COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

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

WEDNESDAY, 26 AUGUST 2009

SYDNEY

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SENATE ECONOMICS

LEGISLATION COMMITTEE

Wednesday, 26 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 Bushby, Cameron, Hurley, Joyce and Pratt

Terms of reference for the inquiry:

To inquire into and report on:

Trade Practices Amendment (Australian Consumer Law) Bill 2009

WITNESSES

Committee met at 8.35 am

CHAIR (Senator Hurley)—I declare open this hearing of the Senate Economics Legislation committee inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009. On 25 June 2009 the Senate referred this bill to the committee. The bill is a first step towards the Council of Australian Governments' goal of replacing state based legislation with a national consumer law, the Australian Consumer Law. It introduces a national law voiding standard form consumer contracts with unfair terms and provides the 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 be given in camera.

[8.36 am]

ANNING, Mr John Melville, General Manager, Policy and Regulation, Insurance Council of Australia

CHAIR—I welcome the representatives from the Insurance Council of Australia.

Mr Anning—The Insurance Council appreciates the opportunity to appear before the committee today to discuss the unfair contract provisions of the Trade Practices Amendment (Australian Consumer Law) Bill 2009. The Insurance Council is the representative body of the general insurance industry in Australia. Our members provide insurance products ranging from those usually purchased by individuals, such as home and contents insurance, to those purchased by small businesses and large organisations, such as product and public liability insurance. Our members represent more than 90 per cent of the total premium income written by private sector general insurers.

The Insurance Council wants to emphasise through today's appearance that in relation to general insurance consumers are already well protected by the Insurance Contracts Act supplemented by other laws such as the Corporations Act and the ASIC Act. The evidence does not support the need for the application of the proposed unfair contracts terms of the legislation to general insurance. To do so would result in unwarranted layering of regulatory requirements on insurers and would lead to operating inefficiencies, the cost of which ultimately will be passed on to the consumer.

The proposed unfair contract terms legislation, rather than assisting insurers will create uncertainty in the application of insurance terms to claims, which is likely to lead to further disputes thereby increasing inconvenience and delay for consumers in the settlement of claims. The existing exemption under section 15 of the Insurance Contracts Act for insurance contracts from the operation of unfair contract terms legislation should be retained.

Australian retail consumers of general insurance already benefit from robust protection provided by the detailed provisions of the Insurance Contract Act. When it was introduced into parliament in December 1983 the act's purpose was described as:

- to improve the flow of information between the insurer and insured so that the insured can make an informed choice as to the contract of insurance he enters into and is fully aware of the terms and limitations of the policy, and
- to provide a uniform and fair set of rules to govern the relationship between the insurer and insured.

The preamble to the act describes it as:

An Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly, and for related purposes.

The act has been in operation since 1 January 1986. It is incorrect, as has been argued in some submissions and in the media, to assert that insurance is no different from other industries, such as telecommunications and energy, that have sector specific legislation.

Insurance is a rare but important example where decades ago parliament had the forethought to establish a comprehensive set of rights and obligations specifically around the insurance contract itself. Statistical data points to the effectiveness of the consumer protection currently provided to general insurance policyholders. In the Financial Ombudsman Service's annual report for 2008, the summary table of insurers' annual returns for personal lines shows that of the 3,167,439 claims lodged with insurers, over 98 per cent were paid. Only 17,973, or 0.57 per cent, involved a dispute. Of those, only 2,046, or 0.065 per cent, were referred to the Financial Ombudsman Service. Similar percentages apply for 2007-08. Considering the ombudsman scheme is free for consumers to access and use, these numbers show how effectively general insurers meet their responsibilities under the act.

Amongst the many consumer protection provisions in the Insurance Contracts Act that protect against unfair terms, I draw attention to sections 13 and 14 of the act. Section 13 provides:

A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

Although there is no statutory definition of the requirement to act in utmost good faith, it has been held by the courts that it means to act with scrupulous fairness and honesty, and the courts have broadly interpreted this concept. The High Court, in the 2007 case of CGU Insurance Limited v AMP Financial Planning Pty Ltd,

discussed the principle of utmost good faith in detail. It is worth noting the statement by Chief Justice Gleeson and Justice Crennan:

In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. … an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured.

Justice Kirby commented:

The language of s 13, including the statement of the general principle as a legal obligation separate from the implication of a provision into the contract, supports AMP's submission that s 13 of the Act had the effect of introducing a larger and reciprocal obligation between the insurer and the insured in the place of what had, for all practical purposes, previously been a one-way street. Such a view of s 13 would fit comfortably with other protections for consumers, introduced into the Act, based on the report of the Australian Law Reform Commission.

I would like to draw attention to section 54 of the act, which limits the ability of the insurer to rely on the terms of the policy in relation to acts or omissions of the insured. If the act or omission could not be reasonably regarded as being capable of causing or contributing to the loss, the insurer cannot rely on a clause in the policy to refuse the claim on the basis of that act or omission unless it can prove actual prejudice.

Section 15 of the Insurance Contracts Act, as you are probably aware by now after several submissions on this issue, excludes insurance contracts from the operation of a Commonwealth, state or territory act which provides relief in the form of judicial review of unfair contracts or the making of a misrepresentation, except for relief in the form of compensatory damages.

In its report which laid the foundation for the act, the Australian Law Reform Commission concluded that, in light of the utmost good faith obligation, it was unnecessary for insurance contracts to be subject to a facility for judicial review for unfair contractual terms.

The panel which undertook a comprehensive review of the act in 2004 concluded that the exclusion provided by section 15 was still valid. The review panel went on to comment:

If a nationally consistent model for review of consumer unfair contracts is developed, the balance of consideration may shift and the issue should be revisited.

However, it also concluded:

The Review Panel believes that sections 13 and 14 of the IC Act, relating to the duty of utmost good faith, have potential to be utilised by insureds in connection with insurer conduct that might otherwise be dealt with under statutes dealing with unfair contracts or unconscionable conduct. This capacity will be enhanced further if the Review Panel's proposal for treating a breach of the duty of utmost good faith in Chapter 1 is adopted.

It should be noted that the recommendations which the review panel made in May 2004 remain to be translated into legislation. A draft bill to update the act was released for comment on 12 February 2007. After a very significant amount of work by all stakeholders, agreement was reached in late 2007 on the broad matters to be addressed in the amending legislation. The Insurance Council is currently hopeful that a bill will be introduced in the current session of parliament. Any consideration of section 15 should therefore take account of the proposed amendments to make the operation of the act more effective, including the introduction of powers to enable ASIC to intervene in any proceeding under the act.

Under the unfair contracts provision of the Australian consumer law bill, if a term in a consumer contract is unfair the supplier will not be able to rely on that term, as it would be void. The remainder of the contract would still be valid to the extent it is capable operating without the unfair term. The same remedy is already provided by the Insurance Contracts Act, with parties being unable to rely on unfair contract terms.

There have been statements in a recent media article that the unfair contracts provisions of the bill go beyond the act and will force insurers to strike out clauses in all similar contracts, not only the contract that is the subject of dispute. On our understanding of the draft legislation, this is incorrect and misleading, as there is no such consequence unless specific steps are taken, such as the minister prescribing by regulation, the term being prohibited or ASIC obtaining a declaration from the court that a term is unfair or prohibited.

Currently under the act, ASIC has no right to bring action on behalf of the consumer, as it does under the bill, though it can seek to appear as an interested party. However, as already explained, this right is amongst the amendments proposed to be made to the act in light of the review panel's recommendation. In summary, taking action under the unfair contract terms provisions of the bill would in many cases see consumers worse off than if they had taken action under the Insurance Contracts Act. For example, specific remedies

unavailable in the bill apply under the act to the termination of a contract. Some terms cited in the bill as being potentially unfair actually operate under the act to curtail the rights and remedies insurers would otherwise have under the contract. These include, for example, section 31, avoiding a contract for fraud; in section 35, minimum claim amounts in relation to certain types of insurance; and sections 46 and 47, relying on exclusions relating to pre-existing defects.

I would like to clarify here that this is the point from an earlier Insurance Council submission to Treasury that has been misunderstood by some providing evidence to the committee. The Insurance Council was not saying in the earlier submission that unfair contract terms were present in some insurance contracts but rather drawing attention to the fact that applying unfair contract term provisions over the top of the Insurance Contracts Act needs to be thought through. Some terms cited in the bill as being potentially unfair had already been addressed in the Insurance Contracts Act.

Some submissions lodged with the committee point to individual cases where there are alleged unfair contract terms preventing claims from being paid. However, caution needs to be exercised in taking into account individual cases as a justification for generally applying change. The full facts and circumstances of such claims need to be properly examined before a conclusion can be drawn that the term relied on was unfair. Also, a clear distinction should be drawn between terms that may be unfair, as distinct from terms that may otherwise be fair but allegedly applied unfairly.

For example, several submissions have cited disputes arising over travel insurance policies where claims have been denied because a policy condition required the insured 'to take all reasonable precautions to safeguard your luggage and personal effects. If you leave your luggage and personal effects unsupervised in a public place, we will not pay your claim.' The Insurance Council submits that such a condition is not unfair or unreasonable in itself. The terms of an insurance contract represent a fine balance between the risks that an insurer is willing to assume and the price that a consumer is willing to pay. It is impossible to imagine that an insurer would provide cover through a policy undertaking to indemnify those not taking reasonable precautions or leaving their luggage or personal effects unsupervised in a public place. The Insurance Council does not comment on the specific conclusions reached by the Financial Ombudsman Service panel in the cases cited but considers that the crucial elements for adjudication would be 'reasonable precautions' and 'unsupervised'.

The Insurance Council believes there is no need to alter the limited exemption in section 15 of the act to allow the unfair contract term provisions of the bill to apply to insurance contracts. Apart from being unnecessary, adding another layer of requirements will lead to confusion for the insured and the insurer, because it will be unclear how the two tests—of the duty of utmost good faith and of fairness—apply in relation to each other. The settlement of claims may be delayed, leading to inconvenience and frustration for the insured.

Furthermore, the use of two tests may lead to increased costs and all contracts will have to be reviewed. It is likely that such costs will be passed on to the consumer via increased premiums without adding any further benefit. It is a major tenet of good regulatory practice that before regulation is adopted a problem is identified and consideration given to whether new government action is needed to correct the problem. The Insurance Council strongly submits that a problem of unfairness has not been demonstrated to exist with general insurance contract terms. Thank you.

CHAIR—Thank you, Mr Anning. You went through quite a lot of detail there. Have you talked to Treasury about some of the questions that occur in your submission?

Mr Anning—We talked to Treasury at the start of the consultation process about, first of all, the compensation package itself and then the bill. Treasury explained that their understanding, from talking to the Victorian consumer affairs authority that had experience of section 15 in relation to their own unfair contract term legislation, was that section 15 provided an extensive exemption in relation to unfair contract terms legislation. That has been the extent of the discussion we have had with Treasury on the bill.

CHAIR—You talk about remaining questions that you want the committee to address. In your submission you say:

The Insurance Council would appreciate the committee seeking clarification of the intention behind the legislative approach adopted in the Bill to the prohibition of indemnification of officers.

Mr Anning—That is a separate issue that we have raised in relation to other provisions of the bill. Our professional indemnity insurer members were concerned that the approach taken in the bill to prohibiting

indemnification of directors and officers for breaches of the legislation differed from the model that had been followed in the Corporations Act. We were seeking clarification of the intention behind that different approach. As you can understand, the terms and conditions of the professional indemnity cover had been modelled on the Corporations Act. Our members wanted to see how the new legislation would affect those terms and conditions—whether they would need to be revised. I did discuss that with Treasury last week. They undertook to look into why a different approach had been adopted in the Trade Practices Act and will be adopted in the ASIC Act compared to that undertaken in the Corporations Act.

CHAIR—Does your argument about the unfair contract terms essentially boil down to the fact that it is more about the application of the term rather than that the terms themselves are unfair?

Mr Anning—The main point that we are seeking to make is that insurance consumers are already well protected, through the Insurance Contracts Act. There are a number of provisions which go to protect consumers, particularly section 13, about the duty of the utmost good faith. But, in relation to the examples that have been raised in submissions put to the committee, we take the view that you need to look at whether the issues raised by those examples actually go to the term of the contract itself being unfair or whether the application of the term is lacking. Going through the examples that have been raised, there would be very few of them that we see would actually relate to the term itself. A number of the examples relate to issues of disclosure. While those are significant issues in themselves, problems about disclosure and the difference between marketing material and the insurance contract do not raise issues that are relevant to the key point that I believe the committee is addressing here.

CHAIR—So can you then explain the difference between a contract that is written in an unfair way and a contract that is applied unfairly and explain why consumers should not be given equal protection in both instances?

Mr Anning—Going to the difference, an unfair contract term would be of itself unfair, whereas there may be a contract term—as I explained in the opening statement in relation to not leaving luggage unsupervised—which of itself is reasonable in a contract. It would certainly not make commercial sense for an insurer to provide a policy which covered people for leaving their luggage unsupervised in airports. That needs then to go to the insurer's interpretation of 'unsupervised'. I am sure there is a range of situations that have been brought to the committee's attention where you could argue whether or not the luggage was unsupervised. As to the point about whether consumers deserve protection from unfair contract terms, certainly they do. We are not arguing that point. The point of our submission and of the evidence that we have given is that that protection is already well provided for in the Insurance Contracts Act and that if the recommendations of the review panel that were made in 2004 were passed into legislation that would actually strengthen the protection that those insured enjoy.

CHAIR—The intent of this bill is to look at standard contracts and see whether they are unfair or not. What you are saying is that the insurance contracts are objectively fair and it may be that they are applied subjectively. That then begs the question that if there were more cases in consumer law, perhaps brought by another body other than consumers having to fight their own case, then the contract terms might be made more transparent and acceptable and fair to consumers.

Mr Anning—We are not saying that there are unfair contract terms in insurance contracts. That may or may not be the case.

CHAIR—What I am saying is that if a contract term can be applied unfairly maybe it is by definition an unfair term and there needs to be an improvement in the way in which contracts are written.

Mr Anning—There may well be scope to improve the way contracts are written. We would argue that ASIC having the power to intervene in proceedings under the Insurance Contracts Act would certainly benefit consumers in principle if there were unfair contract terms. But I would strongly argue that the application of the term 'in unfair manner' does not of itself make a contract term unfair.

CHAIR—We will go to Senator Bushby.

Senator BUSHBY—Thank you, Chair, and thank you, Mr Anning, for coming along and assisting us today. On that last point, you argue that just because a contract term can be applied in an unfair manner that does not mean that it is unfair. Could a term conceivably be applied in an unfair manner yet if it were applied in accordance with the intention of the parties it would actually benefit the consumer? Could that term, if it were applied properly and not unfairly, be a term that conceivably could actually provide benefit to the consumer?

Mr Anning—Certainly. To take the luggage example, the application of that requirement that luggage have reasonable care taken and be supervised means that it is economic for the insurer to provide that cover. If those terms were not in the contract, then the likelihood is that claims would be so extensive that the insurer would have to either withdraw that cover or significantly increase the cost of the premium.

Senator BUSHBY—So a possible outcome is that, if clauses like that were not able to be included, underwriters would look at the risk, assess it and write a premium that appropriately reflected that risk which would be a much higher premium than people previously paid or, alternatively, people could not get that cover?

Mr Anning—That is right.

Senator BUSHBY—No doubt you are aware that we have had lots of submissions—particularly from legal aid and consumer law action groups and people who are fighting very effectively for their constituency, which is consumers—saying that insurance contracts should be included under the scope of this proposed legislation. I note also that your opening statement talked about how parliament showed foresight a couple of decades ago when it nationally regulated the insurance industry to try to provide a balance between the rights of the insured and the rights of the insurers, and so it has its own industry law and regulation. Those who have argued against the exception being made point out some things. For example, the Consumer Action Law Centre stated that many other industries, like insurance, are subject to industry-specific regulation, to address industry-specific matters, in addition to being subject to general consumer protection laws and none of these industries is excluded from the UCT provisions because no existing general or industry-specific regulation addresses the problem of unfair contract terms. They are arguing that, despite the fact that you have your own regulations and set-up designed to ensure that the relationship between the two parties is well regulated, that does not deal with unfair contract terms and therefore should be covered. Would you like to comment on that, please?

Mr Anning—Yes, Senator. The first issue is that insurance is singular to the extent that it has industry sector specific regulation. I know it is imperfect, but I did an electronic search of the Commonwealth database and found that if you search under 'contracts' the only piece of contract-specific legislation that comes up is the Insurance Contracts Act. It is incorrect to argue that the Insurance Contracts Act does not address the issue of unfair contract terms, because, as we have seen from the statements that I have quoted from the review panel in 2004, that panel specifically addressed the issue of whether the act at that stage provided adequate protection from unfair contract terms. It found that it did. So we would strongly counter the allegation that the legislation does not address issues around unfair contract terms.

Senator BUSHBY—In terms of the industry-specific regulation that you have and, despite what you have just quoted to me, do you think there is scope for that industry-specific regulation to be further adjusted to provide additional protection for consumers? Do you think the balance is right at the moment?

Mr Anning—The 2004 review made a large number of recommendations for amending the act to improve the balance between the insured and insurers. We are hopeful legislation will be introduced into parliament soon to implement those recommendations. Yes, there is scope—and the review panel found there was scope—to improve the protection. We would argue that amending the act to improve that industry-specific regime of protection is the way to go, rather than layering another non-specific piece of legislation over the top.

Senator BUSHBY—Would one of the reasons for that be the fact that, given the 26 years of court cases and decisions around the Insurance Contracts Act, the way that act works is relatively well known in terms of the rights of the parties and the definitions and that it has been tested and pulled apart? I am aware that many insurance matters actually go through the courts, which have probably looked at every aspect of that act from every direction. Would it be fair to say that the best way of actually fixing problems that are identified within the act would be to actually change things within that act so it actually falls within that body of jurisprudence rather than to lay over the top something which may upset the balance of known knowledge about how the act actually works?

Mr Anning—Yes, we would certainly see that as the best way of improving the protection that is provided by the Insurance Contracts Act to work within the framework which is familiar to both insurer and insureds. I draw attention again to the fact that if the unfair contract term provisions are also applied to general insurance contracts, quite a lot of work would need to be done working out the actual remedies which would be available to consumers, because some of the situations which are raised within the bill as being potentially unfair contract terms are already addressed specifically with rights and remedies in the Insurance Contracts Act itself. I presume technically you could leave both avenues open for the consumer to choose, but we would argue that

it is confusing and when it comes to examining a claim it would delay settlement because you have to work out which rights actually applied in which case.

Senator BUSHBY—Firstly, claims may be delayed from the insurer's perspective because of uncertainty as to whether their obligations to pay are actually there. Similarly if the insurer decides that the claim does not fall within the scope of the policy, presumably it would be open under the proposed legislation for any person who feels aggrieved to allege that the terms were unfair. If that is the case, almost certainly every refusal to pay would result in action under this bill to have terms declared unfair.

Mr Anning—Yes. We take no sort of position on the bill opening up the scope for litigation to representative action but certainly the impact of that on insurance contracts would be to delay settlement.

Senator BUSHBY—The ultimate benefit for the consumer may not be there to the same extent. It may well benefit some individual consumers who take advantage of that, but ultimately what impact would it have on premiums across the board? I presume it is unlikely to be positive for consumers.

Mr Anning—The feedback from our members is that, because it is going to increase the time taken to examine claims, it will raise the costs they have to incur.

Senator CAMERON—I am sorry that you lost me about three or four minutes into your opening statement, so if I traverse some of the stuff you have done in your opening statement I apologise. The purpose of this bill is to try and bring a single national consumer law in place. Why shouldn't Australian consumers have one law that they can look at that applies across all areas of consumer activity?

Mr Anning—It is certainly an attractive idea of a single regulatory regime and it is for parliament to decide what priorities best serve the interests of consumers. But the Insurance Council is pointing out that the attractiveness of a single regulatory regime governing unfair contract terms needs to be set against the protections which are already provided and are familiar in the context of insurance contracts.

Senator CAMERON—I am just going to the minister's second reading speech. He says:

> As we move towards a single, national market—a seamless national economy as called for by the Business Council of Australia and the 2020 Summit—this tangle of consumer laws must be rationalised. We must reduce confusion and complexity for consumers and provide consistency of consumer protection. We must reduce compliance burdens for business.

Why would the Insurance Council sit outside that principle?

Mr Anning—For the reasons of efficiency. As I said, there is an attraction in a single regulatory regime because everyone would know the obligations that they need to meet. But the protections are already there for insurance consumers and we believe they are more extensive than is provided for within the consumer law bill.

Senator CAMERON—I will come to that. I am trying to deal with the principle here. The basis of the laws that you operate under now is 1986?

Mr Anning—They commenced in 1986.

Senator CAMERON—What reviews have there been since then?

Mr Anning—Reviewed in 2004.

Senator CAMERON—Any significant changes out of that review to the 1986 legislation?

Mr Anning—There were significant recommendations made. We are waiting for them to be implemented.

Senator CAMERON—So you are still operating on laws that were framed in the consumer atmosphere of 1986, 23 years ago.

Mr Anning—Framed, yes, but there have been amendments made to the provisions. For example, section 15 itself was amended in the mid-1990s—

Senator CAMERON—We are getting a little bit more modern now, the 1990s. One of the arguments that has been put forward is that we really need to meet the changing demands of consumers, the changing needs of society, and reflect best practice. How can a law that was framed in 1986, with some minor amendments, meet that test?

Mr Anning—I point to the review that was undertaken in 2004, which found that the regime was still performing very satisfactorily and recommended changes on which the industry has worked with Treasury to get to the stage that there is a draft bill.

Senator CAMERON—Are you familiar how consumer law in Europe, the UK and the United States affects the insurance industry in those areas?

Mr Anning—Not in detail, no.

Senator CAMERON—So you are not aware of whether separate laws apply to the insurance industry in those countries or they come under the general consumer law?

Mr Anning—Not in terms of the consumer law, no.

Senator CAMERON—You do not know?

Mr Anning—No.

Senator CAMERON—You have never looked for best practice internationally, you would have just looked at the laws here. I find that quite interesting.

Mr Anning—I would argue that, given that there was a review in 2004 which looked at the Australian context, that is satisfactory.

Senator CAMERON—The bill has set out new penalties, enforcement powers and options for consumer redress. What is the difference in the penalties under the law you operate under now and what is being proposed here? Is it higher or lower penalties?

Mr Anning—My assessment is that if the recommendations of the review panel of 2004 were implemented—

Senator CAMERON—I am not interested in the review panel; I am interested in the law you are operating under now. It does not matter what the review panel said. I am asking you about the law that you operate under now, not any recommendations. Are the penalties higher or lower as they operate right now?

Mr Anning—They are two very different regimes. The consumer law bill does have scope, once action is taken, to act against unfair contract terms as such. The use of similar unfair contract terms would be avoided.

Senator CAMERON—I am asking about penalties. I am not sure if I am making it clear. Are the penalties higher under the legislation you operate under now than under the proposed legislation we are discussing today? I think it is a simple question.

Mr Anning—I am sorry, I do not have detailed knowledge of the penalties.

Senator CAMERON—So you do not know whether the penalties are higher or lower. Okay.

CHAIR—Senator Pratt has some questions.

Senator CAMERON—I want to finish on this one issue. In terms of enforcement powers, are the enforcement powers higher under the legislation you operate under now or the proposed legislation?

Mr Anning—Putting aside the recommendations of the review panel, the enforcement powers would be higher in the consumer law bill.

Senator CAMERON—And what about consumer redress? Is it higher under the legislation that you want to stay under or under the new legislation?

Mr Anning—The scope of consumer redress, although it would be improved by the review panel's recommendations, has more scope for representative actions under the consumer law bill.

Senator PRATT—I wanted to ask about duty of utmost good faith. You have argued that that is currently adequate. I am a little bit confused by your presentation due to the fact that you have pointed to the potential changes in the future that should take place within the insurance act itself but, on the other hand, you have said there is no problem with the insurance industry in the way that it treats consumers. Can you highlight for us the kinds of examples that have emerged regarding consumers being treated unfairly? We have certainly had examples that have been given to us that do not seem to have been resolved by the duty of utmost good faith question.

Mr Anning—It is difficult to comment on specific examples not having the detail there. Going through the examples that have been raised with the committee, we could not find an example where the term itself was unfair. Certainly, one could argue that the outcome for the insured appeared to be unfair.

Senator PRATT—Clearly though what is being said by those who are arguing for the insurance industry to be included is that duty of utmost good faith is not adequately covering consumers. You have highlighted the impact on the affordability of policies and premiums, should there be a change in this area, arguing that claims

would be so extensive that that would change the claim rate and therefore the viability of the insurance. The question I have on hearing that is: how is it that consumers do not have a illusory cover in that sense? They think that they are insured for something that they are not because of a lack of appreciation of the detail of their contract or a misunderstanding that they feel they should be able to rely on. Could you comment on the notion of illusory cover please?

Mr Anning—Using the example again of the lost luggage situation, I would argue that the cover is not illusory. The cover is as set out in the insurance policy with regard to the term that the insured needs to take reasonable care and they cannot leave their luggage or personal effects unattended. That cover is not illusionary. There may be differences when it comes to claiming how the insured believes they took care of their luggage.

Senator PRATT—If you are standing right beside your luggage, you might think that was the case.

CHAIR—We are going to have to finish there. Thank you, Mr Anning, for coming this morning.

Senator PRATT—I had other questions, but I appreciate that we are limited on time.

CHAIR—We are very limited today, unfortunately.

[9.19 am]

COLVIN, Mr John, Chief Executive Officer, Australian Institute of Company Directors

WATTERSON, Ms Leah, Senior Policy Adviser, Australian Institute of Company Directors

CHAIR—Good morning and welcome. Do you have an opening statement that you would like to make?

Mr Colvin—Yes, good morning. Thank you for the opportunity to appear before the committee this morning. We hope that our submissions will assist the committee as it considers some significant changes to standard form contracts. I do not think I need to go through who the Australian Institute of Company Directors are other than saying that our members are in publicly listed companies, private companies, not-for-profits, government and semigovernment bodies. As a principal, professional body representing a diverse membership of directors we would offer world-class education in this area and provide a broadbased, director perspective to current director issues in the policy debate.

The link of the proposed amendments to the Trade Practices Act and the ASIC Act relating to unfair contract terms poses some unique challenges to directors and their companies. We propose however to confine our comments this morning to some of the consequences that are likely to flow from the adoption of the unfair contracts provisions only. The key issue going forward is whether the proposed legislation finds a balance between consumer rights and suppliers rights, and it is acknowledged by AICD that this can often be a difficult balancing act and one which parliament struggles with and also needs to make decisions about. We note the explanatory memorandum aims to provide clarity and certainty in relation to consumer law to protect consumers and to reduce prices for goods and services. Respectfully, we anticipate the bill may in some cases have the opposite effect. We anticipate the bill may cause uncertainty with question marks to be placed over the enforceability of standard form contracts, and that consumers—the people it is designed to protect—may be burdened by possibly higher prices for goods and services.

However AICD supports the intention of the bill to harmonise consumer laws across Australia, and consistency between laws across jurisdictions can reduce regulatory compliance burdens for directors and companies. To that extent we would be supporting both the government in these moves and parliament in doing these harmonisation laws, and we think that is a worthwhile benefit and, as has been said in the second reading speech, we would be supportive of that. We would argue, however, that consistency by itself may not be enough. To be effective the law must be clear and directors, companies and consumers must be able to understand their rights and comply with their obligations under the law easily.

The drafting of the bill is complicated and we note many of the legal technicalities the bill creates have been comprehensively addressed in written submissions, which you already have, particularly ones like Professor John Carter's submission. AICD is concerned that the drafting of the bill does not include, for example, a definition of a standard form contract. If the scope of the bill is to be confined to standard form contracts, the bill should include a precise and targeted definition to this effect. We would submit that, unless this occurred, directors and their companies will need to make educated guesses as to which of their contracts the law will apply, with the prospect of facing potential liability for making these educated guesses. For example, if an employee of a large company includes a prohibited term in a contract which turns out to be a standard form contract and the company relies on the term, it may be open for the court to impose a pecuniary penalty on a person or disqualify a person from managing a corporation.

If the enforcement regime proposed by the bill does actually have the potential to impose personal liability on directors for acts of the company, we note that this is a significant issue which continues to be overlooked and would appear underestimated, we would say, by lawmakers. As the business and regulatory environment becomes more and more complex and the personal risks to directors increase it becomes harder and harder to attract and retain talented managers and directors to the potential detriment of the economy as a whole. Standard form contracts play an important role in the Australian economy. They allow suppliers to minimise risks in transactions which mean that suppliers can innovate and offer goods and services to consumers at lower prices. The terms of the contract are therefore an essential ingredient of the entire product offering. I think this statement has already been confirmed by the second reading speech.

If there is a risk that terms in a contract could be unenforceable for unfairness or for any other reason, the flow-on effects could be significant. Companies may be required to reconsider product structuring, risk allocation, insurance, prices and even the actual supply of some goods and services. It is the uncertainty that is the issue here, perhaps, rather than the general concepts. We anticipate that the lack of clarity in the bill's

drafting and the subjective nature of unfairness will also lead to an increase in litigation and costs for companies. In this regard we refer to the experience of the unfair contracts provision which became part of the industrial relations landscape of New South Wales. Over a number of decades the judicial interpretation of these provisions, which started off as section 88F and eventually became section 106 of the Industrial Relations Act, expanded and evolved. Between 1997-98 and 2001-02 there was a 450 per cent increase in the number of cases brought in New South Wales on the basis of unfairness in contracts for the performance of work.

The AICD is concerned that the unfairness provisions contained in the Australian Consumer Law are at risk of a similar evolution and expansion and that they will extend beyond the scope of the original aims of the bill by judicial interpretation. AICD is concerned that there will be a weakening of contractual uncertainty and that the bill will inhibit commerce on an Australia-wide basis given the extremely wide market to which the bill applies, and because there is already a range of consumer protection laws in Australia. The unconscionable conduct provisions in the Trade Practices Act, the misleading and deceptive conduct provisions in the TPA and the Corporations Act and the consumer credit code are just some of those examples.

To conclude, the AICD welcomes the desire to harmonise consumer protection laws, and the efforts made by all governments involved to reduce this red tape and burden are to be commended. It acknowledges the difficult balancing involved in consumer and supplier interests and rights. However, AICD cautions against the adoption of unfair contract provisions in the bill. If the unfair contract provisions in the bill are to be adopted, we suggest the key terms in the provisions may need some redrafting. We have set those out in our written submissions. If the committee would like me to go to any of those particular points I can do that in the brief; otherwise, I can take questions now.

CHAIR—I think it is probably better if we take questions, thank you.

Senator BUSHBY—You indicated that there are other avenues through which consumers can take action to protect their legal rights, like unconscionable conduct provisions and things like that.

Mr Colvin—Yes.

Senator BUSHBY—The reality is that that is a very expensive avenue for most consumers to take to seek redress. However, Treasury gave us evidence on Friday that one of the consequences of this legislation and the COAG agreements will be that state based fora for seeking redress will be able to be used to seek redress under the Commonwealth acts, like unconscionable conduct. So presumably that will open the door for more people to access the remedies that currently exist and to reduce the cost.

Mr Colvin—Yes. That would possibly be an outcome.

Senator BUSHBY—In your opening comments you did not raise the issue of the reversal of onus of proof, although you touched on it in the definition of standard form of contract. The bill contains two presumptions. One is that a contract is a standard form of contract unless proven otherwise. What are your thoughts on the fact that the onus of proof has been reversed in this contract?

Mr Colvin—Generally we think that the reversal of onus of proof is a difficult concept. It places a burden, in this case, on the supplier. If you think about a small business, it places further costs and benefits in doing that. A jurisprudential aspect is: should the onus of proof be reversed in these circumstances? I think it is a balancing act and I understand that, in the minister's second reading speech on the bill, the minister indicated that in the circumstances of a consumer contract the consumer should not be put to the task of proving that a contract is of a standard form. The trouble with that approach is that it puts business—I am thinking of all business, not just large business but small business—at a possible disadvantage to the same extent. In other words, the burden of the regulation is shifted from the consumer, again, in this case to the small business. Is that a fair allocation of responsibilities?

Senator BUSHBY—In terms of the standard form contract reversal, would you be more comfortable with it if there was actually a clear and crisp definition as to what comprised a standard form contract?

Mr Colvin—Definitely. The bill says 'standard form contract' but does not define it. How would, for example, a small to medium business know whether there is a standard form contract? It does not say whether it is written or oral, from what I have read. How will they know that they have a problem or that they have to deal with it? That is point 1. Point 2 is: what can they do to protect themselves against these types of claims? You can always take extremes on either side, but let us take a vexatious claim, for example. What can they do to protect themselves? Can they go back to their contract, if it is written, and redraft it to make sure they comply? The problem with unfair contracts is that there is no way you can go back and say something is fair or

unfair. If you go to a lawyer they will say: 'I don't know. It'll depend on (a) what a judge will say is a standard form contract and (b) whether it's unfair or not.' That puts an uncertainty and a burden on business, which is unfair.

Senator BUSHBY—You raised the issue of vexatious litigants. People enter into contracts so that they can understand fully the obligations and rights of the respective parties to that contract before they start the transaction. This legislation is obviously designed to assist those people who enter into a contract in the situation where one party has uneven bargaining power such that those contracts may not be fair. It is fair enough that some protection be provided to those people. However, presumably there is the potential for people to enter into a contract, for things not to turn out the way they expected and for them not to like the outcome. Under the legislation, as it is drafted, it seems to me that there is an opportunity for every person who is in that situation then to say a term was unfair. The obligation is then on the other party to prove it is not a standard form contract or, if it is, to prove the term that is unfair is actually something that must be in the contract to deliver its purpose. It actually opens the door for a very easy out for people who have entered contracts possibly not in situations where there was unfair bargaining power. It puts the onus on the other party to actually prove that they should be able to rely on the term that is causing a grievance to the person who is complaining.

Mr Colvin—You also have to include the nature of litigation. Businesses generally try and avoid expensive litigation, so if a claim is made there may be a settlement just to get rid of it. Also, for small businesses to spend time in courts arguing about whether it is or is not a standard form contract and whether it is or is not unfair, it can end up being an unfair imposition on them. Taking the other end of the spectrum with a large corporation which says 'take it or leave it' and offers egregious terms, you can say there should be a remedy in those circumstances. But there is already a remedy, as I understand it, in this legislation which says that can be prohibited. So you have to ask yourself: if those egregious things can be prohibited—and one of the things we would argue is that there should be a proper review of any such—

Senator BUSHBY—The Law Council argues that you should not actually prohibit any specific term, because the circumstances of what is unfair depends on the circumstances of the parties that are involved and that what might be unfair to one might not be unfair to another.

Mr Colvin—We would agree with that. That is why, if that is going to be put forward, it would have to have a very heavy review mechanism and perhaps be very specific to that contract and that party. Those are the sorts of issues. I think the problem with unfair contract legislation at large is that it is, in the end, so subjective. If you go back to the original rule of law, the rule of law is that if people are certain as to their rights and obligations, they can carry out business in a proper way, they can get proper prices, they can insure risks, if they can get insurance, and they can carry on their business and plan and then sign off accounts from the directors, knowing that there is some certainty, at least in relation to this area.

Senator BUSHBY—The whole point of entering into a contract for a transaction is to actually deliver certainty?

Mr Colvin—Our concern is that if you have such a wide view of what can be a standard form of contract, without a definition, it makes it really uncertain. The only way you will get certainty is that you will have lots and lots of cases where judicial interpretation actually sets out what they think a standard form contract is.

Senator BUSHBY—Ultimately, that will not be good for the consumer in two directions: firstly, because the cost of running many cases, from a business perspective, would ultimately be built into the price of goods and services, to the extent it is possible; and, secondly, because consumers on the other side will be fighting it as well and that is not easy for them to do.

Mr Colvin—I think it is axiomatic. Senators here would be well aware that, if business has to price in a risk, they have to price in a risk as to how this may work. If I use this contract I know what the bounds are and I know how to price it. If I use another contract, I have to price it at a different level. That happens day in, day out in just about every transaction. If you have a system which says that that may or may not be regarded as fair and may be, for example, set aside or voided, then you have to ask: how do I price that? I have to price in something which may be set aside or varied. With respect to the argument that this only deals with egregious terms, I understand that and I understand it in the second reading speech, but the law does not say that. The bill does not say this only deals with egregious terms, for obvious reasons.

Senator BUSHBY—The explanatory memorandum and second reading speech is only of advisory relevance to a court in deciding the issues?

Mr Colvin—Yes. We are supportive of the general thrust of harmonisation. The area we have concern about is the unfair provisions of this bill. We are not sure whether that will have the intended consequences it is designed to. In some cases, it will make things a bit worse.

Senator BUSHBY—How would you improve it so that you could still provide consumers with the protection that they deserve but improve the certainty? You mentioned a definition—

Mr Colvin—There are two aspects. One is not to go ahead with the unfair contracts provision. As I understand it, the only state which has that is Victoria. Some countries have it; some do not. There are different views about whether that is a good or a bad thing, for many of the reasons that are in the submissions. The next aspect is: assume you are going to go ahead with that—and we take the assumptions both ways—then at least tighten up the certainty aspects so that businesses know, in terms of how it is defined, what is a standard form contract. Also, you should have 'material detriment' in the actual substance of, if you like, the offence. Although, in the current bill, that is something to be taken into consideration by the courts, we would argue that it should be standard form contract, unfair, and that the third element should be that the consumer has suffered a material detriment—in other words, they have actually lost something or—

Senator BUSHBY—They have actually suffered rather than could potentially suffer?

Mr Colvin—Yes; they have suffered rather than could potentially suffer. So you have got some elements there where you are at least starting to get a narrowing of what businesses need to think about, what they need to do and how they can actually change their practices. The onus of proof is obviously another issue which I think needs to be looked at. There is also the issue of legitimate interest. There needs to be some guidance as to legitimate interests, where it says a company's legitimate interests are taken into consideration. One of the examples we put in our submission is where a company may look at a series of products and services and one of them may well be simply saying, 'At this level, we're prepared to have this contract,' or 'At this level we are not prepared to,' or 'At this level we are prepared to have an oral arrangement.' So there are all those possibilities.

The other aspect is the transitional period. We would argue—and I know it is foreshadowed in the second reading speech—that there should be a reasonably long transitional period to allow business to actually think about what they need to do to prepare themselves for the introduction of this type of legislation. And when you get to the actual remedies, we would argue that a disqualification of a managerial position or possibly a director position in circumstances where there has been an unfairness which is subjective and you will not go until you go to a court seems to be at the harsh end of penalties.

Senator BUSHBY—I can understand that.

Senator PRATT—Your submission, other than opposing unfair terms, has commented in relation to material detriment and asked for an amendment of that term so that includes that there is a 'substantial likelihood that the party will suffer material detriment as a result of the enforcement of the term.' Can you accept, though, that a party may suffer material detriment or even non-financial detriment as a result of the existence of a term in a contract without it actually having been exercised?

Mr Colvin—If the contract has not been entered into, there is no—

Senator PRATT—No; I am talking about where you have entered into the contract. You have said that, in order for the material detriment to have been experienced, that particular term within the contract needs to have been enforced. There may well be circumstances where the existence of that particular term within the contract means that the party cannot act in a certain way but the term itself has not actually been enforced. As a result a consumer may experience material detriment. You also seem to be arguing that non-financial detriment should not be taken into account, either.

Mr Colvin—I will pass to Leah Watterson to deal with that aspect.

Ms Watterson—With regard to terms that are sitting in contracts that are not sought to be relied on or enforced, it is more unlikely in those situations that the consumer would actually suffer any detriment. So it may be that there is the existence of a term but the consumer is not harmed by it in any case. So, if they were to go to court and have not suffered any harm, it may cause unnecessary burden on business to have to litigate over something where there is potentially hypothetical damage.

Senator PRATT—I can accept that. Do you accept, though, that the existence of a term, without the term itself having been enforced, can cause detriment?

Ms Watterson—The issue with unfairness is that it is subjective. A term in one contract could be completely fair depending upon whose view it is and, in another contract, the term may be unfair or fair depending on the circumstances. So it is difficult to assess.

Senator PRATT—You do not seem to be able to address the actual issue that I raised. Can you comment on why you seem to be drawing a boundary in terms of material detriment. Do you acknowledge that non-financial detriment can also be caused to a consumer in other forms of hardship as a result of an unfair contract?

Mr Colvin—It is possible to have detriment other than financial detriment. The issue keeps coming back to, 'What are the elements you would need to make some unfairness less or have more certainty?' If you have an element of unfairness which says you have to have a standard form of contract and there has to be detriment at least you are getting to the stage with business where they will know what they need to do towards that spectrum. In other words, if you look at it from a business perspective, where they say, 'What do I have to do to comply with this legislation?', it is a very hard thing for business to work out that out. I think I referred to the unfair contract provision in the New South Wales Industrial Relations Act. The experience there would probably illustrate that.

Senator CAMERON—Mr Colvin, you indicated in your opening address as a reason we should not go down this track on contracts that there was a 406 per cent increase in section 106 cases in New South Wales. What did you say was the period for that increase?

Mr Colvin—It was from 1997-98 to 2001-02.

Senator CAMERON—When did the law come in?

Mr Colvin—The original section, 88F, came in not long after the Second World War. It sat there on the statute books for a long time, and then some clever lawyers worked out that it was a bit wide and started using it for other than industrial aspects.

Senator CAMERON—Were they stupid lawyers?

Mr Colvin—Whatever you like. One thing I would say about this unfair legislation is that certainly lawyers will do well out of it.

Senator CAMERON—What is the base that 406 per cent increase comes from?

Mr Colvin—It comes from cases brought before the industrial—

Senator CAMERON—But how many?

Mr Colvin—I do not know. I do not have that figure.

Senator CAMERON—But a 406 per cent increase might be two cases.

Mr Colvin—Yes.

Senator CAMERON—So your submission is basically meaningless unless we know what the bases is, isn't it?

Mr Colvin—No. It is simply an indication. I do not have the exact figures. If you want me to get them, I can probably send them to you.

Senator CAMERON—You can take that on notice, because it is not simply an indication. It is a 406 per cent increase over I do not know what. It is meaningless.

Mr Colvin—I remember appearing in those cases. They went from not being significant at all to being used in every—

Senator CAMERON—Maybe you can get me the figures so we can understand what your submission is, because at the moment I do not understand what your submission is, other than that there has been a 406 per cent increase.

Mr Colvin—You can take it that there was a big increase once it was realised that this was an avenue. That gets back to Senator Bushby's point, which was that once you have an unfairness and it is subjective and you have a court case which looks like it opens up an area of defence for a claim then it could be used routinely.

Senator CAMERON—I will reserve my judgment on that until you give me the figures. You do not have to tell me what I should think on that; I will wait and see. Was Meredith Hellicar a member of the Institute of Company Directors?

Mr Colvin—I do not recall.

Senator CAMERON—You do not know?

Mr Colvin—I do not know whether she is or is not a member. I have not checked.

Senator CAMERON—You would think that with such a high-profile company director in so much trouble you would know whether or not she was a member. Are you seriously saying you do not know whether she was a member?

Mr Colvin—That is not something that has to do with this unfair contracts legislation.

Senator CAMERON—But it is. I will get you there in a minute. So you do not know?

Mr Colvin—I do not know at this present time.

Senator CAMERON—Okay. Are any of the directors of James Hardie members?

Mr Colvin—I do not know that either, at this stage.

Senator CAMERON—You don't? Nobody wants to own James Hardie, do they? In terms of where the government wants to take this, the issue is about trying to get a single, national consumer law in place with new penalties, new enforcement powers and options for consumer redress. Why shouldn't a consumer have access to increased redress in the more complex consumer regime that we have?

Mr Colvin—I think I said at the outset that we were very supportive of the harmonisation process. We are very supportive of most of the bill. The only aspect that we really wanted to talk about was the unfair contract area, because we think that has some difficulties which we have set out in our submissions orally and in writing.

Senator CAMERON—Can you also take on notice this question: as to this 450 per cent increase in the cases that went under section 106 in New South Wales, how many of those cases resulted in a positive outcome for the people who brought them against companies or against directors?

Mr Colvin—I do not know whether I could get that information.

Senator CAMERON—You do not know whether you could get it?

Mr Colvin—I can probably get the information which I have based that on but I do not know whether I could get that information.

Senator CAMERON—So this 450 per cent increase actually might mean that a lot of your members won the case? Could that be the situation?

Mr Colvin—Yes. Some would and some would not.

Senator CAMERON—So it was not just a 450 per cent increase and it is all a problem for business?

Mr Colvin—No, the issue there is simply how contracts dealing with unfairness can sit for a long period of time and then suddenly get, if you like, a lease of life which was unexpected, even by the legislators at the time.

Senator CAMERON—You say, I think on page 7 of your submission, that the laws governing the contractual obligations may impose personal liability on directors for acts of the company.

Mr Colvin—Yes.

Senator CAMERON—Let us come back to Meredith Hellicar. Let us come back to James Hardie—whether they are members of yours or not. Why shouldn't those directors have some personal liability for the acts that they undertook?

Mr Colvin—I understood that we were dealing with harsh and unfair contracts and standard form contracts. So, in this particular area, we would be arguing that that would appear to be a harsh penalty—to have somebody, if you like, being able to be removed from a position—in an area of unfair contracts. In other words, there are many, many laws which require directors to be liable and subject to penalties and disqualification. In an unfair contracts legislation regime the best outcome is that the provision being enforced is void—in other words, cannot be used—and, if you take a large company, they may not even know about this particular legislation, because the materiality aspects which go to the board would be a manager's aspect. No doubt a divisional manager in a particular state would know all about that, but by the time you get to a board—say, an international board—you would say, 'Isn't that a bit harsh?' That is the point. On this particular legislation, under this particular unfairness regime, that is the point we are making there.

Senator CAMERON—What would be the major circumstances in which you would see an unfair contract being a problem for company directors under this legislation? Give me a practical example.

Mr Colvin—I suppose you could have a very small subsidiary doing a very small aspect of a very large corporation's business, which may, somewhere in a federal court—or not even there; in a magistrate's court, in, let us say, Tasmania—be found to be unfair. Say the director is based in New York or London, and does not really get to know about this, and then he or she finds out that suddenly, because of some processes in Australia, there is an issue as to whether they should be disqualified. Does the crime fit the punishment? That is the argument.

Senator CAMERON—Isn't there vicarious liability? Hasn't that been a part of our law?

Mr Colvin—The vicarious liability as I understand it is that the company, not the directors, is liable for the actions of its employees.

Senator CAMERON—So directors should just be kept in this little bubble to the side? All they do is get their directors' fees; they do not have any responsibility? Where does the responsibility start and finish?

Mr Colvin—That has a very long and involved answer, but I am happy to say that there are 657 laws making directors liable on a state basis. That is not including the federal ones. So I do not think there is any lack of laws making directors liable; in fact, you can argue that limited liability companies have been some of the most productive things ever invented. It includes our wealth et cetera. So there is a big argument there that is way beyond the scope of unfair contracts.

Senator JOYCE—What is the reason that you believe that business to business has been dropped out of the bill?

Mr Colvin—I do not know, because I have not been party to those discussions, but we would be very supportive of the fact that business to business has been excluded.

Senator JOYCE—Why?

Mr Colvin—Because we have indicated in our submissions some of the difficulties involved in consumer transactions; it is uncertain because a judgment call on what is unfair will end up being subjective. It is like other legislation in this area. When you start dealing in the subjective nature of what is and is not fair it becomes a bit like beauty; it is in the eye of the beholder in many circumstances and it becomes a subjective test in many cases. We argue that the certainty elements that business needs on a business to business basis should not be destroyed by having subjective unfairness tests. As I have indicated to Senator Cameron, look at section 106 and look at the contracts which were set aside and varied under that legislation. If you applied that to business I am not sure how business would actually operate in many aspects of its business life.

Senator JOYCE—But isn't that excuse something that can happen all the time? People just say, 'I'm not going to say it, because that's subjective.' That is the great out clause. If you use the same analogy, it is like asking, 'What is beauty?' 'I don't know, but I'll tell you when I see it.' I will bet you most of the room agrees with me.

Mr Colvin—There are various aspects of law which are precise and concise, and most of business law is along those lines—'you must do', 'you cannot do' et cetera. Business then knows exactly what they can do and how they can do it. They can then price it and adjust their contracts and their behaviour accordingly. But if it is in this area a standard-form contract—which is not defined—there is no detriment test and you also have a position where it may or may not be unfair, whom is it unfair to? When is it unfair and under what circumstances? When is unfairness fair in one circumstance? Is it not fair in another? That would bring uncertainty into business to business transactions. If we were worried about the 106 litigation percentages, I think we would be incredibly worried about that sort of business litigation and using that to avoid commercial transactions.

Senator JOYCE—But isn't it an issue to do with business to consumer litigation? Businesses, especially larger businesses, have an immense capacity to outspend you and starve you of oxygen. If you want to take them to court, you can be there all day. What is the problem? You are reticent about having a capacity for what is unfair to be determined. What is unfair is quite easy to determine: it is when someone uses their position to put another person into a position completely and utterly to their detriment.

Mr Colvin—Perhaps I will put it the other way. Why you would introduce an element as uncertain as unfairness into business to business transactions? You would only do it if you thought that it was going to have

some positive benefit and the detriment did not outweigh that. We argue that the detriment would far outweigh any benefit that could arise.

Senator JOYCE—So why would the government have considered it?

Mr Colvin—I am not in the government, so I cannot answer that question.

Senator JOYCE—But you were obviously part and parcel of the direct lobbying that was done to change their position.

Mr Colvin—We put in a written submission supporting the change after it had been made.

Senator JOYCE—So you were aware that business to business was in there. It has been removed and people have obviously lobbied to have it removed. You were aware of it.

Mr Colvin—We were aware of the fact that it was removed and we endorsed that in our submission. We put in a late submission, late in the sense that it was not put in at the very beginning of the Productivity Commission inquiry but when the draft bill came out. When it was removed, we were supportive in our submission of that.

Senator JOYCE—Do you think that there are any issues that require consumers to have greater protection than what they have currently?

Mr Colvin—In Professor Carter's submission, he argues—and he is a position to know this—that Australia has probably some of the most rigorous consumer trading laws in the world. The question as to whether we need any more is an issue which is being debated know. As I have said, we are supportive of the harmonisation of these laws to reduce red tape and numerous different state laws. The area where we have concern is purely in the unfair contracts area because of the difficulties inherent in such legislation.

CHAIR—I thank the Australian Institute of Company Directors for coming in this morning.

[10.03 am]

COCKBURN, Mr Milton Roy, Executive Director, Shopping Centre Council of Australia

CHAIR—Welcome. I invite you to make an opening statement, Mr Cockburn.

Mr Cockburn—Thank you for the opportunity to put our views directly to the committee. Along with many other business organisations, we lodged submissions to Treasury in March 2009 in response to the consultation paper and in May 2009 in response to the draft provisions arguing for the exclusion of business to business contracts from the scope of the unfair contracts regulation in what is now the Trade Practices Amendment (Australian Consumer Law) Bill 2009. We are grateful that the federal government has listened to those arguments and has excluded such contracts from the scope of the bill. We are concerned that in the wake of this decision statements have been made by some small business organisations and repeated in submissions to this committee suggesting that the government in doing so has ignored the wishes of state governments and has gone against the recommendations of the Productivity Commission. We do not agree with those statements and in our submission we have concentrated on repudiating them. In particular, we have pointed out that first it was never the intention of the Ministerial Council on Consumer Affairs, which was the originator of this bill, and nor was it the intention of the Council of Australian Governments, which endorsed that recommendation, that the opportunity would be taken in achieving a uniform national consumer law to expand the scope of this law to include business to business transactions. This is obvious to anyone who reads the joint communique of the Ministerial Council of Consumer Affairs of 15 August 2008 and the COAG communique of 2 October 2008.

Second, it is not correct to claim, as some have done, that the Productivity Commission recommended the uniform consumer law framework should cover business to business transactions. It is true that the Productivity Commission's report includes discussion of whether the laws should also cover small business, but—as we have pointed out in section 3 of our submission—if you examine the commission's recommendations, they do not include any recommendation that the law should be extended to cover business to business transactions. If the commission had recommended such a move in its draft report, it would, in our view, have been flooded with submissions arguing against such a move, and this would have required the commission to provide detailed information on the costs and benefits of such a broadening of the unfair contract terms regime.

We also point out, on page 5, that, at the same time as the Productivity Commission was considering the consumer policy framework, it was conducting a major inquiry into the market for retail tenancy leases in Australia. The report of that second inquiry, which was released only one month before the commission's report on the consumer policy framework, specifically recommended against attempting to introduce fairness laws in the retail leasing context. This finding was motivated by the commission's concerns about the business uncertainty and market inefficiency likely to result from any such measure being adopted and about the potential for moral hazard—an increased likelihood of bad business decision making through business being shielded from the negative consequences of decisions.

In our view, it is hardly credible that the Productivity Commission would have made such comments if in another report it was just about to recommend such extensive regulation of business to business contracts on the grounds of whether or not those contracts contained unfair terms. Thank you.

Senator JOYCE—Mr Cockburn, you said the commission would have been flooded with submissions if they had included business to business transactions—flooded with submissions from whom?

Mr Cockburn—From business organisations.

Senator JOYCE—Such as?

Mr Cockburn—Such as our own. I think the Australian Institute of Company Directors just said that they were concerned about it. Also, if you look at the submissions that were received in response to the consultation paper and in response to the draft provisions, you will see that numerous business organisations argued against such a move.

Senator JOYCE—With your organisation, there is basically an open book, isn't there—the shopping centre owner has the capacity to see what tenants are earning and then determines the rent? It works basically along those lines, doesn't it?

Mr Cockburn—In some companies there is a requirement that tenants supply their turnover information to the owner. This is not for the purposes of determining rent, however; it is for the purposes of making business decisions in relation to that shopping centre or those shopping centres. It goes to things like finding out which areas of the shopping centre are and are not performing well so that you can direct marketing budgets into those areas or make tenancy mix changes in those areas. It is needed to decide whether or not you are going to expand your shopping centre. That is the reason that information is required.

Senator JOYCE—So you do not use it to determine rent—is that what you are telling me?

Mr Cockburn—That is a myth. If we did not have that information, it would be like expecting the managing director of Myer or DJs to run his company without knowing how this or that particular store was performing, without knowing how his menswear, ladies fashion or homewares were performing. I think both of those companies would tell you in those circumstances they would not be able to do their job. We also would not be able to do our job if we did not have that information.

Senator JOYCE—It is a myth that seems to be widely endorsed by many of the people who work or own shops in your shopping centres.

Mr Cockburn—Yes, and you will also find there are other tenants in shopping centres that rely on this information. In our submission to the Productivity Commission we included a monthly sales report that one of our major members provides every month to the tenants who request it. That enables them to benchmark themselves against how their competitors are performing, not just in that particular shopping centre but in shopping centres throughout Australia. If we did not have that information—

Senator JOYCE—Do you think it is fair to be able to ask someone exactly what they are earning?

Mr Cockburn—Yes, I do, for the reasons I just outlined.

Senator JOYCE—Mr Cockburn, what do you exactly earn?

Mr Cockburn—I earn around $250,000 a year. I cannot be precise because a lot of my salary is performance related. It depends on my board of directors deciding how I have performed every year. And, if I have not performed, then obviously I do not receive—

Senator JOYCE—Wouldn't a fair contract be one where you determine terms and then they are locked in? Do these contracts for rent vary on the premise of basically the shopping mall owner?

Mr Cockburn—I am sorry; I did not understand that question.

Senator JOYCE—Do the rents change where the negotiations are heavily weighted towards the shopping mall owner and where they utilise your turnover as one of the key components of putting up your rent?

Mr Cockburn—There are some leases—and this is permitted under retail tenancy legislation—where the rent is actually determined as a particular percentage of the turnover of the retailer. It might be struck at five or six per cent. Obviously, in those circumstances, if the retailer does very well the rent goes up; if the retailer does not do very well the rent goes down. Those are bargains—

Senator JOYCE—That is just a form of commercial serfdom, where the more potatoes you grow the more the person in the big house keeps. This is the whole essence of what is unfair. Surely it should be just cut and dried: 'This is my lease. This is my term. That is what you'll get. That is what I'll pay.' That is the way contractual relationships exist everywhere else. Why should shopping malls be different?

Mr Cockburn—For one very good reason: there are tenants who insist on that form of rent. In other words, they will not come into the shopping centre unless their rent is based on turnover. They do that for one very good reason: if they are not performing well, their rent goes down. I would hardly regard that as being a form of serfdom—would you?

Senator JOYCE—So you are saying that it is an ordinary principle that rents go down?

Mr Cockburn—What I am saying is: if you have negotiated with your lessor a lease that is based on a percentage of your turnover—so, if your turnover goes up, your rent goes up and, if your turnover goes down, your rent goes down—I would think you are actually in a very, very good position. I would hardly regard it as being serfdom.

Senator JOYCE—That is funny. I have to declare my interest: I actually have a commercial property that I rent it out to solicitors. I have tried the line with them that they should tell me their turnover and then I will determine their rent, and they have told me to go put it where the monkey sticks its nuts.

Mr Cockburn—Well, that is entirely proper. You are in a bargaining situation. Some—

Senator JOYCE—But there is a difference in the bargaining situations.

Mr Cockburn—Sometimes you are able to bargain effectively and sometimes you bargain ineffectively. I would have thought that is the freedom of our commercial society.

Senator JOYCE—It sounds like bargaining position is determined by size. Someone using their excessive size to stand over somebody else would be inherently unfair.

Mr Cockburn—I know a lot of people who are in the business of advising retailers on how to negotiate a lease. I might give you a list of their names—next time you are negotiating your lease you might use their services. You may end up with a much better outcome.

Senator JOYCE—You know full well that, as you always say, you have people lined up down the street. If people do not like the terms, they are kicked out of their shop in the shopping mall and someone else takes their place.

Mr Cockburn—You make the assumption that every shopping centre in Australia is a regional shopping centre or a large shopping centre. The reality is that most shopping centres in Australia—in fact, around 800 of the 1,350 shopping centres—are what we call neighbourhood or supermarket based shopping centres. There is certainly not a queue of people waiting to become tenants in those shopping centres, and in most cases it is the tenants who dictate the terms of leases and whether they are going to come into the shopping centre. You should not make the judgement that Chadstone, Chatswood Chase and Westfield Bondi Junction are typical of shopping centres in Australia.

Senator JOYCE—In this legislation should we bring back 'business to business' and differentiate between regional areas and multiple shopping centre areas?

Mr Cockburn—No, because—and as a lessor you should be aware of this—we already have retail tenancy legislation in every state. In your state, Queensland, it is the Retail Shop Leases Act. That act sets out minimum provisions that must apply in relation to the negotiation of the lease—protections that begin even before the lease is signed, protections that guard the tenant, the lessees, all the way from before they sign the lease right through to the conditions that apply at the end of the lease. Given that we are one of the most regulated industries in Australia, I hardly think that we need unfair contract terms laws on top of that.

ACTING CHAIR—Senator Joyce, we might go to other senators. If we have time we will come back to you, because you and Mr Cockburn are obviously both enjoying this little discussion. Senator Pratt.

Senator PRATT—Mr Cockburn, you seem to be putting forward some very strong advocacy on a bill that your sector is excluded from. I can only assume from that that you are worried about legislation in this area are emerging someone else. It is certainly clear to me, in terms of the advocacy work I had done with members of state parliament right cross the country—whether it is franchises, tenancy contracts or whatever—that there are small businesses experiencing significant problems because of unfair contract. Is that why you are here today—because of the whole debate around this issue?

Mr Cockburn—We are here primarily because, while this bill had gone off to this committee, there was no assurance that the committee would not recommend the reinstatement of business-to-business contracts in the scope of the bill. If the minister had previously made the comments he made this morning in the *Australian Financial Review* I probably would not have gone to the bother of lodging a submission. But certainly at the time this bill was referred to the committee there was a possibility that this committee would recommend reinstatement of those contracts. That is the reason why we lodged a submission and that is the reason why I am here today.

Senator PRATT—Despite the fact that business-to-business contracts are excluded from the consumer laws before us, do you acknowledge that this is going to be an ongoing debate because the call from businesses for protection from unfair contracts is going to continue? I accept that it is a complex debate, but many of these issues will remain outstanding and need resolution.

Mr Cockburn—I think you have to start with two things. Firstly, if there are complaints by small business organisations about allegedly unfair treatment in their particular industry then I think they should be addressed within that industry. I notice that the Newsagents Association said in their submission that they had to have this law because they are about to enter into contract negotiation with newspaper companies next year. The Motor Trades Association said it needed these laws because motor traders have problems with motor car companies. The Pharmacy Guild said they need these laws because they have problems with the

pharmaceutical supplies. I am not saying that simply because they say there are problems there are problems, but if in fact there are problems in those industries they should be addressed within those industries. We should not introduce a law that impacts on all commerce within Australia simply because there may be problems in one particular industry.

Senator PRATT—I think your comments relating to the number of industries in which this debate is taking place contradicts your argument that this should be resolved sector by sector. In fact, the significance of the problem cuts across a wide range of sectors and, therefore, people are motivated to find a universal solution. Anyway, I do not need to ask you any further questions.

Mr Cockburn—You have touched on our industry. This is a classic example of an industry in which it was addressed on a sector-specific basis. Twenty-odd years ago policymakers, legislators, said there were problems in the shopping centre industry and we needed to address them. As I said, unfortunately it was addressed on a state-by-state basis rather than being done nationally. As a result, we have ended up with eight separate pieces of legislation. In each of those states it said, 'We think there is an imbalance of bargaining power between the lessor and the lessee, so what we will do is lay down what we regard as being the minimum protections that should apply for tenants in shopping centres and any other retail properties.' Over the last 20 years, that is exactly what they have done. For example, it is often necessary to relocate shopping centres tenant when you are about to do a redevelopment. If you do not redevelop your shopping centre you die, so it is occasionally necessary to relocate the tenants. But the legislators have said, 'These are the minimum conditions that must apply if you actually want to relocate the tenant.' If your lease does not comply with that legislative provision then the legislative provision overrides the lease. It seems to me that that is the sensible way to address this issue. You do not come in with a vague law which extends across all industry if in fact you only have problems in a couple of particular industries. You should address those problems within those particular industries. If the MTAA or the Pharmacy Guild says there are problems, I do not assume from that simple fact that there are problems. But if there are problems in specific sectors, you should address them in those specific sectors.

Senator BUSHBY—Senator Pratt has teased out a lot of the answers I was looking for, but I will just run through a couple of things. When I read your submission I made a note at the top of that said it is very well written in terms of putting forward arguments against government interference in business-to-business affairs and that that should be reserved for only those circumstances where there is a clear and exceptional need for something to be addressed. I agree wholly with most of your points. But one point I do not agree with—and we have touched on it to some extent today—is where you say:

> … businesses, unlike consumers, already have sufficient knowledge of the subject matter in respect of which they are contracting; have access to legal and other specialist advice; and have sufficient bargaining power to resolve such matters through negotiation without intervention by government.

On the whole, that is probably true. But there are certainly circumstances, I think—and we have discussed this in general with some of your answers to Senator Pratt—where small businesses are effectively consumers and there is a position of uneven bargaining power. Although you might not like to concede it today, it may even exist at times within the industry that you represent—that uneven bargaining power does result in circumstances where there are outcomes that are not really as equitable as they should be as a result of contracts that are entered into. You have conceded that other industries have also raised potentially problems in their areas. But what is quite clear from your submission is that you do not think this legislation is the way to deal with those issues. I think from your statement you have conceded that there are allegations, but do you concede that there are circumstances where small businesses, because their bargaining position is so uneven, are in a position where they need protection?

Mr Cockburn—I will start from your initial comment: small businesses are consumers in some respects. I always start from where I think the federal government starts, and that is: what is the principle we adopt when it comes to regulation? The government has adopted a charter of good regulatory practice. It is up on the department of finance's website. Basically, it is a step-by-step guide on how the government should respond to regulation. The very first of that is to say: 'Is there a problem that needs to be addressed. I would say: 'Yes, businesses are consumers. But is there a problem? Do they actually have a problem as a result of that? Is there evidence that there is a problem now?' We have had consumer laws—fair trading laws—in this country for many years. Is there any evidence that small businesses are being disadvantaged by those laws and, in some respects, by the absence of those laws? The answer to that would be: there is no real evidence that there is a major problem that requires regulation here.

Senator BUSHBY—Are you talking about your industry or generally?

Mr Cockburn—I am talking across the board. But, as I said, 20 years ago, regulators saw regulation differently in relation to our industry. They said, 'No, we think there is a problem there and we're going to address it by regulation.' That is what has been done. That is what led to my point. If you start from the question of 'Is there a problem that needs to be addressed?' I think the answer is that there is no evidence of a widespread problem but there may be evidence of problems in specific industries and, if that is the case, then address them within those industries.

Senator BUSHBY—Personally, I would not argue too much with that last part. I am glad you got to the point where you said that there may well be problems in specific industries, because I think there are quite clearly notable instances of where small businesses do suffer as a result of uneven bargaining power.

Mr Cockburn—Although, one has to keep these things in perspective.

Senator BUSHBY—You do have to keep it in perspective; but, nonetheless, in terms of applying what you mentioned as the first principle that the government applies, just because it is not a widespread problem does not necessarily mean that the government should not interfere if the circumstances are exceptional and warranted. That is reflected in the state based legislation, as you mentioned, and in specific industry legislation.

Mr Cockburn—I would disagree with that. I suppose that is an argument for another day. I actually think that government should not intervene unless there is widespread evidence that there is a problem.

Senator BUSHBY—You and I might not agree on that particular point, but if you do agree with my perspective, the question is: what is the appropriate tool to address it? And the further question is: is legislation like this the appropriate tool? Or do we come back to what you were talking about, which is industry specific legislation or legislation that is a bit more sophisticated in how it targets the problem that needs to be addressed?

Mr Cockburn—I will leave our industry to one side for a moment. The franchising industry is another area where, some years ago, the government said: 'We're getting a lot of complaints about franchising. We think the way to go there is not actually by the way of legislation. We think it is up to the industry to come up with a code.' That is what has happened. We have ended up with a franchising code. It is a compulsory code in the sense that it is made under the Trade Practices Act. It is a code that is constantly being reviewed. It was reviewed by the previous government and, as you know, it is under review by the present government. This is another example of where a sector-specific problem was addressed with a sector-specific solution.

Senator BUSHBY—Clearly, it is your evidence that, if the government does decide to address a problem—whether or not it is one that you agree should be addressed—it should be as targeted as possible. That is really what you are saying.

Mr Cockburn—Yes, very much so.

Senator BUSHBY—An issue that you touched on in answer to a question from Senator Pratt was that, apart from the unfair contracts aspect of it, you would welcome the national approach that is being taken to the consumer law for consistency, or is that something—

Mr Cockburn—If it does lead to substantial improvements in efficiency. This morning, Dr Emerson referred to a figure, which, I must say, I had not seen before, but I suspect it is probably a figure from the Productivity Commission's report. We would certainly support that. In our industry, we labour from the fact that our laws are not harmonious.

Senator BUSHBY—That was going to be my next question.

Mr Cockburn—We have eight pieces of legislation around Australia and they seem to be getting even more disharmonious rather than more harmonious. Uniformity is a goal that we would generally support.

Senator BUSHBY—You support it in the context of the overall principles of what this legislation is trying to achieve?

Mr Cockburn—The objective of a single, uniform national consumer law is a very good one.

Senator BUSHBY—Similarly, you would also welcome a single, national retail tenancy law or framework.

Mr Cockburn—We argued for that in the Productivity Commission inquiry. Unfortunately, I suspect we are a lone voice in arguing for a single, national law.

Senator BUSHBY—Theoretically, if we had a national approach to that, any issues of unfairness in contracts between shopping centre owners and their tenants could be dealt with as part of that process?

Mr Cockburn—They are being—

Senator BUSHBY—That is right—but in a consistent manner.

Mr Cockburn—Yes. Although the words 'fairness' or 'unfairness' are not used in any of the legislation for retail tenancy, the legislation sets out to achieve the goal of a fair transaction between the two parties. It does that by laying down minimum protections that must apply in a whole range of transactions that occur in a retail leasing sense. Certainly, we think that is a much more preferable way to go.

Senator CAMERON—Mr Cockburn, I am interested in the proposition that you put forward that there has to be widespread evidence of a problem before there is legislation. Why would the problem have to be widespread? Why wouldn't there be legislation to deal with a problem that destroys someone's life, their business? It is an isolated problem, but you would legislate to make sure that it does not happen generally.

Mr Cockburn—Whenever you introduce regulation there is a cost. There are costs to the parties who are regulated. I am talking here about an economic cost to the parties who are regulated. So I suppose it comes to a balance. Do you want to impose a cost on everyone who is operating in the industry, including all the people who are operating honestly and with integrity, in order to protect or to repair a situation which may be resolved in some other fashion? We already have laws—for example, the unconscionable conduct laws in the Trade Practices Act—that can be applied to situations where people are not behaving with integrity. We already have misleading and deceptive conduct laws in the Trade Practices Act. It seems to me that there is already quite a battery of laws that have been introduced to address specific situations such as those. To regulate an entire industry and impose the economic costs that will result is, I think, not a step that legislators should take lightly.

Senator CAMERON—I am not sure what that cost would be. You have brought no evidence of the cost versus the benefit. You have simply focused on cost without any evidence of what that cost would mean. Is that cost appropriate, given the benefit that someone would have that their life is not destroyed and their business is not destroyed? That is a question for legislators as well.

Mr Cockburn—Yes. One of the problems is that, if you go to the Productivity Commission's report, I do not think you will find that the Productivity Commission has done a rigorous cost-benefit analysis of the laws that we have under discussion at the present time. Certainly no cost-benefit analysis has been done by the Productivity Commission of the present law, if it had been extended to business to business contracts. In the absence of a rigorous cost-benefit analysis, it is not something that we can really debate, Senator.

Senator CAMERON—You are talking to the wrong guy about the Productivity Commission. I am not a fan of the Productivity Commission, let me tell you. On unconscionable conduct, you speak about business having some certainty in relation to the laws. I have got section 51AC in front of me now. That is subject to uncertainty. That is subject to judicial interpretation, isn't it?

Mr Cockburn—It is, but it is judicial interpretation that has probably gone back several hundred years—in fact, longer than that. So a body of jurisprudence has developed in relation to unconscionability which is able to guide our judiciary. It is not as uncertain as you and I might think.

Senator CAMERON—If that jurisprudence is so good, why would we need the review into the Trade Practices Act on unconscionable conduct? Are you saying that is an necessary approach?

Mr Cockburn—You would have to ask Senator Xenophon that. It was Senator Xenophon who initiated that inquiry. As Senator Hurley knows, the conduct of that inquiry was something of a sore point with me. I do not really know what was in Senator Xenophon's mind, but I know there is a general—

Senator CAMERON—There were probably a few small businesses that have lost their livelihood that were in his ear; I do not know about his mind.

Mr Cockburn—Yes, but there was also, for example, in the last two months, a major shopping centre in Melbourne which had a very significant and very costly finding of unconscionable conduct against it. A number of tenants were protected by that law. These sorts of victories by the ACCC tend to be ignored by the critics of 51AC. They only see the situations where the verdict goes the other way. It is also a funny thing that we judge section 51AC only on the basis of the number of scalps that are hanging from the belt of the ACCC. We do not judge our homicide laws on the basis of :'Gee, we only had 33 convictions for homicide last year. Our law is failing.' Laws have two purposes: one is punishment and the other is to try and change people's behaviour. In my view, section 51AC, since it was introduced over a decade ago, has led to a significant change in behaviour, certainly in the industry that I represent. The amount of time and resources that my members put into education and compliance procedures just to ensure that their staff do not transgress that law

is quite phenomenal. So if you are judging 51AC, judge it not just on the basis of the scalps that have resulted but on the basis of the behavioural change that it has brought about as well.

Senator CAMERON—The deterrent.

Mr Cockburn—The deterrent effect, yes.

Senator CAMERON—Minister Emerson has indicated that once these reviews are finished—that is, the Trade Practices Act and the franchising code—the government will consider the issue of business-to-business standard form contracts. So it is still an open question. The open question could then lead to those laws being included not in a separate business-to-business approach but in the general Australian consumer law bill 2009 that we are discussing now.

Mr Cockburn—Possibly.

Senator CAMERON—So you still could have within that bill the outcome of these reviews in a way that increases the accountability of big business to small business and introduces new penalties, new enforcement powers and options for consumer redress. That is the basis of this bill, so all of that could still be ahead of you.

Mr Cockburn—Yes, although I notice that Dr Emerson today did say that he was not going to reinstate business-to-business contracts in this bill. I think we are encouraged by the fact that Dr Emerson, as well as his major portfolios, is Minister Assisting the Finance Minister on Deregulation. He is probably doing the heavy lifting in that area. Whatever may come next, it will certainly be in accordance with the government's own principles of good regulatory practice.

Senator CAMERON—What difference would it make? I have not read what the minister has said today but we are addressing this. The minister can make these statements but the Senate has an obligation to address these issues as well. What would be the problem about merging the business to business contracts within this bill if it is in terms that are appropriate and terms that provide some better redress and a balance as setting up a separate bill somewhere? That then meets what the government has tried to do in having a single, national consumer law. What would be the difference?

Mr Cockburn—That is far too hypothetical, Senator, for me to address now. There are problems with this bill that have been addressed by other organisations and were certainly addressed by our organisation when the exposure draft was released. We looked at those issues in a business to business sense.

Senator CAMERON—That is not what I am putting to you. What I am putting to you is that, if, as a result of the review of the Trade Practices Act on unconscionable conduct, certain agreed positions between business and industry and the government can be implemented in a bill to become law, why can't it be included in the general consumer law? So you have one bill that deals both with consumer to business and business to business. Why can't that happen?

Mr Cockburn—You qualified that by saying, 'If there were certain conditions that were agreed to by business and such likes.' Without actually knowing what we are talking about in specifics I really do not want to address that question. I suppose the real answer to that is that it would be incorporated within the Trade Practices Act, and of course this bill is incorporated with the Trade Practices Act. It would make logical sense, I suppose, if you are talking about an agreed law in the form that you are talking about, that it would be located within the Trade Practices Act. Other than that I am afraid it is just too hypothetical for me to address.

CHAIR—Senator Joyce, do you have further questions?

Senator JOYCE—Mr Cockburn, are you happy with section 51AC as it currently stands?

Mr Cockburn—Yes, Senator Joyce, I think it is working quite effectively.

Senator JOYCE—You think it is working well, a good act, easy to use, everybody has access to it and there is evidence of successes especially from the people working in your shopping mall or your own shops?

Mr Cockburn—If we had been invited to address the Senate economics committee when it was considering section 51AC, we would have put forward the arguments as to why it was working so well. The Senate committee had only half a day of hearings and those who appeared before the committee were selected by Senator Xenophon. I would be very happy to come back before the Senate committee to give you strong reasons as to why section 51AC is working very effectively.

Senator JOYCE—Is there a threshold test for 51AC?

Mr Cockburn—The threshold has been removed. It was originally set, I think, at around about $3 million for the value of the contract, then it was lifted to $10 million and now it has been removed completely.

Senator JOYCE—In your knowledge which is the last 51AC case that has come before the courts? I understand your argument that successful prosecution of murder is not what you want; what you want is no murders.

Mr Cockburn—As I said, two months ago—I forget the name of the case—the particular shopping centre or arcade is the Paramount centre between Bourke Street and Little Bourke Street in Melbourne. That resulted in a very substantial fine against the owner and manager by the Federal Court. That case was completed only about two months ago.

Senator JOYCE—Is the Paramount centre part of your group?

Mr Cockburn—No, it is not.

Senator JOYCE—Who actually owns the Paramount centre?

Mr Cockburn—From memory, it has an offshore owner. I think it is a Hong Kong based owner.

Senator JOYCE—Have any of the shops in your group ever prosecuted a successful 51AC against a Westfield or Centro?

Mr Cockburn—The only case I am aware of is a case that was brought against Westfield that Westfield defended. That was ultimately settled on the basis that there were no admissions.

Senator JOYCE—Basically, you do not know of any successful 51AC case ever having been prosecuted against anybody from AMP Capital Investors, Brookfield Multiplex, Centro, Eureka Funds—and on and on it goes.

Mr Cockburn—I am not aware of it, although I have to qualify that by saying that 51AC has now been drawn down into retail tenancy legislation in most states. In order to bring an unconscionable conduct action now, you do not just have to go off to the ACCC and convince it to do it on your behalf. You can actually now bring it before the appropriate dispute resolution mechanism in the state, which in New South Wales is the Administrative Decisions Tribunal and in Victoria is the Victorian Civil and Administrative Tribunal. Those cases are probably now more frequent than they were when it was only in the Federal Court, so I could not answer with certainty as to whether there have been any such cases against our members at the state level.

CHAIR—Thank you.

Proceedings suspended from 10.47 am to 10.54 am

ZUMBO, Associate Professor Frank, Private capacity

CHAIR—Welcome. If you would like to make an opening statement, please go ahead.

Prof. Zumbo—Thank you for inviting me again to appear before the committee. I certainly welcome the opportunity. I think it is useful to provide some background on my interest and research in the area and my general position in the area for the sake of clarity. Firstly, I welcome the unfair contract term proposals and, having been involved in the area—I have researched it for almost 15 years, I have seen it work firsthand in the UK, I have visited the UK Office of Fair Trading, I have had discussions with Consumer Affairs Victoria—and having looked at the practice in the United Kingdom, in Victoria and in Europe, there is no doubt in my mind that we do need an unfair contract term regime.

I welcome the government's proposals, particularly given that I did work with Chris Bowen and his office when Chris was in opposition and in the early part of his ministry on the issue of unfair contract terms. Many of the issues that have come up were discussed, including business to business, which, I have to say from the outset, was originally included, as we all know, in the proposals. I believe that was endorsed by federal cabinet, it was obviously endorsed by Minister Bowen, and that had my full support, the inclusion of business to business. Trying to draw a distinction between consumers and small business is very dangerous and arbitrary. There is the obvious example that has emerged from the Victorian experience where you have, for example, a mobile phone contract that relates to consumers and then you have a mobile phone contract that relates to small businesses. The small-business mobile phone contract would not be included in these proposals. But a mobile phone for a small-business person could equally have unfair contract terms in the same way that a mobile phone contract for consumers can.

While I support the thrust of the unfair contract proposals in relation to consumers, I do have a couple of concerns. Broadly I am concerned about exemptions that are in there. I am sure the committee has traversed that ground, so I will not go there too much. But it is obviously of concern when you have too many exemptions that it may undermine the operation of the legislation. I have focused my concerns on the elevation of a couple of factors, including to the mandatory requirement that they be considered. I am concerned that those factors, because there is a mandatory requirement to consider them, will be elevated to de facto tests for unfairness. In particular, I am concerned about the reference to detriment as a factor that the court must consider.

The requirement to consider detriment is in contrast to the factors in section 51AB. In the last hearing there was a lot of evidence given and discussion about 51AB having a list of factors. In 51AB the list of factors are factors that the court may consider. The court does not have to consider them. The practice with 51AB, as in the case of 51AC, is the factors are considered in passing, but the test for 51AB and 51AC is a very high test. It does require very extreme conduct that offends the conscience.

At that point, I have to clarify one point that there was some confusion about in the previous hearing. When we talk about unconscionable conduct, the concept of unconscionable really has two meanings. It includes procedural unconscionability. Procedural unconscionability relates to the 'surrounding conduct', the conduct surrounding the relationship that focuses on the procedure leading up to the making of the contract—that is, was there what the courts call a 'special disadvantage', which is the very legal meaning. It is a very high threshold. In relation to the other form of unconscionable conduct, you have what is called 'substantive unconscionability'. Substantive unconscionability looks solely at the terms of the contract. I do not believe that distinction between procedural unconscionability and substantive unconscionability has been flushed out to the extent that it should, because that will help understand what the provisions in 51AB and 51AC are intended to deal with on the one hand, and the unfair contract terms on the other hand. 51AB and 51 AC are concerned about procedural unconscionability, the surrounding conduct.

Yes, the terms are relevant in relation to procedural unconscionability, but there is a leading case, a McDonald's case, where one of the parties was Hurley—I am not entirely sure if there is a connection with the chair.

CHAIR—I don't think so.

Prof. Zumbo—That is a definitive case. It stated in relation to 51AB and 51AC that you cannot use those provisions to look at solely the terms of a contract; under 51AB and 51AC you need to show procedural unconscionability surrounding conduct that offends the conscience before you can look at the terms. So, if there is not that procedural unconscionability, 51AB and 51AC are of no help to you because, in many cases,

the consumer, the small business, may have understood the terms of the contract but they were simply offered on a take-it-or-leave-it basis. And a take-it-or-leave-it basis is not considered a special disadvantage that triggers the operation of 51AB and 51AC.

So there is a crying need for legislation that deals with substantive unconscionability. The Europeans have long recognised this. The English have long recognised this, and in Victoria they have recognised this for the last five or so years. What these unfair contract term provisions are concerned about is the substantive unconscionability, the fairness of the term. 'Fairness' is given a definition, and that is the other thing I need to clarify. Under the unfair contract proposals, it is not an open-ended test of unfairness. There is a specific test. There has to be a significant imbalance between the rights and obligations of the parties, and the term has to be not reasonably necessary to protect the interests of the big business.

The ability to show that the term is not reasonably necessary is the defining factor and also provides a safeguard. If a term is reasonably necessary to protect the big business, the term is not challenged under this legislation. That in itself is the most important and more than ample safeguard for the interests of the big end of town. Simply stated, the term has to be beyond what is reasonably necessary. So, if it is reasonably necessary, it is not attacked under this legislation, and big business are safe in using the term provided that it is there to protect their reasonable interests—that it is reasonably necessary to protect the legitimate interests of the big business.

So the concerns about this legislation, whether it applies to consumers or small business, by big business, with all due respect to all those vested interests, have been overstated. The fact is that big business can protect their legitimate interests. If the term is reasonably necessary to protect their legitimate interests the term is not challenged under this legislation. I emphasise that for the simple reason that big business can protect their interests, and in no way does this legislation detract from their ability to protect their interests. It is what is reasonably necessary to protect their interests.

It is only when they go beyond that. It is only when there is a significant imbalance, where they go beyond trying to protect their legitimate interests and have a term that is one-sided or heavily in favour of the big business or the big business are trying to shift the risk onto the consumer or the small business, as the case may be, or they alter the goalposts. The thing that is of most concern about unfair contract terms is that the consumer or the small business may enter a contract with their eyes wide open, may understand the terms of the contract, may accept the terms of the contract at that particular time, but—because of, for example, unilateral variation of clauses that are open ended or wide discretionary power that is conferred by the contract—the goalposts can be considerably shifted under the contract to the significant disadvantage of the consumer or small business.

So in principle I support the legislation. There are some drafting issues that are of concern in terms of elevating detriment to a de facto test and elevating transparency to a de facto test. My concern is that a term may be very one-sided, may be unfair, according to this legislation but the big business may bring it to your notice and say, 'Just sign here that you have read this term, that you accept this term and it is clear to you,' in circumstances where you have no opportunity to negotiate an alternative term. It is still offered on a take-it-or-leave-it basis, but it may be very transparent.

On business to business, I am troubled that, despite the good work of Minister Chris Bowen and the federal cabinet in endorsing that this apply to small business, when Minister Emerson took over the decision was reversed. That is of concern because a lot of consultation went into getting to a position where small businesses were included. There were more than sufficient safeguards to allay the concerns of the big business, and it is disturbing that small businesses have been excluded. That is the tenor of my submission, with a bit of explanation on some of the key issues that I see arising from this inquiry.

CHAIR—Thank you, Professor Zumbo. I am actually interested in another part of your submission, the failure to provide for safe harbours for business certainty. How would those advisory opinions or authorisations interact, as you see it, with the grey list that is being talked about?

Prof. Zumbo—I would see that as complementing. A safe harbour is just that. There could be a mechanism whereby a business could get an authorisation, in much the same way that they could get an authorisation under part IV of the Trade Practices Act, if they were uncertain about a particular term. Once they have an authorisation, that term is beyond challenge. I think that would put the issue beyond doubt by having a mechanism where, if big business are concerned, they can approach, for example, the ACCC and get an opinion. That ability is missing, and I think we can easily strengthen this legislation to a point where we allay

everyone's concerns, I believe, to a very high standard by giving big business an ability to get an authorisation or an advisory opinion that is binding.

CHAIR—Have you talked to the ACCC about this? Does it need to be included in the legislation, or would it just be something they would do as a matter of practice?

Prof. Zumbo—I have raised it with many people, including Chris Bowen's office. It is in the writing that I have provided, the articles that I have written over many years. It is there on the table. It has not been accepted at this point in time, and I am hopeful that the committee will endorse the proposal.

CHAIR—You have not had discussions with the ACCC about whether they might do it in any case?

Prof. Zumbo—No, I have not had discussions with the ACCC, but I have had with Chris Bowen and his office previously on it.

CHAIR—Okay.

Senator CAMERON—Professor Zumbo, we had John Colvin, from the Institute of Company Directors, appear this morning. His argument against the legislation is that section 106, I think it is, of the New South Wales Industrial Relations Act has, over a period from 1997 to 2001-02, had a 450 per cent increase in the cases before the tribunal. He says that this shows you that, if you make these changes, it means increased litigation, increased costs on business that business should not be absorbing, and that is why we should not make these changes in the law. Do you have any comment on that?

Prof. Zumbo—Absolutely. Section 106 is a broad church. It does not apply to consumers, but it does apply to independent contractors. It has over many years. So it does apply to franchising agreements, and I have to say that the number of franchise agreements that have come before the tribunal under section 106 have been small in number compared to those independent contractors cases. The independent contractors cases are a reflection of the fact that big businesses are outsourcing previous functions that were provided by employees and, when they have those independent contractors, there will be a view as to how they can screw down those independent contractors on all sorts of issues. Now, independent contractors have the ability, through the foresight of the New South Wales legislature, to have that remedy in place, and they are taking advantage of that remedy on the basis that it is available. But I do not envisage that in terms of consumers, because the Victorian legislation has been in place for about five years or so and there have been very few cases by consumers. When I say 'few cases', I am talking of around a handful of cases in relation to even 51AC, about which we are told—on which I disagree emphatically—that it is working very well, that there are a handful of cases.

The context is that the access to justice is a real issue. The costs of accessing the Federal Court in relation to 51AC are just prohibitive. In relation to even going to a consumer tribunal for a consumer, there is a cost. There is a time factor. It is time consuming. In some of these tribunals the cases extend out. I am aware that in the retail tribunal here the cases run on for two, three, four or five years because some of the shopping centre landlords are very effective in delaying those cases. They use every procedural trick in the book to delay the case.

Senator CAMERON—That brings me to my next question. You appear before us so often that I think you can read my mind at times! Milton Cockburn, of the Shopping Centre Council of Australia, has said that there must be widespread evidence of a problem before you change the law. What is your comment on that? That is basically saying that there is not a widespread problem, and there must be that evidence before you change the law.

Prof. Zumbo—I agree there needs to be evidence and there is ample evidence—look at the United Kingdom experience, look at me and European experience, even in Victoria. There is ample evidence to demonstrate that there are terms that can be considered objectively as unfair. Mr Cockburn has been following these inquiries in the same one way I have. I recall the days when 51AC was proposed and groups such as the Shopping Centre Council and other big vested interests said that 51AC would bring the market economy to an end, to its knees, that the world would end the next day. Interestingly, 10 years later they say it is wonderful. They say it is wonderful because the reality is that it is so hard to prove 51AC cases. They are very hard to get to court and when they do get to court they are strung out indefinitely. So of course Mr Cockburn would be happy with 51AC because the reality is that people do not have an effective remedy for 51AC in relation to procedural unconscionability. Don't get me started: there is no access to any jurisdiction in relation to unfair contract terms except one or two pieces of legislation here and there. Obviously, if there are not any cases getting up, if it is very hard to bring these cases, of course you can say that there is no problem. The evidence

is overwhelming that complaints in this area are increasing. The overseas experience is very telling. The same sorts of contracts that they use in the United Kingdom are used here. Those terms are unfair, here or in the United Kingdom.

Senator CAMERON—Minister Emerson has put out a press release saying that, in relation to business to business contracts, the government is currently reviewing both the unconscionable conduct provisions of the Trade Practices Act and also the franchising code of conduct. I put it to Mr Cockburn that after that review what would be the problem of consolidating both business to business and consumer to business contract law into one area of the Trade Practices Act and he said it was too hypothetical. What is your view?

Prof. Zumbo—With all due respect to Milton, he would say that. There is no reason why they cannot be consolidated. Let us not forget that Minister Chris Bowen believed there could be consolidated. We saw a draft piece of legislation where they were consolidated. The federal cabinet would have signed off on Minister Bowen's announcement so they are convinced of the argument. From the technical point of view, it is consistent to have them together and it can be done. The same safeguards which protect big business in relation to consumer contracts are there to protect big business in relation to small business contracts. I emphasise that there are more than ample safeguards in this legislation to protect the legitimate interests of big business. So to draw an artificial distinction will create problems of definitions, will create gaps in the legislation and will deny small businesses the opportunity to access legislation that balances their ability with accessing justice on unfair contract terms with the ability of big businesses to protect their legitimate business interests.

Senator PRATT—At the moment, there is a lot of lobbying going on to alter this bill. What might the ramifications of that be in the context of the fact that we are trying to reduce red tape for the sake of business. Is it possible that states will want to re-enter this debate?

Prof. Zumbo—On a personal level, I could not agree more that we need to reduce red tape. I am a firm believer in minimum effective regulation. In fact, I have had a discussion with Mr Cockburn over the years where, if you have appropriate principles in place, appropriate regulatory reframe works, you can do away with some of the more prescriptive parts of the retail leasing legislation around the states. The concern is that you get this proliferation of legislation because sadly governments are trying to please everyone in terms of drawing a compromise and they end up pleasing no-one, and we get more and more legislation. If we have a clear framework dealing with unfair contract terms that provide the parameters with sufficient protections for big business and opportunities for small business to access this legislation, then this is minimum effective regulation.

Senator PRATT—That applies also in terms of consumer law as a whole rather than business to business contracts, too, does it not?

Prof. Zumbo—Absolutely. In dealing with unfair contracts, the same arguments apply to both consumers and small businesses. The other thing I have to know in terms of safeguards is that the upfront price has been excluded. That is another safeguard for big business. This legislation is targeting those unfair contract terms which are specifically defined as a significant imbalance between the rights and obligations of the parties and not reasonably necessary to protect the legitimate interests of the big business. That is a carefully focused test.

In the United Kingdom in particular, with all but a handful of examples, these cases are resolved through negotiation with the regulator. Discussions with regulators can be very intense. No one rolls over. Typically when those terms are challenged in courts, it is typically a bank that will challenge. In a small number of cases the banks have failed because the Office of Fair Trading in the UK has been very careful in demonstrating that there was a significant imbalance between the rights and obligations of a party to go well beyond what is reasonably necessary to protect the interests of big business.

Senator PRATT—If lobbying was successful in further changing the bill before us, would the ramifications be that consumers would have to continue to rely on other parts of existing law and the states might continue to legislate in this area?

Prof. Zumbo—The purpose of Australian consumer law, as you would know, is to provide consistency. One would expect that the ACCC would provide a leadership role, in the same way that Consumer Affairs Victoria has provided leadership role. For example, Consumer Affairs Victoria targeted mobile phone contracts. They had extensive consultations with the mobile phone companies and as a result, with the exception of one company, they all came to an agreement to rectify those contracts so that both parties were happy. In fact, the feedback from some of those big businesses is that they are very surprised when told by the

enforcer that there is this reprehensible unfair term which the lawyers have slipped in for no reason other than to try to cover every single base, to try to shift the risk in every single way to the consumer. So the leadership role the ACCC could provide would lead, as has happened in Victoria, to a code of conduct in relation to mobile phones, so that we have fairer contracts because the industry has got together as a whole to have fairer contracts.

The retail shopping centre industry can get together to come up with a list of model terms which could not be challenged. That would lead to less disputation, fewer misunderstandings between landlords and tenants. Industry associations can provide a leadership role in making sure that, through extensive consultation with the regulator and the industry they come up with fair terms which everyone lives by, in the same way that the mobile phone industry has come together with a code.

Senator PRATT—You talked in your submission about a misplaced emphasis on questions of detriment. I do not necessarily completely agree with your analysis but I wanted to ask in relation to the question of detriment as to the distinguishment that other submitters are trying to make between material detriment and other forms of detriment that may be taken into consideration. Can I get your comments on the efforts that people are going to to contain the question of detriment.

Prof. Zumbo—Senator, you so beautifully demonstrate my concern with the concept of detriment, the fact that everyone has an opinion on what detriment is. That worries me. From a lawyer's perspective on this legislation, I can see that it will be a feast for lawyers to look at the issue of detriment and I am concerned that it will be elevated to a de facto test. The we will have an argument about what is detriment, what does it include? We will have court cases on that and it will go to the High Court because every aspect will be challenged. The reality is that detriment is a side issue which is very much related to compensation. So if I am a consumer of small business and I am affected by unfair conduct, and I suffer a detriment as a result of that unfair contract term, then I can approach the court for a remedy, prove my detriment and get compensation. Compensation is a separate issue. The central issue of unfair contract terms is whether there is a significant imbalance between the rights and obligations of the parties and is the term reasonably necessary to protect the legitimate interests of big business. Anything beyond looking at those tests is a distraction from the evil we are trying to deal with and the fairer contracts we are trying to promote.

Senator PRATT—With respect to unfair contract terms, there are those arguing that the term itself must be exercised in order for detriment to be experienced. But surely the very existence of an unfair term can cause detriment. Could you comment on that?

Prof. Zumbo—Yes, absolutely. The mere existence is a problem in itself, because what you have is the mere existence of many of these terms, any one of which could be triggered. It is like having a gun to your head with only one of the chambers with a bullet in it. The other chambers may never be fired, but it may be your turn in this particular instance. You have got to look at these contracts as a whole—I agree with that, because there is a bargain there. But when you look at the contract as a whole you also see that there may be a number of terms that individually may never be triggered but could at any one point in time be triggered. The fact that they are sitting there, the fact that they are there in the first place, is a concern because they could be triggered and they will be triggered where it suits the big end of town.

Senator PRATT—I suppose I am saying that the detriment can actually be experienced without the term having been expedited in and of itself, can't it?

Prof. Zumbo—Yes. The lopsided nature of the contract is the detriment.

Senator PRATT—In a sense, it might, to their detriment and in an unfair way, prevent the consumer from acting in a certain way, even though that particular clause of the contract itself has not been exercised.

Prof. Zumbo—In most cases the term does not have to be triggered because it is pointed out to the consumer. The consumer looks at it, they might get legal advice and they are told, 'You can't act on it—end of story.' So it does not have to be triggered for consumers to be denied access to this legislation or access to justice.

Senator PRATT—That is something we need to be mindful of. Some submissions are stating that clearly the term itself has to have been exercised in order for the consumer to experience that detriment.

Prof. Zumbo—This is obviously another argument that those vested interests that oppose this legislation will use just to create uncertainty and doubt in circumstances where the definition is there, it has been effective in the UK and Victoria, it is a point of reference where you can get a view beforehand between the regulator and the big business or the industry associations can take a leadership role to avoid these unfair contract terms.

Look, the reality is that detriment is the existence of the terms—the fact that they are there and can be triggered at any point in time or certainly pointed to, to dissuade consumers from protecting their interests. That is a concern and the evil that we are trying to address.

Senator PRATT—Thank you.

Senator JOYCE—I know Frank, so I am just going to ask some basic questions.

Senator CAMERON—This is not an Eric Abetz moment—that's fine!

Senator JOYCE—Mr Cockburn said that 51AC is the be all and end all and that is all you need to protect consumers, especially in stopping centres. Do you have any knowledge of disputes arising in shopping centres where 51AC has anything but the capacity to protect the rights of small business people in that environment?

Prof. Zumbo—In the just over 10 years that 51AC has been in operation I could probably point to only a handful of retail leasing cases. Some of those have been lost. One or two have been won. The common theme is that it is very hard to argue the case under 51AC because it is a very high threshold.

Senator JOYCE—Just elaborate on that, please.

Prof. Zumbo—It has to be very extreme conduct—it has to offend the conscience. To offend the conscience is a pretty high standard of moral turpitude. The courts keep emphasising that issue. The other thing is the cost of justice: going to tribunals and going to courts with the shopping centre delaying endlessly the case. I am well aware of a handful of cases in the retail tribunal here in New South Wales where major shopping centre operators like Westfield have dragged cases out for years and years and years, challenging each procedural point. Access to justice is an issue. With 51AC and 51AD you have to challenge each instance of unconscionable conduct in itself. Each example has to be challenged, has to be taken to court, so it is almost impossible to have class actions in relation to unconscionable conduct.

Senator JOYCE—One of the other cruxes to their argument is that 'unfair' is a nebulous term; therefore, who knows what unfair is and what unfair is not. Surely, it is not nearly as nebulous as 'offending the conscience'. Offending the conscience is something that works in their favour, so they support that and want to stick with it but 'unfair', which I think is infinitely more decisive as a term, is something they do not want.

Prof. Zumbo—Absolutely not, but I have to be very careful and clarify that we do not have an open-ended unfairness test here. We do not have simply a term that is unfair—full stop—let the courts decide. We have a definition of what is unfair, which is a significant imbalance between the rights and obligations of the parties, and we have the term 'not reasonably necessary to protect' big business. That becomes the focal point and the fact that you define it in those terms removes all the elements of doubt that that there may be as to what unfairness may mean if you simply say, 'You shall not engage in unfair conduct'. This definition of unfairness in the unfair contract terms regime is a test that sort of mirrors the Victorian test and the UK test and it works well in those jurisdictions.

Senator JOYCE—Business to business has been knocked out of this and, obviously, I have problems with that. I this just part of the momentum that will continue and they will ultimately try to knock out business to consumer and would probably get rid of the lot if they can?

Prof. Zumbo—There are two possible scenarios. One is, yes, they could possibly try to knock out the business to consumer side of things and there is an incredibly hysterical campaign out there with a lot of shrill voices even opposing business to consumer application. But the most likely scenario is that they will introduce terms like 'detriment' and 'transparency' to muddy the waters, so it becomes hand-to-hand combat to try to prove this. They will inject obstacles; they are very good at injecting obstacles and creating a feast for lawyers.

Senator JOYCE—As I said, I know Professor Zumbo, so I do not think it is fair that I should ask questions.

Senator BUSHBY—I notice that at least three times you have talked about it being 'not reasonably necessary to protect the interests of big business'. As I read it, the contract term is 'not reasonably necessary to protect the legitimate interests of the party advantaged by the term'. Why do you keep on using the term 'big business'?

Prof. Zumbo—Because I am not aware of any examples where it advantages small business or consumers. These unfair contract terms are designed to protect the larger parties. The lawyers will draft the contracts to protect the larger parties and I simply use it as shorthand.

Senator BUSHBY—They are designed to protect in situations where there is uneven bargaining power. I acknowledge that, in most cases, big business is likely to be in that position more than small business, but it does not necessarily exclude the fact that, in some circumstances, small business will have an uneven bargaining power with consumers. There may be cases where small businesses, such as a gym or something like that, a small operator, that is putting forward a standard form contract, may have an uneven bargaining position and may include unfair provisions.

Prof. Zumbo—I agree in relation to business to consumer certainly you could have small businesses that have these unfair contract terms because they are standard in the industry—absolutely. I have focused a lot of my discussion in relation to business to business and it is shorthand.

Senator BUSHBY—When you use the words 'reasonably necessary to protect the interests of big business'—

Prof. Zumbo—To say 'of the bigger party' is more correct. Whether it is a big business or a small business it is bigger than the weaker party.

Senator BUSHBY—We have had a lot of evidence particularly from business groups and similar regarding the uncertainty that this bill is likely to introduce in its contractual relationships with consumers to the extent that the bill applies. We are not talking about business to business in that context. You have addressed that to some extent by talking about the safe harbour option. That is not currently an element of the bill.

Prof. Zumbo—No.

Senator BUSHBY—The Law Council of Australia argue that what is unfair depends on the circumstances of the contracting parties. They would argue against being able to prohibit specific terms, because a specific term may be unfair for the vast majority, but it might not be for some or another mix. I do not know whether you would necessarily accept that, but the same argument could be used to say that, if a term is actually decided to be unfair and so a party does not include it in their standard form contracts then, depending on the circumstances, that may disadvantage consumers who might like that term to be included in the circumstances that they are seeking to contract with that party?

Prof. Zumbo—You have raised a number of issues there. If the consumer has negotiated with a small or big business or if the small business has negotiated with a big business and they come to a negotiated agreement, that is not covered by this legislation. This only covers standard form contracts. So if there is a process of negotiation where each one is happy with a particular negotiated outcome, that is fine. But that is not covered by this legislation. As you know, this legislation deals with standard form contracts where often, typically, it is a case of 'take it or leave it'. You could leave it but if you go down to the next mobile phone operator or to the next shopping centre, the unfair contract terms will be standard in those industries. That is a concern.

With all due respect to my colleagues at the Law Council, they have conveniently focused on procedural unconscionability. Procedural unconscionability requires looking at the circumstances. That is the nature of sections 51AB and 51AC. I have been around too long, and I remember the arguments in relation to section 51AC. I distinctly remember people like Milton Cockburn and other vested interests clearly saying that that would create uncertainty. Today, interestingly, I found out that it is all certain. I find that very interesting on the basis that, yes, it is very certain that it will apply to very few cases. But, back in 1997, when former Minister Reith was considering this matter and the parliament was considering it, the same vested interests—the Law Council, the Shopping Centre Council—all said that section 51AC would create uncertainty. You can always raise uncertainty about every single piece of legislation that appears. All you can do is minimise that uncertainty. This legislation goes a very long way to doing that and, with the addition of safe harbours, it would clinch that issue.

Senator CAMERON—There was a debate at the last hearing in Canberra between the Department of the Treasury and Senator Brandis on the definition of 'unfairness' in part 2, division I, clause 3 and also in section 51AB of this bill. Could I ask you to have a look at that debate—

Prof. Zumbo—I have.

Senator CAMERON—and give us your views as to who is right and who is wrong on that argument?

Prof. Zumbo—I have alluded to it already by opening up remarks. With section 51—

CHAIR—Professor Zumbo, we are out of time. We have a very tight schedule, so if you could just take that notice, that would be good.

Prof. Zumbo—Sure.

[11.33 am]

BELL, Mr David Peter, Chief Executive Officer, Australian Bankers Association

GILBERT, Mr Ian, Director, Retail and Regulatory Policy, Australian Bankers Association

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

Mr Bell—We do. Thank you for the opportunity to present our views on the Trade Practices Amendment (Australian Consumer Law) Bill. From the outset, the ABA has been opposed to this type of legislation because it will create a great deal of uncertainty for business and for banks. However, we acknowledge that the government currently intends to proceed with this bill over the top of strong business concerns. If this is the case then serious deficiencies in the bill must be addressed. The bill is scheduled to commence on 1 January 2010. This means that any business, be it big or small, including banks, have virtually no time to review, amend and reproduce their standard form contracts to meet their deadline. This is exacerbated by the particular period banks will be required to make the changes.

Mid-November to January is a period of high volume and high value financial transacting by customers. To ensure banks systems can operate at full capacity to handle this peak, banks put a freeze of any systems changes at this time and give priority to IT systems handling this load without the risk of interruption. As a result of this, banks will be exposed to the serious risk of litigation and regulator intervention before they have had any real opportunity to understand what they will need to do to be compliant and to act accordingly. The ABA has therefore asked that the commencement date be deferred by 12 months.

We have been told that in Victoria and Europe, where similar laws exist, there has been significant disruption to businesses. This has happened after investigations into terms of standard-form contracts where there are allegations that many terms are unfair. In some cases it has taken more than a year of negotiation and significant time and financial resources to amend contractual documents simply to placate the concerns of a regulator and without any tangible evidence of actual consumer benefit.

Central to our concerns is that the regime will create uncertainty for banks. Recently the minister removed business to business contracts from the regime because the proposed law was vague and likely to create uncertainty resulting in detrimental impacts on small business. We agree and commend the government for its decision. The ABA does not understand why a law identified as vague and likely to create uncertainty and therefore undesirable should also apply to consumer contracts. Central to these concerns is the definition in the bill of what is unfair. We believe this needs to be reviewed. Contrary to the recommendations of the Productivity Commission in its April 2008 report on the review of Australia's consumer policy framework, the bill omits any reference to consumer detriment in this definition. This is a serious omission and should be corrected.

In practice the operation of this legislation is likely to see customers agreeing on the terms and conditions for their banking services before the customer accepts a financial product, only to later seek to avoid their obligations by claiming a particular term is unfair. A major concern will be the case where a bank is faced with a decision to enforce a credit contract because the customer has defaulted. The standard defence is likely to become that a term of the contract relied upon is unfair. All the consumer needs to do is assert that a contractual term is unfair because it causes a significant imbalance in the rights of the parties, and the onus then shifts to the bank to prove either or both that the contract is not a standard-form contract or that the term is reasonably necessary to protect the legitimate interests of the bank. Further, the regulator will be free to challenge contractual terms on a theoretical basis and business is likely to see a repeat of the Victorian experience. Finally, we believe there needs to be a thorough overhaul of some other key expressions in the bill, including: firstly, what are a company's legitimate interest; secondly, what is a standard form contract; thirdly, to what extent is a fee or charge part of the upfront price?

CHAIR—You have said that the timing for the introduction is going to be difficult for you and that a number of contracts might have to be changed Do you have any estimate of how many contracts that might be?

Mr Bell—There are two aspects to the timing. To answer your question on the number of contracts, there would be literally hundreds of different types of contracts that will need to be changed. In addition to that, we are talking about many millions of customers who will eventually be effected. In terms of the timing, as this committee knows, there are other pieces of legislation the banks will have to deal with in the pipeline, and that

also adds to the burden and the concerns the banks have with changing their systems to deal with these changes?

CHAIR—And why would the contracts need to be changed? Is it because they have terms which might be perceived as unfair?

Mr Bell—By virtue of this new legislation banks will be obliged to go through every single standard-form contract to make sure that they meet the obligations of the new law. They simply cannot assume that is the case.

CHAIR—So you have no estimate on how many you think. You have a large number of contracts out, but you are not sure how many of those might be caught under this legislation.

Mr Bell—We can probably cite the example of one of our major banks, which has 700 or 900—

Mr Gilbert—Seven hundred standard-form contracts. You need to consider that the law extends not just to the contract but also to mortgages, for example—security instruments which are also contracts. They will have terms in them that need to be reviewed as well. So the breadth of the documentation that needs to be reviewed and considered is very wide.

CHAIR—I understand that there are a lot of contracts out there. But seriously, do you estimate that a lot of them will have unfair terms in them? Are you saying that you have a lot of contracts that will be regarded as unfair?

Mr Gilbert—Perhaps we should come to what the legislation is attempting to do and whether it is clear as to what its intention is. There have been a number of submissions lodged with this committee which indicate that the current drafting of this bill is very vague and very unclear. In fact, the minister himself said that in justifying his decision to remove small business from the ambit of this law. If that is the state of play with the legislation—that it is unclear and vague—it is impossible at this stage to be able to determine whether a term in a standard form contract of a bank is or is not unfair.

CHAIR—Then why not bring it in and let it get started and find out how things will be defined? You are saying you cannot determine unfairness because the legislation is vague, so how are you going to be able to review those contracts? Why not have it brought in, make the assumption that your contracts are fair and let the legislation take its course?

Mr Gilbert—That would be one way of approaching it, but our members like to comply with the law and, if there is any doubt about whether they are going to be compliant with the law, they will need to take steps to fix that. What I am saying at this stage is that, with a range of submissions ranging on issues from definitions through to other expressions in the bill, everyone is saying that the law in its current state needs looking at. The whole bill needs a thorough overhaul. The process of consultation leading up to the development of this bill was not the best. I think we are seeing the results of that process in the concerns that are being expressed on both the demand and supply sides in terms of what the bill is actually trying to say.

The other aspect is that next year banks will be reviewing their consumer credit contracts as well to comply with the consumer credit laws. As a result of that, the government has agreed to extend the responsible lending obligations of banks to 1 January 2011. If all the contracts are open and are being reviewed at a particular point in time, it makes a lot of sense in efficiency and cost terms to have it all done in one swoop. That is why we are really seeking this extension.

Senator BUSHBY—You mentioned in your opening statement the 'Victorian experience'. What do you mean by that?

Mr Gilbert—We were advised by a major firm acting for businesses in Victoria that the way in which the administration of the law in Victoria was conducted was that the regulator would approach businesses and say, 'We consider your terms unfair.' What followed were extensive negotiations, using legal advisers at cost to the businesses, disruption as people were distracted from the normal efforts of the business and negotiations taking up to one year with the regulator on whether a term was or was not unfair. That was not in isolated cases. In fact, Professor Zumbo's evidence even acknowledged the fact that there have been those types of extended negotiations over a period of time, and that has very much been Victorian experience. The law is unclear in Victoria; the law as drafted at the Commonwealth level is unclear. That is how that type of law can play out. The important thing is to get it clear and to get it right. If everyone knows what they have to do then you will not have those types of engagements.

Senator BUSHBY—You said that the Victorian experience was reported to you. Don't you have members that operate in Victoria that would have been subject to those laws?

Mr Gilbert—To our knowledge—and whether the bank had dealings in Victoria with the regulator would be a matter that it would generally keep to itself—we are not aware of any.

Senator BUSHBY—But they would have been subject to the Victorian laws, though, when they were operating in Victoria.

Mr Gilbert—Yes. We are not aware of any, but that does not mean that they have not been approached. We know that one charge card company was approached, and that took an extended period of time.

Senator BUSHBY—You also raised issues to do with the consultation process. How did you find that?

Mr Gilbert—It came to us, I suppose, in one sense! The first thing we knew about the unfair contract terms law being enacted this year was on 17 February when the minister announced it. Up until that time, the major settings of this law were developed between the members of the Council of Australian Governments, so it was not really until the announcement and a consultation paper came out in February this year that we were seized by the full range and import of the proposals for unfair contract terms.

We had a month within which to respond to that consultation paper. There were also parts of an exposure draft of the bill released as well. We have endeavoured to deal with Treasury on some of the key definitions in this bill, to be met with the response that the definitions are not open for discussion by Treasury because they are matters that were settled at COAG. We think a better process should have been undertaken. This bill has been rushed. We believe there should be a further consultation process to deal with all parties' concerns and all of the concerns that have been raised in submissions to this committee. There should be a good look at it, a good edit and a good and thorough review. Get it right, get it clearer and then move forward with it. That to us seems to be the best process.

Senator BUSHBY—In your submission you suggest that the definition of consumer contract should not apply to contracts for business type services. What do you mean by that? How is the definition going to extend to cover business type services, and why should that be excluded/

Mr Gilbert—We supported the minister's decision in terms of business to business being excluded. There are uncertainties for banks and other suppliers of goods or services in dealing with anybody where the terms of trade in which they engage are open to be challenged and potentially declared void and set aside. In a lending context, that is something that banks are particularly concerned about. The stakes are much higher in small business lending than in consumer lending. That does not mean that there is not a risk in consumer lending with terms being set aside.

Senator BUSHBY—So do you think that the bill as drafted will actually include loans to small businesses?

Mr Gilbert—There is a definition in the bill which speaks of a contract being captured by the law if only one of the parties is a consumer, which leads us to the conclusion that, if there is a business as well included in that contract—for example, a sole trader—the entire contract is captured and could inadvertently—

Senator BUSHBY—What about individual guarantors for loans?

Mr Gilbert—They may not be affected because they are not in receipt of the supply; they are guaranteeing the supply to a third party.

Senator BUSHBY—So, once again, it is a definitional aspect? You would like the certainty of having that clarified?

Mr Gilbert—Yes. A guarantor of a business loan has actually agreed to provide the guarantor in consideration of the bank providing those services to that third party—the small business. So, conceivably, that is open to argument.

Senator BUSHBY—What about prudential implications? You also raise that in your submission.

Mr Bell—You touched upon it before. That is, again, an unquantifiable concern at this stage.

Senator BUSHBY—How does it arise?

Mr Bell—It will arise in the case where a bank is going to lend to an entity like a small business. If the bank perceives or realises that the risk of lending has increased because the small business itself is subject to the unfair contracts terms that we have just talked about, an increase in risk means that more capital has to be set aside by banks. That is where the prudential uncertainty comes in.

Senator BUSHBY—Has the banking industry had any contact with APRA about that? Is that something that APRA has looked at in any shape or form?

Mr Bell—Certainly the ABA has not spoken formally to APRA about that. Whether our member banks have, I do not know.

Senator BUSHBY—But if there are real implications in a prudential sense, you would think that APRA would be interested in that.

Mr Bell—You would think they would. I guess this has to play out in this bill. Again, this is the problem. There is a lot of uncertainty around this bill. But most certainly, if there is increased risk associated with lending to any entity—be it small business or other—typically, lending institutions have to price for that risk.

Senator BUSHBY—In relation to the bill's presumptions, you argue that the bill reverses the onus of proof—which clearly it does in terms of those two presumptions—by requiring the defendant to prove that a consumer term is necessary to protect its legitimate interests and that it is not a standard form of contract. Others disagree with this position. For example, the Consumer Action Law Centre has argued that subsection 3(4) is sensible and practical because, effectively, the party that has access to the information to be able to prove the allegation should be the party that has responsibility for proving that. What do you say to that argument?

Mr Gilbert—That is a point that can be made. But there is the question about what 'reasonably necessary to protect the legitimate interests of the supplier'—in our case, the bank—means and what sort of evidence a bank is going to be required to produce to get over that line. I notice that in one of the submissions to this inquiry there was a significant concern expressed about the expression 'reasonably necessary'—in other words, an extremely high hurdle would have to be got over. It was not just 'reasonable to protect the legitimate interests of the company'; it had to be 'reasonably necessary'. In other words, it could not be done without, which is a very high hurdle. We agree with that submission—it is a very high standard.

Senator BUSHBY—You have mentioned both prudential regulation and the potentially incoming consumer credit legislation. Banks are highly regulated already. Assuming that the consumer credit legislation comes in, do you think that, with the regulation that you already face, the issue can be covered in terms of unfair contracts? If not, would it be better to deal with it as part of the regulation that you already face rather than imposing a different form of regulation upon you?

Mr Gilbert—That is an interesting question. It is not something that we have considered, other than that what would happen is it would confine this law to the area of greatest risk for the bank, which would be in its lending, because the consumer credit laws will be concerning lending. It probably would not change the spectrum of risk that banks face by simply confining it to one area rather than to the broader financial services area. I think we would still have the same problems.

Mr Bell—I might answer your question from another point of view. There should be a fundamental question asked here: what is the ill that this bill is trying to fix in relation to banks? We are not aware of that. It has not been spelt out to us.

Senator PRATT—Is it true that banks have already started to look at potential unfair terms in their contracts and look at removing them?

Mr Gilbert—I am aware that one bank has started a process to look at it.

Senator PRATT—What kinds of things are being identified?

Mr Gilbert—I do not know. All I know is that they have started a process to look. The terms of the legislation are not clear or settled and there is a long way to go. That particular organisation would agree that the time available within which to do this before 1 January is manifestly inadequate.

Senator PRATT—Frankly, it appears to me that banks are already moving in this regard. It has been reported that many banks have moved to remove or lower exorbitant 'you have accidentally overdrawn your account' fees and that it is quite likely that those kinds of fees would not have met fair terms in a contract because of the exorbitant size of the fee. Is that the kind of thing that you think bank would be identifying and addressing?

Mr Bell—Senator, you are quite correct that banks have moved on the issue of exception fees. In fact, there have been recent announcements by a number of banks, and those have been preceded by two years of action by banks to reduce those fees. Some two years ago we said that we recognised the community's fees concerns about those fees and we were taking steps to deal with it.

Senator PRATT—I think two years is probably quite a long time to adjust those but, noting the high revenue levels attached to those fees, I imagine it would have taken some rebalancing in terms of adjusting banks' bottom lines. Is that why it has taken so long?

Mr Bell—It is a whole range of issues. If we go back to basics about banking, banks make money from two sources. One is interest margins; the other is fees. Banks are required to get a certain return on the capital; otherwise, their investors put their money elsewhere. So when a major change occurs to a revenue line for a bank of course it has to adjust. It also has to adjust to various products out there. But over the last two years our member banks have adjusted those offerings, and in fact a couple of our banks prior to the most recent announcements have had products in place which have been exception fee free.

Senator PRATT—I would expect that, should this legislation successfully go through, banks will, as you have identified, try to anticipate as many of those unfair terms as possible and remove them. That sounds like a pretty good way forward to me, particularly in reducing uncertainty for both you and the consumer. On that basis I am a little bit confused by your statement that it is so difficult to identify unfair terms. Clearly, you will have to debate which ones you think might be in and get some advice about them, but you are not necessarily leaving yourself any real risk, in the sense that you will seek to identify which ones are likely to put you at risk and amend and withdraw them, I would think.

Mr Bell—There are a number of aspects to the question. One is that banks are prudent organisations and they have to anticipate what is coming down the track, so naturally they would be looking at things. However, because the legislation has not been crystallised they cannot finalise that. On top of that, we do not know what is going to happen when the legislation has actually been put into place. Who knows what will happen? So there are those uncertain elements which, even with the best will in the world and on the basis that our banks do like to comply with the law, they simply cannot deal with at this point. Unfortunately, time is ticking by, and we cannot do it.

Senator PRATT—Frankly, surely banks would have some idea from their complaints departments about which areas of the contracts would leave them most vulnerable, and that would be their starting point. Are you arguing that all those things are in fact fair? They may well be, but surely you have some grounds on which to begin this work.

Mr Gilbert—A lot of people complain about a lot of things for a whole range of reasons and not just—

Senator PRATT—Including to us.

Mr Gilbert—Yes, I know that. The question of course is whether those complaints fall within or outside what is currently a fairly vague and uncertain set of proposals in regulating contractual terms. Yes, you might get a bit of a lead from that, but at the end of the day it is what the law says you need to do in relation to your contracts that is going to determine what needs to be done with them.

Senator PRATT—What is the consumer supposed to do in the meantime, in the sense that consumers will have complained and there may well be some systemic issues there? They should not be denied recourse for what are legitimate concerns in relation to unfair contracts.

Mr Bell—Let us put unfair contracts to one side. Banks have very sophisticated systems in place to deal with customer complaints, and their objective is to deal with them as appropriately as possible. If that system breaks down, we have an independent ombudsman.

Senator PRATT—Yes. I refer people quite frequently.

Mr Bell—Sure. We believe we have a very good system in place already to deal with customer complaints.

Senator PRATT—You should not have anything to be scared of, then.

Mr Gilbert—Can I just add that those internal dispute arrangements and external dispute arrangements are mandated under legislation in the Corporations Act and will be mandated under legislation under the consumer credit laws that are coming into force next year. There is a regulatory requirement to have these arrangements in place to deal with those things.

Senator PRATT—Yes, I understand that.

Mr Gilbert—Senator Bushby asked earlier on about whether this law was necessary. You already have law which touches that area, and the banking ombudsman can determine disputes on the basis of contract law, good banking practice and fairness in all the circumstances. It is already there in the Financial Ombudsman Service terms of reference.

Senator PRATT—I would expect that there are limits on the extent to which they can determine questions of fairness because of the definitions within the contract. Is that not true?

Mr Gilbert—I think you will see in a lot of the guidance and in the bulletins that the Financial Ombudsman Service puts out that there are strong flavours, if you like, of a tempering of the rigidity of the contract to make a decision which meets those three elements: good banking practice; the law; and fairness in all the circumstances.

Senator PRATT—There are many who argue that that does not go far enough and really that is why these kinds of laws are before us today. Thank you.

Mr Bell—Senator, I go back to the point that I made to Senator Bushby and that is: what is the ill in regard to banks that this law is trying to fix, and when we will get to hear that.

CHAIR—Senator Joyce, are you there?

Senator JOYCE—Yes, I am. The power has unfortunately been knocked out with business to business contracts and in shopping malls, and it was clear in evidence of the expose of what that ill is and the unfair terms that are appropriate. Do you believe that 51AC and 51AB are an appropriate mechanism to deal with any issues that currently come to play in contracts?

Mr Gilbert—Is this in relation to banking contracts? I cannot speak in relation to shopping centre or other contracts unrelated to banking contracts.

Senator JOYCE—What laws do you think are currently at play that stop unfair contract terms in the banking sector?

Mr Gilbert—Certainly the existing provisions in the ASIC Act, which is the act that is relevant to organisations that provide financial services, provide the regulator with a broad range of functions. I know this is slightly off the track, but what we are concerned about with the primary definition in this law about something that is unfair is that, with the absence of detriment being a requirement in that definition, it gives the regulator a roving brief to effectively take banks and other parties to task—and this is what happened in Victoria—over terms that it, the regulator, thinks for a particular reason are unfair. That is a major concern as far as we are concerned. It is one thing to go to court; it is another thing to have a regulator working off a law that simply says: 'There is a significant imbalance of parties' rights under that contract term. We think that is unfair. Satisfy us that it is not.' I think that is a large burden to put on any business, large or small.

Senator JOYCE—In relation to the oversight of ASIC—and you have to deal with other regulating bodies that, for instance, shopping malls do not have to deal with—do you think that one of the problems might be that, with greater centralisation of the banking industry, there is perception—and I think it might be true in some instances—that you have the capacity to basically offer terms and people can either accept them or go without money? They do not have an alternative venue and a lack of competition is becoming evident in the marketplace.

Mr Bell—I am not sure that there is any evidence that there is a lack of competition in the marketplace. The things we look to would be the number of products available and, if you like, the price of money. The evidence is that interest margins continue in their long-term decline over the last 15 years from about four per cent to two per cent.

Senator JOYCE—You would not have to worry about unfair contract terms as there are a multiplicity of players in any industry or you have the capacity to easily switch because if someone is unfair you just go somewhere else. You find that markets become centralised and that capacity is lost, and people are bitterly held in or structured in that the government has a greater role to play as a regulator.

Do you acknowledge that the nature of banking itself is one where the relationship is far more coercive or far more prevalent than it would be in other forms of engagement in the marketplace where, basically, if you don't agree with something or you don't like something you just switch to another product, another brand or another venue?

Mr Bell—We would contend that it is relatively easy to switch your banking service. At the beginning of last year the government brought into place new switching rules, and they have certainly promoted the ease of switching for people. So I would not agree with your suggestion that there is a coercive relationship there. If someone does not like their bank, building society, credit union or non-APRA regulated lender, they can switch elsewhere.

Senator JOYCE—Do you find in this current environment that people wishing to switch are finding it increasingly difficult?

Mr Bell—I have no evidence to suggest that at all. I believe that the numbers of people switching their banking services between those institutions, as I described, have not particularly changed in recent times. If you wish to switch your banking services, it can be done and relatively easily, especially with the advent of the government's new rules.

Senator JOYCE—Are there any mechanisms in the banking industry at the moment where there is a form of unilateral variation of contract on the bank's behalf? Does a bank have the capacity to do that?

Mr Gilbert—I'm sorry—I missed part of that question.

Senator JOYCE—Does a bank have the capacity in any way, shape or form at the moment to unilaterally vary a contract—that is, vary the terms of an arrangement with a customer just by the bank deciding to vary the terms, as opposed to the customer agreeing to a variation of terms?

Mr Gilbert—Yes, they do, and the next question is: is that reasonable? The answer is yes. Banking service contracts are not simply a matter of a single supply and delivery. They go on for a period of time. In fact, the contracts are terminable at the option either of the customer or of the bank. As you know, loans can go on for years and years. You need unilateral variation clauses for a whole range of reasons, such as to make contractual changes because of changes in the law. There may be additional aspects of the contract. It may be that the pricing needs to track changes in the cost of funding and so forth. It is all there because the financial services market is a very dynamic market. It is not static and you need that flexibility. But I am not aware of any body of complaint that suggests that a unilateral variation clause exercised by a bank has been exercised in an unreasonable way.

Senator JOYCE—You are going to be surprised, Mr Gilbert—I agree with you. You have to have the capacity to unilaterally vary. But my following question is: who has the oversight, though, when the market that you are in, the banking market, becomes excessive in the way in which they unilaterally vary the contract? Where are the checks and balances on that?

Mr Gilbert—Under the Corporations Act—and it will certainly be the case under the forthcoming consumer credit laws—that either credit products or broader financial services products must be delivered efficiently, honestly and fairly by licensees. ASIC is the regulator of those licensees. So, if there are questions to be asked about those things, there is power already in chapter 7 of the Corporations Act, and will be under the new national consumer credit protection law, for those sorts of questions to be raised.

Senator JOYCE—What would you determine to be unfair? In your version of unfair, what would you say is unfair? I suppose unfair is if you put someone on a fixed rate and a year into the fixed rate you decide they are not on a fixed rate or you put the fixed rate up.

Mr Gilbert—I am not sure—

Senator JOYCE—In your mind, what is unfair? What does unfair mean? If I think you are being unfair—

CHAIR—Senator Joyce, are you asking for an example or a definition of 'unfair'?

Senator JOYCE—I am just asking for the concept of unfair. If I were a kid and I said to you, Mr Gilbert, 'I've found this new word "unfair"; what does "unfair" mean?' what would you say?

Mr Gilbert—This is one of the problems with the whole concept of fairness and unfairness. We have the Australian fair go, and I think we all understand generally what that means. Everybody's view of what is fair and unfair is going to be tempered by their background and approach to the world and their experiences in life. I have not got a definition in the top of my head about what is fair or unfair. I just know it when it happens. It tends to be something that offends my conscience. I put it in terms of unconscionable. I accept that things in the world can be unfair, but that does not necessarily mean one needs to bring a regime of regulation down upon those things.

Senator JOYCE—The term 'offending one's conscience' is already there. At the start, you said this is too vague and it creates too many uncertainties. But 'offending one's conscience' is already there in the unconscionable conduct clauses, and that is far more vague than 'unfair'.

CHAIR—Senator Joyce, I have to move on to Senator Cameron in a minute. Have you got a final question?

Senator JOYCE—I have one more query. In the banking system, are there any facilities at all where, the greater the profit you make, the more they put up your interest rate?

Mr Bell—I am sorry, I do not understand your question.

Senator JOYCE—It is just a straight-out question. In the banking system that you operate in, Mr Bell and Mr Gilbert, are there any products out there where, the greater the profit you make, the more they put up your interest rate and demand immediate access to what profit you are making?

Mr Bell—I do not understand the question, I am sorry. Are you saying the greater the profit the bank makes?

Senator JOYCE—No. I am saying, the greater the profit that I, as a client—Barnaby Joyce, accountancy practice—make, the more you put up my interest rate. Are there any products like that out there? You know the banking system.

Mr Bell—I must admit I have not heard of a product like that.

Mr Gilbert—I would expect the interest rate to go down because the pricing for risk would indicate your business is extremely successful and we would certainly want to keep you, particularly if a competitor—

Senator PRATT—Nevertheless there are other contracts like that out there.

Senator JOYCE—If there are products like that in other sections of the industry, away from the banking industry, that would be a fair shake of being unfair, wouldn't it?

Mr Gilbert—It depends on what you have agreed to and what the terms of the contract as a whole are and whether you understand those terms and, notwithstanding, agree to go into the contract—which is why this concept of transparency in the bill is very important to retain.

Senator JOYCE—But that might be because I had no choice.

CHAIR—I think we need to leave it there, Senator Joyce. Senator Cameron has some questions, I think.

Senator CAMERON—Mr Bell, do you agree that we should have a single national consumer law?

Mr Bell—Yes.

Senator CAMERON—Do you believe that, if we have a new law, there will be new penalties, new enforcement powers and options for consumer redress?

Mr Bell—When you have a new law, there are always going to be changes to that law and you have to deal with those when they arise.

Senator CAMERON—You say that we have to deal with them when they arise. On this question of vagueness and lack of certainty when a new law comes in, whether it is an industrial law or a general law there is normally a process of determining the law in court as it applies. Is that correct?

Mr Bell—I am not an expert in industrial law, but I accept your point.

Senator CAMERON—Not industrial law, general law.

Mr Bell—There is no doubt that, whenever there is new law or new regulation, there will be an element of uncertainty, but the point we are making is that banks want to comply with the law. It is important that we do comply with the law. So we are asking for as much uncertainty as possible to be removed from this legislation before it starts.

Senator CAMERON—Do you know of any complex law where there has not been some uncertainty and that law has just gone through everything and every 'i' has been dotted and every 't' crossed? Law does not work like that, does it?

Mr Bell—I accept that but I do not think that is a good justification for saying that we should not try and remove as much of the uncertainty from this law as we can before it commences.

Senator CAMERON—That is not the argument that I am making.

Mr Bell—I understand that but I am responding by saying that is our argument.

Senator CAMERON—That is not the argument that I am making.

Mr Bell—Yes.

Senator CAMERON—Professor Zumbo gave evidence to say that business was really protected under this new law and that the arguments that have been put up are not legitimate arguments, because if there were a

term in one of your contracts and that term was reasonably necessary to protect the legitimate interests of the business then that was a very strong safeguard. That does not disappear, does it?

Mr Gilbert—No, it does not, Senator. I note witnesses are not allowed to ask senators questions.

Senator CAMERON—You can try.

Mr Gilbert—Would you like to describe to me what the legitimate interests of a bank are?

Senator CAMERON—Some people lead with their chin! That is a general proposition under trades practices law, isn't it?

Mr Gilbert—But what does it mean?

Senator CAMERON—But you have survived. By that I mean you have managed to make profits and you have managed to become the best banks in the world with that there. You deal with it now, so nothing changes, does it?

Mr Gilbert—We do not know what that means even under the existing law. It is not clear. What is it going to mean under this law? It is not clear. Remember the bar is being lowered under this law, and it is unclear. Our view is that parliament should not be passing laws where it is possible for them to make them clearer for people to comply with them.

Senator CAMERON—But you are really asking for 100 per cent legislative outcomes.

Mr Gilbert—No, I am not.

Senator CAMERON—You just do not get that certainty, do you? You conceded that earlier.

Mr Gilbert—Every submission that has been put to this committee has, almost without exception, in one way, shape or form raised concerns about some of the definitions and expressions in this bill. In our view that is a very strong message to the parliament to have a closer look and to get some more certainty into some of this.

Senator CAMERON—Or it could send a message to the legislators that we are on the right track and that people are squealing because it is going to make them more accountable. That is another analysis of that, isn't it?

Mr Gilbert—I disagree.

Senator CAMERON—You may disagree but it is a legitimate analysis from my perspective if I want to make that.

Mr Bell—That is an easy thing to say, but in relation to banks where do you see the gap by which we are not accountable? That is a rhetorical question.

Senator CAMERON—Well, let us talk rhetorically. If you want to talk about banks, then I think the community would be saying, 'Regulate, regulate, regulate!' That is what they would be saying. Given the experience internationally of banks in a deregulated and not very substantial legislative position, then you would demand more regulation. I think that is something that you have to accept. You have conceded on the record here that part of the reason why Australian banks are strong now is strong government action to regulate.

Mr Bell—We have certainly conceded that there are two parts to the equation. One is strong regulation, which we have actively supported and worked to develop. The second is that we have made good decisions based on certainty of law and certainty of practice.

CHAIR—I am afraid our time has finished and we have to move on. Thank you very much, Mr Bell and Mr Gilbert.

[12.19 pm]

COX, Ms Karen, Coordinator, Insurance Law Service, Consumer Credit Legal Centre (New South Wales) Inc.

LANE, Ms Katherine, Principal Solicitor, Insurance Law Service, Consumer Credit Legal Centre (New South Wales) Inc.

CHAIR—Welcome. Ms Lane, do you have an opening statement that you would like to make?

Ms Lane—I do, and thank you for asking us to appear. The Consumer Credit Legal Centre is a community based consumer advice, advocacy and education service. It specialises in personal credit debt and banking law and practice. We employ solicitors and financial counsellors. We have a credit and debt hotline which is the first port of call for anybody in New South Wales who is experiencing financial difficulties. We provide legal advice and financial counselling information and strategies and also referrals to a face-to-face financial counselling service. In 2008 we took over 15,000 calls.

The Insurance Law Service is a project of the CCLC. It has recently received funding from the Commonwealth Attorney-General's Department—and we are very happy about that—to continue to operate for the next 12 months. The Insurance Law Service is a national service, unlike the Consumer Credit Legal Centre, which is New South Wales only. So far it has provided advice and information to over 2,000 consumers and has provided casework for nearly 130 consumers. The Insurance Law Service recently visited bushfire affected areas in rural Victoria to give advice. We also have comprehensive website resources including fact sheets relating to bushfires and floods and we attend to those for educational reasons and all those sorts of things. We are actively involved in giving community education to the public and in community work on insurance issues.

The CCLC and the Insurance Law Service support the introduction of unfair terms legislation as contained in the Trade Practices Amendment (Australian Consumer Law) Bill. The legislation is needed to address the unfairness of some terms in standard-form contracts. We believe the enactment of the unfair terms legislation will mean that suppliers will take care to avoid unfair terms in drafting contracts, leading to fairer contracts for consumers. Consumers will have more confidence in standard-form contracts. Currently they do not. Consumer confidence will increase generally as consumers will know they have some standard consumer protections, particularly in relation to terms, and consumers will have access to justice if they are a victim of unfair terms. The regulator will be able to drive systemic change, which I think is absolutely critical.

Of the two points we want to raise the biggest one is the insurance contracts exclusion. That worries us greatly at the Insurance Law Service. We are opposed to the exclusion of insurance contracts from the proposed legislation. We became aware of this very briefly from the explanatory memorandum in which there are only a few lines mentioning section 15 of the Insurance Contracts Act and mentioning that the law is not going to cover them. Until then we had no knowledge of this. In fact the elegance and the vision of this legislation are that it will cover a wide range of industries and contracts, so to exclude one type is very worrying.

I come to the reasons that we have for the view that they should not be excluded. It represents a loophole in what is meant to be comprehensive consumer law provisions. The insurance industry users unfair terms which cause consumer detriment, which we have given examples of in our submission—and we continue to worry about this. The duty of utmost good faith has failed to make any improvements in decreasing the use of unfair terms in insurance contracts and to provide consumers with a remedy when unfair terms have been used. The industry dispute resolution scheme, which is the financial ombudsman's service, has repeatedly stated in many annual reports and in case decisions that they cannot deal with unfair terms as the duty of utmost good faith does not cover this area.

Leaving unfair terms in insurance contracts is a considerable risk as in certain circumstances it leaves consumers unable to successfully claim on insurance, sometimes causing almost detriment—for example, someone being unable to rebuild their home. I cannot think of anything more serious than that, particularly with bushfires. It is a risk. On the flip side, this is also a risk for the government. When natural disasters occur, the government gives money towards rebuilding communities, which I absolutely support, but it is absolutely essential that we have confidence in the insurance industry to pay out on claims so that burden does not fall on the government. If an unfair term leads to somebody not being able to claim on their insurance that would be a disaster.

I also want to mention the transparency test, which is a matter that comes up within the consumer movement all the time. The biggest problem with the transparency test is that contracts are completely not negotiable and, worse still, the same terms are used across all the suppliers. The lawyers who draft these contracts tend to draft them as very similar contracts. I look at contracts all day long in my job and they are all similar so the idea that there is competition between contract terms is fallacious. That is the end of my opening statement.

CHAIR—Thank you, Ms Lane. Earlier in the day we had the Insurance Council of Australia here. What they said was that it was not that their contracts had unfair terms; it was that occasionally they were applied in an unfair manner.

Ms Lane—I disagree with that completely. I put evidence in my submission in relation to unfair terms. They are just unfair on any basis. Take travel insurance as an example. There are contracts where you have to have gone to the airport a certain way to claim on them. That is just absurd. It is unfair by anybody's reckoning. There is the uninsured motorist extension, where you have third-party insurance. You have to prove things that are impossible to prove. It is clearly unfair. The idea that there are not unfair terms in insurance contracts is absurd.

I think it is really important to remember how these things came about. Years and years ago, it used to be possible to negotiate your contracts with your supplier, but then everything became bigger and they got their lawyers to draft the contracts and therefore they became standardised. From a supplier's point of view, you want a standard contract because you do not want to be stuffing around negotiating each time. But the result is that when they instruct their lawyers to draft the contracts the lawyers use the same precedents and they draft in the best interests of their client, which is the supplier, to the complete exclusion of the consumer. You end up with a situation where it is absolutely set up structurally that you will end up with unfair terms, no matter what you do. Yes, there are pockets of industry that are worse, but I think the insurance industry is up there, well and truly.

I am also a credit lawyer. It pains me to say anything good about the banks, but despite their unilateral variation clauses they are above the insurance companies. Insurance companies are worse on unfairness. There is no doubt about it, for me. The insurance companies are behind on dispute resolution. The insurance companies are just not as mature as the banking industry. Obviously I have lots of things to say about banking because I am a credit lawyer. But the idea that there are no unfair terms in insurance contracts is absolutely absurd.

CHAIR—The Insurance Council also referred to a review that was being undertaken.

Ms Lane—That is the General Insurance Code of Practice. That has been set up in a way that I think is very unfair for the consumer movement. We were only given four weeks to respond. We were given no funding to assist us to write massively long submissions, remembering that our primary responsibility is to give service to the community—to actually help people who have insurance and credit issues. They have set up the review so that it does not even consider unfair terms. In our submission we have specifically said, 'Look, if you're not going to be covered by this legislation then you should put it in your code of practice.' There is no indication that they are going to do anything like that. You heard them testify this morning; I did not. To me, they have no interest in sorting this out. It needs legislation. If everybody else is going to be legislated, it seems unfair to me that they are not legislated as well.

CHAIR—What about the proposal that it should be a review of their own insurance act, rather than being included in the general consumer act?

Ms Lane—As long as exactly the same types of things end up in the Insurance Contracts Act, I can deal with that. But it does delete the elegance and the beauty of having Australian consumer law. One of the things that really thrilled me when this happened was that it was elegant and beautiful—and I know this happened in the UK. It protected consumers and it allowed consumers to have confidence in standard terms where we had none. Nobody reads contracts. I have gone to legal education seminars where they have asked, 'Who reads their contract?' No-one puts their hand up. They ask me, a credit lawyer for a long time—I was in financial services for 20 years and a credit lawyer for 13 years—and I say, 'I don't bother reading them either.' I read them when I was drafting them. I used to draft these things. There is no point reading them because there is nothing to negotiate—not a thing. You cannot negotiate. They pull them out and look on price. There is nothing to negotiate. My favourite query is when somebody rings me up and says, 'I've noticed in the banking contract there's a unilateral change clause. That's really unfair. Where's the bank or credit union I can go to where that clause is not there? 'I say, 'There is none.' Every single contract has it. It says they can change

anything, whether it is fair or unfair. Some of it is fair, but there is a whole heap of stuff that is unfair. I can give examples of that as required because I have come across them in my practice. I think that that is the crux of it.

CHAIR—The final issue I want to explore with you, you said something like governments needed confidence in the industry to pay claims. Insurance companies do need to be profitable. I have had a lot of representations lately from people who have not been able to get insurance, and in some areas insurance is not profitable and the industry is pulling out, so you have to be careful that they are still profitable. One of your examples was of travel insurance, where someone was given a free policy and it was very limited. Most people, if they were given a free policy, might have a look to see what it covered.

Ms Lane—It is not like you get it like that. The main free policy that people get, to be obvious about it, is with an AMEX. You know if you have an AMEX card, an American Express card, you get this free travel insurance if you are gold or something. Who ever reads the policy? You are not even given it—you are supposed to be given it—and even if you are given it it just goes in amongst all of the other stuff. The concept that people read all these things and go through the fine tooth comb stuff is just a nonsense, nobody does. The way we get confidence back for consumers is that they have certain expectations they are not going to be exploited or treated unfairly, and this is why this legislation is magnificent, because it brings back that confidence, which is currently gone.

CHAIR—You have to say if you get something for nothing, you might contemplate the possibility that it does not cover you for what you would like to be covered.

Ms Lane—But you are not getting it for nothing, are you?

CHAIR—Maybe not, but it is still something—

Ms Lane—You are still using your AMEX card.

CHAIR—You look at a normal travel insurance contract, which might cost you $100, and it comes free—

Ms Lane—It is all true.

CHAIR—with the AMEX, which is $50 annual fee. There is an element there that the consumer does have to be a bit cautious.

Ms Lane—I am not advocating anything about not having balance because I think, if anything, this legislation is not really serious. Despite the banks going on like this, it is not seriously over-the-top pro-consumer either. There is a nice balance about saying, 'Look, if necessary the regulator can look into things that are just unfair and look at driving change.' I agree that if you pay 10c for an insurance policy then you are not going to get a whole lot, but by the same token there are people out there who get house insurance and shop around on price and they still do not get that that means they get less coverage. And so when these bushfires come through, the people who have the cheap insurance policies have more trouble than the people with the expensive insurance policies. That may be a financial literacy problem, but it is also a whole-of-society issue, because when these things happen they affect us all. The critical thing is that somebody, whether it be a court or a regulator, is going to balance those things and say, 'Okay, is there anything unfair in here?' This is not throwing away the contract, and nor would we want to because the whole of society would collapse if we threw away contracts. We are just taking away exploitation. I am not saying insurance companies have to pay no matter what; I am just saying that if something is just absolutely blatantly unfair, we should be able to do something about it.

Senator BUSHBY—Thank you for coming along and assisting us today. You have a lot of expertise in the area: you practice daily, you see the problems that individuals have on a daily basis. So your comments noting that the ombudsman in particular says that duty of good faith does not include unfairness are interesting. The Insurance Council this morning quoted some legal cases and legal precedents where they thought unfairness was a concept that was relevant to disputes.

Ms Lane—It is worth me trying to explain all of that, because there is push-pull at the moment there.

Senator BUSHBY—Yes, it confuses me.

Ms Lane—It is confusing. There are two different concepts being bandied around. One of the things that the dispute resolution schemes have always had as part of their thing, and always the industry quotes this, is that they have to consider industry practice, the law and fairness in the circumstances. I have been putting cases into external dispute resolution schemes for a long time now—10 years—and before that I was in a bank where I took the external dispute resolution scheme cases, so I have seen both sides. The dispute resolution

schemes have seriously struggled with fairness. In fact, if you look at the insurance contracts decisions, they have not really applied fairness. The chief ombudsman, Colin Neave, has indicated to a number of people, including me, that one of the things he is going to do now is look at trying to work out this fairness thing.

Senator BUSHBY—Is the problem that they have to balance fairness with those other factors instead of looking at it as an issue on its own?

Ms Lane—Yes, it is a balance issue. Lots of these people who sit on panels and make decisions are lawyers—and I am one too—and lawyers tend to take the view that you look at the law. The whole fairness thing has been a struggle for them. Now that does not mean the dispute resolution scheme is going to do it, but they are in their infancy on this. I have run so many complaints, and I have never had one decided on fairness or that even mentioned fairness, and that includes insurance. There are one or two insurance complaints where they have mentioned fairness, but I do not think they have even applied it correctly, so they are struggling.

Senator BUSHBY—Ignoring this legislation for the moment, is the problem that in the insurance industry they are struggling with the application of what could be done?

Ms Lane—Yes.

Senator BUSHBY—Okay, so it is not necessarily a failure of regulation but a failure of the application of that regulation.

Ms Lane—Just to distinguish: we have possible fairness coming through with this legislation. The insurance industry struggles with fairness anyway as it comes through into dispute resolution, and I do not think it is their fault. The external dispute resolution scheme completely struggles with fairness, and they are not there yet.

Senator BUSHBY—Who administers that?

Ms Lane—It is the Financial Ombudsman Service. So when the panel goes to consider it, they just decide on law. They do not think about fairness. They think about industry practice, but fairness got too hard. There are two decisions I am aware of where fairness is mentioned. I think they were misapplied and they misunderstood. So they have work to do. But that said, the whole external dispute resolution scheme for banking, finance, all of it, has to struggle with fairness because it is part of their thing. I think the law would complement that. They have to struggle with it anyway, and the legislation is just reflecting those things that were always in dispute resolution schemes anyway, which have not been applied because there is actually no law to back them up. And that is my main point: when I am in a dispute resolution scheme, the ombudsman often comes to me and says: 'Look, I need law. I'm not a lawmaker, I'm not a judge. I need law.' The more law you give these people, the better off consumers are because they get law to look at. At the moment they are going to struggle until this comes in. When this comes in, I strongly advocate it has to include insurance because now you are going to have a nonsense where one part of the ombudsman scheme for the Financial Ombudsman Service will be applying a fairness, and the rest, for the insurance, would be more ridiculous there. It is absolutely essential that the ombudsman has tools to make decisions.

Senator BUSHBY—I hear what you are saying and I understand what you are saying. One thing I do not agree with you is that more law is better.

Ms Lane—It is targeted law.

Senator BUSHBY—I prefer less law, but very effective and targeted law. And that comes to my next point. I note you admire the elegance of this proposal in that it covers everything. I personally am attracted to the elegance of a law that is tailored to the problem in each industry and takes a more sophisticated approach to deal with those issues as they apply in the industry. The fact the insurance industry is a specifically regulated industry highlights the fact that it is probably one of the areas where it is most open to abuse and that consumers needed to be protected, and that is why action was taken in that earlier than it was in the broader economy. Senator Cameron asked some questions this morning about the fact that it was an eighties piece of legislation, and Senator Cameron took the Insurance Council through some of the updates and noted that it had been updated. Not to say that it should not need more, because it is a 1980s piece of legislation. But there is a separate argument to the elegance of a piece of legislation that covers everything, that says maybe you are better off looking at each industry and saying what are the problems here and putting in what I would say is a more sophisticated approach in addressing the specific problems of that industry in a separate way.

Ms Lane—I see that argument. Because I practice in credit and insurance, I am worried. I can live with having it in the Insurance Contracts Act; I cannot live with having it just in a code, because I do not think it

being voluntary works very well. With my practice in insurance and credit, I tend to treat banks and insurance companies the same and run the practice like that. They are similar enough, particularly since you have to remember that banks own insurance companies and they are very connected and related. If you go to a bank, they have an insurance arm. They do make sense as a group. When the ombudsman scheme put them together, it still made sense. I am still not persuaded that they are different enough. I think that given that they are owned by banks, they are very related to banks and they are in the financial services regulation with banks, it just seems to me that they should be regulated the same.

Senator BUSHBY—I am conscious of time constraints, so I will quickly move on. Clearly, most insurance policies are take-it-or-leave-it, but you said that the same terms are across the policies. Are you not talking necessarily though about the coverage? You also highlighted that if you pay more you get more.

Ms Lane—You do.

Senator BUSHBY—Yes. So when you are talking about the same terms you are not necessarily talking about what the policies might cover, because that might vary. You are talking about basic terms.

Ms Lane—Yes.

Senator BUSHBY—That is just a bit of clarification in my own mind. The other thing that the Insurance Council raised was the example of a bag you might leave in an airport and whether that should be covered if you left it unsupervised. The bottom line was that they said that, to remove the uncertainty, if you have an unfair term fear that may apply to whether you were supervising it or not and whether that should be covered, ultimately the insurance company would either have to build in a high premium to cover the risk that you might not supervise it or alternatively choose that it is not economic to offer the coverage at all. That is a micro-example of a problem that they say will be exacerbated by including insurance in this bill which ultimately will make all consumers suffer to protect those few at that margin.

Ms Lane—I would love to address that argument because it has come up with previous witnesses and I think it is a really interesting argument. My first answer to that is that we are regulating not just one industry but a whole range of industries with Australian consumer law. Unfortunately, any time any type of regulation comes in, industry cry that premiums will go up or fees will go up. We hear it all the time. Of course, there is no way I want my low-income, disadvantaged people to end up with more cost. But I have to take these claims with a grain of salt because my low-income people get hit anyway regardless of regulation. The fantastic example is that of banks fees. There has not been any good reason why they have skyrocketed and why everybody gets charged a direct debit dishonour fee of $50. Yet, that is exactly what has happened. Yes, I am mindful that I do not want premiums to go up, but I do not want to be held captive for consumers on something as important as their contractual relations.

I am a lawyer, after all. I believe in justice and social justice and all those things. The concept of a contract is that it is supposed to be a meeting of minds. That is the first thing you learn in law school. Of course, it is not with supply contracts. That is such an important goal for consumers. Those contracts make the difference for me in running their cases. The idea that they are going to almost blackmail us with increased costs so that we can get something like a semblance of justice in contracts pains me greatly. If I had to say what the higher goal is, I would say that it is that we have a semblance of justice in contracts. It is something we have lost and need back. It is a consumer issue. It makes a huge difference to my practice because I cannot tell you how many unfair terms I come across. I have grown used to it. This is going to be very good for me because I will be able to feed to the regulator the things that need to be looked at so that they can start to make a change.

But what I am really looking forward to is nothing to do with regulators; it is when the industry briefs their lawyers and says, 'Hey, there's unfair terms legislation now. Next time we look at this contract we need to think hard about what we are putting in here.'

Senator BUSHBY—They probably cannot afford to wait until the next time they look at it. They probably need to do it straightaway.

Ms Lane—Good. But the idea is, when they brief their lawyers they say, 'We have to think about the consumer here. We can't just think about us. We're thinking about the consumer.' That type of preventative change, which is nothing to do with regulators or laws or me going to court, is the kind of stuff I love.

Senator CAMERON—The Bankers Association are opposed to this legislation, and one of the reasons they argue they are opposed to the legislation is that no-one has demonstrated a need. Show us where the problem is. Can you help with that?

Ms Lane—Yes, I can. It will take me a few hours and we will run out of time, but can I just give you a flavour—

Senator CAMERON—You can take some of it on notice if you like.

Ms Lane—Yes, I know. I just want to give you a flavour of what my life as a case worker is like. I see both unfair terms and terms being taken in an unfair way regularly enough to absolutely pain me. For example, hire cars are just shocking. You cannot possibly claim. There are insurance contracts where it has been set up so it is impossible to claim. I see it all day every day. For example, I see things with fixed rates. One person rang up the bank and said, 'I'll fix my rate' and they did not even get consent from the other partner. When the other person said, 'Why were they allowed to fix the rate without my consent?' they were told: 'We've changed the terms of the contract on the unilateral change clause.' This sort of stuff actually happens.

If you could spend time with me you would see that I see it all the time. It is very difficult for us. We really and truly get worn down. We are so used to every contract that we are thrown into being completely not negotiable. We have been used to them for so many years that we have forgotten they are there. They are supposed to be negotiable, but they just are not. So is it a live issue? Absolutely. I see it all the time and I continue to see it.

Unfortunately, for the last many years, even though we have unconscionable conduct provisions and all of that, they have not worked for this type of problem. If I went to court I would lose if I was arguing unfair term. I have been unable to do anything with them and so I have had to advise consumer after consumer after consumer that yes, it is unfair—in fact, this is one of my mantras. I say, 'Yes, that's unfair, but can we do anything about it legally? No. But, by the way, they're talking about bringing in legislation.' I receive lots of calls where people say, 'This is unfair.' Whether it will be or not when we look at it in the light of day is a different story—but do I get thousands of calls from consumers saying things are unfair? Yes, I do, Senator.

Senator CAMERON—The banks are saying that the legislation is vague and uncertain and that is a reason why it should not proceed. What are your comments on that?

Ms Lane—I heard your comments and I could not agree more. This uncertainty thing again is a furphy. First of all, the legislation has been brought in in the UK. The whole world did not collapse. The UK did not go into receivership. It was brought in as being there. It has been brought in in Victoria and again it did not fall apart. It has made some really useful changes to certain contracts with telecommunication companies that were completely unfair. There was a decision on AAPT which I thought was completely right. Regarding this uncertainty thing, I have uncertainty from a consumer movement point of view, too. I do not know whether this is going to achieve its outcomes, and how can we know? We do not have crystal balls. But what we do is put in the best effort we can to make sure that the legislation makes sense. If there is a precedent overseas, that helps; that is great. We want to achieve a certain goal, which is making sure standard form contracts are fair. What is the uncertainty in that?

Senator CAMERON—I am not sure if you can answer this question. The banks say, 'Look, it's going to be such a complex job changing all these standard form contracts that we need 12 months to change.' Have you got any insight into that?

Ms Lane—The first point I have to make is that it is ironic. Why have you got unfair terms in there in the first place? They have obligations under the code of banking practice to be fair and reasonable and yet they are saying they need 12 months to change all their contracts. The new code of banking practice has been in since 2002, so the idea that they do not know that things have to be fair and reasonable is just a nonsense. Other industries have an argument, but I do not think the banks do on this because they know they are supposed to be fair. They have just been drifting along and pretending that that bit of the code of banking practice does not apply to them.

Every time there is any change in legislation—I have got the same thing with the credit staff: they all say, 'It's going to take us millions of years to change,' '12 months,' 'We've got systems problems,' 'There are technological issues,' and all of that. But what I find interesting is that when they want to change their products to benefit themselves, it takes a lot less time.

Senator CAMERON—So would you say that the pendulum has swung too far over to the provider and away from the consumer?

Ms Lane—Yes, absolutely. The beautiful thing about this legislation is that we are trying to redress the imbalance in power. The provider just holds all the power. They have got the contract that says, 'We are looked after,' and the consumer has nothing—nothing. Even the consumer credit code was never designed for

really unfair terms. The Insurance Contracts Act was not ever designed for this issue. This is new legislation that is just for this issue, which is a giant loophole at the moment. And, yes, we need it.

Senator PRATT—I want to go back to the question of insurance. You are aware of the earlier discussion we had today in which the Insurance Council put forward evidence about impacts on affordability of policy. I want to ask you about the extent to which insurance is only affordable because of the illusory nature of the cover in some circumstances. Could you comment on that, please, and on whether that is fair or not.

Ms Lane—It is one of the things that concerns me, in my policy area of insurance, greatly. There are a couple of issues of that sort. The flood issue has been interesting because suddenly there is some movement to cover flood but some people are not covered yet other people are, and the cover changes, and that has been difficult because I do not think consumers are aware of it. The other one is replacement cover versus the underinsurance issue. If your house burns down to the ground in a bushfire, if you are underinsured you cannot rebuild your house; you have to rebuild something which is tiny in comparison.

So, yes, there is that whole policy issue of the illusory nature of insurance. I wish I had a brilliant answer right now to sort this out. But it is something I am going to be chipping away at as long as we have funding in insurance—and probably even if we do not, because it is something that I think is a combination of policy work and financial literacy on insurance. I think the government has spent a lot of money on financial literacy in terms of credit and things like that. But I think insurance is one area where people really struggle to understand what is going on.

That said, I think that having unfair terms legislation in insurance would make the most difference. When I think about insurance contracts and how often we come across unfair things, it is actually more than in other areas—apart from pockets of problems. So, for me, excluding insurance is a tragedy. I take the point about increasing premiums and things like that, but I think we have to have a holistic approach and that holistic approach cannot just be getting rid of unfair terms.

Senator PRATT—If such an exclusion has taken place because of a purported impact on premiums and that overall risk management, you can turn that on its head and argue, 'Taking that from a consumer point of view, if someone thinks they are covered by something and they are not, then they have clearly paid for something that they have not received.'

Ms Lane—They have been misled.

Senator PRATT—What kind of acknowledgement should there be in talking about the fairness or unfairness of an insurance contract that should clarify those matters?

Ms Lane—I am not sure what you mean.

Senator PRATT—For example, there are likely to be certain things that seem to systematically trip people up, one being whether someone's bags are truly minded or not, and another being whether someone's house is occupied or unoccupied. If we were to start to look at whether these things are fair or not, then surely with that fairness would come greater clarity and there would need to be a focus on making sure that consumers were truly aware of the nature of their contract in order to argue that they were fair, perhaps.

Ms Lane—I agree with that. I think it is a threefold approach. We need to look at what they understand they are getting and we need to make sure that the terms are not unfair. I do not think the duty of utmost good faith has sorted that out, and that is why I am here today to say that we need this. I am sitting here talking about bigger issues, but the insurance industry is critical going forward. We saw funding for helping people because, with climate change and natural disasters and the fact that they are behind on certain things, it is like a perfect storm, if you can imagine it. From my perspective, I sit there watching and I see that there is going to be more cost to government and there is going to be detriment to consumers. I think they need to be closely looked at it, because they are going to be very important going forward. I do not want them to be not profitable, that is not the idea, but I do want to make sure we can have confidence as a community that people who are insured and have properly paid their premiums will get paid—and unfair terms are an anathema to that.

Senator PRATT—It gets back to the question of cost. Clearly there is no point in having cheap insurance if it does not cover you, but, at the same time, consumers do not want to pay a lot for their insurance when they have a lower level of risk attaching to them. They do not want to subsidise bad drivers. They do not want to subsidise unoccupied houses. How do we get balance and clarity around that issue in terms of what is fair and what is not fair?

Ms Lane—As I said, I think it is two things. Firstly, we need to get consumer confidence on insurance. I think unfair terms are part of that, but there might be more. Secondly, it is about education. Once I have said to people over the phone, 'If you do this with your insurance you're not going to be covered by this,' they get it. It is just that no-one explains it to them and they do not read the contract. That is what we have to contend with. It is a financial literacy issue.

Senator PRATT—This goes back to the fact that we have a whole range of consumer contracts that are written for the supplier, not for the consumers themselves. With insurance, surely that is simply not acceptable. Insurance is so fundamental that you really ought to understand what it means. Your insurer should have an obligation to make sure that you understand the terms.

Ms Lane—I could not agree more with that. I think it is absolutely vital, and massive consumer detriment could be caused if we do not get this right.

Senator JOYCE—Do you find that 51AB and 51AC, in unconscionable conduct terms is sufficient protection, or is it lacking?

Ms Lane—It is lacking. Academics could go on for days about this, but I will just give you my take.

Senator CAMERON—Professor Zumbo usually does!

Ms Lane—I know. I bow down to Professor Zumbo. I am not an academic, I am a case worker—and caseworkers are a different species—

Senator CAMERON—You should hear Senator Brandis—it gets even worse!

Ms Lane—I have thought about that too! Here is my comment. It is about outcomes. I want outcomes for consumers, I want fairness and I want social justice—and I am not really concerned about how I get there, so long as it is fair and ethical. It is not just about section 51AB. It is also about the ASIC Act, unconscionability, unjustness in the Credit Code and the Fair Trading Act. Let us not leave all those other laws out—it is basically a family of unconscionability. For whatever reason—and I think it is a lot to do with the way the law developed—that whole unconscionability thing—and I know because I have run case after case after case—and some of them with your brother, Senator Joyce.

Senator JOYCE—Christopher. Hang on, you had better declare that. I did not know that you worked for Christopher, but there you go.

Ms Lane—No, I do not. I worked with him years ago, but I do not work with him now.

Senator JOYCE—He is a crazy leftie!

CHAIR—So there is someone in the family who is all right!

Senator CAMERON—What happened to you, Barnaby?

Senator JOYCE—He is a good bloke. He is always doing pro bono stuff.

Ms Lane—He is a very good bloke. He is one of the consumer advocates, and he has been one of them for many years. But the issue is that I have run heaps of these cases and they do not work on unfair terms—full stop. I could go on forever. Every time I have raised an unfair term, I have lost—you cannot win. The only case I am aware of where an unfair term got up—it was a strikingly unfair term—was a tiny tribunal decision on vendor finance. Vendor finance contracts are the most terrible contracts, but they are going to be regulated under the new credit laws. You go to a person or a company and they sell you a house over 25 years—that is called 'vendor finance'. You do not own the house until you make the last payment 25 years down the track. It says in the contract that, if you move out or do anything, they get to keep all your repayments, your first home owner's deposit and everything else. The tribunal said: 'Hey, that's unfair. Because it's more than you'd pay for rent, you're actually getting ripped off.' It was the only such decision I have ever come across. Yes, that gives me a little bit of hope—because it is a tribunal—but I am not sure it would last in court. That said, I think it is to do with the traditional treatment of unconscionability and the idea of unconscientiously taking advantage of someone. I just do not think unfair terms fits with that. I know that people were arguing about it. I think it was meant to cover it but, for whatever reason, it does not. Does that answer your question, Senator?

Senator JOYCE—It just goes to show that justice runs in the family and crosses political divides.

CHAIR—Thank you, Senator Joyce. I think that is a good point on which to end. Ms Lane, thank you very much for coming in to talk to us.

Proceedings suspended from 1.01 pm to 2.01 pm

BATTEN, Mr Richard, Partner, Minter Ellison Lawyers, Investment and Financial Services Association

O'REILLY, Mr David, Director, Policy and Regulations, Investment and Financial Services Association

CHAIR—Welcome. Thank you for coming in this afternoon. Do you have an opening statement that you would like to make?

Mr O'Reilly—We do.

CHAIR—Thank you. Please go ahead.

Mr O'Reilly—For a start, thank you for receiving us to give evidence before you. IFSA, as you know, is a national not-for-profit organisation which represents the retail and wholesale funds management, superannuation and life insurance industries. IFSA has over 145 members who are responsible for investing over $1 trillion on behalf of more than 10 million Australians.

While IFSA members support COAG's proposal for the introduction of a national, unfair contracts term law, our members are concerned that the broad scope of the proposed new law will undermine arrangements in the already highly regulated funds management, superannuation and life insurance industries. We note in particular the fiduciary and common-law obligations on superannuation and managed investment scheme trustees and the statutory obligations on life insurance companies to prefer the interests of policyholders to those of their shareholders.

The Corporations Act currently provides a comprehensive regime for the regulation of financial products and services. The providers of financial products and services are required to hold an Australian financial services licence and are already required to do all things necessary to ensure that financial services covered by the licence are provided efficiently, honestly and fairly. Financial services licensees are also required to have in place arrangements for compensating retail clients who have suffered damage because of breaches of their obligations under the law and must be a member of an external dispute resolution scheme as a compulsory requirement.

The financial services industry is characterised by a range of standard form documents, having a contractual obligation, that are already subject to a significant degree of regulatory prescription and oversight. The requirements of the financial services regulation are designed to provide investors using financial services and investing in financial products with appropriate protections and remedies while imposing high standards on those entities offering financial services and products. The extension of the unfair contracts provisions to standard form financial services contracts will not add to investor protection but will add a level of uncertainty and cost that is not warranted. I will just hand over to my colleague to make a brief statement.

Mr Batten—Thank you, senators. I am the chair of the IFSA regulatory issues working group, which is one of the reasons I have been asked to represent IFSA today, and I am also a partner in the Minter Ellison financial services team. My role there is to advise clients in the industry on compliance with various regulatory requirements affecting the industry and on implementation of new regimes as well. In that role, I do get to see how industry is affected by the introduction of new requirements and how it responds to those new requirements.

One of the concerns that I have and that the association has is that, as David indicated, while we recognise the need for national consistency in the space of unregulated contracts, we are concerned that, with the level of regulation in the financial services sector already, this additional overlay will essentially just add to cost and create the risk of confusion and uncertainty in the industry. The existing regime is designed in part to protect consumers but also in part to ensure that the right balance is struck between the interests of consumers as a group and the interests of individual consumers. That is reflected in prudential requirements for banks, insurance companies and superannuation trustees, for example, and for trust related and statutory obligations for managed investment products.

In our industry, we do not believe there is any need for, or any proven deficiency that requires, this form of regulation and that, given the extensive nature of the regulation that already applies, it is an additional burden that is likely to lead to an increased cost, which ultimately will get passed on to consumers, and a more risk averse industry, unable or unwilling to make sensible choices in product innovation, again to the detriment of consumers.

I have, in a separate submission on behalf of Minter Ellison, focusing purely on the financial services aspects—given that that is my background—suggested some particular amendments. We are concerned that,

although there is an exception being proposed for managed investment scheme constitutions, which we understand is probably intended to reflect some of the concerns that the association has raised in its submission, it does not actually go far enough. I have suggested some amendments to try and clarify that, firstly, we are concerned about the specific impact for product disclosure statements and application forms which could be themselves seen to form a contract—a standard form contract, of course—and to exclude that, given that they are already subject to quite extensive regulation, and, secondly, to recognise that not only managed investment schemes but also, for example, superannuation funds are subject to an equivalent level of regulation as managed investment scheme constitutions.

The only other issue that I wanted to mention was concerns about the change that seems to be flowing into the legislation more generally in terms of introducing civil penalty regimes and broader enforcement powers. While we recognise the need for the regulator to have appropriate enforcement powers, I am concerned about the potential—again in a highly regulated and risk averse industry already in many regards, certainly at the institutional level, which the association represents and in relation to my clients—that the kind of civil penalty regime that is proposed, making it easier to prosecute, making it easier for ASIC to simply issue an infringement notice, will actually again create a very risk averse culture within the industry. Again, that is ultimately to the detriment of consumers.

I would suggest, while it is not reflected in the submission, that perhaps something that the committee could consider would be whether or not, if civil penalties are an appropriate outcome—and I certainly recognise some of the comments that have been made by the Productivity Commission and Treasury in relation to some of their papers on that issue—that potentially the burden of proof does not need to be a civil burden of proof for that nature of offence. That may resolve some of those concerns.

CHAIR—Thank you. Could I just explore the idea that your organisations have got quite stringent regulation through the prudential aspects of them—through various means but principally ASIC—but not necessarily on all the contracts that you have with customers and clients?

Mr O'Reilly—In terms of which documents? When we are talking about, say, managed investment schemes—

CHAIR—Or life insurance or superannuation.

Mr O'Reilly—Okay. I will start perhaps in terms of managed investment schemes. For a start, the legal requirements are essentially that you have a responsible entity effectively with trustee duties. So you have got an entity which is subject to both statutory duties and common-law duties in terms of their trust obligations. Those are the entities that have got requirements for their members to act in the best interests of their members, and therefore the documentation going out from those things in terms of PDSs, in terms of any other documents they may issue, generally falls under those types of fiduciary obligations in any event.

Mr Batten—And there are content requirements specified in chapter 5C of the Corporations Act for constitutions that have to deal with certain measures that are probably the critical measures for consumers in any case in terms of having fair provisions for withdrawals and pricing of interest, for example. Those sorts of measures are actually addressed in chapter 5C at a statutory level, and that is in the context of very detailed consideration of the sorts of measures and controls that are necessary in that particular industry.

CHAIR—If consumers, in all their other dealings with other organisations, are used to having consumer law that they, hopefully, understand well and that covers all of their transactions—and given that you have said you already have a fairness provision in any case—wouldn't it be simpler and more efficient just to deal with it all under this current bill that we are considering?

Mr O'Reilly—No. What we are saying is that that extension is unnecessary because the regulation is there at the moment. In terms of extending it further, you have got issues. My understanding is that the unfair contracts provision will operate on an individual basis as well as the type of term. It is not necessary. It is something which will, if you introduce it, simply impose an additional check on something which we believe does not need to occur.

Mr Batten—Obviously over an extended period of time there has been regulation of financial services. In terms of insurance, for example, there is the Insurance Contracts Act as well as the relevant provisions of the prudential legislation such as the Life Insurance Act and the Insurance Act and prudential standards that have been made by APRA under those provisions. In terms of superannuation there is the Superannuation Industry (Supervision) Act and of course chapter 7 of the Corporations Act, which very heavily regulates the kind of conduct that can occur. That body of law has developed over an extended period of time and has reflected the

necessary adjustments between the interests of individual consumers, the interests of other consumers as a group and the interests of issuers. What we are concerned about is that an overlay over the top of that potentially interferes with what is a very considered body of law in that space. To the extent that any such obligation should be transposed into any of those regimes, it should be done on a very considered basis with specific regard to the form of regulation that is already in place, rather than simply being done as an across-the-board solution.

I acknowledge the observation 'If we are already fair, then what harm does it do?' but the reality in terms of implementation of new requirements is that every additional requirement does produce an additional level of review. It will produce an additional review at the outset, when the legislation is first put in place. There will be money spent. Whether or not contracts are in fact fair—and I would expect that in almost all cases they are fair—there will be an expense that is undertaken to go through that exercise of ensuring that there is no risk. In our industry in particular, being a highly regulated industry but also an industry where reputation is the keynote of success, there is a concern about any risk of being seen to be unfair, which means that almost all institutions will take every step to avoid any risk of being unfair, which often means pulling back much further than what the legislation itself says. So there is the risk of additional expense in terms of compliance but there is also the risk of reducing the innovation and preparedness to put new products to market where there might be a perceived risk of unfairness.

CHAIR—But of course you are talking, as you are expected to, from the point of view of the organisation. From a consumer's point of view, I had an instance in my own superannuation contract where I had a problem, and when I rang I was put through to a call centre and was subsequently informed that the superannuation company involved did not even look at the correspondence or monitor the call centre. So, given those kinds of circumstances, I am perfectly able to look after myself but a lot of consumers are not. That is what I am talking about—those contract provisions.

Mr O'Reilly—Also, in our industry, as you would know, with our licensees there is a whole area in terms of those providers required to be licensed—certainly in terms of managed investment schemes. They are required to hold an Australian financial services licence with a whole range of obligations there. Part of those licence conditions is that they have internal dispute resolution arrangements—remembering that, if you are in a managed investment scheme or a superannuation scheme, you have auditing requirements in terms of compliance. So you have those requirements for internal dispute resolution. You also have a requirement for external dispute resolution. That is a scheme which is funded by industry in the case of managed investment schemes, at no cost to the investor. So certainly a lot is done to make sure situations like that do not occur or that people have an open avenue of redress.

Mr Batten—With respect, that does not sound like an issue of unfair contract; that sounds like an issue of poor service, which potentially is a breach of whatever obligations exist in that situation.

CHAIR—I think it was both, actually.

Mr Batten—Certainly there are many remedies available in that particular situation. A superannuation trustee is not entitled to wash their hands of their service providers' conduct. There are, as David mentioned, a lot of dispute resolution mechanisms that are available within our industry and that would not be typically available. They are binding upon our members where they are not binding on the consumer, so the consumer can go to the body and make their complaint internally, and then externally if they are not satisfied with the result. Ultimately they get the opportunity, at no cost to themselves, to appear before that body if it cannot be settled. If they are still not satisfied, they still have the legal remedies of going to court. So we are talking about a different kind of environment, and we think it is qualitatively different from the kinds of environments that we are conscious of in other consumer dealings.

CHAIR—Okay, thanks.

Senator BUSHBY—Thank you for coming along today. I was going to ask the question, 'If you're already fair then where's the issue?' but that has already been dealt with to some extent. But I am interested that you mention in your opening statement that under your fiduciary and common-law obligations your members are required to prefer the rights of investors over the rights of the shareholders. How does that actually work in practice? What does that actually mean for investors?

Mr O'Reilly—They must act in the best interests of investors.

Mr Batten—It creates a statutory remedy, essentially—a statutory or common-law remedy; that does vary to some extent within different contexts. An investor has a remedy against the issuer for either putting

shareholder interests first or failing to act in the best interests of investors. If they fail to do that, depending on the context, there will be a range of remedies available to investors. Obviously they will be able to take civil action, but the simplest solution would, of course, be to make a complaint and for that complaint to go through the internal processes and, if they are still not satisfied, the external processes and then potentially to go to court. But, in practice, a lot of times consumers will go to ASIC because ASIC has statutory responsibilities in this area currently.

Senator BUSHBY—So ASIC has powers to address issues that arise under those obligations?

Mr Batten—Yes, absolutely. ASIC has powers under chapter 5C of the Corporations Act in relation to managed investment schemes, under chapter 7 of the Corporations Act in relation to all financial services and products and under the ASIC Act in relation to misleading and deceptive conduct and unconscionability. So ASIC has a range of powers now and uses them very actively to manage those sorts of issues that arise that it becomes aware of.

Senator BUSHBY—But that is an issue of balancing between the rights of investors and the rights of shareholders. It would not necessarily mean that that will go to the extent of an unfair provision in a contract, though, would it?

Mr Batten—But, in practice, the sorts of scenarios that potentially give rise to unfairness have been addressed in different ways through the particularities of the type of product that arises. In the Insurance Contracts Act, for example, there are a range of different considerations that have developed over many, many years to try to make sure that the interests of the insurer and the consumer are balanced—and they do need to be balanced. The insurer is taking on risk.

For example, there need to be appropriate disclosures made by the consumer prior to a contract being issued. Those matters and the way they are handled are very carefully defined in the insurance contract today, which is why the explanatory memorandum has indicated that it is not intended to apply, for example, to insurance. We would submit that that exclusion, for the reasons I have outlined in my submission, should be made express because there is some uncertainty as to whether or not the provision in the Insurance Contracts Act that purports to have that effect actually completely has that effect. That is an example.

Senator BUSHBY—It probably makes some of the other submitters quite happy to hear that there is some doubt in that.

Mr Batten—Unfortunately that is right.

Senator BUSHBY—Overall, you are suggesting that the obligations that the financial services sector is currently required to meet actually deliver in practice as high a standard of protection for consumers?

Mr O'Reilly—In terms of their standard form documents, yes, absolutely.

Senator BUSHBY—That is good to hear. On the assumption that government decided that they did not and wanted specifically to address unfair contracts as they apply to financial services, I take it from what you were saying earlier that your preference would be to have that built into the specific regulation that applies to your industry rather than as part of a general act that crosses the board.

Mr Batten—The view I would take—and obviously this is a personal view; it is not something that has been discussed as a matter of policy within the association, so it does not reflect association policy—is that to the extent that it is identified that it is appropriate for an additional requirement to apply in relation to a particular form of financial product then it should be looked at in the context of the regulation of that financial product. There should be a clear and identified need and that should then be built into the relevant piece of legislation in an appropriate manner, taking into account how that product is meant to operate—balancing the various interests that we have already discussed.

Senator BUSHBY—I think that is appropriate. I have asked most witnesses about the advisability or otherwise of specifically looking at industry sectors and what they need. The Law Council generally said that what is unfair depends on the particular circumstances of the two parties involved in the contract and that a blanket approach may not necessarily deliver a fair outcome overall. Therefore you can take that approach and say, looking at each industry, the level of sophistication of the consumer under different scenarios is quite different, what is unfair in the context of those varying scenarios might be different and, as a result, where you need to set the bar might be different, so it may be better to deal with it from an industry perspective.

Mr O'Reilly—It is also a question of the obligations and the supervision of the provider of that product. We are talking about an industry where the provider of those products is heavily regulated and subject to a range

of statutory and licensing duties and, quite often, common law duties. There are rights against the provider for doing the wrong thing.

Mr Batten—An across-the-board solution creates the risk of uncertainty as to application. The beauty of the solution that is proposed is that it is purportedly simple, it is across-the-board and everybody knows where they stand, but the risk of that, of course, is that it does not provide clear guidance on application in a particular industry area. It is that uncertainty factor that adds significantly to cost to industry. Obviously, principle based regulation is in a broad sense a good thing but it does need to recognise the environment in which it is operating. We have an extensive range of regulation in our industry, and I think it is important to work out what the role for that particular proposal is in relation to the existing form of regulation within the industry and the rights and interests that are already being balanced by that legislation.

Senator BUSHBY—There are currently a number of reviews underway as well, which may ultimately impact on the regulation of the financial services industry—

Mr O'Reilly—Absolutely.

Senator BUSHBY—and which may or may not be consistent with the obligations that this legislation is seeking to place upon the industry.

Mr Batten—And, again, there is a cost issue. We are already facing, in various forms, a potential for extensive change. But even if the change does not occur, there is obviously a lot of work being done to try to address the concerns that are arising as a result of certain things that have happened but also in relation to certain proposals. Credit reform is an example of that, where we have a proposal for a new form of regulation that is addressing many of the concerns that are, I think, intended to be addressed by the proposals.

Senator BUSHBY—Certainly from the perspective of the activities of IFSA members.

Mr Batten—Yes. And to have the idea that you have to work out how to comply with that piece of legislation, and then another piece of legislation on top of that, rather than making sure that it is a coordinated approach, is what is giving a lot of concern.

Senator BUSHBY—And presumably if this legislation gets passed, in September, say, your members will go off and re-look at all their standard formal contracts and spend a considerable amount getting all of those up to date and making sure that they comply, and then, when the next review comes along and delivers its findings and says, 'We're going to tweak this,' you would have to go through and look at all your contracts again—

Mr Batten—Absolutely.

Senator BUSHBY—and bring them up to date, and then, as I mentioned, there would be a number of reviews.

Mr Batten—It would be an ongoing process.

Senator BUSHBY—So, rather than doing it in one hit, and saying, 'Let's get this right,' it could be a series of costs for you.

Mr Batten—Yes.

Senator BUSHBY—You also mention that one of the consequences of this bill could be that it makes your members more risk averse and that that would be a bad outcome for consumers. Why would being more risk averse be a bad outcome for consumers?

Mr O'Reilly—Our industry, in terms of compliance with obligations, tends to go 110 yards instead of the 100 yards. They are very concerned, as Richard said, in terms of risk to their reputations and being seen to do the right thing, so they will often go beyond what is required. We have high industry standards which go beyond, in most cases, what the pure legal requirements are, to facilitate. So, yes, if something like this comes along, all documents will be reviewed. There will be a significant cost in terms of that. What gets done to existing documents and arrangements out there I am not sure.

Senator BUSHBY—But, in terms of risk averseness, how would that actually play out?

Mr Batten—In my experience, what that would mean is: we have an industry, in the major financial institutions, that is very, very focused on compliance obligations, very focused on governance responsibilities. The role for compliance, risk management, and internal and external legal, in terms of putting new product to market, is very high. Every additional requirement, if it is not well oriented to the actual need for protection, produces another reason to question whether or not something is the right thing to do. In principle that sounds

like a good thing: obviously we do not want unfair contracts. The concern that I have is this. What actually happens is that most clients are unwilling to take the risk. That means that, if you have a series of options in terms of new product choices that might be available to a consumer, and one of them is seen to be one that gives rise to a little bit more concern on a particular angle then, unless you can get an absolutely clean bill of health, often that product will just not go ahead at all, or there will be a lot more cost associated with putting that product to market. That does not necessarily mean that it is unfair.

Senator BUSHBY—So it might be because of the uncertainty—

Mr Batten—That is right.

Senator BUSHBY—of determining whether that may or may not be captured by the unfair—

Mr Batten—That is right. If I am asked to give a legal opinion on something and somebody says, 'Consider all of the various legislation; is this unfair?' then I, as a lawyer, have to go through a difficult exercise of trying to balance unfairness. There would probably be limited court guidance for a significant period of time, making it somewhat speculative. I might say, 'Well, I think, on balance, it is fair,' or 'I think it is actually fair, but there is a risk that ASIC might take a different view—

Senator BUSHBY—You do not know.

Mr Batten—or that the courts might take a different view.'

Senator BUSHBY—Professor Zumbo, who is sitting in the back of the room, gave evidence this morning and one of his suggestions was for the inclusion of what he called 'safe harbours', where you might be able to say, 'Look, we're not really sure about this,' where you will have made your best efforts but are still not sure. If you could take it somewhere and have it assessed, so that you could say, 'Yes, this will be fine,' and be fully protected from then on, would that allay some of the concerns?

Mr Batten—It is an interesting place to look at. It would still involve cost.

Senator BUSHBY—But it might remove some of the risk.

Mr Batten—It would remove some of the risk. The question would be: who would perform that role and what would be their mandate in relation to performing that role? My personal experience, in looking for guidance—and obviously this is not the kind of mechanism that you are talking about necessarily—has been that often it is quite hard to get that kind of certainty in guidance that you might be seeking. That might be because the mechanism is not there.

Senator BUSHBY—That is right.

Mr Batten—But it would very much depend, I think, on the actual mandate for that proposal. So I can see it having value, but it would need to be done very carefully.

Senator BUSHBY—It would need to be done properly. It could, if done well—

Mr Batten—That is a personal view, not a comment from the association.

Senator BUSHBY—Given all else, given that parliament decides to pass it but they actually provide something like that that is designed and, in your opinion, could work well, it might actually help offset some of the concerns about that.

Mr O'Reilly—My experience in terms of, say, going to regulators—be they ASIC, APRA or the ATO—in terms of getting guidance or sign-off on anything is that it tends to take a long time, it tends to be a costly exercise and it will not necessarily provide you, unless it is binding by statute—

Senator BUSHBY—The intention was that it would actually provide you an absolute—

Mr Batten—It is an interesting proposal. It could have some merit. Whether this is the right kind of legislation for that kind of proposal, I can certainly imagine certain scenarios where that could be very useful. I guess I would still be concerned. We are still adding, potentially significantly, to cost. In fact, as David said, in some ways, although that would provide the certainty factor, and help on the innovation side, in terms of the actual dollar cost it will significantly increase—

Senator BUSHBY—No doubt government will be seeking to recover costs. There would be user pays and significant costs as well.

Mr Batten—There would be that kind of cost as well.

Senator BUSHBY—Okay. We will move on from there. In your submission you noted a similar scenario in terms of an overlap that occurred some decades ago between the Corporations Act and I think the Trade Practices Act. There was some action taken that resolved that. Would you care to expand on that?

Mr O'Reilly—This was the overlap between the regulators when section 52, I think, of the Trade Practices Act and the relevant provisions in the Corporations Act had operated at the same time. So you had dual regulators for the position, which certainly caused confusion. The structure of the act, in terms of putting the responsibility within ASIC, seems to have tried to have overcome that. However, our problem is that you are introducing very much a consumer law context into an investment type context.

Senator BUSHBY—How would that translate into what you are suggesting could be done here?

Mr O'Reilly—What I have simply suggested in terms of what could be done was that regulated documents should be excluded, exempted.

Mr Batten—Because they are already regulated.

Mr O'Reilly—Yes, because they are already regulated.

Senator BUSHBY—Which was mentioned in the opening statement. It is a relatively clean solution. If the document is already subject to forms of regulation and oversight then there is no point in doubling up. That is what you are essentially saying.

Mr O'Reilly—That is right. It is regulated. In some instances it is highly prescriptive in terms of the regulation. There are investor rights in terms of anything which is wrong with those documents or rights that arise out of that. As Richard has said, we have got false and misleading provisions in the ASIC Act. This is just adding something to it which I do not think will produce any additional investor benefit but will certainly increase costs.

Senator BUSHBY—I note in your submission as well that you talk about business to business. Is this submission written prior to it becoming apparent—

Mr O'Reilly—It was. Unfortunately, I was not given an extension of time.

Senator BUSHBY—That is all right. I am just clarifying whether there was still some residual issue there that I was not aware of.

Mr O'Reilly—No. My apologies.

Senator BUSHBY—Thank you.

Senator PRATT—Your comments and your submission point to existing obligations within law that cover consumers. You have mentioned a range of different laws and regulation regimes. Does each and every one of those have an unfair contract provision?

Mr Batten—Not in that form.

Mr O'Reilly—Not in that form, no. My issue at the start would be that we are talking about investors. This is an investment being made. There is a level of risk there. In terms of the safeguards which are applying to investors, which do not necessarily apply to consumers in normal consumer contracts, as I said before, you have high regulation in terms of the providers, often common-law duties or statutory duties specifically applying to those providers and rights against those providers over and above the contractual terms. So fairness is certainly one of the elements.

In terms of the licensing requirements, section 912A of the Corporations Act for the licensing says that in performing the duties it must be done efficiently, honestly and fairly.

Senator PRATT—To what extent is your sector regulated by other forms of consumer law versus the laws generally governing financial services on behalf of consumers?

Mr Batten—The ASIC Act, the Corporations Act plus the individual statutory instruments that relate to the specific industries are what govern the industry at the moment. The ASIC Act has provisions that are basically identical to certain provisions in the Trade Practices Act. There is though recognition within that regime that those provisions in the ASIC Act should not apply to certain forms of documents, for example. They have been carved out of the ASIC Act to make sure that the regime for those documents, such as a product disclosure statement, is a stand-alone regime on the basis that it is important for issuers that they are not constantly having to second-guess whether they are doing the right thing—that the regime is meant to be an entire regime for that particular document, for example.

Senator PRATT—The Attorney-General has said quite clearly that the overlap and the number of different laws governing these things is a problem, and we are trying to move towards something more accessible to consumers. It has certainly been put to this committee that ASIC is pretty unintelligible unless you are part of the industry itself. That is what consumer advocates have told us. Can you accept that there is a greater need for something that is more universal rather than burrowing down into a gazillion different silos?

Mr Batten—No.

Mr O'Reilly—For financial services there is across-the-board regulation. Chapter 7 reflects an across-the-board solution for financial services and products with appropriate adjustments where necessary. The ASIC Act itself, to the extent that it has not been excluded from operation, also does the same role.

We have not got the consistency problem in relation to unfair contract terms because those terms do not currently apply to the industry. Therefore, from our point of view it is essentially a new level of regulation that is unnecessary, given the extensive regulation. If the government feels there is too much inconsistent regulation in relation to financial service and products—and the financial services reform project was to try to eliminate some of that—then we would submit that we should be looking at the financial services regulation regime at that level and determining what should be the rightful regulation rather than simply adding an overlay to something that is very heavily regulated. It is not an unregulated industry.

Senator PRATT—But from a consumer point of view if everyone gets carved out and hived off and this does not apply to them then we are not left with very much and consumers are again left with all this inconsistent regulation.

Mr O'Reilly—As I understand it, here we are talking about an extension of these unfair contract requirements which appear in different pieces of state legislation at the moment.

Senator PRATT—That is right.

Mr O'Reilly—We are talking about something new—an extension of it to financial services in contract. We are talking about an extension to an industry which is already heavily regulated. Participants in that industry are highly regulated. Investors participating in the industry have currently got well-defined rights and recourse to dispute resolution arrangements. So there is no need, as far as I can see, for that extension. As Richard has expressed, overlaying this additional thing will achieve no greater benefit to investors at all but will achieve certainly additional costs, which ultimately investors pay for.

Senator PRATT—So when an investor ends up at the Ombudsman—

Mr O'Reilly—The Financial Ombudsman Service—

Senator PRATT—Yes, at the financial Ombudsman that you have contracted that service to, that you are legally obliged to do. If someone has gone to that Ombudsman because they think there is something manifestly unfair in their contract, it appears to me that it is quite likely, based on the fact there are a number of laws for which that contract is being assessed, that they may not have recourse to a fairness test.

Mr Batten—They will have recourse to various rights. The mandate for the Ombudsman service is to essentially assist consumers to identify what remedies they might have as part of a mediation process. They will settle as many claims as they can without having to put consumers through a formal hearing process. Part of that introductory process is about working through, given the nature of the complaint, what remedies the consumer might have.

Senator PRATT—Do you mean the nature of the complaint or the nature of the complaint and the nature of the contract?

Mr O'Reilly—I go back to my previous point in terms of the licensing requirement. The first obligation on the provider is to provide service in a manner which is efficient, honest and fair.

Mr Batten—So that is one of the remedies.

Mr O'Reilly—That is one of the remedies when you are looking at it.

Senator PRATT—But nevertheless the service is defined by the contract itself, is it not? Is there a capacity to strike out a part of the contract because it is not fair?

Mr Batten—Not in that form and not normally, but that is because most of those contracts do not take the form that you are suggesting. Many of the contracts are a reflection of trust deeds and disclosure to the extent that there is a contract there. If you are talking about a managed investment scheme or a superannuation fund,

you as an investment provider describe to the consumer what it is that they are investing in. If you misdescribe that then that gives rise to remedies. That would be unfair.

Senator PRATT—I can think of some things that might unfairly arise. In a private superannuation fund they might define spouses and exclude a same-sex partner, for example. That in today's world would be manifestly unfair and yet that could be provided for within a contract.

Mr Batten—It is probably illegal under the discrimination act.

Senator PRATT—It is not in private superannuation companies. We have changed all of the superannuation laws with this equality provision, baring those though. Someone might hypothetically have been unknowingly caught up and been unaware that a clause like that existed, for example.

Mr O'Reilly—That may be a disclosure issue, but part of my response to you would simply be that it is like the tail wagging the dog. Are you prepared to impose additional requirements for a minority situation and impose a significant cost on the majority for no benefit?

CHAIR—I thank the Investment and Financial Services Association for coming in this afternoon.

Mr O'Reilly—Thank you, Senator. It has been a pleasure.

[2.45 pm]

LOWE, Ms Catriona, Co-CEO, Consumer Action Law Centre

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

CHAIR—I welcome representatives from the Consumer Action Law Centre. I invite you to make an opening statement.

Ms Lowe—I thank the committee for inviting us here to speak to you today. We would like to touch on what we see as some of the key points that we made in our submission to the committee. Firstly and importantly, we want to state that we strongly support the Trade Practices Amendment (Australian Consumer Law) Bill 2009 and its intention. We note the two key aspects of the bill, which are to introduce unfair contract terms law and also to put in place best practice remedies and enforcement for our regulators. We will touch on both of those aspects in our remarks here today. We also note that the bill is the culmination of an extremely extensive consultation process. The bill has been the subject of much discussion, and particularly the unfair contract terms aspects but also, it must be said, the remedies and powers aspects have been under discussion for many years through a variety of processes, including the standing council of officials of consumer affairs and the Productivity Commission—not to mention the discussions that were held when the Victorian law was put into place.

Our view is that the bill represents best practice in that it brings not only significant, necessary and important consumer protection elements but market wide competition benefits due to the fact that it will enhance consumer confidence in participating in the marketplace. We will talk a little bit more about that later. For this reason, we are very strongly of the view that it should apply economy wide. We note that the Productivity Commission recommended that it apply economy wide and indeed specifically cautioned about the costs that may flow from carving out particular industries from the application of the law.

We note the provisions of the bill relating to transparency and the second reading speech and the apparent intention that those provisions be directed to lack of transparency. We are concerned that that is not the way that they will operate in practice and that in fact transparent disclosure of an unfair term may be brought forward as a potential defence of the substantive unfairness of that term, which we think would fundamentally undermine the intent and indeed the effectiveness of the law.

Going back to the point about economy-wide coverage, we note that we are aware of absolutely no policy justification nor indeed discussion of any policy justification for exclusion of insurance contracts from the operation of the law. We note that in particular in the context of the extensive consultation process and discussion that has occurred in relation to these laws to date.

Turning to the enforcement and remedies section of the bill, we note that the provisions there represent best practice in enforcement and remedies. There is evidence from the OECD that provisions that provide best practice enforcement powers and remedies reduce the need for other potentially more intrusive monitoring and other action on the part of government and are to be supported for that reason in addition to the likely effectiveness of those provisions in stopping undesirable conduct.

We would like to make the point that the infringement notice remedy does not at this stage apply to codes that are brought into being under section IVB. of the Trade Practices Act. We are particularly concerned about the absence of those powers in relation to the unit pricing code that has come forward. It seems to be a particularly sensible remedy for what are likely in the main to be minor but nevertheless important breaches of that code.

Lastly, we would simply note that it is our view that the fact that the bill allows regulators own motion actions in relation to the unfair contract terms are incredibly important aspects of the law. We strongly welcome the fact that they are there because we view them as fundamentally important to the success of the law and also to the delivery of those competitive benefits that we have mentioned in our submission.

CHAIR—Thank you. It is interesting that you are talking about a long period of consultation, because we have had various witnesses complain about the short period in which they have had to get ready to make some arguments about their case. So that is quite useful. Can you go through for me the issue about transparency. It does seem to me on the surface that if someone enters into a contract and has had explained to them very carefully what the contract involves and still signs or accepts the contract it is more difficult to make a ruling of unfairness. Can you just go through that with me.

Ms Lowe—Certainly. In a way, that comes to the fundamental core point of these laws, which is their intention to address substantive unfairness in the terms. It is not a question of how a contract may have been entered into but the substantive effect of that contract in terms of the bargain that is struck between the consumer and the trader. Some of the very typical examples that are referred to perhaps as natural first ports of call to look at if these laws are passed through parliament include, for example, car rental contracts. If a consumer fully understands what they are entering into, they have the choice to not enter the contract and not hire a car or purchase electricity or purchase telecommunication products or sign up to the unfair terms. It is a recognition of the fact that the consumer cannot actually negotiate an alternative provision even if they are aware of the unfairness of the terms that they are about to sign up to. The very nature of standard form contracts is that that negotiation is not available to consumers and these laws are a very important recognition of the fact that that negotiating power is not there.

Ms Rich—Can I just add that, in the sort of scenario you were talking about when you asked the question, clearly those sorts of issues are relevant to an overall consideration of whether you decide that a term in a contract is unfair. We are suggesting that it is totally irrelevant that a term was disclosed transparently or conversely was not disclosed. It is relevant, but the way that the bill is drafted elevates that to a primary consideration in determining whether a term is unfair. But the whole point of the bill is to deal with the substantive content of contracts, so to elevate a procedural issue to a central consideration is completely misplaced when you consider the policy intent of the legislation. For example, our colleagues at National Legal Aid have suggested that perhaps it be reduced to one of several considerations that a court could take into account. That is possibly a way forward on the issue. It is not completely irrelevant, but it is something that you would consider along with all the circumstances of a contract.

Senator PRATT—We have had submitters argue that the definition of detriment needs to be limited to material detriment, which I would imagine, therefore, fails to take into account other forms of material detriment that might take place. Have you had experience in that area of the different kinds of detriment and harm to a consumer and how the law should best manage that issue?

Ms Lowe—Certainly. There are a number of points to make about that. The bill quite properly, in our view, contemplates both financial detriment and non-financial detriment in terms of a consumer. We consider that both of those sorts of detriments are appropriate. The inconvenience or ability of a consumer to comply with terms and such like are important considerations. Equally, we have already talked about the potentially positive impact on competition and the market for these laws, and it is our view that those non-financial aspects—for example, impact on consumer confidence—are critical if we are to see those benefits come through. Of course, the Productivity Commission in recommending these laws, obviously as part of a package of consumer law reforms, did extensive cost-benefit analysis work and found benefit to the tune of many billions of dollars to the economy if the laws are put in place. So we would not want to see an overly restrictive view of detriment actually remove the ability to realise those less tangible but, nevertheless, extremely important benefits not only for individual consumers but also for the Australian economy as a whole.

Senator PRATT—Some submitters have also argued that the detriment should only be able to be found if the particular unfair clause within the contract is exercised in some way. Can you comment on the manner in which detriment can occur without that particular clause in a contract being manifested?

Ms Lowe—Again, to some degree it goes back to the point that I have just made. For example, the existence of unfair terms may impact on the willingness of consumers to participate in the marketplace. If there is an awareness that there are generally unfair terms or that the consumer may be at risk of ending up in a situation that could be very potentially costly to them, even if that risk does not actually manifest itself, that can obviously have an impact on the decision-making process on the part of the consumer as to whether or not to enter into particular sorts of contracts.

The other aspect of this that is very important again goes back to that own motion action on the part of regulators. We do not want to make it too hard for regulators to be able to take action in relation to unfair terms. We do not want to have to wait for them. We do not want to see a situation where regulators may be aware of unfair terms and have to sit back and wait for those terms to be exercised in fact before they can do anything about it.

Senator PRATT—Even while many consumers may be impacted on unfairly by that term, it has not actually been formally exercised in any way.

Ms Rich—I can probably give you a good example. It is one that has just popped into my head, which I think demonstrates the impact. We had the terrible bushfires in Victoria and a lot of people in some of the regional areas that were affected by the bushfires are rebuilding their homes. People who had an insurance policy that covered just replacement of their home are fine. They are rebuilding their home and their policy will cover that for replacement. But some people had a set value that they get under their insurance cover if they want to rebuild. If they have underinsured, which is not uncommon because consumers are very bad at determining what level they should insure at, then they are really in big trouble. So you can have a situation, which is occurring at the moment, where one neighbour is fully rebuilding their home and the neighbour next door, who was also insured and paid the same amount of premiums, is not going to be able to rebuild their home. As a consumer, why wouldn't all consumers have the better policy if they are basically all at the same price? You would expect that all consumers, in the rational economic model, would have taken out the better policy—the one that has the term that says, 'We will provide replacement of your home if it is destroyed in a fire.'

Firstly, consumers do not read contracts; they do not understand them. But more importantly, for your point, there is a lower level of confidence in the market. I think a lot of consumers just say, 'All insurance policies are the same'—and often they are—'so really what's the difference, I'll ring a few, I'll get some quotes on the premium and then I'll just take out the one that is the easiest for me to sign up to and maybe I'll save a few dollars.' There is a much lower level of confidence that it actually makes any difference. If you have a regulator that is able to go out into the market and fix some of those contract terms up then you will have consumers saying, 'Actually it's safer for me to go in there, it's more worth while for me to insure my home, maybe I should think about replacement cover.' Maybe they do not even need to worry about it because all insurance policies will have replacement and not a value in their policy.

There is a range of confidence improvements that these laws can engender and it will ensure that people are going into the market more confidently and are getting better coverage at the same price. If you are asking a regulator to prove that there has been a material effect on a consumer because the term has actually been exercised, it basically makes it very difficult, if not impossible, for a regulator to go into a market and say to all the companies operating in the market, 'This term is unfair, fix it.' They have to sit back and wait until they can actually prove an individual case of harm and again that is anathema to the sort of legislation where we are trying to fix a market-wide problem but proving detriment is an individual by individual type of exercise.

Senator PRATT—Thank you.

Senator BUSHBY—Your argument about consumer confidence was based on the fact that consumers are not going to sign up to contracts if they feel that there is a risk inherent in those contracts. But you were also saying, in terms of your transparency argument, that people will sign up even if they know it contains unfair contracts. That seems to be in conflict with what you are saying there.

Ms Rich—To clarify, with my insurance example, what it means is that consumers are not necessarily making the best or most economically efficient decision in the market because they are buying products that are not as good as other products that are available and they are sending the wrong signals to the suppliers in that market. That is what I mean in the sense of the way that it can actually interfere with the better running of the economy. To clarify, when we are talking about confidence and so on, it means consumers do not search around for the best product because they think there is no difference anyway.

Senator BUSHBY—I do not deny that the attitude exists—consumers will ring a few companies, get a quote and say, 'Okay I'm covered therefore I'm fine.' They pay the cheapest premium and on they go. Do you really think that by having an unfair contract provision people will all of a sudden take a far greater interest in their insurance policy, they will not just ring around, get three quotes and buy the cheapest one? Do you think all of a sudden they will be fully aware and the economy will start humming because all of a sudden consumers are—

Ms Rich—They will still behave like that, but the difference will be that it will send the right signals to the suppliers in the market because they are offering better products. At the moment we have economically inefficient outcomes because people do not make decisions based on contract terms but you have better or worse products out in the market or you have a situation where products all end up at the lowest common denominator type of quality even though that may not actually reflect actual consumer preferences in the market. I know we are getting a bit technical and it is moving away from the fairness aspect but—

Senator BUSHBY—We are concentrating on insurance which, although I understand your argument that it should be included, is not actually included at the moment.

Ms Rich—It was just an example that came to mind, given that it is topical. I was aware of it because I know that that is occurring at the moment.

Senator BUSHBY—That was not my main focus but when you were saying it, it struck me that it did not seem to add up. I was not trying to make any great point with that. The main criticism from business groups is that the bill itself will introduce a high degree of uncertainty. We have had a lot of evidence on that today and we can go through that but we have also had evidence putting the other side as well. The uncertainty will also introduce costs, not just compliance costs but risk premiums because of the uncertainty and other things like that that will build into products and services and that will ultimately be passed on to consumers.

One of the allegations of uncertainty is about what terms like 'legitimate interest' mean, in terms of a company's legitimate interest as part of one of the presumptions, and also—and I know you addressed this in your submission—the definition of 'standard term contract'. The lack of clarity in that, they say, makes it very hard for them to sit down and say, 'Okay, let's review our standard term contracts and make sure they comply with the legislation and look after consumers, and then everything will be fine,' because they do not know that it will be.

Ms Lowe—There are a number of points that we would make in response to that. Firstly, we think—and we think there is evidence to support—that the way that the bill is drafted is a best practice approach, in the sense that, yes, it elucidates a broad principle of conduct, but it also has the grey list which provides guidance, if you like, to industry as to the sorts of terms that are likely to be the ones they would need to be particularly careful of and pay particular attention to in their drafting. The reason that that is best practice in our view and, indeed, in the view of the OECD and others is that the principle based approach allows flexibility such that you do not, by introducing a narrow and constrictive definition, almost by definition invite avoidance behaviour around the edges of that definition, nor is it overly restrictive and therefore inhibiting of innovation in the way that a business may choose to implement the law. I suspect that, if the law had been drafted in a very prescriptive way, we would be having a discussion about the fact that it may stifle innovation. So there is guidance there for business.

In terms of some of the more specific points that you have raised, 'legitimate business interests' is actually wording that is used in other existing provisions of the law and is not a new concept in Australian law. It is one that business is generally well used to working with and grappling with in other contexts. Indeed, certainly for businesses that operate on a national stage, these laws have been in place in Victoria for some many years. If those businesses have been complying with the Victorian law, they already have a model of how to comply with these laws.

Senator BUSHBY—Your argument about the increase in competition and therefore adding to overall economic activity is also counter to submissions put to us today. For instance, the AICD argued specifically that the weakening of contractual uncertainty from the perspective of those who draft the standard form contracts, and the lack of certainty that they will be able to rely on all the terms going forward, will actually undermine economic activity and may lead to the opposite outcome to what you are suggesting may occur.

Ms Lowe—I suppose our main response to that would be referring back to the extensive consultation that has been undertaken already in relation to this law. That, it would not surprise you to know, was an issue that quite obviously seriously entertained the Productivity Commission in its analysis of the application of this law. It undertook a cost-benefit analysis of the impact of a law like this and found benefit outweighing cost to the tune of—

Senator BUSHBY—But was the Productivity Commission's analysis on this bill?

Ms Lowe—No, it was not, but it was certainly on a law that—

Senator BUSHBY—On the principles behind this bill, yes.

Ms Lowe—very substantially matches what is now being put in place.

Senator BUSHBY—Overall, I do not think there would be too many people—and, that said, there have been some submitters who have suggested that the bill itself should not be passed—who would object to the principles behind the bill. The main objections that are being raised are in terms of its implementation, particular provisions and particular aspects of how that will play out rather than the principles. All submitters that I am aware of—and I may be wrong—have actually welcomed the national aspect of consumer law and the fact that that will bring savings and will be of advantage to business sectors. However, once again, it is the implementation and the specific provisions of the bill that raise concerns in their minds.

Ms Lowe—Perhaps I will just make two further points. We have produced a report—which Nicole has here and we would be happy to hand up to you—on some work we did at Melbourne university with Dr Rhonda Smith, who is a well-respected economist. She undertook an economic cost-benefit analysis of unfair contract terms law. It was not on the suite of reforms recommended by the Productivity Commission but on that specific aspect of the proposed reforms. That analysis certainly found a positive outcome in terms of the overall economic effect.

Further, these laws have been operating successfully in the United Kingdom and in Victoria for a considerable period of time, and we are aware of no evidence that has been brought forward that suggests that the costs imposed through the operation of those laws in any way outweigh the benefits that accrue from them.

Senator BUSHBY—I do not have access to the evidence, but a submitter earlier today—and I did not get a chance to actually ask them about this—did indicate, in a passing comment, that, in respect of both the UK and Victoria, there were significant disruptions in the business community for the 12 months or so after the introduction of the laws. They used the example that some of their members and others that they were aware of spent 12 months sorting out whether the contracts that they were trying to implement were going to infringe the legislation. It did take some time and there was uncertainty. That is the evidence that they gave. That obviously would impact on cost and on the ability to deliver the service to the consumers that they want to deliver and the consumers want to receive. I am just saying that, although you say there is no evidence, earlier we heard that there was.

Ms Lowe—We would certainly accept that businesses will have to make changes to implement these laws. We would not be supporting them if we did not think that they were actually going to bring about some change in the way that contracting is done. So we do accept that there will be an implementation period for the law. What we are saying is that all the evidence that we have seen—the evidence that was put before the Productivity Commission and the evidence that has been considered in the various consultations around these laws—suggests overwhelmingly that, whilst there will of course be some costs, the benefits that accrue will outweigh those costs.

Senator BUSHBY—Once again, taking that as read and assuming that all that evidence turns out to be true, surely in the implementation of the legislation you should try and minimise those costs and try to get to that point as quickly and with as great a degree of certainty for everybody involved as you possibly can.

Ms Lowe—I suppose we would say: provided that that is not ultimately to the detriment of the effectiveness of the law, because of course the benefits only come if the law is effective in doing what it sets out to do. On the certainty point again, the risk with being incredibly prescriptive in this law is that it will not keep pace with what happens in the marketplace. The marketplace is an innovative place and there are new products, new contracting methods and new service delivery methods coming online all the time. We need a law that will adapt to those changes. That, in our view, is the strength of the principle based approach, which has underneath it those quite specific elements in the grey list which point business very strongly toward the sorts of terms that they need to be careful of in their contractual drafting.

Senator BUSHBY—The other evidence that we have received today, particularly from those business sectors that are already heavily regulated like financial services and the banking sector, is that they tend to be risk averse when it comes to legislation so as to try and avoid breaches, partly because they want to do the right thing and partly because it affects reputation and all sorts of things. If you give them a grey list, that will be a black list from their perspective. They will just look at that and say, 'Anything to do with that we won't touch.' There may well be quite legitimate terms of contract that work to the benefit of both consumers and themselves that would then be excluded. That may impact on innovation—something you mentioned earlier—and outcomes that could be beneficial to everybody involved. But, if there is a grey list and it is not clear, they will just completely avoid it.

Ms Lowe—The law allows consideration of the contract as a whole. For example, one of the clauses in the grey list that seems to have attracted a lot of attention is the mention of unilateral variation clauses. In the banking context we are well aware of clauses which allow banks to vary interest rates, for example.

Senator BUSHBY—We had some evidence about that from the ABA today.

Ms Lowe—However, the market being what it is, if all of a sudden banks were to exit the business of providing variable home loans on the basis that they were concerned about the potential operation of this clause, we expect we would quickly find people moving in to fill that gap in the marketplace, because there is a consumer market. We do not consider for a second that the laws will act to inhibit that sort of behaviour.

Ultimately businesses have to make choices for themselves about how they implement these laws, but on a plain reading of the laws they would not act to stifle that sort of contractual behaviour. They specifically require consideration of the contract as a whole in determining whether an individual clause is unfair.

Senator BUSHBY—Professor Zumbo suggested one way of reducing the concerns of the standard form contract would be to provide people with safe harbours. If they are looking at putting together a standard form contract but are not sure whether something might be a bit grey or not and are a bit uncomfortable, they could actually go to a body of some sort and say, 'This is what we're proposing to put in there,' and get a ruling on it which is binding from then on. It would be yes/no. If they put it in and are told it is okay, they are protected in respect of that clause from that point on in terms of the contractual relationships they enter into on that basis. How would you feel about something like a safe harbour type of thing where businesses could get the certainty they desire but through a process that actually looks at it and considers whether a particular term is unfair in the context of the contract?

Ms Lowe—We would be very surprised if business were happy for a government or regulatory body to be telling them what terms were okay to put in their contracts.

Senator BUSHBY—That is ultimately what this bill does in a broader sense. It basically tells them that some contracts are unfair.

Ms Lowe—There is a fairly big difference between saying 'you can't put these sorts of terms in your contract' and 'you must put these terms in your contract'.

Senator BUSHBY—It is more about getting an advanced ruling as to whether a term that they think is a bit grey is actually okay or not.

Ms Lowe—Going back to the point we made before, one of the strengths of this law from the point of view of business, based on the concerns that they are expressing about uncertainty and flexibility, is it requires consideration of the contract as a whole. It is difficult to see how a process that looked at a clause could do that without then looking at the entirety of the contract.

Senator BUSHBY—I think Professor Zumbo's intention is that if you took it to this organisation, ASIC or whoever it might be, it would look at that term in the context of the contract and ask: would this constitute an unfair term given what this contract is trying to deliver and the people who will be signing up to it?

Ms Rich—In theory that sounds like it is potentially logical. I guess the only thing I would say about that is that in practice businesses actually change their contracts all the time. You would have to draft it very carefully so that the regulator was approving the contract as a whole, including those terms, because this law does require a consideration of the contract as a whole. Even a small change to the contract would probably necessitate the business going back and seeking approval for the new contract.

Senator BUSHBY—I only had the opportunity to put this to one business organisation after Professor Zumbo, and they thought that it could hold some value and might assist but they had concerns about how it would be implemented and so on, on the assumption that all that could be addressed, and there is obviously cost for business. No doubt if it was ASIC or whoever was doing it, they would not do it for free. There are issues involved but, if they could all be worked through, it might actually help a meeting of the minds between consumer advocates and the business advocates to some extent.

Ms Lowe—Certainly, if the issues we have raised were addressed, then theoretically it could have that effect. We would also make the point though that we would in any event expect that, once the bill became law, we would see the development of guidance in other materials by regulators that would not perhaps go to the point of actual sign-off. Regulators traditionally are, I think, fairly reluctant to provide those sorts of sign-offs, but certainly we would expect in any event that there would be guidance and that there would be further articulations by the regulators as to their interpretation of the law, as we see in any number of other contexts.

Senator BUSHBY—Which no doubt would be useful but once again I think business likes absolute certainty when they sign up to contracts, to the maximum extent possible, and even without this sort of legislation there are sometimes issues. They like to maximise the certainty and, if they do not and there is a perceived risk, then usually that is built-in somehow and ultimately the consumer ends up paying.

Ms Rich—Yes and no, but that certainty does come at a cost for consumers. At the moment that is really clear. They get great certainty with their standard form contracts but consumers are paying a lot for that. In fact the economy as a whole is suffering as a result of that, as we have said, and as plenty of research suggests. It is not like that certainty is cost-free. Conversely we get a lot of benefits. There might be a bit less certainty for

businesses about whether their contracts might be attacked, but by the same token we are going to get a lot of benefits as our cost benefit analysis and so on suggest. Also you are saying that the risk will be pushed onto consumers and consumers will pay for that. Yes, to some degree, but consumers pay more at the moment because all the risk is pushed onto them. So we are very certain about where the risk lies at the moment and the consumers are paying for all of that risk.

Senator BUSHBY—The vast majority of people who sign up to standard form contracts would not have issues at the end of it. Certainly there is a percentage, but the vast majority probably are quite happy to sign up to the standard form contract and they get the service they expected, and then the contract expires with both parties relatively with the outcome. That is not to say that there are not distinct problems that need to be addressed, and I acknowledge that. Part of the evidence we had today, which I actually accept, was that standard form contracts have ultimately—and it might have come from a consumer advocate—helped drive down the cost of services because it means you do not have to negotiate every contract. In the overall scheme of things they are not a bad thing, provided that the unevenness of bargaining power is not used to exploit one side of the bargain.

Ms Lowe—We would indeed agree with that. The mechanism of standard form contracting is clearly an efficient mechanism. It is the content of the mechanism that we are concerned with here. You can still have efficiencies flowing from a standard form contracting procedure albeit with a contract that is more substantively fair in the terms.

Senator BUSHBY—I was really responding to Ms Rich's comments about standard form contracts costing consumers. There are also benefits with it.

Ms Rich—I think that our submission is the one that says that. We are very big fans of the process of standard form contracting because it is absolutely more efficient. Our economy would grind to a halt if companies and consumers had to negotiate every individual contract they entered into. None of us could go about our daily lives. We are big fans of standard form contracting. We are not fans of the outcomes in the modern marketplace where you have mass consumption, mass production and mass contracting, and where consumers do not have any ability to influence the content of those standard form contracts. That is part of what this law is intended to address. If we get some benefits flowing through the economy the fact that we will use the process—

Senator BUSHBY—The vast majority of consumers would get benefits. Even in the bad old days of phone contracts that were not particularly good, most people managed to get through them without any overly adverse consequences.

Ms Lowe—I do not know that we would agree with you about that, Senator. If you put together the number of standard form contracts that each of us enter into in our daily lives across electricity, telecommunications, gas, car hire, banking, and financial services, one only needs to look at reports in the press yesterday and on Monday about the number of complaints that are currently going to the Telecommunications Industry Ombudsman. There are significant numbers of consumers who are dissatisfied.

Senator BUSHBY—I know you can look at numbers but you also have to look at the per cent value. I think the insurance industry actually gave us some figures today and, from memory, 0.065 per cent of claims end up with the Insurance Ombudsman.

Ms Lowe—One could equally I suppose talk about—

Senator BUSHBY—That is probably a large number of people who are affected but in terms of the overall percentage it is actually quite small.

Ms Lowe—We would say a number of things on that. We are not asserting a particular number of consumers. We are not saying it is 51 per cent of people having difficulty with unfair terms. We do not think that evidence is in fact out there in terms of the number of consumers that are experiencing this sort of detriment. There is any amount of evidence to suggest that complaint numbers vastly underestimate the people that are actually experiencing the problem. The numbers are anywhere from one in 10, to one in 20, to one in 50 of actual complaints received versus numbers of people out there having the same or similar problems. Again it comes back to not only the individual but the economy as a whole and the cost to the economy as a whole of inefficient contracting.

Senator BUSHBY—I could sit here all afternoon toing and froing on that, but I will leave it at that, so thank you very much.

CHAIR—Thank you, and you are tabling that report for us?

Ms Lowe—Yes, the cost benefit analysis is appendixed to the report.

Ms Rich—I have heard that everyone is saying that our concerns about insurance contracts relate primarily to travel insurance, so I have dug out a very recent case study of a different sort of insurance policy and it is actually specifically about the effect of an unfair term in that policy, so I wonder if I could table that to give you a flavour of the sorts of things we see in insurance.

CHAIR—That will be fine, thank you. The inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 is now concluded.

Committee adjourned at 3.28 pm