.

Senator BUSHBY—You need certainty for those who are not treating their consumers poorly.

Mr Degotardi—Absolutely.

Senator BUSHBY—Okay, thank you.

CHAIR—Are there any further questions?

Senator PRATT—I think that last discussion actually answered my question.

CHAIR—Thank you then to Abacus for appearing here this morning.

Mr Degotardi—Thanks for having us.

[11.25 am]

BODGER, Ms Amanda, Partner, Mallesons Stephens Jaques; and Member, Trade Practices Committee, Business Law Section, Law Council of Australia

PODDAR, Mr Dave, Partner, Mallesons Stephens Jaques; and Chair, Trade Practices Committee, Business Law Section, Law Council of Australia

RIDGEWAY, Mr Stephen, Partner, Blake Dawson; and Deputy Chair, Trade Practices Committee, Business Law Section, Law Council of Australia

CHAIR—I welcome the Law Council of Australia's Trade Practices Committee to the table. Thank you for coming in today. Do you have an opening statement you would like to make?

Mr Poddar—Yes, thank you. The Trade Practices Committee of the Business Law Section of the Law Council of Australia would like to thank the Senate Standing Committee on Economics for inviting us to attend this hearing to discuss its inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009. We believe that a properly functioning consumer protection system is important for the full and effective operation of Australia's economy. The Trade Practices Committee are supportive of the government's desire to nationally reform Australia's consumer protection laws to ensure that laws across all states and territories are harmonised and to ensure businesses are not burdened by unnecessary regulation and inconsistent laws.

As part of the harmonisation of consumer protection laws, the Productivity Commission recommended making unfair terms unenforceable. The commission's main concern was the unreasonable use of unfair terms, not their mere existence. As they noted in their report:

… dormant unfair terms often do not cause detriment to consumers.

The TP committee believes that, although the bill satisfactorily addresses certain issues, further improvements may be made in a number of respects. In the committee's view, it is essential for the promotion of business confidence and the health of Australia's economy that the new unfair terms regime to be established is restricted to consumer contracts and that those contracts should be defined using the existing definition in section 4B of the Trade Practices Act. This will enable the regime to provide protection to small businesses, where those businesses are purchasing goods and services under standard form consumer type contacts, while preserving consistency and certainty for the overall business community.

The committee also considers that the current proposal to permit wholesale banning of certain terms—either by regulation or by declaration—would risk implementing a rigid, impractical and commercially limiting regime. Whether or not a particular term is unfair should always be dependent upon the assessment of that term in its context and take into account all relevant circumstances. Other regulators have taken the view that a term may be fair in one context but unfair in another. An approach which requires assessment of all the relevant circumstances in every case would maintain the flexibility required for efficient and effective regulation of consumer contracts. Such an approach would be consistent with comparable regimes and does not risk the unintended consequences that may occur, particularly given no economic cost-benefit analysis appears to have been done.

With regard to the proposed introduction of tailored enforcement provisions in the new regime, the committee supports the clarification of those procedures and provisions. The introduction of new enforcement powers needs to be proportionate and necessary, and provide clear parameters within which a regulator may act. The committee considers that the proposed new enforcement measures do not meet these tests. In particular, the proposed public warning powers, infringement notices and substantiation notices are disproportionate, may be prejudicial to the expectation of natural justice and may lead to serious commercial disadvantage for affected parties without sufficient checks and balances. For example, in the case of public warning powers and substantiation notices, existing regulatory and enforcement powers permit the same results to be achieved without giving rise to the potentially significant adverse consequences of the proposed new powers.

The inclusion in the new regime of presumptions that a contract is a standard form contract and that a term is not reasonably necessary to protect legitimate interests is unnecessary and, in our view, undesirable. The committee also have considerable difficulty with the reversal of the presumption of innocence in respect of the warning powers and infringement notices that will occur under this bill. The committee believe that the government's recent changes to the Trade Practices Act to allow the ACCC to bring applications for

interlocutory injunctions in the courts and to continue to use its section 155 evidence-gathering powers in those proceedings makes the proposed new remedies unnecessary.

Further, the committee notes that the proposed new enforcement powers remain unclear in both their application and consequences. With regard to the non-party redress orders, for example, essential processes and meanings are not clearly set out in the bill. For example, how would the affected class be determined? The bill has similarly not taken fully into account the consequences of some of the proposed enforcement actions on business reputation and consumer perceptions. The committee is also concerned that, under the bill as presently drafted, the regime will have unintended retrospective application once terms are prohibited or declared as unfair.

In summary, while the committee is supportive of the policy objective to create a world-class consumer protection regime, there remain a number of deficiencies and a considerable erosion of legal rights in the current proposals. The committee hopes that our submission may assist in the development and introduction of an appropriate and effective regime.

To be helpful, can we give some examples to you of some of the issues we have just raised? We are very happy to take questions, particularly questions about the application of the bill to small business, but can we please go through the examples because we think it is important to show some of the impact of the provisions before we deal with that issue?

CHAIR—That would be helpful.

Ms Bodger—One of the points made by Dave in the introduction was the possibility that the legislation may operate retrospectively. That arises by the ability to ban terms, either by regulation and the regulation prohibits them as being unfair terms, and even when a court declares a term to be unfair. An example of that might be that sometime after the introduction of the new regime, businesses have been conducting their business with standard form contracts for some time and under the standard form contracts a fee is required to be paid by a consumer in certain circumstances. The business has been collecting that fee for a number of months or years and believes that the fee is a fair one, action is taken either to get that term declared as unfair or perhaps a regulation is passed prohibiting the collection of an early termination charge or some sort of fee. The bill does not only provide an ability for redress going forward but because the term is void from its inception there is a risk that the regulator could require redress for all amounts that have been paid under that term—for many months, for many years—and the business collecting it in good faith. That is where there is an ability for the regime to act in a retrospective way. That leads to a lot of uncertainty for businesses generally in relation to standard form contracts.

The second example that we want to raise is in relation to the ability to prohibit terms outright, either by declaration or by regulation. Generally it has been acknowledged in both the Victorian regime and the UK regime that whether or not a term is unfair is dependent on all of the circumstances. A term that may be fair for one consumer in one context may be unfair for another consumer in a different context but under the same standard form contract. The ability to prohibit all types of a certain term without due regard to the particular circumstance is problematic for that reason. It is also unclear whether the declaration right will strike down a term in a particular contract or in all standard form contracts of that type. That is another example where it may have unintended consequences.

In relation to determining whether a term is unfair, the bill carves out the main subject matter and the up-front price. These are two aspects that cannot be taken into account in determining whether or not a term is unfair. We think the definition of 'up-front price' may lead to unintended consequences and may have quite a significant effect on the way businesses price their goods and services. 'Upfront price' does not include the payment of any charge or fee which is contingent on an event. For example, it would not pick up an early termination charge. The issue is that a lot of those sorts of charges go into the whole cost modelling for businesses. If they are carved out, it will lead to uncertainty as to whether that charge would be able to be relied upon and therefore whether or not businesses need to redo their pricing models for certain goods and services and bring all the prices up front. It is also thought that if these prices are made very clear, up front, fully disclosed, clearly disclosed, transparent, the ability for a consumer to argue that it was unfair when they had knowledge of it may not be the right balance between supplier and consumer. Those are the main examples.

Mr Poddar—Shall we deal with the small business question. I noticed a few senators raising eyebrows when we talked about our preference for the section 4(b) definition.

CHAIR—Perhaps we will just go to questions first and then we will get to that. I have one question about the public warning powers that you mentioned. I could be wrong, but it is my understanding that it is based on existing state powers to do that kind of thing—powers which have operated for some time. Is that right?

Ms Bodger—There is a variety of different state powers. The bill is drafted along the lines of 'reasonable grounds to suspect'. My understanding—it is not in my notes—is that the Queensland regime, for example, has a higher burden: 'reasonable grounds to believe' there has been a breach. There is quite a difference in the threshold for exercising that right. So you are correct in that there are some state based rights, but the thresholds for enforcement are not consistent.

CHAIR—The threshold in this act is higher or lower?

Ms Bodger—Lower than 'reason to believe'. This one has 'reason to suspect'. 'Reason to believe' is a—

CHAIR—Is that lower than most states currently have or are you not aware of that?

Ms Bodger—I do not know the answer to that. I think it is lower than Queensland. I am not sure. I do not think all other states and territories have one. There are maybe a few others. I do not know about the thresholds.

CHAIR—I know that South Australia does, but I am not sure what the threshold is.

Mr Poddar—The key point we were making in relation to the public warning powers was that we believe that the changes made by the government to allow the ACCC to bring interlocutory proceedings and continue to use section 155, compulsory powers to obtain evidence, means that the commission is much better placed now to bring proceedings to stop the issue which is at the heart of the problem rather than having warning powers as to whether someone is engaging in inappropriate business conduct. The regulator has an ability to go to a court and stop that conduct quickly rather than rely on publication or ads, or however it wishes to do things. It allows for more immediate redress, deals with the issue and stops the problem occurring rather than having something trying to, I guess, shame or stop something by publicity. The more effective remedy, we believe, is something that government has already provided for—that is, to allow the regulator to stop the conduct, and that will stop people being misled or deceived, as well as inappropriate conduct. That is why we believe this power is not necessary. As the Dawson committee indicated in 2005, these types of issues, where regulators say that conduct should be stopped or putting out warning notices, can be quite difficult because it has an impact if it is an incorrect determination or assessment by a regulator. It has an unfortunate impact on a corporation or an individual's reputation. That is why we believe it is more appropriate for the regulator to go to court and for a judge to make a determination as to whether or not the conduct is actually contravening conduct. Mandy or Stephen may want to add to that.

Mr Ridgeway—No.

Ms Bodger—I agree with that.

Senator BUSHBY—Thank you for your submission; I think you have raised some very good issues in a very constructive manner. One of the issues you do note is that, in the context of banning particular terms as unfair, a term is subjective and it will be interpreted differently by a court depending on the circumstances of, particularly, the individual consumer who may have signed it—whether it is unfair in the context of that particular person's circumstances. We just had evidence from ABACUS and one of the concerns that they have is the uncertainty that will arise because, despite their potential best efforts in trying to ensure that their standard-form contracts are fair, they will not know whether a court will treat it as such until such time as those individuals, with their own individual circumstances, have signed it and then taken action to say that those particular terms are unfair. To what degree can we satisfy the concerns of businesses regarding certainty of the terms that they put in their standard-form contracts so that they can avoid potential litigation and the costs that may flow from that?

Ms Bodger—In my view, the unfair terms regime will lead to a lot of uncertainty as a result of the entire regime. It is going to be the case that a term can only be assessed as being unfair or not by taking into account all of the circumstances. That inevitably leads to uncertainty. I think that the Productivity Commission quite rightly said that the fact that, if a term is unfair, usually there is no detriment caused by it; it is only when the term is going to be implemented and relied on.

Senator BUSHBY—The action is taken.

Ms Bodger—That is why one of the earlier submissions the Law Council did indicated that the area of unconscionable conduct covers, in many respects, what the unfair terms regime is attempting to do. So the

unconscionable conduct regime will look at the way a business has exercised the term and decide whether that is fair and reasonable or unconscionable. That then means that the businesses have certainty of contract because the terms are not void. It is only when the terms are attempted to be exercised that businesses are rightly expected to act fairly and appropriately and take into account the circumstances of the other contracting party. That is, I think, a problem of the regime; it does lead to uncertainty and that is why the preference is that the unconscionable conduct provisions should be relied on in those circumstances.

Senator BUSHBY—You mentioned the unconscionable conduct term should be relied upon but, given that we are looking at the bill that we have in front of us today, you mentioned that the regime that would be set up in that bill does not provide that certainty because it does not look at the conduct; it looks at the actual terms of the contract.

Ms Bodger—Correct.

Senator BUSHBY—Could that regime be modified so as to require looking past the terms of the contract to the conduct and proceed on that basis and thereby provide additional certainty and, also, make I work better in that sense.

Ms Bodger—If I have understood it correctly, I think the question is: can anything be changed so that there is more certainty about whether these terms are fair and those terms are unfair.

Senator BUSHBY—Particularly in terms of the point that you raised about looking at the conduct of the side of the contract that has the higher degree of bargaining power in terms of actually relying on the terms of the contract.

Ms Bodger—It is right that a term is only declared unfair after looking at all the circumstances. The only way businesses can get more certainty is actually outside the regime through guidelines and the like as to when and in what circumstances a term may be unfair. But the regime necessarily introduces uncertainty by requiring all the circumstances to be taken into account.

Senator BUSHBY—But you would not want it any differently.

Ms Bodger—No. If it has to come in, then I think you have to accept that is part and parcel of the regime.

Mr Ridgeway—One of the difficulties in attempting to give meaning to this term is that it is a more subjective and value laden term than most of the other terms in the act. If you ask the members of the committee to agree on what is misleading or deceptive, reasonable minds do differ. But you are more likely to reach a consensus than if you ask the committee to agree on what is unfair. It is a very contextual concept that refers to particular economic conditions, social conditions and values at a particular time. I do not think it is coincidental that the law has grappled with conduct that is a bit more readily definable such as misleading and deceptive conduct or even unconscionable conduct. But you can see the difficulties that there have been in defining unconscionable conduct and an acceptance by the courts over many years that unconscionable conduct needs to be looked at in the circumstances. Someone said to me that you recognise it when you see it, but without knowing its context it is very hard.

Senator BUSHBY—And that would be subjective as well. 'Unfair' as a concept has been used in independent contractors legislation. Has that been tested by the courts and defined?

Mr Ridgeway—It has. That it has been applied is the most significant development with it. Even after the application of legislation and the use of the unfair contracts legislation in the UK, a clear definition has still not emerged.

Senator BUSHBY—But presumably over time if it was included in legislation the common law would build up a body of law that would actually make it clearer.

Mr Poddar—The difficulty with that is that, as we indicated and as other senators have noted, it depends on each particular factual circumstance as to the weighting of the position of the parties. The building up of case law and the concerns that Abacus have raised, which we share, are that you need to almost mirror the precise factual circumstances to see whether that provision, in the circumstances of that particular matter, is unfair.

Senator BUSHBY—So it might reduce the fuzziness but not eliminate it, to some extent.

Mr Poddar—Correct.

Senator BUSHBY—You are very strong on ensuring that the regime is restricted to consumer contracts only and does not include business to business. Is that a correct statement?

Ms Bodger—Yes. We think it should be a consumer protection regime because that aids certainty. The current definition of 'consumer' in section 4B of the Trade Practices Act should be adopted. The definition in the bill requires businesses to assess the purpose for which goods and services are acquired. That is a subjective test: whether or not they are going to be acquired for personal domestic household use or consumption. The definition in the Trade Practices Act is an objective test: whether or not the goods are of a type, ordinarily acquired for personal use, with a $40,000 threshold as well. In dealing with standard form contracts and many consumers, businesses are not going to know the subjective intent of the customer in acquiring the goods. We think that the 4B definition is a better one. It has been around a long time, businesses are used to it and it will then be consistent.

Senator BUSHBY—We have heard in evidence today and seen in the submissions that some small businesses feel that they are effectively consumers, and they are certainly subject to uneven bargaining positions with standard form contracts in certain industries.

Ms Bodger—I think if the 4B definition were adopted, they would get the protection that it offers, so if they purchase goods of a kind ordinarily required for personal use, they would get the protection or under $40,000 they would get the protection.

Senator BUSHBY—Okay. That would provide it in some circumstances. We had the pharmacists here this morning and they were talking about the regulatory regimes which then flow through to suppliers of pharmaceutical products forcing them on to a take it or leave it option in terms of their supplies. As a result they have very little ability to influence the terms of the contracts upon which they take them. In that sense, they feel that they are basically consumers. We had the Motor Trades Association as well who were talking about how they are subjected to uneven bargaining terms. Some of the terms of those contracts would not fall under $40,000, some of them would not qualify under what you are talking about; nonetheless, they can make a reasonable case that they need some protection. Do you (a) agree that they do need some protection and (b) consider that, if that protection should be provided, it should be provided by an alternative method?

Mr Poddar—The issue that we are seeking to deal with by our recommendation that the committee considers using the definitions in section 4B of the Trade Practices Act is because we are trying to strike a balance. With the issues that you have raised this morning you can see that this bill is heavily weighted in favour of protecting consumers and it really does move the balance because of the change in presumptions. One of the comments that we made in the opening statement was that there has been no observable economic impact statement of the impact of this type of legislation across businesses and the additional transaction cost. That was a very key factor in the Productivity Commission's recommendations.

We are concerned that if you start to extrapolate these very heavily consumer focused and weighed provisions in favour of business-to-business transactions, it will really create significant business uncertainty. It will be detrimental to the views of small business. We submit that it is also very important that small business realises that these provisions will apply to consumer transactions dealing with small business. They will not necessarily have the resources to actually deal with the uncertainty that this may create. What we have sought to do is to strike a reasonable balance. Associations such as the Motor Trades Association, which I see has very many constituent elements, and chemists have collective bargaining powers so that under the Trade Practices Act there is an ability for them to redress imbalances through other mechanisms under the act. We would have a concern that if you started to impose business-to-business provisions into this heavily weighted consumer protection legislation, it would have so many unintended consequences to the overall economy that have not been considered. Amanda, did you want to provide detail?

Ms Bodger—I can expand on some of those points. There are some businesses that are vulnerable and need protection as consumers do, but that is the same for any part of the Trade Practices Act—the implied warranties and conditions, for example.

Senator BUSHBY—That is why the act is there in the first place in a sense.

Ms Bodger—Indeed, but a balance has to be struck between those that perhaps need a little more protection than otherwise they can get and those that do not. The current balance is there in section 4B, it is well understood and it has been there for a long time. Is that the right balance? We think that it is, but I do accept that there will be in some cases businesses who may need to be protected. Even if they miss out on the definition of consumer contract, they do have in section 51AC the protection of unconscionable conduct which in many respects covers the same ground, so it is not as though they are devoid of protection.

Senator BUSHBY—That answers my question pretty well. One aspect of the evidence that we received this morning from Treasury was that, under the intergovernmental agreement, the remedies available under the new Australian Consumer Law will actually be available through state based dispute resolution mechanisms ranging from the courts and whatever they may have in place in each of the state jurisdictions. Is that your understanding of how that would work?

Theoretically, depending on the regimes in place in each state, it may actually become easier, as well, for small businesses to access some of those remedies that are currently in the Trade Practices Act than it is at the moment—and it is really up to the states to make it easier—because there are a couple of aspects. One is proving your case under unconscionable conduct or other remedies; the other is the prohibitive cost and time of achieving that remedy. So, theoretically, it might actually become easier because of state based fora in which they could take their actions.

Ms Bodger—We agree.

Senator PRATT—I am not sure if this is an issue that you have considered, but I note that Legal Aid have raised the issue of the exclusion of insurance contracts. They regard that there have been some systemic problems with consumers being offered unfair contracts. I was wondering if that was an issue that you had considered.

Mr Poddar—We have not considered it specifically, but there are certain carve-outs from the Trade Practices Act in relation to financial services, insurance contracts and cargo liner shipping, for example, where I think in specific sectors it is recognised that there are a number of different pieces of legislation and a number of different factors at play and putting the jurisdiction into an umbrella jurisdiction such as this is not an appropriate way to deal with it. Particularly for critical industries such as financial services and insurance contracts, failure to take into account all of the economic circumstances can lead to some very undesirable outcomes in the community such as the scarcity of insurance or credit, which are very important features in the community.

Senator PRATT—I am unclear, based on those comments, about the extent to which financial products are in versus out in terms of where some of those distinctions are.

Ms Bodger—They will be in—not under the Trade Practices Act but under the ASIC Act. But there is a mirror bill and legislation proposed. The unfair terms regime, for example, will apply to financial institutions.

Senator PRATT—But not to insurance providers?

Ms Bodger—Correct.

Mr Ridgeway—There is a cross-delegation between the Australian Competition and Consumer Commission and ASIC allowing them to take action under those delegations. That is the position under the current legislation and it will continue under this bill.

Senator PRATT—We have explored these issues to a large extent already, but they relate to paragraph 10 of your statement. It is with regard to what is in and what is out. From what I understand from your statements, the bill is not clear, if there is a finding in favour of a consumer, whether any redress affects just that consumer or a whole class of consumers. How should the bill clarify that?

Mr Poddar—That is a very difficult question.

Ms Bodger—It is a difficult question. It is uncertain. If a declaration is sought, it is uncertain whether it will apply to the particular standard form contract that is in dispute or across all contracts of that type. I think the intention is, in fact, that it applies to all contracts of that type. Otherwise, you would have to have the regulator going back to court in relation to them all. But the drafting of consumer contracts requiring it to be to an individual—and the definition goes on—seems to suggest that maybe it does only affect that. It is unclear.

Senator PRATT—How does that relate to whether a consumer is initially offered an appropriate contract? For example, I am thinking of bank fees. You might have a certain class of individuals who are not particularly economically literate, who have low incomes but who hold accounts where they are repeatedly charged significant overdraft fees. That is a clear example that has emerged, I think, in different states.

While it might be quite appropriate to charge someone like me a fee like that where I have been quite neglectful, clearly there might be a class of consumers for whom that kind of bank account should never have been offered. They should perhaps have been signed up to an account which they cannot overdraft and therefore the persistent overcharging of fees like that would never be an option. If you find that particular case

in favour of that particular consumer, is it that the bank or whatever institution did not make their own assessment as to whether that contract was initially appropriate for that consumer to start with?

Mr Ridgeway—The committee has no objection to retrospective application of the provision in the sense that a contract term can be unenforceable from its inception; it is the application to contract terms that were entered into before the commencement of the legislation that is of greater concern. I think the conferring of a discretion on the regulator as to the application of the unenforceability is the key. The provision should not be per se void as is provided in the legislation at the moment.

Senator PRATT—Void for all consumers or void for just that particular class of consumers or void for the individual consumer?

Ms Bodger—These are the uncertainties the bill raises. It is the case that it is going to be very difficult to make void the terms for all contracts, for the reason that you said—there would be a class of contract customers for whom it is quite appropriate to charge that and a class for whom it is not.

Senator PRATT—Perhaps a viable way around that might be if you made that finding with respect to just that single consumer—but then that could clearly set a precedent whereby banks should be transferring consumers who they think are vulnerable across to a different type of account, and there would be an expectation that they make that assessment of their customer base. I do not know. It is a very complex issue.

Mr Poddar—I think we agree. The concern that we have is that some of these details do not appear yet to have been grappled with. As we have said in our submission, how do you define the appropriate class and the remedy? Then you start to have questions like the opening questions we were asked: is that confined to that particular factual circumstance or does it relate back to a wider group; is the impact on businesses; and has that particular case, if it is in a certain state, come to everyone's attention around the country? It does start to raise a lot of issues of uncertainty.

Senator PRATT—Have some states been more successful than others in resolving this question?

Ms Bodger—In terms of unfair terms, the only other state is Victoria, and that did not apply to financial institutions, so it is untested.

Mr Ridgeway—There is a longer experience in the United Kingdom, and the experience is that it has taken some time to get an understanding of what terms might be broadly regarded as unfair. I think businesses are, in the main, fairly sensible about understanding the opportunity for class actions and adjusting. If there is a test case board and there is a finding in relation to that term that is not limited to the particular circumstances, and there is going to be a flow-on effect, they will adjust their practices accordingly.

Senator BRANDIS—Ms Bodger and gentlemen, I am sorry that I was not here for the start of your opening statement, but I have seen the two-page statement. What is your ultimate view on the whole bill regarding the Australian Consumer Law? Is it your recommendation to the parliament that the bill not be passed at all? I know you have specific criticisms and there are some sections of the bill that you say outright are bad—and I agree with you—but ultimately is it your preference that the bill not be passed or that the bill be amended?

Mr Poddar—We as a committee are very concerned—and I am sure the Law Council more generally—to be constructive and assist committees such as yourselves. I think what we are raising—

Senator BRANDIS—Sure, but nobody expects you to help fix up a bad bill. Sometimes the best thing to do with a bad bill is to throw it out.

Mr Poddar—We think there are significant issues raised here. The Productivity Commission and the government have worked for many years trying to address some issues in relation to consumer protection. We see there are significant benefits in cutting out overlaying levels of regulation. So we see there are some very solid positives with this. We believe—and I think this is where we can seek to answer your question—there is a need for a possible delay while some of these issues, which are the more granular issues and which we believe will exercise enforcement authorities, are worked through in more detail. We would, of course, be willing to work with regulators and other bodies such as Treasury to try to address some of these issues. We have an overall view that there are some significant positives in decreasing amounts of regulation. Our concerns are the uncertainty created by the application of certain provisions. What we have sought to do is identify and list several of the issues we believe are very important to be considered.

Mr Ridgeway—One factor in that is that the legislation exists in Victoria on a state basis and for business certainty across the nation there is some interest in having a uniform regime. I think that was a significant factor in the Productivity Commission's recommendations.

Senator BRANDIS—Let us cut to the chase here and let us say, for argument's sake, that this committee were to recommend to the government amendments that deal with the issues that you raise, and the government were to say, 'Thank you very much, but we're going to stick with the bill in its current form.' Would it be better not to have the bill in its current form if we cannot have it in an amended form?

Mr Poddar—That is very difficult—

Senator BRANDIS—That is the ultimate question we might have to answer, Mr Poddar. The opposition does not support the bill in its current form, but it may well be that we are of the view that it can be fixed by amendment. But, if those amendments did not succeed, we will be faced with a choice—the very choice I am asking you to express a view on.

Ms Bodger—If the only option was the bill in its current form or not at all, our view would be that it would be preferable not to have it at all.

Senator BRANDIS—That is a direct answer. Thank you, Ms Bodger. Can I take you then to a couple of the issues in controversy—what was the lovely term you used, Mr Poddar, 'more granular issues'? On the provision for the prohibition of contract terms by regulation, you say, do you, that that certainly should be removed from the bill?

Ms Bodger—Yes, we do, because we say that whether or not a term is fair or unfair needs to be assessed in the context of all the relevant circumstances.

Senator BRANDIS—Except that it is not defined as whether it is an unfair term; it is defined as whether it is a prohibited term—and prohibited term we learn is 'a consumer contract term of a kind prescribed by the regulations'. Unless I am missing something, there is no further guidance given as to what may or may not be prohibited.

Ms Bodger—The regulations may prohibit a term and once that term is prohibited the act provides that if that prohibited term appears in a standard form contract it is void and, moreover, it is a contravention of the Australian Consumer Law to include that term, apply or rely on it. So there will be no second assessment of whether the term is fair or unfair.

Senator BRANDIS—But I was coming at it from the other way. A prohibited term is defined as nothing other than a term that the minister prohibits by regulation. It does not have to be an unfair term; in fact, the bill gives us no guidance at all and imposes no limitations at all upon what kind of term may be prohibited. Is that right?

Mr Poddar—That is correct. I will give you a more direct response to this question than I did before. We have raised that issue in our previous submissions. What we have seen, either in the explanatory memorandum or in some of the second reading speeches, is that there will be government processes and, as part of COAG, the government and the states will consider very carefully as to what provisions are prohibited, but we have seen no other guidance. We have expressed concerns that there is no economic analysis. There have been no underpinnings to show that a government body's decreeing that provisions are inappropriate has been subject to any cost-weighting or benefit economic analysis. We also believe that that is inappropriate because that does not go through parliament to actually ban those types of provisions.

Senator BRANDIS—I do not think it is controversial that some contractual terms should be prohibited. We all know that there are some kinds of contractual terms that the common law and by statute are prohibited. One would have thought that if you pass a law that gives a minister a general power of prohibition of any contractual term (a) there would be guidance as to what type of contractual term one was referring to and (b), as you rightly say, Mr Poddar, you would expect that the parliament, not the minister by regulation, would be making a decision like that.

Mr Poddar—Those are the views we have expressed we agree with you.

Senator BRANDIS—Coming back to your submission, paragraph 9 is a little ambiguous to me. Is the concern you are addressing there merely the reversal of the onus of proof? In other words, are you saying there merely that clause 3(4) of the bill should be removed or are you saying more broadly that that limb of the test that is necessary for the protection of legitimate interests should not be there in the first place?

Mr Poddar—We were smiling because we struggled on that paragraph when we wrote it this morning. The example we were concerned about is that in the infringement notices there is effectively a reversal, that a regulator or other party can take a view that a provision is inappropriate. You are in a sense proven guilty or there is no presumption of innocence. Our concern when we started this was that you are effectively deemed or it is considered that these things are unfair and you must prove in the circumstances that they are not. That was our opening statement, that we are concerned that some of the normal legal principles of small businesses, individuals or companies, being innocent until proven guilty, have been reversed by this bill and parliament should be very mindful of those changes. They go into issues such as public warning powers, that if people think someone is acting unfairly and a regulator takes that view without having tested it in court, that is why our preference is that it is taken to a court. Similarly, in relation to infringement notices, we have made the comment in our submission that we believe there are not sufficient checks and balances, so that if a regulator takes the view, particularly in some of the more difficult and controversial areas—such as section 53C, which is as yet untested—and also in relation to issues such as whether something is unconscionable, which is a vexed issue, and determines on the facts, we believe it is inappropriate that a regulator be allowed, because it is a view that something is unfair, to issue an infringement notice and for a party to go off to court to have to prove that that is not the case.

Senator BRANDIS—I agree with everything you have said, but again that is not exactly what I want to know. It is clear to me that you are against reversed onuses and therefore you would not have clause 3(4) or clause 7(1) of the bill, but I want to know whether you go beyond saying that, particularly in this vexed paragraph 9 of your submission. Do you actually say that that limb of the test, whether or not a term is necessary to protect a legitimate interest, should be there at all or do you not have a position on that?

Mr Ridgeway—We do not have a quarrel with the use of that criteria.

Senator BRANDIS—Okay. That is what I wanted to know—because it is already in section 51AB, of course, isn't it?

Ms Bodger—Correct, and the onus is on the person trying to prove the conduct is unconscionable, and that is what we say should be the case here.

Senator BRANDIS—Sure.

Ms Bodger—There is no difference.

Senator BRANDIS—Absolutely. I think I understood you correctly, but let me make sure I am not reading into what you say: is it basically your position in relation to unfair contracts that sections 51AB and 51AC of the Trade Practices Act in their current form go as far as it is necessary to go, so that the inclusion of a new category of unfair contracts in the law is unnecessary?

Ms Bodger—Yes. I think the first submission the Law Council put forward indicated that, in its view, the existing laws in relation to unconscionable conduct were sufficient to address these issues.

Senator BRANDIS—Okay. So your position is very simple: it is as simple as that. Good. Lastly, I just want to dwell for a second on an issue that we were exploring earlier today with the bureaucrats who were responsible for the bill. Have you had a look at clause 3(2)(a)—that is, the question of whether or not there is a 'substantial likelihood' that the term would cause detriment, 'whether financial or otherwise'?

Ms Bodger—Yes, we have.

Senator BRANDIS—Without putting words in your mouth, can I invite you to speak to that. I am concerned about the ambiguities and vagueness of that term.

Ms Bodger—Yes, and I think we have also made some comments on that.

Senator BRANDIS—Have you? Can you direct me to the paragraph in your submission where you have done that, please.

Ms Bodger—I cannot do that so readily!

Senator BRANDIS—Just speak to it, then.

Ms Bodger—One issue is the concept of detriment. The Productivity Commission, if I am correct, recommended that it be a material detriment, so that we do not get cases where trivial detrimental, vexatious—

Senator BRANDIS—That is in the Productivity Commission report, is it?

Ms Bodger—I will have to get that checked. Is that right, Stephen?

Senator BRANDIS—I have not read the Productivity Commission report.

Mr Ridgeway—That is my understanding.

Ms Bodger—That is my understanding. I do not have the Productivity Commission report here.

Senator BRANDIS—Okay. Would you take this question on notice, please: would you be kind enough to locate and advise us of the paragraph or paragraphs of the Productivity Commission report which make that point.

Ms Bodger—Yes.

Senator BRANDIS—Do you read their discussion of detriment needing to be a material detriment as meaning it needs to be the equivalent of a kind of economic loss, or is the word 'material' used in the sense of relevance rather than the sense of something that is economically measurable?

Ms Bodger—Well, 'material' is not in this—

Senator BRANDIS—No, I know that, but you said the Productivity Commission said it should say 'material detriment'.

Ms Bodger—Yes.

Mr Poddar—Senator, we will consider that, but I think the initial response may be that that is both qualitative and quantitative.

Senator BRANDIS—All right. It seemed to me, I must say, earlier on in the day when we were looking at this—and the man from the department seemed to go along with this, as I understood him—that 'detriment' could even mean a change of position. So, to use the words that I recall he used, if a person acted differently from the way they might otherwise have acted in reliance upon a contractual term, that might be enough. Do you see what I mean? Is that the way you read it?

Ms Bodger—Yes, I would think, and the concept of detriment has been used in other areas. I think the correct interpretation would be if the consumer was in any way worse off or inconvenienced or—

Senator BRANDIS—Or acted differently.

Ms Bodger—Or acted differently, yes.

Senator BRANDIS—That was my very point, Ms Bodger: it does not even need to be—

Ms Bodger—Correct.

Senator BRANDIS—anything that could be regarded as a kind of loss or a worsening of their position; as long as they did something different, that would be what we as lawyers would call detrimental reliance, would it not?

Mr Ridgeway—Senator, I do not think that is a matter that the committee has considered in detail, as to what the precise meaning of 'detriment' is in that context.

Senator BRANDIS—In the context of this clause?

Mr Ridgeway—Correct.

Senator BRANDIS—There is a reason for that—it is because it is not defined. The point I am making to you, as you know very well, Mr Ridgeway, because I know you are a very good lawyer, is that detrimental reliance has a technical meaning different from a layman's understanding of what a detriment means. It seems to me that if a technical rather than a layman's interpretation of the word 'detriment' in this clause were to be adopted by a court then it could mean almost anything. Almost any change of position would be enough to constitute a detriment.

Mr Ridgeway—That is of course possible, Senator, but the use of material, in the sense of importing relevance, would cure that.

Senator BRANDIS—A better way to cure it, surely, would be, rather than use the word 'detriment', to talk about 'suffering loss', so that it would be perfectly clear that the criterion would necessarily comprehend a person being damaged in some way as a result of entering into the contract containing the unfair term.

Mr Ridgeway—Or perhaps 'disadvantage'.

Senator BRANDIS—Disadvantaged or damaged. All right. Thank you.

CHAIR—As we have finished our questions, I thank the representatives of the Law Council for coming in today.

Proceedings suspended from 12.21 pm to 1.31 pm

COOREY, Mr David, Solicitor, Civil Litigation, Legal Aid New South Wales

HITTER, Ms Monique, Director, Civil Law, Legal Aid New South Wales

SHEARER, Ms Elizabeth , Director, Client Information, Advice and Civil Justice Services, Legal Aid Queensland, and representing National Legal Aid

CHAIR—Welcome. Do you have an opening statement you would like to make?

Ms Shearer—In our opening statement, I will summarise the reasons for our support for the bill and address our concern about one aspect of the bill, the transparency requirement. Monique will then summarise our concern in relation to the application of the bill to insurance contracts.

National Legal Aid support for the bill is founded on our experience in providing legal assistance to vulnerable consumers. Our experience accords with the finding of the Productivity Commission that unfair terms are common in Australian contracts. We also agree with the Productivity Commission's conclusion that the existing regime of generic consumer law is too costly, slow and uncertain to provide any real relief to vulnerable consumers in relation to unfair contracts.

The National Legal Aid submission provides case studies in relation to insurance contracts and the Legal Aid Queensland submission provides other examples in relation to hire car contracts, consumer leases, telecommunications, tertiary education, impotence treatments, gym contracts, home alarm systems, finance broking and contracts arising from the sale of products at high-pressure seminars.

We support the regime of regulation for unfair contracts in the bill and particularly we support the fact that it addresses 'substantive fairness'. Our first significant concern with the bill, then, is the insertion in section 3(2)(b) of the transparency test that the court must apply when considering whether a term in the contract is unfair. The essence of this test is that it comes into application at the very point where the court is considering the practical application of this bill to a consumer contract. The court may take into account any matter it considers relevant, but this provision directs that it must take into account the issue of whether the term is transparent, and that term is then defined in the bill.

It is our view that this requirement undermines the substantive fairness provision by mandating consideration of an issue of process. It is important to remember that these provisions only apply to standard-form consumer contracts. They recognise and seek to remedy a problem of unfairness resulting from inequality of bargaining power. As the Consumer Action Law Centre noted in their submission, these provisions address a problem of negotiation, not a problem of disclosure.

The bill seeks to ensure that a lengthy contract in fine print drafted by the supplier and presented to the consumer with little time for consideration does not contain unfair terms. The fact that the contract clearly discloses that it contains unfair terms does not make those terms fair and nor does it remedy the essential ill of the inequality of bargaining power that will almost inevitably lead a consumer to enter into the contract despite the disclosure. As the Productivity Commission noted in its report, for most low-cost, standard-form contracts disclosing the terms or allowing consumers time to find them rarely makes a difference. Non-disclosure is not the ill that this bill seeks to remedy.

The Productivity Commission noted that a light-handed regulatory approach, such as requiring only disclosure of unfair terms, does not present a satisfactory solution to the unfair term problem. We note that the same point is made by Associate Professor Frank Zumbo of the University of New South Wales in his submission to the inquiry.

Our concern is that while the bill does not make transparency of itself sufficient to overcome the unfair term, the pre-eminence of the transparency requirement—the fact that the court must consider it—risks significantly diluting the protection offered. We can foresee circumstances where jurisprudence would develop such that a finding that a substantively unfair term was transparent would almost inevitably lead to a finding that the term was not unfair. This would undermine the effectiveness of the protection that the unfair contract regime seeks to offer consumer.

Monique will now address the issue of insurance contracts.

Ms Hitter—National Legal Aid commends the introduction of national generic consumer legislation on unfair terms to the extent that the bill, through the explanatory memorandum, currently contemplates that insurance contracts will be excluded from the operation of this important legislation. We urge the committee to reconsider this position.

The recommendations of the Productivity Commission agreed to by the Ministerial Council on Consumer Affairs and the Council of Australian Governments were to develop a national generic unfair terms legislation that would apply to all standard-form consumer contracts, subject to constitutional limitations. Since February 2009 there have been extensive consultations on proposals to implement a single Australian consumer law, including unfair terms legislation, culminating in the introduction of an Australian consumer law bill into parliament in June 2008. The reference to the exclusion of insurance contracts in the explanatory memorandum of this bill is the first time a proposal has been suggested to exclude insurance contracts from regulation of unfair terms.

As far as we are aware no research has been undertaken to date at any level of government on what effect excluding insurance contracts from unfair terms regulation will have on the overall effectiveness of a national consumer law, such as the one envisaged in the bill. On the other hand, the comprehensive report delivered by the Productivity Commission recommends a national generic consumer law that would apply to all consumer transactions and with no industry exclusions.

The recent and unexpected reason given for excluding insurance contracts appears to be based on section 15 of the Insurance Contracts Act. Essentially, this section prohibits the judicial review of the terms of an insurance contract under any other law. This section was devised and considered some 30 years ago by the Australian Law Reform Commission to facilitate the consistent operation of federal legislation in the regulation of insurance as a more desirable option to the then existing piecemeal state legislation.

The Insurance Contracts Act, through sections 13 and 14, provides that parties to an insurance contract must act in utmost good faith. There is also provision, under section 35, for a minimum standard of key clauses in policies. Based on our collective casework experience, examples of which are provided in our submission, the requirement to act in utmost good faith and other provisions in the Insurance Contracts Act have not prevented the proliferation of unfair terms in insurance contracts being put into policies or given the courts the real power needed to strike down unfair terms. An example is the case of a third party property motor vehicle claim, where the insurer sought to rely on a clause which said, 'If the car is involved in a no fault accident with an uninsured vehicle, we will cover your damage up to $3,000 but only if you report the accident to the police and provide evidence that the other vehicle is uninsured.'

The objective unfairness of this clause is that in order to successfully claim against the policy, our client needed to (1) know about this particular clause, (2) convince the police to take the report despite there being no major property damage or personal injury or (3) provide proof that the other driver was uninsured which, as you could imagine, is a very difficult task. In our view there are sound reasons to expect that the exclusion of insurance contracts from unfair terms regulation, will mean that unfair terms such as those cited in case examples provided to this inquiry will continue to exist in insurance contracts to the detriment of consumers.

All that would be required to ensure consumers are protected from unfair terms in insurance contracts is a consequential minor amendment to section 15 of the Insurance Contracts Act, which would enable unfair terms in insurance contracts to be dealt with under the Australian consumer law. Such amendments were contemplated by the Productivity Commission in order to achieve a comprehensive national framework.

There has been considerable public reporting over the last 20 years, since the advent of the Insurance Contracts Act, of systemic unfairness in terms contained in insurance policies. Concerns have been raised in a number of reports and submissions—these are listed in our submission—including successive annual reports prepared by the Insurance Ombudsman. The Insurance Council of Australia, in its submission to Treasury dated 16 May 2009, appears to also acknowledge the existence of unfair terms in standard insurance contracts and refers to two particular examples of unfair terms that would not be prohibited under the Insurance Contracts Act

A key underlying objective of unfair terms legislation is to facilitate balance in the parties' rights and obligations under contracts. Consumers contract with insurers from a situation of significant disadvantage. Insurance contracts tend to be a standard form contract for consumers. There is little or no opportunity for consumers to negotiate individual terms. If an unfair term exists in a standard insurance contract, it could potentially affect thousands of consumers with the same standard contract. The unfair terms legislation has the capacity to systemically strike down unfair terms in standard insurance contracts. The Insurance Contracts Act is not able to perform this function in the same way.

If it is proposed that the Insurance Contracts Act currently protects consumers from unfair terms in contracts, then bringing insurance contracts within a national regulation of unfair terms should pose no

commercial difficulties but provide a more consistent and certain legislative framework for consumers and insurers.

If it is accepted that the Insurance Contracts Act does not sufficiently protect consumers against unfair terms, as has been our experience, then carving out insurance contracts from the Australian consumer law will leave consumers who are reliant on insurance to protect their basic interests without the same protection afforded to consumers of other products. Ultimately, it would leave a significant gap in the proposed national consumer law framework and therefore be contrary to the recommendations of the Productivity Commission and the model ultimately agreed upon by COAG. Thank you for the opportunity to put these views to you today.

CHAIR—Thank you very much. Regardless of whether or not insurance was included—you were talking about striking down terms, and I think you mentioned some contracts where that might be relevant too—I think I am right in saying this, the Law Council do not agree with the prohibition of terms by declaration or regulation under this bill because they say that what might be fair for one consumer might not be fair for another and there are powers for the ACCC under interlocutory injunctions that deal with that. Would you see a case for the ability to strike down terms in that way?

Ms Shearer—I think we would—not in every case, and the bill does not contemplate that that would happen commonly. One of the issues for vulnerable consumers seeking to access justice is that it is rarely possible for them to get the legal help they need to bring an individual case to get the result that they need. The advantage of a term being prohibited is that it is prohibited across the board, for all. Therefore, having that term in that instance declared unfair will benefit a whole class of consumers who would otherwise be unable to take action themselves.

CHAIR—There was also some discussion about what happens when a case is brought and a particular term is found to be unfair, as to whether that applies to just that individual case or the class. What would you expect in that situation?

Ms Shearer—I think that will largely be dependent on the actions of the regulator, the ACCC or ASIC, in terms of what orders they seek in relation to those terms. But we would certainly contemplate a situation where the regulator could seek a declaration that a term in a standard insurance contract was unfair, and that would then be a declaration that applied to all of the contracts of that insurer.

CHAIR—Rather than a particular instance. Right.

Mr Coorey—I am not sure if it helps senators to also mention the grey list—I am not sure if you were going to that point as well—but there are two ways it could be done. One is to have a blanket prohibition, which is a black list, but another way to do it is to create a grey list. At the moment the bill does not contemplate that there are any terms on that grey list, but that would be another way to give effective guidance to courts to determine what terms were unfair.

Senator BRANDIS—Mr Coorey, I have not heard that expression 'grey list' before. What exactly does it mean?

Mr Coorey—I guess it is used to give the courts assistance in relation to terms that are commonly of that sort—considered to be unfair. A list would be enacted in the regulations of types of contracts that were contemplated by parliament to be the types that would be commonly unfair and so, when the court came to an analysis of a particular type of contract, if that contract clause that was on the grey list, it would give the court an indication that that term might be unfair, but the court would still have the power to find one way or the other, depending on the particular facts or circumstances.

Senator BRANDIS—Okay. Thank you.

CHAIR—Just one more question before I call other senators. There was quite a bit of discussion about detriment, the 'substantial likelihood of detriment'; there is a view that 'substantial likelihood' is unnecessary, that we should just be looking at whether there was any actual detriment. Do you have any view on that?

Ms Shearer—I guess that goes to our fundamental concern, which is that free legal services are not widely available to all who need them. So having to wait for somebody to establish personal detriment before a finding can be made benefits one consumer, but having a finding that a term is likely to cause detriment can benefit a wider group.

CHAIR—That might be your cue, Senator Brandis.

Senator BRANDIS—Going back to the question of whether or not there should be a power to prohibit contractual terms, the scheme of this bill, as you will have seen, is to enable that to be done by regulation. Do you not see a problem with the idea that a minister, without reference to parliament, should by simply publishing a regulation be able to prohibit a contractual term? I do not have any problem with the idea of certain contractual terms being prohibited—the law does that not infrequently as you know—but shouldn't that be a matter for parliament.

Mr Coorey—There has been some discussion over a number of years about whether you have the black list, which is the blanket prohibition, or a grey list. A lot of consumer advocates that you have a black list. My personal view is that a grey list is actually a more flexible outcome. It gives the courts some guidance as to a term that is unfair, but then the court—

Senator BRANDIS—But you would have your grey list in the statute, wouldn't you; not by regulation?

Mr Coorey—By regulation is how I—

Senator BRANDIS—That really does not meet my point. Do you not see a problem with this being done by regulation rather than by enactment?

Senator CAMERON—Obviously not.

Senator BRANDIS—I invite whoever wants to defend the removal of this power from the parliament to do so.

Mr Coorey—The point, from our point of view, is that the legislation contemplates a whole series of procedures for companies who may have a clause on that list whereby they will have a chance in response to a regulator and also have a chance in response to a declaration before a court and also have a chance in response to enforcement of a declaration. They will have a chance to respond at each of those points to any clause that has been put on the list. If it is a grey list I think there are arguments to say that that gives sufficient power to a court so that it has the opportunity to consider those unfair terms in that particular contract.

Senator BRANDIS—That presumes that they should be there in the first place. It also presumes that it is appropriate that that decision not be made by parliament. Ms Shearer, do you not see a problem in having these decisions removed from parliament and given to the discretion of a minister?

Ms Shearer—This is not an issue that was addressed in our National Legal Aid submission and it is not something on which National Legal Aid has a view.

Senator BRANDIS—Do you have a view, Ms Hitter?

Ms Hitter—I concur with Ms Shearer.

Senator BRANDIS—You do not have a view. From what you have said, I can tell which broad philosophical standpoint you are coming from. But would it concern you that, if a minister could without reference to parliament prohibit a particular term by regulation, another minister, perhaps with a different ideological point of view, could remove a prohibition by regulation without reference to parliament? Let us say for argument's sake that you had an extremely ideologically dedicated free enterprise economically liberal government or minister. The minister could under the proposed clause 6 remove every prohibition that had ever been regulated for by previous ministers without reference to parliament. Would you not find that an offensive thought, because that is what this bill allows for?

CHAIR—The regulation would still be disallowable, would it not?

Senator BRANDIS—Sure, but the parliament would not be legislating. That is my point. Do you find that contrary scenario—the capacity of a minister to withdraw prohibitions without reference to parliament—problematic.

Ms Shearer—That is not something on which we have a view and not something that goes to the essence of the protection that is offered by the bill, which is the statement of what can constitute an unfair term in a contract and then a process by which it can be decided whether that particular term in that instance is unfair.

Senator BRANDIS—But you are running two things together, you see. There is division 2, which deals with unfair contract terms, and division 3, which deals with prohibited terms. The bill gives absolutely no guidance whatsoever or imposes no limitation whatsoever on what may be prohibited. Is that problematic for you?

Ms Shearer—It is not something on which National Legal Aid has a collective view.

Senator BRANDIS—Okay. Well, you are here to speak for them, so if they do not have a view then I should not press you. The problem I have, Ms Shearer and others, with this sort of legislation is that, and I am sure you would be familiar with or at least be aware of the very large body of literature which demonstrates this, laws like this hurt the poor worst—because any commercial enterprise has an interest in the security of its transactions and in the enforceability of its contracts and the more you put the security or enforceability of contracts at risk the more the enterprise is going to factor a risk premium into the price. So the marginal consumer, who is the person who may or may not be able to afford a good or service, is always the person who gets hurt by this because the good or service will always be a little more expensive than it would otherwise have been because the commercial enterprise has to put a price on risk if its capacity to enforce its contracts is made less sure. You understand that, surely.

Ms Shearer—Yes, I understand. I am familiar with the research, as was the Productivity Commission. It addressed that point specifically when it came to the conclusion that this legislation was nevertheless warranted in the Australian market.

Senator BRANDIS—Okay, so you are perfectly happy that the poorest people in the community will suffer from a bill like this because there are other policy purposes served by it.

Ms Shearer—I said I was aware of the argument.

Senator BRANDIS—You said you were aware of the literature.

Ms Shearer—Yes, I said I was aware of the literature and the argument.

Senator BRANDIS—But you think the other policy purposes that would be served by this justify the impact on the poorest people in the community?

Ms Shearer—I think I accept the finding of the Productivity Commission in that respect.

Senator BRANDIS—Do you and your various legal aid authorities have much involvement with legal aid consumers who seek to sue under the existing state unfair contracts terms laws?

Ms Shearer—We have no such laws in Queensland.

Senator BRANDIS—No. Is there somebody there from New South Wales or Victoria?

Ms Hitter—Yes, we are from New South Wales.

Senator BRANDIS—Do you have many cases? Is the New South Wales Contracts Review Act of 1980 still in force?

Ms Hitter—Yes.

Senator BRANDIS—Do you get many inquiries under that?

Ms Hitter—Yes, we do; quite frequently.

Senator BRANDIS—Do you use those provisions very frequently to secure outcomes for your clients?

Mr Coorey—We do, yes. I have a case at the moment that I am running that is a Contracts Review Act claim in relation to a possession list matter.

Senator BRANDIS—Lastly, I should give you the opportunity to address one matter that I addressed to others. In what particular respects do you say that the existing provisions of part IVA of the Trade Practices Act about unconscionable conduct are inadequate?

Mr Coorey—The confidence that this legislation brings is that it reframes the whole consumer framework to give a mandate to the regulator to proactively engage with industry to ensure that they are contracting on fair terms, and what we say is that it provides the regulator with a test in relation to an objective test and a series of—

Senator BRANDIS—Well, you say it is objective—but, let's face it; it is not. It is a subjective test. The language is so vague and the definitions of unfairness are so vague that it would be a bit of a stretch to call that an objective test.

Mr Coorey—We would say that it is. This legislation, although it is new to Australia, has been around in the UK for some 20 years now—and it has existed in Victoria for a number of years as well. It is not legislation that is unfamiliar to the court system, and we would say that it is legislation that is necessary for Australia because what it does is to balance the inherent imbalance of consumers who do not get to contract on the terms in which they engage in.

Senator BRANDIS—You have not answered my question though. In what particular respects do you say that part IVA of the Trade Practices Act does not already do that?

Mr Coorey—Because the provisions in relation to unconscionability are provisions that have developed from principles of common law, and what we say in relation to this legislation is that it creates a new tier of protection. It is a different type of test to the test for unconscionability because it is seeking to have traders develop terms that are fair in an objective sense, and the test on unconscionability does not do that.

Senator BRANDIS—With respect, the reason you hold that view is just wrong because the two tests provided for by clause 3 of the bill, a significant imbalance and not reasonably necessary in order to protect the legitimate interests of the party seeking to enforce them, are in the first case substantially and in the second case almost identically the same two tests as you find in section 51AB of the Trade Practices Act.

Mr Coorey—I think the issue here is that the legislation that the Commonwealth has developed in this draft bill is legislation that has been developed overseas in the UK and in Victoria, and there is a whole history of research that has been done in relation to contracting terms. There is a whole body of research, which we have referred to not so much in this paper but in an earlier paper of 2006, that relates to the reason why it is necessary to have this type of legislation enacted to ensure that contracts are drafted on fair terms.

Ms Shearer—I think the other point to make is that the Trade Practices Act is fine law but neither our clients, the legal aid commissions nor community legal centres have the resources to run cases for every client who could rely on a provision of the Trade Practices Act.

Senator BRANDIS—That is why we have a regulator called the ACCC. Very few private litigants, relatively speaking, enforce the Trade Practices Act. Usually it is enforced by the ACCC. That is how that mischief is dealt with under the existing law.

Ms Shearer—And the unfair contracts regime provides for determinations for the regulator to become involved in relation to the setting of contract terms themselves rather than in relation to a particular instance of where there has been a breach of the provisions in the Trade Practices Act. It provides a wider remedy.

Senator PRATT—I want to turn to the insurance matters that your submission has raised. Some of the examples given do seem extraordinarily unfair, if somewhat contradictory—particularly the example of the young man who paid a lot of money for insurance because he knew he was a bad driver only to find that the insurance product did not cover him individually as the driver. Why it should have been such expensive cover I do not know. In that context we have had a lot of discussion about what is in and what is out of this particular bill before us, and most of that discussion has happened around small business and whether it should be in. There has been a debate about whether it is better placed elsewhere in the law or dealt with here. Others have argued that it is adequately covered in the Insurance Contracts Act. But are there other places where this would belong or is this where it naturally fits in your view?

Mr Coorey—The argument raised against us—the reason given as to why insurance contracts should not be included within this bill—goes to this notion that the Insurance Contracts Act is a self-contained code. When you look at the actual Insurance Contracts Act itself, and the explanatory notes in relation to that draft bill, it was not contemplated that it was a self-enforcing code, that it was a self-complete code. That is an important point because, if it is not a self-complete code, the issue is that where there is other legislation that is relevant to insurance contracts then that legislation will apply.

There is a particular section in the Insurance Contracts Act, section 7, which specifically contemplates that. I have it here in front of me. It is an important section because it actually does talk about that. I have an annotated version of the Insurance Contracts Act by Peter Mann in front of me. The notes to section 7—these are the notes to the Draft Insurance Contracts Bill 1982—say: 'The Insurance Contracts Act is not a code of insurance contract law. It only relates to certain aspects of the law relating to insurance contracts.'

Senator PRATT—So it is much the same as other financial services, in that sense? Financial services are covered by the law before us, though they also have some other regulation and management elsewhere.

Mr Coorey—That is correct.

Senator PRATT—So there is no rational reason for that distinction?

Mr Coorey—No. And, when you look at section 15, it is actually quite a specific type of exclusion. It is in relation to judicial review, in relation to an act, state or federal, that relates to unfairness, inequity, et cetera. So, if parliament had wanted to enact this as a self-contained code, it could have done so and would have done so.

Senator PRATT—What are the implications of bringing in insurance at this late stage? You are right to bring the issues before us, but it would seem, I suppose, a bit of a big political wish, if the consultations have not taken place right across the industry from the outset.

Mr Coorey—It is a good point, but, from our point of view, it is actually the converse of that situation. The Productivity Commission did an analysis of the consumer framework in Australia, and it made quite clear comments that there should be one national, generic, consumer legislation. It also said, quite specifically, that there should not be any exclusions in relation to that. It was within the contemplation of the Productivity Commission that—to the extent that other legislation, state or federal, was inconsistent with this legislation—that legislation would be repealed. That is at pages 19 and 20 of the Productivity Commission's report. So they specifically contemplated the situation that other state and federal pieces of legislation, to the extent that they were inconsistent, would have to go. The insurance industry has had the opportunity, since the Productivity Commission first started the investigation into the consumer framework, to put forward submissions as to why their situation was somehow special or different, and it has not done that.

Only a few weeks before this bill is to be passed we are being presented with this reference to section 15 of the Insurance Contracts Act in the explanatory memorandum. But the effect of this section is that, if there is no consequential amendment to section 15, this act will not have the effect that it should have on insurance contracts.

Senator PRATT—In the stakeholder consultations around this, were you or the insurance industry consulted?

Ms Hitter—As Mr Coorey mentioned, this is the first time—about three or four weeks before the bill is to be introduced—that the proposal that insurance be excluded has been suggested. So you are quite right: it has not been the subject of consultations.

Senator PRATT—So it was on the table before that point?

Mr Coorey—If you look at the way that the Productivity Commission concluded its report, and the intention of COAG in relation to having national, generic consumer legislation, as far as we were concerned, and as far as we understood, there was always going to be one law to apply to all consumer contracts. And now, at the last minute, three or four weeks before the bill is to be introduced, there is a reference in the explanatory memorandum to section 15. So it is a new development.

Senator PRATT—Lastly, other than the argument some would put that there is a suitable instrument already available—and clearly you have stated that there is not—what other arguments would you expect to come up against insurance being included, and how would you critique such arguments?

Mr Coorey—That is a good question. If there are other arguments as to why insurance contracts should not comply with this legislation, we do not know what they are because they have never been publicly articulated. In so far as it is being asserted by the insurance industry that insurance contracts do not need to comply with this legislation, I think that is a pretty bold statement to be making because every other industry in Australia does need to comply with that legislation. We say that there is no real basis for that particular exception. In fact, if you look at the way the bill has been drafted, you see that there is an exception in relation to shipping contracts—there is a bold heading 'Exceptions to this act'. It is not contemplated within this bill that there should be an exception as such to this act; it is simply that there are two pieces of Commonwealth legislation and to the extent of the inconsistency with this legislation section 15 will have a devastating effect because it will mean that insurance contracts will not comply with this legislation.

Senator PRATT—As compelling as the issues you raise are, from the point of view that we have heard from you but we have not heard from the rest of the insurance industry For them to put their view as to why they should be excluded, it is very difficult for us to properly consider those issues.

Mr Coorey—The ALRC contemplated, when it drafted the Insurance Contracts Act, the principle of utmost good faith as being a basis for insurers contracting on fair terms. We have referred in our submission to the quote made at the time of enactment of that legislation. They had high hopes for insurance contracts for that to happen. In practice we know that the principle of utmost good faith, whilst it is an important principle in insurance contracts, is not sufficient to ensure that insurers do contract on fair terms because, for whatever reason—I guess because the concept is such a big principle—courts feel reluctant to use that principle to strike down terms which are unfair. The other side of that issue is, if the duty is there for them to apply the duty of utmost good faith to insurance contracts, it should be something they can do. The point is that this test

proposes a 'due-process process' for any trader in relation to a term that is potentially unfair and there will be the ability for any industry to respond in relation to an initial assessment that a term may be unfair.

Senator PRATT—Have you identified any reasons why insurance contracts may have slipped out of this bill, other than it having been incorrectly—as you would have put it—identified that the issues are already adequately dealt with?

Ms Shearer—We do not see that they have slipped out. From our perspective, it has always been the contemplation of the bill that it would apply to all consumer contracts. The only reason we think now it is not the intent is because the of the explanatory memorandum issued recently. Until that point, we have every expectation that this bill would cover insurance contracts. That was the basis of the consultation and that was certainly the basis of the Productivity Commission's recommendations and the actions since that point.

Senator PRATT—What does the explanatory memorandum say?

CHAIR—The explanatory memorandum quotes the insurance act.

Ms Shearer—The explanatory memorandum seems to accept that section 15 of the Insurance Contracts Act means that this bill will have no application to insurance contracts. We do not agree that that is necessarily a correct interpretation of section 15.

Senator PRATT—Of the explanatory memorandum itself?

Ms Shearer—Yes. We do not think the explanatory memorandum is necessarily a correct interpretation of section 15 of the Insurance Contracts Act.

Senator BRANDIS—It is probably based on the definition of 'consumer contract' in section 2 of the bill. Clause 2(3) says:

A consumer contract is a contract for:

(a) a supply of goods or services; or

(b) a sale or grant of an interest in land—

that is not relevant—

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

I suppose you could argue that a contract of insurance is something other than a service predominantly for personal use or consumption. I think you could probably argue it either way, but it would be an unusual way to define a contract of insurance, wouldn't it?

Mr Coorey—I have not heard that argument raised before.

Senator BRANDIS—I am just reading you what the bill says.

Mr Coorey—In all of the context of the work that we have done in relation to consumer law and the definition of consumer contracts, it has been assumed and is assumed for the purposes of matters that are before the Financial Ombudsman Service, which defines consumer contract, that insurance contracts are considered contracts.

Senator BRANDIS—I think that that is an available view, but I can also imagine why the other view might be taken—that because of the peculiarities of an insurance contract it does not seem to fit obviously within the statutory language chosen for this bill.

Ms Shearer—I differ on that point. I would say that it clearly fits as a service.

Senator BRANDIS—But not for household use and consumption necessarily.

CHAIR—Are there any further questions?

Senator BUSHBY—Yes.

Senator BRANDIS—David, just before you go on, can I just correct one thing. Mr Coorey, the duty of utmost good faith in insurance contracts does not come from the Insurance Contracts Act. That was always the law. What the Insurance Contracts Act did was express that obligation in statutory form.

Mr Coorey—Exactly.

Senator BRANDIS—It was given a Latin name, uberrimae fidei, but the law did not change in that respect with the Insurance Contracts Act.

Mr Coorey—That is partially correct, but what the Australian Law Reform Commission did that was revolutionary in that respect was that it codified that principle.

Senator BRANDIS—Yes, exactly, but it did not change its meaning. That is my point.

Mr Coorey—No. The duty has always existed in relation to insurance contracts that that principle exists, but in codifying it they clarified that the law applied to the pre-contractual and the post-contractual phases of insurance contracts, and that was significant.

Senator BRANDIS—I agree with that.

Senator BUSHBY—Didn't the Australian Law Reform Commission at the time also consider that, because of the presence of the duty of utmost good faith, there was no need for insurance contracts to be subject to judicial review of unfair contractual terms? That was part of their conclusion when they actually did codify it.

Mr Coorey—That is the point that we are making—they had very high hopes for the principle of utmost good faith that it would be sufficient, because they actually had within their contemplation the notion that, if you had this type of legislation, insurers would contract on fair terms, but what we are trying to say here today is that our casework experience and the 20-year documentary evidence from the Insurance Ombudsman Service is that the practical reality is that insurers do not necessarily contract on fair terms.

Senator PRATT—If you look at the examples—

Senator BUSHBY—I am not denying that there are certainly examples where that occurs. I would be the last person to do that. What I want to explore is the best direction for dealing with instances of that and whether it is by inclusion as part of the bill that we are looking at today or whether you are better off tweaking the insurance act to make sure that that better deals with it and keeping the law as it applies to insurance and insurance contracts, which is a well-developed body of law in terms of common law over and above the act and around that act. Perhaps it is better to tweak the law there to keep it clear and remove uncertainty both for the insurer and the insured in terms of where you go forward—I am not advocating this; I am just asking—rather than including it in this bill, which would then come with its own whole set of law that would develop around it, which would overlap with the insurance law and maybe complicate it and make it even less clear, both for the insurer and the insured.

Mr Coorey—It is an interesting point, but we would say in response to that that the beauty of this new legislation, the consumer bill, is that it does have a nice fit with the principle of utmost good faith. These are not inconsistent concepts. If we start from the premise that the Insurance Contracts Act is not a self-contained code—and section 7 makes it quite clear, when you look at the explanatory notes as well, that the Insurance Contracts Act was not intended as a self-contained code—and you have this beautiful fit with legislation being drafted at the moment on unfair terms, the simple solution is simply to remove the word 'unfair' from section 15—

Senator BUSHBY—It is very simple from the perspective of the insurance act, but it may not be in how it plays out in the myriad court actions that are brought every day on insurance contracts. It may actually complicate that and make it more expensive and less clear from the perspective of the insured.

Ms Shearer—The application is only to consumer contracts, and in our experience most of those cases are not litigated but are dealt with through the Financial Ombudsman Service.

Senator BRANDIS—Yes, but if this did apply to insurance contracts then the sort of insurance litigation that Senator Bushby is talking about would take place under this act.

Mr Coorey—It is Elizabeth's point, but the problem is that if you look at the cases on good faith, like the recent High Court case of CGU, it is not consumers who are bringing these cases to the High Court. They have not got the money to do that. It is multinational corporations that are going against each other on this. Consumers do not have the funds, the will—

Senator BUSHBY—That is true as it currently stands, but we have actually heard evidence today from Treasury that with the passing of this new regime the remedies that are available currently under the Trade Practices Act would flow through and be available through the dispute resolution fora that exist in each of the states—which would vary according to the state regimes. Hopefully that would reduce the cost of people taking action—whether that be court action or dispute resolution action—and make it far more likely that an individual who does feel aggrieved would actually seek redress, and it would make it far cheaper and less difficult to do that, depending on which each state has set up. If you bring insurance into that, that is a great

thing, but it also has the potential to complicate it in terms of how it overlaps with the body of law around insurance. I think that you would see a lot more litigation and a lot less certainty.

Mr Coorey—We would say that the fit is nice between the duty of utmost good faith and unfair terms. The simple solution is to have one national legislation that applies across the board to all industry. We think that the duty of utmost good faith probably means that insurers should be doing this now anyway. It is a compliance cost that every other industry in Australia has to bear. In 2007 and 2008 there were 69,000 rejected claims for insurance contracts. That is a lot of people—

Senator BUSHBY—I am not denying that there are issues in the insurance industry and that maybe they need to be looked at in an appropriate manner, but I guess what I am trying to tease out is the best way. We have had submissions from other organisations, like the Investment and the Financial Services Association. They are regulated themselves and they say that a better approach would be to deal with this through the method that they are regulated. That argument could apply to insurance. I put that to a witness earlier this morning that represented a section of the approved deposit-taking institutions. They have prudential regulation and they have also got to be subject to the consumer credit legislation. There are other ways of ensuring that consumers are appropriately protected through the specific regulation that applies to their industry, which could be more responsive to the needs of consumers in that particular sector of the economy—rather than having a one-size-fits-all approach, which is not necessarily a sophisticated answer that addresses all the needs of consumers and businesses.

Ms Hitter—I guess our answer might be that the current system of regulating insurance through the Insurance Contracts Act has clearly not worked from the point of view of the consumers that we have been—

Senator BUSHBY—Why can't it be fixed?

Ms Hitter—I guess our response to that is that you have got a fantastic fix through this bill—

Senator BRANDIS—How do you know that this bill is going to solve—

CHAIR—I think we really need to move on, so if we just let Ms Hitter finish and then we will—

Senator BRANDIS—I just want to make one observation, Mr Coorey—after Ms Hitter finishes, if that is all right, Madam Chair.

Ms Hitter—The point I was going to make was that the fix that is contained in this bill is that it would provide a consistent and national approach to the treatment of unfair terms which, from the point of view of both the industry and the consumer, would give much greater certainty than to have another regime of unfair terms existing in another piece of legislation that would also apply on a national level. So bundling it all into the Australian Consumer Law provides that certainty across all jurisdictions, which is what is missing right now.

Senator BRANDIS—Mr Coorey, I think you have a stronger argument for your point of view. I disagree with your point of view, but I think there is a stronger argument for it than the argument you have presented. In fact, in a sense it is the opposite of the argument you have presented. You seem to assume that the duty of utmost good faith and unfairness are vaguely equivalent concepts or cover much the same space. But remember that the duty of utmost good faith in insurance contracts developed basically as an obligation upon the insured to make full disclosure beyond the ordinary contractual obligations of disclosure. It was a burden on the insured, not the insurer. Here you are talking about a burden on the insurer rather than the insured, because it is the insurer that is seeking to impose the standardised terms. I would have thought that your argument would be better put that this is a necessary fit not because they cover the same territory but because this fills a lacuna.

CHAIR—I think you can argue this legal point for some time, but I might call it to a halt there and thank all of the legal aid people at the table for coming in.

[2.26 pm]

LAMONT, Mr Colin, Chairman, Unit Owners and Body Corporate Alliance

CHAIR—Welcome. Do you have an opening statement you would like to make?

Mr Lamont—Thank you. I represent the unit owners of Queensland, and I think I most certainly speak for the unit owners around Australia. The original document, when it was published as the unfair contracts legislation, contained reference to bodies corporate. I believe the initial intention was to include citizens living in strata community living. The Property Council of Australia have made a submission, which I believe has been taken aboard, saying that it should be restricted to consumer-to-consumer contracts and that at least one of those consumers ought to be an individual. I think that is the key to their motive, despite them saying that they are speaking in the best interests of consumers. I always worry when there is an outpouring of altruism from an unexpected source, and I wonder why the Property Council of Australia would want to defend consumers.

I ask myself the question: who would want to raise objections to legislation designed to protect the citizenry from unfairness? Surely the only answer is those who might want to indulge themselves in the unfair contracts. So the question then becomes: does the Property Council of Australia really represent anybody who might indulge in unfair contracts? I would suggest the answer is yes. The Property Council of Australia inter alia represents multimillion-dollar developers. These are the very developers who sell units to citizens like you and I to live in or to invest in, and they do write unfair contracts.

When they throw up a building, they not only sell the units or the lots, but they also sell a contract to a caretaker to look after the building. It is called a management rights contract. That contract commits that other party to cleaning the rooms or cleaning the corridors, keeping the place tidy, mowing the lawn, doing the gardening, keeping the pool clean. It is a job that in many cases probably would be tendered out for about $30,000 a year in some of the bigger complexes. But if the developer offers a $30,000-a-year income to a caretaker, say for three years until the developer has sold all of his interests, no-one is going to take any interest in buying it. So the developer says: 'Look, I'm not going to have to pay you anyway. I'm the body corporate at the moment, but I'm going to sell these units and someone else will be the body corporate and they'll have to pay you. And what's more, the longer the contract I give you, the more money you'll give me, so let's give you $200,000 a year for this $35,000-a-year job and let's say we'll give you a 25-year contract.' Any accommodation module unit in Queensland, in particular—and I believe it is the case in New South Wales as well—can have a 25-year contract. No-one in this room, regrettably, has a 25-year tenure on their job. I have never had a 25-year tenure on my job. I doubt very much there are very many Australians who do, but these resident caretakers do.

This bumps the value of the contract up into the millions. So these developers can sell these management contracts to caretakers, who are really just gardeners and pool-keepers, for $5 million, $6 million, $7 million or $8million. I think the latest one in Queensland went for $8 million. The developer sells the units and then disappears into the blue faraway hills, leaving the new body corporate to pay this amount of money every year to a caretaker. The body corporate—the unit owners—are deprived of the opportunity to put the job out to tender at the best price to them, and they are deprived of the opportunity of selecting a person they believe is best fitted to do the job.

What makes it worse is that the more generous the contract, the higher the price the caretaker pays for it and the harder it is to dislodge them if they under-perform or even if they are dishonest. This is because if we find dishonesty or gross underperformance, as we have done in the past, and the body corporate elects at a general meeting to terminate the contract, there will be an automatic appeal to the relevant authority in the respective state—in Queensland it is a body corporate commission—and the adjudicators take the view that, because millions of dollars are being paid out for these contracts, it is pretty unfair to terminate them as that is a penalty in excess of a penalty for mere fraud or whatever.

Now, this legislation that is being proposed comes at a time when there has been a significant shift in the judicial approach. There have been two landmark decisions in the past 12 months—one in New South Wales and one in Queensland. In the Queensland case a member of my executive, on behalf of his body corporate, took the adjudicator to the courts and appealed his adjudication. This was the most senior specialist adjudicator in Queensland, and the courts found that the argument he brought to the case—that he would move with great trepidation in favour of termination because of the great amount of money paid for the contract—was

untenable. The judge went so far as to say that the safest way to protect a contract is to meet your obligations. I would have thought that that was common sense but it took a judge of the District Court to get somebody to take notice of it.

The same judge found that the senior Specialist Adjudicator Mr Gary Bugden, had erred in matters of law in several statements, and when the judge referred the matter back to be reheard, he ordered—unlike the usual circumstance, where it is referred back to the original adjudicator—that it not go back to the senior specialist adjudicator because he was uncertain or could not be confident that the adjudicator could give unit owners a fair hearing. That is pretty serious but it is something that unit owners have felt for the last 10 years in Queensland.

In the New South Wales case the District Court went so far as to itemise the various ways in which a caretaker could be in breach of contract and should be terminated. So it seems to me that the Resident Managers Association and the developers and the Property Council would be fairly worried at this point in time, if not alarmed, that the tide is turning against them. And then suddenly along comes this government and proposes something that is going to protect individual citizens from unfair contracts.

There was another case in Queensland where this same adjudicator found two interim orders. In one he lambasted unit owners without giving the unit owners any opportunity to put their case whatsoever, so it was a clear denial of natural justice. And then later he sacked a committee that had been elected with an 80 per cent majority and put in an administrator who was not only a director of the managers' association, and therefore obviously going to support the caretaker—this was in a case where an auditor had found dishonesty by the caretaker—but who has been suspended by the Queensland Law Society over trust fund matters. And here he was being given total control over all the money! That matter has been referred to the Crime and Misconduct Commission, and I am still vigorously pursuing the matter.

So we have changes in thinking. Certainly in Queensland the McGill decision about the contract costing so much that it must not be overturned will overturn the way adjudicators approach matters from now on. There is absolutely no way that any adjudicator will be able to use that argument with any confidence in the future, because the unit owners will simply appeal it. So there is a revolution going on in the approach to these matters in Queensland. They are unfair contracts. Any contract is unfair where you are bound by someone else who has signed it and who has generously given these terms to the caretaker and then disappears and does not have to fulfil his part of the contract because there has been a sale and therefore other people now inherit the burden of the contract. I suggest that is what the Property Council is all about in this matter.

I suggest to you, if there is some suggestion that the unfair contract legislation be limited to an individual, at least as one of the parties, that 'individual' should be defined to cover not only unit owners in strata living complexes but also tenants in common—Mr and Mrs Smith might be tenants in common in their own residence in a suburban street. But in general I do not believe it should be restricted just to consumer to consumer. But clearly the Property Council is aiming at excluding unit owners. There is no doubt in my mind that that is what it is all about. I believe it would be unconscionable for any government to exclude what may be upwards of four million Australian citizens from the protection of legislation to protect people against unfairness in contracts. That, very briefly, is the case. I am not arguing a legal case; I am arguing a principle of justice.

Senator PRATT—As far as you are aware, what these laws have involved is a referral of state powers to the Commonwealth. I am a little bit unclear when it comes to property management whether that is in fact something that has been vested in Commonwealth powers and if perhaps that is one of the reasons why it has not been dealt with in this law. I would imagine that there are some states that have reasonably good protection and others that have significant problems.

Mr Lamont—It would seem New South Wales certainly does not. We certainly do not have any consumer protection in Queensland at the moment, although we do have a new minister who took a great deal of interest, as a backbencher, in unit owners' problems. He lives in a unit himself, which is rather a help, and so does my local Labor member, who is one of his senior advisers. So we are in better shape than we were last year, with a minister that understands.

When it comes to property management, there is a Property Agents and Motor Dealers Act in Queensland and there are comparable acts in other states, I understand, and they deal not with the caretaking of the building but with the management of investors' units. That brings up another point, and that is that, if you are responsible for managing someone's unit and they are reliant upon you to maximise their returns every year, and they then go down to, say, 15 years of their 25-year contract and want an extension back to 25 years, you

have got a fair amount of duress over those people to see that they vote the way you want, because you are handling their interests. So there is a distinction between property management and the caretaking of a building. They are covered by different acts, I think, in every state.

Senator PRATT—They are covered by different acts in every state, but I am not sure that those acts have been referred under this particular consumer law. That is my question.

CHAIR—No. I think that is our issue. I think we need to take advice about whether the—

Senator PRATT—For example, similar to the situation that you have as unit owners, Mr Lamont, are the significant problems that have been experienced around the country in terms of contracts attached to living in a retirement village. There are a range of contracts there that are consumer contracts but also real estate contracts at the same time. As I understand it, they are all still governed by state law. You certainly do raise a very significant issue. I suppose it might be that these things have not been adequately presented within national consumer law as yet, which is the point I guess you are trying to make.

Mr Lamont—Yes. I would think that, if unit owners are not excluded from this unfair contracts legislation, there will be some pressure on state ministers to adopt the same philosophical approach as the federal government. There have already been signs of this in Queensland, where special developments such as Sanctuary Cove and Hope Island—some of these big wealthy ones—either have their own act, such as the Sanctuary Cove Act, or come under the Building Units and Group Titles Act, as opposed to the Body Corporate and Community Management Act. That comes under local government. Just last month the Minister for Local Government in Queensland legislated to limit these contracts to three years, which is sensible. If there were a Property Council representative or a developer here today debating me, he would probably say that these people buy a unit in the complex and reside in it and it is very hard for them to keep moving on. That is nonsense, because more than 90 per cent of people who get these 25-year contracts sell out within three years. If they do stay five years and use up the five years, they immediately reapply to the body corporate to extend it to 25 years, and within 12 months they have sold it and made a profit on the extra four years that they are handing on.

Unit owners are unaware of this when they buy in. You can do your disclosure, you can do your searches, but the body corporate manager, who looks after the committee's business, does not say to them: 'This is how your levy is broken up: eighty per cent of it goes to a caretaker, and it would be a darned sight cheaper if you put it out to someone else.' I will give you a simple example. My wife has friends—acquaintances to me—who have been retired from property management and bodies corporate for 10 years. But their son is in the game, and he rang them up and said, 'Would you like to come out of retirement?' They said, 'What's on offer?' He said: 'There's a new property on the foreshore in Cairns. There is nothing to do. It has a swimming pool which you have to keep clean, but there is virtually no gardening and there is no lawn to mow. It is $45,000 a year and it is a 25 year contract.' Naturally, they have gone back. The first thing they did was join the golf club.

In some of these places there is absolutely no work to be done—or it is work that could be farmed out to Jim's Mowing for $100 a week—and there are caretakers collecting large amounts of money for it. In all fairness, it is not necessarily the majority of cases, but it is certainly a substantial number of cases. I am the secretary/treasurer of two bodies corporate. That does not make me wealthy. I actually hold a power of attorney to represent somebody in one of them. In both of those developments, if the caretaker came to me and said they wanted a five-year extension, they would get it—because they are worth it, they work well, they are honest people, there is never a question of fraud, there is never a problem with auditing the books and so on. There are plenty of those around, especially the mum and dad outfits. At the other extreme, I was secretary/treasurer of the Phoenician Resort at Broadbeach, where the Office of Fair Trading has brought 2,900 charges, some of them criminal—in one building, against one caretaker. So that is the experience.

Senator BUSHBY—You have raised some very serious issues that clearly raise questions about unfairness in contracts. To what extent have those issues been explored through the unconscionable conduct provisions of the Trade Practices Act?

Mr Lamont—They have not been. When we think about bodies corporate, we think about the retired millionaire living in a penthouse on the beach at Surfers Paradise, but there is also the 90-year-old widow who is living on a pension in a duplex—a $130,000 unit. To challenge these contracts under the unconscionable conduct provisions in the Trade Practices Act requires a barrister, so you have to have a body corporate that is committed to spending money. In the Palm Springs case, where Judge McGill overruled Gary Bugden, it cost them $80,000 and, if the matter had gone further, it would have cost them a great deal more. To get ordinary

unit owners in a body corporate to agree to having their levies put up to take on that kind of burden, with no guarantee of winning, is very difficult.

Senator BUSHBY—I understand that. But if this law change comes in with respect to unfair contracts and it applies to the sorts of contracts you are talking about, you would still need to enforce that in the same way that you do under the unconscionable conduct provisions.

Mr Lamont—We will.

Senator BUSHBY—But, that said, as I understand it from evidence we received from Treasury this morning, the remedies available in the Trade Practices Act currently, and those that are proposed to be added with this bill, will be available through state dispute resolution fora—whatever they have in Queensland or New South Wales. So you will be able to use your own state's dispute resolution mechanisms to access the remedies in the Trade Practices Act, which, according to Treasury this morning, would also include unconscionable conduct. Hopefully, that will make it cheaper.

Mr Lamont—Hopefully. It was quite a battle to get appeals against adjudicators moved from the District Court to a consumer complaints tribunal. What you have said is no doubt true, but this legislation, if it includes unit owners in strata living, will certainly strengthen our ability to resist these sorts of things. And I believe it will put some pressure on state ministers to reduce the period of time for which developers are allowed to sell these contracts.

Senator BUSHBY—I think it will. Prima facie, 'unfair' is clearly a lower threshold than 'unconscionable', but some of the behaviour you are talking about would, I think, probably meet 'unconscionable'. Obviously, it depends on the case. But probably the more important thing for the people you represent is the fact that it may become easier to access those remedies.

Mr Lamont—Absolutely.

Senator BUSHBY—And that may happen whether or not the request you are making occurs.

Mr Lamont—That may be so. Prior to the win we had last December, only one per cent of the cases that had been put before adjudicators for terminating these contracts had been successful. It was pretty difficult.

CHAIR—Mr Lamont, we undertake to get some response from the minister's office and clarify for the committee what the role is. We undertake to get them to respond to you, as well.

Mr Lamont—I was told by the minister's office—I do not know whether this is quotable; I suppose it is—that it would be possible that residents in bodies corporate would be included but investors would not be. That seems to me a pretty unfair break-up, too. If you have a problem in your own unit, you obviously fix that yourself. But if the swimming pool needs relining, or even if it is just the mowing of the lawn, you cannot contract that out individually. You must act as a body corporate, you must act in concert, just as tenants in common must do.

CHAIR—Exactly. Thank you, Mr Lamont. We will check that out.

Committee adjourned at 2.48 pm