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Reference: Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

WEDNESDAY, 28 APRIL 2010

SYDNEY

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SENATE ECONOMICS

LEGISLATION COMMITTEE

Wednesday, 28 April 2010

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

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hutchins, Johnston, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Marshall, Mason, 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 Eggleston Hurley and Pratt

Terms of reference for the inquiry:

To inquire into and report on:

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

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Committee met at 8.29 am

CHAIR (Senator Hurley)—I declare open this hearing of the Senate Economics Legislation Committee into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, which the Senate has referred for inquiry and report by 21 May 2010. This bill is the second step in introducing a single national consumer law. Among areas covered are consumer protection against misleading or unconscionable conduct, unfair contracts and practices, consumer guarantees, unsolicited selling, information standards and product safety.

These are public proceedings, although the committee may determine or agree to a request to have evidence 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 for 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. Such a request may, of course, also be made at any other time.

I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to a minister. This resolution prohibits only asking for opinions on matters of policy and does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted.

[8.31 am]

NOTTAGE, Associate Professor Luke, Co-Director, Australian Network for Japanese Law, Law School, University of Sydney

CHAIR—Welcome. Would you like to make an opening statement?

Prof. Nottage—Thank you very much for this opportunity. As you may be aware, I have made many written submissions on aspects of the Australian consumer law reforms and some New South Wales reviews of the consumer law in recent years, especially since 2006. Most of these focus on product safety regulation, which is a growing concern in Australia and worldwide; so that is where I am going to focus my attention, based on the submission I made to this bill. In particular, I am going to focus on part 3-3 of the bill and, more specifically, the division 5 new requirements on suppliers to disclose serious product safety related accident information to regulators. These new information requirements are central to all the other more traditional product safety regulation measures which have existed in the old Trade Practices Act since 1986 and are proposed to be improved in the new act.

You have to have good information flows for the regulators to be able to do all those other things set out in the Trade Practices Act and now in the new bill, such as giving warnings to the public, imposing product bans for unsafe products and developing mandatory product and information standards. We also have to have good information flows for an effective product liability system, which is another mechanism that, through private action by injured individuals or sometimes businesses, encourages manufacturers and others to supply safe goods.

This new duty included in the bill, which will add a new requirement on suppliers to notify regulators of product safety risks, is long overdue. Many of us have pressed for it for over a decade here in Australia, prompted by the European Union introducing a similar requirement back in 2001, which in turn followed a requirement that has been around in the United States for many decades—although in the US, as you may be aware, they have a uniquely high level of product liability litigation, so everyone finds out about risks and accidents through that mechanism. Our Treasury, in fact, issued a discussion paper as long ago as 2000—a decade ago—suggesting this needed to be added to Australian law. So here we are.

The problem is that, since a decade ago—and, indeed, even since the Productivity Commission's report in 2006 that formally recommended to the then Treasurer that Australia introduce such a new duty—our major trading partners have moved on. They have gone even further: they have introduced more expansive disclosure requirements in the context of ongoing product safety failures—for example, in recent years problems with Chinese toys and other problems around the world.

The Productivity Commission's recommendation was for a new duty, but it was tightly circumscribed, and that is what we have before us in this current bill. But if it is not as good as what the other major trading partners of Australia have, this is going to be bad for Australian consumers and for Australian regulators who are seeking to cooperate with overseas counterparts who are working on a more expansive disclosure regime. It will also be bad for overseas importers and consumers of Australian goods and therefore for Australian exporters. That is the problem we face now with the bill.

My simple solution is to more closely align our bill, even at this stage, to the regulatory requirements we have overseas, to the information disclosure obligations we have in the US, the EU, Japan since 2006 and China since 2007 and will have soon with Canada. In my submission, I have done a comparison of the bill, as currently drafted here, against the bill which has basically been accepted by both houses of parliament in Canada. It is therefore likely to be enacted there soon too.

All these jurisdictions have had information disclosure duties introduced over the last decade and debated extensively and they are now working well. I think that is what we should be aiming for because, as you can appreciate, it takes a long time to enact consumer reforms. I doubt whether we will be able to quickly make further amendments to the current bill. I urge you to get it right this time.

In my submission, I have brought up several areas where I think we can quite easily improve the bill and meet our objectives, aligning ourselves more closely with our major trading partners, but I am conscious of time. I will highlight the most important ones and hopefully we can pick up on others in question and answer time. The major area where we fall short in the current bill as drafted relates to point 5 of my original submission and that is that the trigger for notifications in Australia is going to be limited to situations of actual accidents, more specifically, situations where there is a serious injury or illness or a death. Of course, this

means that there is an actual accident. It does not cover situations in its present drafting, where there is a serious risk of such events happening but, because of good luck, in a sense, although there has been an accident, no-one is injured or killed.

All other jurisdictions I have mentioned, all our trading partners who have introduced information disclosure obligations, to varying extents do require their suppliers to notify regulators if there are risks of such serious injuries occurring to consumers. So we should just follow those jurisdictions as well. This would have a lot of benefits, not just for consumers in Australia immediately but also allow our regulators to match information more simply with the regulators overseas, as these countries are already doing through intergovernmental agreements. That is the most important recommendation I make.

A second one, which I would like to emphasise, goes back to paragraph 2 of my original submission and relates to this question also of serious injury or illness. Although the drafting of the bill is not clear, it seems from the explanatory memorandum that the officials intend that this trigger is also very tightly circumscribed in that it is not supposed to be triggered by a gradual development over time. So we are talking about illnesses that somehow develop acutely through a sudden onset, according to the explanatory memorandum.

Again I question that, for two reasons. One is that overseas jurisdictions do not interpret this so narrowly. For example, the Canadian bill talks simply about serious adverse effects on human health. Secondly, as a lawyer originally and a law professor now, I can imagine a huge amount of legal discussion, even court litigation, about this distinction between an illness that is captured by the notification on the government's interpretation, which is a sudden onset, as opposed to a gradual development. Where are we going to draw the line? Let us just keep it simple. Let us just keep it like our major trading partners and simply refer to any serious adverse effect on human health. I cannot see any policy reason for distinguishing the two. I give the example of a manufacturer who becomes aware that consumer goods containing a material like asbestos, which is associated with asbestosis, a disease which develops gradually, often over decades. If the supplier becomes aware of that connection, they should disclose it to the regulators and the public should know.

Those are the two major points out of many in the submission. As I say, I am conscious of time and I would like to leave time to respond to any specific questions you have. If we have time towards the end, I can bring up further points in my submission and in the supplementary submission that I have tabled for you today. In particular, there is a major drafting error in the product liability provisions in sections 114 to 141 of the bill as drafted presently.

CHAIR—Thank you very much. Was the Canadian legislation developed in response to a particular incident or incidents that heightened awareness or was it just a gradual evolution?

Prof. Nottage—I think it developed from quite a while back. As you know, Canada is influenced by its geographic proximity to the US, and the two countries have increasing legal connections, with regulatory cooperation, including their free trade agreement, NAFTA, dating back to 1994. So there is a growing tendency in Canada to look closely at and, as much as possible, to align their system with the US, even though the US has a different history. The Canadians were looking at the US, but also, as we did a decade ago, looked at developments in the EU and realised there was something missing from their legislation. But I think it would be fair to say that the problem became more acute around 2007 to 2008 when more and more problems started to emerge with imports, particularly with toys and other consumer goods imported from China.

A bill was introduced. There was some discussion between the House of Representatives and the Senate in relation to, in particular, the provisions about under what conditions the regulators can disclose further information to the public so as to protect the interests of suppliers who are trying to do the right thing and so on. The information disclosure requirements proposed in Canada for suppliers, in terms of when the suppliers had to provide information to the regulators themselves, were relatively uncontroversial. Unfortunately then the Canadian parliament dissolved and they had to start again and then it happened again. It is going to be reintroduced this year, but these particular provisions on information disclosure should go through, because they have basically already been agreed to by both houses on several occasions.

CHAIR—From the point of view of the existing consumer law, it seems to me that whenever there is an issue that arises with safety, whether it results from an existing accident or not, the state ministers have the power to recall or deal with products or ban the importation of products in any case. Are you saying that this bill will be a lessening of that ability?

Prof. Nottage—No, basically this bill is not making any change to the traditional measures available to regulators at state or federal level in relation to things like deciding to ban a product or develop a new

mandatory safety standard. What this new duty does, which people around the world have realised is important, is provide a mechanism for the regulators to get in the information to be able to make that assessment about whether a ban is necessary or whatever. In general, suppliers are better placed to be aware of problems with their own goods. So for everything else to work in the product safety regulation part of the legislation we really need information coming through from the suppliers themselves which the government can then assess. Even before they have reached a decision they can disclose it to the public so that they can make an informed decision about whether or not to keep purchasing goods where there have been reported accidents or risks of accidents.

This goes back to the point I started with, emphasising that our current bill is not triggered by risks of serious accidents. If you look at the original provisions in the TPA in relation to bans, for example, as restated and hopefully improved in the current bill, the government can ban goods even if they have not already caused an accident; if they are likely to cause serious hazards then the government can act. That also makes sense because not only is prevention usually better than cure but if an accident occurs we have the backup of product liability compensation claims. The injured party can claim as well. So the point of having product safety regulation is to have a more expansive regime so that the government can act more proactively if they see a problem arising, and avoid the accidents or minimise the losses. But how can the government actually implement this power to ban emerging potential risks of accidents if they are not getting information in from suppliers, not necessarily that supplier but suppliers in the industry or whatever, to have an information base to say, 'Look, it appears that there is likely to be further injury or actual injury and so we need to ban these unsafe goods.'

Senator EGGLESTON—Professor, I think your international comparisons are very interesting, especially with China, which is a bit of a surprise in a way because they have sometimes been held responsible for exporting toys and other things which have caused problems. I am also interested in the Japanese halfway house model that you refer to. What is the actual reporting mechanism in Australia for defective consumer goods? Is it to the states or to the federal government as well?

Prof. Nottage—At the moment under the current Trade Practices Act the only information requirement is to the federal regulator, the minister or the ACCC, if you conduct a voluntary recall. In the current TPA voluntary recall was not even defined, and this is an area that has been tightened up in itself in the current bill. But there is no general requirement to report to federal legislators, let alone state regulators, even if you become aware that someone has been killed by your product, let alone the risk thereof—if there was a near miss and someone almost got killed and you are aware of that and you can see an arguable connection with your product, you do not need to disclose it the regulator. That is what the new provision, this more encompassing provision, in Australia and especially in other jurisdictions is trying to address, to cover that loophole, if you like, in the current regime.

Senator EGGLESTON—That will only be to the federal government, will it?

Prof. Nottage—The whole Australia's consumer law will then be applied by the states and so the information will come up that way as well.

Senator EGGLESTON—Let us go to the specific example of Toyota and the problems they have had with the floor mats, which apparently have impinged on the accelerators and caused, it is said, up to 90 deaths in the United States. Tell me what would happen in Australia with that sort of incident. What reporting mechanism would be in place and what could be done about it?

Prof. Nottage—In short, it will not make any difference, because that particular product, road vehicles, is covered by separate legislation in Australia. In the current ACL bill there is a proposal to list in a schedule all the legislation where there are already specific reporting requirements for situations like that. So that will take priority and you will have to follow those particular procedures.

There is still a role outside this legislative framework for the government to work harder, I would say, to make accessible to consumers a one-stop portal where they can see what goods are not covered by the ACL—not general consumer goods covered by the ACL but other legislation—and have them subject to information disclosure requirements about problems with their goods and recalls and so on. That is the way these regimes are proposed to work in Australia and the way they work overseas. In the EU they have, what they call, a general horizontal directive that imposes obligations to report accidents and risks of accidents to the regulators. But if there is a specific vertical product specific directive, say, for toys or for automobiles, or even higher risk goods, then you would follow that regime instead.

Senator EGGLESTON—Is that fragmented approach a deficiency or should we have some sort of global coverage of all consumer goods?

Prof. Nottage—If we were starting from scratch, I agree it would be helpful if we had just one product safety disclosure act covering everything and differentiating between products, and within that one piece of legislation it would be accessible and user-friendly. But the way it has evolved governments around the world including Australia were focused on higher risk products initially, such as automobiles or pharmaceuticals or whatever, and impose specific disclosure obligations often of varying standards.

Now we are getting to the stage where people realise that with general consumer goods we really need some information flows to make the system work, so we are going to try to fill out the gaps and cover the field with new legislation. I am quite comfortable with the way the Australian bill proposes to deal with this problem, which is to list in the schedule all the acts where there are specific requirements and where the Australian consumer law does not apply. That is actually quite user-friendly, because you can then go and look up the link to that other legislation or the websites of the relevant regulator, such as the transport ministry or whatever, as opposed to the European approach where it is not listed in the horizontal generic legislation so you just have to know that there is a bit of legislation out there that has a separate reporting requirement. So in that respect, as I say in my submission, I am quite happy with the bill as presently drafted.

Senator PRATT—Professor Nottage, you talked about asbestos as an example of the kind of product that might not be picked up under the kind of law that is before us. Is it specifically issues of long-term toxicity that are of special concern here?

Prof. Nottage—Yes, although not limited to that.

Senator PRATT—Other things could be repetitive movement or any—

Prof. Nottage—Yes. The reason I give the example of asbestos is that it springs to mind in Australia as in many other countries, but also, as I mentioned in my original submission, this very Senate looked into an issue like this in relation to product liability provisions which were added to the Trade Practices Act in 1992—part VA of the act—based on an EU directive of 1985 that provided compensation for individuals and others harmed by unsafe goods, so a private law mechanism. At that stage there was a lot of discussion about toxic tort type cases where it takes a while for the injury or disease to manifest itself, let alone for people to get around to actually bringing a claim and identifying the relevant manufacturer. So there was a discussion about having a longer limitation period for bringing such claims. They could not agree on it in parliament at the time, so they said, ‘Let’s just enact part VA and then refer it back to the Senate committee to look at another provision to deal with that,’ but unfortunately it got lost in that subsequent process. So, ideally, we should revisit product liability provisions in the new act, but as an alternative or in addition we should have a more expansive reporting requirement in our safety regulation provisions.

Senator PRATT—Reporting would not necessarily require the banning of a particular product. Just as an example, I am struck by the drink bottles before us. There is a lot of community debate at the moment about whether within plastic drink bottles there are a range of cancer-causing toxins. Clearly, the manufacturers would be aware of that debate, whether they think it is true or not. There is probably a range of scientific research going on around the topic. Some consumers are aware and are starting to replace their drink bottles with other items. Where would a disclosure obligation sit with a product like that?

Prof. Nottage—The way it has been addressed in all the other jurisdictions that have this disclosure obligation is the way it is worded in the legislation in relation to the causal connection. Under our presently drafted bill, it has to be ‘an accident’—hopefully it will be changed to ‘a risk of a serious accident’—and I think the wording is ‘associated with the product’. Within proposed section 131(1) of the bill, it goes on to give more specification about that, and the explanatory memorandum goes even a bit further. Other jurisdictions have left that to be sorted out, if necessary, by, first of all, guidance notes from the regulators and, secondly, the courts.

Senator PRATT—So who needs to be aware of the causality in order to create an obligation to inform the regulator?

Prof. Nottage—The supplier needs to keep aware of the evolving scientific and technical evidence—as hopefully they should be as responsible suppliers anyway—when they decide what materials to use in their plastic water bottles or whatever their product is. If it starts to build up and they start to get consumer complaints and reports of injuries, or there seems to be a risk emerging, then they report it to the regulator. If the regulator then says, ‘Gee, we’re getting a lot of different reports now from various responsible

manufacturers,' it will go and examine the scientific evidence as well and eventually perhaps develop a safety standard.

Senator PRATT—If a regulation is written in this way, is it likely to be the importer, the manufacturer or the supplier that ultimately makes such notifications, or are they likely to come from other consumer movements or bodies?

Prof. Nottage—It is only an obligation on those respective suppliers. You would expect the manufacturer to be the one, for example, in relation to what materials are used in their goods, to be making most of the decisions about which are most appropriate and therefore, as they become aware of problems, to notify the regulators. Consumers directly cannot notify the regulators under this regime.

Senator PRATT—They could call on regulators to act on particular pieces of information, surely?

Prof. Nottage—Yes, especially if some manufacturers or some suppliers start doing the right thing and saying, 'Look, the evidence is building up,' and they report to the government and the government then makes that information available, consumers can say, 'Actually, yes, I've had this problem,' and then they could ask the regulators or the government to look into it and have an independent scientific study if necessary.

Senator PRATT—I would be interested in any specific examples that you have of the kinds of products that might have been banned through this pre-emptive notification—or not necessarily banned but altered or where the regulator has had to respond—or through that long-term risk issue. I think you have given a clear framework for what that might look like, but I would be interested in any specific examples from the jurisdictions you have talked about. You do not necessarily need to give them now; you could certainly submit those later to the committee.

I think you raised in here the manner in which Australian law reform in this area has taken place in association with the states and that we have been, in effect, looking internally within our federation rather than externally. I am not across the detail of how these things have been negotiated with the states, but clearly a big reform like this requires a lot of different parliaments to pass the law. I think it is quite a complex and difficult thing to get all jurisdictions to pass a reform like this. Is it too big an ask in terms of getting Australian parliaments around this issue to say, 'Actually, you've all been on the wrong track and this is the benchmark you should be hitting'? It is actually a very difficult thing, aside from just reforming the whole system, to say, 'Actually, there's this whole other thing over here you should be pitching for.'

Prof. Nottage—I appreciate that, but this is precisely the problem. It has taken pretty much five years since the Productivity Commission started recommending, firstly on an interim basis and then in its final report in 2006, to introduce this information disclosure obligation and then to get all the states to sign on to what it recommended back then, but in the meantime other jurisdictions overseas have gone further.

Senator PRATT—In the last five years the world has changed.

CHAIR—I understand that Professor Nottage has to go by 10 past, so I think we had better—

Prof. Nottage—But this is one area where none of the states, no jurisdiction in Australia, had added an information disclosure obligation, because they were expecting the federal government to lead the way, starting back in 2000 with the Treasury's discussion paper. Everyone was also expecting that Australia would meet the global standard with the new requirement. I am very concerned that we will end up with a bill which has been delayed—for constitutional and other perfectly good reasons sometimes, but delayed—and which is the worst regime for consumers and even for regulators to work with amongst all our major trading partners.

I would hope that there is still time to fix it. In particular, as Senator Eggleston mentioned, the Japanese compromise is plan B for this committee, for the Senate. Why not at least make an amendment to the bill so that the governments have the power, by regulation, to specify certain risks that would trigger a reporting requirement as well as actual injuries? To do that, if the federal government or any state government wanted to add that to the regulations, they would have to go back to COAG and get agreement across a majority of jurisdictions. That would be difficult but at least there would be something in the new Australian consumer law that made it possible. That would also encourage this process of ongoing monitoring of what is going on in the rest of the world so that we keep up with the rest of the world.

The second thing we could do, which I have mentioned in earlier submissions, is to add into the present bill, as the EU and the Japanese legislators do a lot now, a requirement for a periodic review under the aegis of parliament and the officials of specific parts of the act—and this would be one of them. So within three years there should be a process of review of these provisions. We should build that into the legislation so that the

officials actually have to conduct it. So those are two things that I think are perfectly feasible even at this late stage.

Senator BUSHBY—Quite clearly your main focus is on the consumer product safety side of these reforms.

Prof. Nottage—Yes.

Senator BUSHBY—You talk about us not having picked up some of the developments that have occurred in the last five years internationally. Are you aware, from consultations that you may have had with officials, why we have not picked them up, why they are not included? What are the arguments against doing so?

Prof. Nottage—Unfortunately I think it is just a timing issue. What you have before you in the bill is the recommendation of the Productivity Commission, which developed an interim report in 2005 and a final report in 2006. At that stage there were only two jurisdictions—the EU and the US—which had a reporting requirement. In the US, as I said, that is a unique situation. They do not really need such a regulatory requirement anyway because of uniquely high levels of product liability litigation, which gets that information out to the regulators and the public anyway. So really it was just the EU. In 2005 and 2006 the EU regime was just being implemented, even though the directive dated from 2001. The Productivity Commission said clearly there were very good arguments, even for economists, to bring in this information disclosure requirement, but let us just wait and see, let us just bring in quite a narrow one—which is what we have before us in the bill. Also of course there was a different government in those days and the Productivity Commission probably had an eye to what might be politically acceptable. Like any commission, they wanted to see their recommendations at least in part acted upon by the government.

Senator CAMERON—Or perhaps not!

Prof. Nottage—Maybe I am too cynical about how laws are made—you would know better than I! But the situation has changed. Japan has introduced legislation, China has introduced legislation and Canada is going to introduce legislation, and all of them are saying it does not make sense to limit it to actual injuries. Even in Australia, where the other product safety regulation requirements allow the government to ban products or take measures against them where accidents have not yet happened but are likely, you need the information to deal with that.

Senator BUSHBY—If the Productivity Commission looked at this five years ago and these developments have occurred since then, how recent are the changes in the EU that take it further than what this law proposes?

Prof. Nottage—The EU directive has been in effect throughout the EU since about 2005 and has been ticking over nicely. In fact, countries like the US are hooking into the European system for product disclosure information so they can make joint decisions if necessary about products. Japan introduced legislation in about 2006 and China in 2007. If the Productivity Commission were to look at it now, they would certainly take all those new developments into account. But I do not think we need to send it back to the Productivity Commission to make that decision.

Senator BUSHBY—There are a number of officials, some who are in the room today, who are quite capable of looking at that, taking it into account and putting it into part of the process.

CHAIR—Thank you, Professor Nottage. We will refer point No. 4 of your submission back to the department and see what the response is.

Prof. Nottage—Yes, I think it is just a drafting error in relation to the product liability provisions.

[9.12 am]

HOWARTH, Mr David Nixon, Legal Policy Officer, CHOICE

ZINN, Mr Christopher, Director, Communications and Campaigns, CHOICE

CHAIR—Welcome. I now invite you to make an opening statement.

Mr Zinn—At the outset, CHOICE would like to thank the committee for the opportunity to present further information to support our submission. I would like to speak for a few minutes about CHOICE's policy approach to the bill and some of the areas where we consider that more work needs to be done. David will then talk about some of our concerns about the detail of the bill and then we will be happy to answer any questions. This year CHOICE celebrates its 50th anniversary, and perhaps because of this we are very conscious of the historical significance of this bill. When CHOICE first opened its doors in 1960—and it was then known as the Australian Consumers Association—there was really very little consumer protection to speak of. To the extent that consumer laws existed, they really were a hotchpotch of state laws, mostly after thoughts in terms of licensing, and many of the protections, such as the implied terms in the Sale of Goods Act could be excluded in contracts. Two years after we first published, President Kennedy in America gave what to us was a really important address to congress setting out what is now regarded as, if you like, the 'Magna Carta' of consumer rights. This included the right to safety, the right to choose, the right to information and the right to be heard—and we have added a few more rights since then. Perhaps 'Minima Carta' would be a more correct description nowadays because these have really become minimum standards. Some of these core rights still give us a very useful benchmark from which to measure our present consumer laws—and I will come to that in a minute.

Fifteen years after the founding of CHOICE, Australians finally got the benefit of a comprehensive national consumer law in part V of the Trade Practices Act. It was at the time a truly visionary piece of legislation, incorporating provisions like section 52, on misleading and deceptive conduct, which probably were bitterly opposed by the vested interests of the time but which have now easily stood the test of time and greatly improved the standard of business conduct in this country.

CHOICE believes that 2010 will be recorded as another watershed year in the development of consumer protection laws. This year sees the culmination of a long battle for uniform laws in which we have been involved. Rather than bask in the prospect of any reflected glory, we think this imposes on all of us the important duty to get it right. It was never easy to get the legislation right the first time, and there is a history of amendments to the TPA that testifies to that, but it is in the interests of all of us to get the legislation as correct, as robust and as good as possible the first time. Hence, CHOICE recommends the following three qualities that the committee should use to guide its deliberations. We believe consumer law should be understandable; uniform and universal; and effective.

In the area of consumer guarantees, we are delighted to see that the bill moves away from some of the musty legalese that infected the existing regime of implied warranties and conditions. A rose by any other name may smell as sweet, but a name for a consumer guarantee that means nothing to the average consumer effectively just stinks. We are pleased that the Office of Parliamentary Counsel has taken the opportunity to simplify the consumer guarantees, but we must say that in other areas we think the degree of complexity is out of all proportion to what is necessary to achieve the ends. The structure of the act is now so convoluted that the average consumer would find it difficult to see what the difference would be. Coming in, we were discussing how we might do one of our *Choice* cartoons or videos and compress the whole thing into three minutes to try and make a really consumer-friendly guide to these laws. That is still something we will be working on.

On uniformity, one of the key objectives of the current reform is to achieve a truly national consumer law. In our view, 'national' does not just mean the same regardless of which state is involved; it should mean the same nationally as well.

Finally, I talk about the enhanced role of consumer organisations, which is not strictly within this brief. There has been a dramatic imbalance between the funding available for corporations to fund their work in terms of the development of legislation. In Germany there is the Federal Association of Consumer Advice Centres. They receive about €9 million for an institutional budget and about the same for projects—massive amounts that we can only dream about, not just at CHOICE but in the consumer area generally in this country. However, we are not talking about dreams; we are talking about what is in the bill. I pass over to David to provide some more information.

Mr Howarth—I would just like to cover a few of the issues raised in our submission very briefly: product safety; the consumer guarantees; exemptions and exceptions; the origin-labelling provisions; remedies and enforcements; and, finally, the time allowed for consultation on the bill. As in our submission, there are some issues on which we will not be making submissions. The unconscionable conduct provisions, we understand, are going to be the subject of later amendments. The unfair contract terms provisions have already been exposed to considerable public debate. There are also several issues on which we support submissions and evidence given by other organisations: in particular, on unsolicited door-to-door sales we support the submissions by the Consumer Action Law Centre, and on the application of consumer guarantees in the area of telecommunications we support the position of the Australian Communications Consumer Action Network.

We have just heard from Professor Nottage on the issue of product safety, and CHOICE has expressed similar concerns about Australia's product safety system for some time. While we are pleased to see that the bill makes important reforms, it is clear that there is much more to be done if Australian consumers are to have the same safety protections as those enjoyed by consumers in the EU, Japan and Canada. There have also recently been changes to product safety regulation in China. China is now working with regulators from other markets to obtain information on product safety issues such as under the European RAPEX system. CHOICE would be greatly concerned if, a few years from now, Australia became a dumping market for unsafe toys that could not be exported to other markets and could not be sold in the Chinese domestic market because of their more stringent standards. To prevent this scenario, CHOICE strongly supports two things: first, the introduction of a general product safety provision and, second, a requirement on suppliers to notify of serious product risks before they cause injury, illness or death. We have already heard from Professor Nottage, and we will not go into much detail on those points.

One thing which we think is worth mentioning is that we can probably expect in this debate to hear a fairly often repeated argument from some parts of the business community that enhanced safety regulation merely increases compliance costs which manufacturers have to pass on to consumers. As a representative of thousands of consumers, CHOICE has always advocated that the small increase in the price of individual goods for safety overall is worth paying. We also take the view that enhanced product safety regulation removes an externality that helps markets deliver safe products more efficiently and thereby reduces the cost of goods overtime. Lax product safety regulation appears to let the cost of unsafe products lie on a few unlucky individuals, but because we are all consumers, we all bear this cost, even if it is just in the form of a risk when we buy products. And because a lax product safety system provides little information to consumers, it is difficult to avoid unsafe products and minimise risks.

At the same time, lax product safety rewards makers of shoddy goods by allowing them to cut production costs and impose these costs of injuries on consumers. The suppliers of safe products, on the other hand, cannot recover their investment in safety because they compete against artificially cheap unsafe goods. Effective product safety regulation corrects these perverse incentives. It puts the cost of dodgy products back where they should be, on the shoulders of suppliers producing unsafe goods. Even if all businesses incur some costs of compliance, the cost falls more heavily on the makers of unsafe goods and in this way investment in safety becomes cost reducing and overtime competition will lead suppliers to provide a socially acceptable level of safety at the most possible cost. Our view is that by establishing a safe, level playing field, product safety is vital to the efficient functioning of markets for these products.

Onto consumer guarantees. CHOICE, as we have said in our submission, wholeheartedly supports the simplification of the system of consumer guarantees in the bill. The move away from legalese, away from distinctions without differences and away from remedies that fail to redress are all to be welcomed. These improvements make it easier for consumers to understand their rights, for honest businesses to comply with the law and for regulators to take action against those who do not. There are two areas where CHOICE would like to see some improvements. First, extended warranties continue to raise serious problems. For many consumers, paying for an extended warranty on a large purchase seems to make good sense because it offers peace of mind but in many cases that sense of security is an illusion. It is based on a danger that does not exist because the statutory implied warranties offer as good or better protection. Nevertheless, under the old system of contract based remedies, consumers may have seen some value in paying to avoid the hassle of trying to enforce these warranties. With the move to consumer guarantees, CHOICE calls on the Senate to ensure that consumers receive adequate information about their rights before entering into extended warranties. This should be done through a compulsory disclosure at the time the extended warranty is offered so that consumers can judge for themselves whether the warranty offers any additional protection and, if so, whether it is worth

the price. Any additional remedies that the manufacturer or retailer makes available through its extended warranty must also apply to the consumer guarantees.

CHOICE research conducted for the New South Wales Office of Fair Trading revealed that many traders are either unaware of their obligations or deliberately mislead consumers about extended warranties. The bill attempts to eliminate false or misleading conduct in section 29N, which prohibits false or misleading representations concerning a requirement to pay for a contractual right that is wholly or partly equivalent to the legislated guarantees. To put it simply, our concern is that consumers are not so much being misled about the requirement to pay but they are being told the truth. They are being required to pay for rights that duplicate their statutory guarantees. The problem with misleading information is one of omission, which is why CHOICE supports enhanced disclosure where an extended warranty is offered.

Our second area of concern is in improving the awareness and effectiveness of the consumer guarantees. Both our own experience and the research conducted by the National Education Information Advisory Taskforce revealed disturbingly low levels of awareness of the statutory warranties. The NEIAT report for the Commonwealth Consumer Affairs Advisory Council found that not only many consumers but fully 57 per cent of retailers and 47 per cent of manufacturers were unaware that there are statutory rights beyond those in their own warranties. So we agree with the CCAAC's recommendation that a single, simple message about warranty rights should be developed by state and Commonwealth agencies and should be displayed at points of sale. Rather than giving the minister an option to make regulations to require this, the legislation should require a regulation to be made.

In terms of enforcement, we are somewhat hopeful that the simplification of the language and the legal basis of the consumer guarantees will improve consumer redress. However, we believe there is increased scope for alternative dispute resolution mechanisms to assist consumers by avoiding costs of litigation. We look forward to seeing the ACCC making use of its representative powers in section 277 in appropriate cases.

Just briefly on the exemptions and exceptions: Christopher has already mentioned the importance of uniformity. Not only does uniformity minimise competitive distortion within the economy; it gives consumers confidence that the rules in the Consumer Law are applied fairly and it assists consumers to be aware of and to understand their rights.

At this point I have to refer senators, unfortunately, to one small error in our submission with regard to gas and electricity. We said that we oppose the retention of these exemptions to the consumer guarantees. The intention here was to refer to the existing exemption for transport services and insurance. Gas and electricity are not currently exempt under the Trade Practices Act and should not be exempted in the Australian Consumer Law. We apologise for the error and we will provide a supplementary submission correcting it. However, the point we want to make is the same and in fact it is made even more strongly by our own error. The presence of exemptions not only deprives consumers of their substantive rights in the sector exempted but also creates confusion about their application generally.

It is a matter of great concern to us, therefore, that the current bill introduces a power for the minister to exempt gas and electricity and, particularly, telecommunications. There is no evidence that the current implied warranties have had unintended consequences in these industries. As operators of these services have become increasingly commercial, CHOICE believes there is a greater not a lesser need for the same guarantees to apply to them as apply in other sectors.

As discussed further in our submission, it borders on the absurd that telecommunications should be singled out for special treatment at a time when the Telecommunications Industry Ombudsman reports increasing complaint levels and the Australian Communications and Media Authority is currently conducting investigation. We do not accept that the presence of industry-specific regimes should be a basis for abrogating the Australian Consumer Law. The ACL should set minimum standards, and any industry-specific regime should be in addition.

Just briefly on country-of-origin labelling: the Trade Practices Act currently includes several defences or safe harbours for claims about country of origin. We think it is important to keep in mind that these are defences. It is always open to suppliers to avoid any liability by simply giving consumers the full, accurate description of where the goods came from. We support, or at least accept, the introduction of a new exemption for 'grown in', but we think that the degree of complexity in the bill is now becoming very concerning.

On remedies and enforcement, CHOICE supports the introduction of the new remedies and powers for the ACCC and ASIC, particularly the introduction of substantiation notices, which puts the onus of establishing

the truth where it should be, on those making the representations. We also support the new infringement and warning notice powers for the ACCC. Our only concern there is that these may become an easy out in difficult cases, and we would be concerned if there were parking tickets being issued when full court action was more appropriate.

We also want to comment on the limited time available for debate on this legislation. As Christopher said, this is historic legislation and we think it should be exposed to full public consultation. Given the short time, it is a tribute to the staff in Treasury and the Office of Parliamentary Counsel that they have delivered such an impressive result. However, we still have found some problems in the drafting, and Professor Nottage referred to some this morning. We think more time should be allowed to consider those.

In concluding, we think the bill effectively brings Australian consumer law up to date. It is the first time we have had a truly national consumer law, and it includes many welcome reforms. Nevertheless, we are firmly of the view that improvements can be made and, with some policy courage, this law will set the terms for consumer protection for the next decade. Thank you. We welcome any questions.

CHAIR—Thank you for your comprehensive run-through of the bill. Senator Eggleston, do you have questions?

Senator EGGLESTON—I was quite interested in what you said about parking ticket options for ASIC and wondered if you would like to expand upon that. We are quite interested in ASIC.

Mr Howarth—In ASIC in particular or in both regulators?

Senator EGGLESTON—We have an interest in ASIC.

Mr Howarth—The infringement notice regime, as you know, does not really provide a penalty as such. It provides the option for the recipient of that notice to pay a fine to avoid any further court action. So, in this sense, what looks like a sanction can be interpreted as the ACCC accepting a limitation of its own action. We support the introduction of that system, because it provides a very effective mechanism in small cases for the ACCC to take action. However, we would be concerned if that became an easy option for the ACCC where further action should be taken. We have seen the ACCC use its current powers under section 87B wisely and well. That has provided consumer redress in many situations, improved the standard of compliance in the economy generally and avoided a lot of the costs that litigation would impose on business, but there have also been cases where we, as the consumer representative, would have preferred to have seen more vigorous action. In particular, court outcomes provide an educative effect as well as the direct redress or the demonstration effect of the judgment. It is something that we think should be supported but should be monitored.

Senator EGGLESTON—We are also very interested in the ACCC, of course. The other thing you mentioned was telecommunications compliance. You thought there were some weaknesses there. Could you expand upon that for the committee's benefit.

Mr Howarth—We acknowledge that there is an extensive telecommunications-specific consumer protection regime and that that is currently under debate as part of the government's National Broadband Network process. Our understanding is that a lot of those guarantees answer different problems to those in the consumer guarantee, so the consumer guarantee for telecommunications services covers the situation where the service is not provided with due care and skill and provides a full redress mechanism for consumers as well as representative action. If you look at the consumer service guarantee in the telecommunications-specific consumer protection regime, that provides fairly minimal fines at times for telecommunications carriers and carriage service providers and it does not, in our view, at all replace the provisions that are in the Australian consumer law.

As I said in my prepared comments, we think these provisions should provide the basic level of protection throughout the economy. We do not accept that any exemptions should be available, even where those exemptions are under ministerial regulation. To the extent that one accepts that there may be special cases, that ministerial power should apply generally across the economy. One would have to argue that it be available to any industry, because naming gas, electricity and telecommunications is almost an invitation to those industries to lobby for special treatment. As we said, in the case of telecommunications, we cannot see any justification for rewarding that industry for what have been fairly appalling standards of consumer service over the last 10 years.

Senator EGGLESTON—So you would have an overarching consumer protection law or consumer guarantee that applied everywhere.

Mr Howarth—Yes.

Senator EGGLESTON—That does make a lot of sense, I must say.

Senator PRATT—I want to ask you about your submission on extended warranties. I find it somewhat befuddling that, as a member of this committee who debates these issues frequently, even I as a consumer struggle to work out how extended warranties work and whether they are worth having, so I welcome your contribution on that. Even with your submission I am still having trouble understanding what it actually means. Are you arguing that a consumer guarantee and statutory rights are already the equivalent of an extended warranty? How does a consumer tell the difference between their regular warranty, what their statutory rights would be and what is actually covered under an extended warranty that goes beyond what one's statutory rights might look like?

Mr Zinn—I might just say a few words on this and then pass over to David. I do quite a bit of talkback, where people phone in, and I have to say that the area of warranties would probably occupy 60 to 70 per cent of that. We have been saying—and it is not just us—for two to three years that extended warranties are generally not worth the paper they are written on. The problem, of course, is that people do not understand that, and the hard sell of extended warranties at the point of sale is such that people are often pressured into buying them. Our own research for the Department of Fair Trading actually shows that. About nine months ago we sent off to the major national retailers—JB Hi Fi, Harvey Norman, the Good Guys et cetera—a warranty code of practice. The Good Guys actually did become signatories to that, and part of the code of practice was that at the point of sale they would make all the information available to show that you did enjoy statutory protections for free without actually having to buy an extended warranty. However, the way that the commissions to the sales staff work on extended warranties is such that it is not currently in their interest to make people aware of what their rights actually are.

Senator PRATT—Are extended warranties undermining people's capacity to access their statutory rights?

Mr Zinn—I would say that inasmuch as when you come to claim on an extended warranty often the terms and conditions are such that people do not get much satisfaction, so they lose faith in anything that is called a warranty. Also, in terms of the statutory protection, again, as the research that David talked about showed, the more people there are armed with information about their rights, the more quickly and more effectively the remedies tend to happen. Currently, from anecdotal feedback, people really have very little idea about what their rights are.

Senator PRATT—And people would be unaware, so that if their regular warranty has expired they will usually write the product off and say, 'Oh well', when in fact they still might have some statutory rights.

Mr Zinn—Exactly. In fact, a body of work that we are going to be doing in the next year is about how long something should last—how long, realistically, should any particular item last and what is that 'reasonable period' which is so hard to define? People often report that one or two days after the manufacturer's warranty expires is when they get into trouble with the good.

Senator PRATT—So the existence of an extended warranty to some extent undermines any understanding of what a consumer warranty beyond that warranty period might actually look like.

Mr Zinn—I would say 'confuses' as much as 'undermines'.

Senator PRATT—Right.

Mr Zinn—It does confuse people considerably. Plus, as I said, there is the fact that if you at the point of sale use the word 'warranty' they will talk about the manufacturer's warranty, which is the bit of card in the box, and they will talk about the extended warranty, which is the thing you can buy. But they will not generally make you aware of the statutory warranty, which is the protection you enjoy for free.

Senator PRATT—How, in contemplating this law, should we be making these issues clearer? I am almost surprised to find that you are not arguing that extended warranties should be done away with entirely.

Mr Howarth—That would be an intervention in the marketplace that goes even beyond our ambitions. You can draw an analogy between an extended warranty and an insurance policy. People pay upfront to be sure that, if something goes wrong, they can get their product fixed. If you take the analogy to health insurance, we have a market which operates quite well for private health insurance that is over and above what Medicare provides. We do not have a problem with that market because everyone knows about Medicare. So our main concern is to ensure that everybody knows about their consumer guarantee so that they can make an informed decision about whether any additional warranties are required. To answer your question directly, the solutions

are, first, to tighten up that misleading and deceptive conduct provision so that it addresses the real evil and, second, to require positive disclosure, where people are offering extended warranties, in a way that is above what is required normally in a shop.

Senator PRATT—Is it realistically possible for a consumer to have goods replaced and fixed using their consumer guarantee, as opposed to an extended warranty, if that product breaks down outside its warranty period? Frankly, I have never heard of anyone ever being able to have that done.

Mr Howarth—It is theoretically possible and in practice very difficult. That is why the other area that we have mentioned today is that, whatever redress mechanisms the manufacturers offer in their express warranties or their extended warranties for their own warranty, they should also express that those are available with regard to the consumer guarantees. What that means effectively is incorporating the terms of the consumer guarantees into the extended warranty at least for that period

Senator PRATT—Who decides that a consumer guarantee must be upheld and a product should be replaced, and how do you work out whether it is actually worth pursuing?

Mr Howarth—At the end of the day that is going to be a tribunal, or a court in the worst case.

Senator PRATT—It is pretty difficult if your washing machine has broken down and you need to get the week’s washing done. You would just go out and buy a new washing machine, surely, if you could afford to.

Mr Howarth—Absolutely. This is why we are hoping that the change in the law will improve consumers’ awareness and make them more assertive on the shop floor. In other places there are systems for registers of consumer complaints through consumer organisations such as, in Germany, the Verbraucherzentrale, which provide some backbone to consumer complaints that traders will then take more seriously. You cannot, as a matter of practice, have law enforcement officers outside every shopping centre, but the fact that consumers know their rights and express them seriously, with some apparent organisational support, often will lead to a better outcome in the marketplace.

Failing all of that, we are looking very eagerly to the ACCC taking representative actions under section 277. While a washing machine is an example where you might consider quite a bit of time and expense to get it repaired, a toaster or a record player—I am showing my age there—an MP3 player is not the sort of thing where consumers would even bother spending the time, but over the sum total of consumer complaints these can be very important issues, so we do need a strong regulator that is taking action under those powers.

Senator CAMERON—Has there been any analysis done on the growth of extended warranty purchases in Australia, to your knowledge?

Mr Howarth—We have done that research. To be honest, I do not have all of the figures at my fingertips. We can certainly provide you with a copy of the report, which was provided to the New South Wales office of fair trading. It showed that certainly manufacturers, but also consumers in many cases, were much more aware of the existence of extended warranties than they were of the statutory warranties. So, just on the sheer recognition factor, there was an advantage for extended warranties, and a large number of consumers—I think it was 68 per cent, from memory, but I will check that figure—had used extended warranties.

Senator CAMERON—Most of these extended warranties are provided by insurance companies, aren’t they?

Mr Zinn—They can be by third parties; they can be by the retailer. It really depends. There is no one model, as we understand it. That is part of the problem: people feel that the extended warranty is, say, with Harvey Norman, something goes wrong and Harvey Norman say, ‘No, your agreement is with a third party.’ That has added to the confusion, certainly, when some of those companies perhaps have experienced difficulties or have been hard to track down as time has gone on.

Senator CAMERON—I am not into purchasing extended warranties but for some reason I did on a multifunction printer because I had had a problem with my previous one from Harvey Norman, and the insurance company could not have been better. I thought I was ringing Harvey Norman but then they put me onto an insurance company. I am not sure if that is typical; probably not.

Mr Zinn—Again, in terms of the work we did with the office of fair trading, there were some people who were very satisfied with the way the extended warranties work but others inevitably who were not. I suppose that is why what we are calling for is not the end of extended warranties. One, you should not have to buy them then and there at the point of purchase; you should be able to get them for up to 30 days afterwards. Also,

there should be a cooling off period of up to 20 days or whatever in which you can actually cancel the contract once you have had a chance to interrogate the fine print.

We believe that those kinds of protections would protect those who were perhaps pressured into the purchase, but would certainly allow those who are prepared to buy some peace of mind to go through with buying the product.

Senator PRATT—What about people who do not have them that are refused any service by the supplier of the product? That happened to me recently. I bought a laptop computer three years ago. It has now started to fail—the screen blanks out. I rang them and said, 'Can you fix this?' They said, 'Did you get an extended warranty with it?' They told me, 'No, I hadn't,' because I could not remember, so they have not offered me any solution to fixing this problem. Is that typical of a consumer's experience.

Mr Zinn—I would say yes, because how long should a laptop last. If it is a $500 one, how long should that last as opposed to a $3,000 one? Yes—and people do get brushed off, but we do recommend if they have got grounds to take it to the various fair trading bodies or even the tribunal, and on occasions that does happen and people do get some remedy. But, yes, they have got to really want to pursue it.

Senator CAMERON—Can I move off that issue of extended warranty and come to the electricity industry. Energex have put a submission into this inquiry basically saying that they should be exempt from the act. They argue that they are subject to a standard connection contract prescribed by the Queensland electricity industry code and that therefore this is duplication. They argue that a supplier should not be subject to consequences for matters beyond their control. Have you got any views on those two arguments on exemptions?

Mr Howarth—We would ask: if the consumer protection standards in Queensland are higher than in the ACL, why is there a problem, and, if the standards are lower, why energy and electricity suppliers should have the competitive advantage of providing those lower standards compared to other sectors in the economy? That is on a macro level. On the question of the electricity suppliers being subject to matters beyond their control, this is an argument that has been raised on several occasions, including in 2001, when the matter went to the Federal Court. There was a dispute between the Electricity Supply Association of Australia and the ACCC. There is simply in our view no evidence of situations where that has occurred. So we do not see that there is an argument for exempting the industry on that basis.

There is, also, of course, a similar argument that could be made in any number of other industries and sectors of the economy: where something intervenes in the production process that results in the good coming out effectively at the other end, why should the suppliers be liable to that? The answer in the consumer guarantees is that they are to the extent that it is covered in by the guarantee and the costs of that are spread across all of the goods supplied. As we have said in the submission, our view is that that is a reasonable price to pay for consumers to have the benefit of these warranties overall.

Senator CAMERON—The Energy Retailers Association have also put a submission in which says door-to-door marketing has been central to Victoria, South Australia and New South Wales being ranked as the first, second and fifth most competitive energy retail markets in the world. I assume what they are saying there is, 'Don't put any impediments to door-to-door marketing.' What is CHOICE's view on that?

Mr Zinn—I would be interested in their definition of 'competitive'. Perhaps they are meaning the greatest amount of churn, which is perhaps something a bit different. We have real issues with door-to-door knockers. While there might be codes of practice that they adhere to, we know—and I know through personal experience, because when they knock I always take the time to let them go through the whole spiel—that they do not conform to the code of practice and that vulnerable people are pushed into deals. There is something called affinity marketing, where particular ethnic groups will go to areas where those people live, particularly elderly people, and really push them into switching deals which are often not in their best interests, because they are not clear in terms of what the savings. They will say—and we have got examples of this—you are getting a 10 per cent discount off 'the rate'. 'The rate' is not the government regulated rate; 'the rate' is a market rate that they have which is perhaps above the government rate. While the electricity companies use door-to-door and it is a key part of switching existing customers to new contracts and gaining new customers, we want there to be considerable scrutiny of the way that they operate.

Senator CAMERON—On compliance, Coles have argued that the infringement notices under section 134A are problematic. They say that an assessment officer will be subjective rather than objective and that it is better for a court to make a determination. Does CHOICE have a view on these infringement notices and the

proposition that you can actually be subject to an infringement notice but still have your legal rights to fight against an infringement notice?

Mr Howarth—That, with respect to Coles, is an illusory submission, if I can put it that way. The infringement notice regime as we have just described, and which is in the bill, only gives the corporation an option to escape further enforcement action by the ACCC. They retain all of their legal rights. If they feel it is a matter that should be taken to court of course they have that option. In the case of Coles, if there were a number of infringement notices being issued to Coles, we would have serious concerns about that, because if Coles were regularly breaching the Trade Practices Act or Australian consumer law then our view is that they are the sort of corporation that should be subject to the full force of the legislation by dint of the fact that they are well resourced and obviously have compliance mechanisms in place.

Senator BUSHBY—Thank you for coming today. You mentioned that the three qualities that you would like to see are understandable, uniform and universal, and effective, which I think is a noble aim to achieve. But, particularly in terms of 'uniform and universal', do you acknowledge that there are different industries providing different goods and services and by providing a standard set of obligations that they have to comply with that may actually impose differing levels of compliance activity on them? If you are a manufacturer making hundreds of thousands of units, which you have thoroughly tested, you know it is going to meet fitness-for-purpose requirements. You can be fairly confident that you were doing that and send it out. But using as an example the current exemptions—engineers and architects—you might be a small business architect sole practitioner, spend two months working on a design and overseeing to some extent the project. First of all, as we have discussed, to some extent there will be third parties who intervene in terms of how your design is interpreted and actually built, and at the end of it the interpretation of whether that is fit for purpose is a subjective thing. What are the consequences if they say: 'Look, having seen this built, it's not what I thought it was going to be. It is not is light and airy as I thought it was going to be. It is not as fit for purpose as I thought it might be.' The consequences for that individual person might be a loss of two months income. So in terms of universality of approach, it may have differing impacts on those who are supplying and differing requirements for them to seek to comply. Sometimes common sense—and I am not saying necessarily in this case the argument is—but common sense should prevail if the strength of an argument sufficiently backs a need to look at something differently.

Mr Howarth—First of all, one of the problems with exemptions is that, exactly as you say, there are any number of industries where there are special considerations. In fact, in our experience, in every industry there are special considerations which ultimately leads to every industry claiming a need for an exemption. So what starts often as a small exemption in one corner quickly becomes a precedent for a hollowing-out of the protections across the economy.

Senator BUSHBY—But that has not been the case with implied warranties for engineers and architects. They sat quite comfortably there for the last 14-odd years.

Mr Howarth—Yes. In fact, your point is a very good one, because the exemption has been taken out of the current bill. However, there are other exemptions that have been included which we think make equally little sense.

Senator BUSHBY—On the telecommunications one, I agree with you. You yourself made the comment that telecommunications may actually require a higher standard, and I tend to agree. The sophistication of approach where you look at the problems of each individual industry and tailor your solution to that appeals more to me than a universality of approach. I think telecommunications is a classic example where it probably requires a bit of a closer look.

Mr Howarth—Yes. We certainly have no objection to higher standards in particular industries. The bill, as senators know better even than we do, is the product of a long fight across the country to get a uniform system of consumer protection. That is probably expressing it a bit too highly, but it is similar to the battle for European integration that was brought on in the 1950s. The concern that they had in Europe was that, having spent all this time getting all the governments together to have a single markets, if you allow private agreements and exemptions to undermine that uniformity in different areas then consumers are back to a worse position than we were, and we would say the same thing. As Christopher said, in the same way that we believe it should be uniform across the states, it should be uniform across sectors, and that is because consumers will understand the laws and be more confident about asserting their rights under the laws if they apply everywhere.

Senator BUSHBY—I am supportive of measures that increase consumers' understanding of what is going on, because I think that is a hugely important part of this, and I agree with everything you have said on that. To some extent, the existing remedies might provide far better protection if the current level of understanding of consumers was much higher.

Mr Howarth—I think that is right, yes. On the particular question of fitness for purpose in the architectural case, the example you quote is one that often comes in the architects' submissions, and I warn the committee about spectres or fears that are raised and that do not have much actual evidence for them in real life. The case of somebody ordering an architectural plan and a building being built and not being quite what they expected is very different to that of somebody enforcing their rights because it is not fit for a purpose. The 'fitness for purpose' remedy is quite specific, and certainly a court would apply the common-sense approach that you advocate in resolving these disputes.

Senator BUSHBY—On the basis of the submissions, it is not clear that that is necessarily the case, and I guess that is where their concern is coming from. Theoretically, I would think you could argue that you could go and commission an artist to do a piece of art and let the artist know that you want this piece of art to impress your friends, one of whom might be an art critic, and when you hang it on the wall and they come round they say, 'I don't like it at all.' Do you have a right to say, 'It doesn't fit the purpose, because it was supposed to impress my friends'? To some extent there is an artistic and subjective element to what architects do.

Mr Zinn—In the case of architects, as opposed to people who make widgets, there are various sign-off periods in the development of the plan which the person commissioning the work should agree to, so I think it would be very hard for them to say when it is actually built, 'Hang on; you were wrong here,' because they should have put their initials on the plan all the way through the process.

Mr Howarth—Another point on that is that the 'fitness for purpose' guarantee only applies where that requirement is made known to the supplier. If the artist accepts the commission on the basis that the work must impress the client's friends then we see no reason why he should not be held to that guarantee. But if it were not clear—

Senator BUSHBY—We are a long way away from protecting consumers at that point, I think.

Mr Howarth—Exactly. In that situation, if the consumer merely said, 'I would like it to impress my friends,' without making that quite clear to the artist, and it did not impress them, you would be struggling to find a court that would enforce that remedy.

Senator BUSHBY—There is only one other comment I would make. You mentioned that you would like to see more dispute resolution mechanisms—that was a small comment you made at some point. One of the things I do like about the proposal currently before us is that it will make available low-cost dispute resolution fora in the states for use for all of the remedies that are basically contained in the ACL. For example, you could take an unconscionable conduct action in a small claims court, subject to monetary limits and things like that, which I think would provide far greater opportunity for consumers to seek redress. Using the example of a washing machine, presumably you could just run along to your small claims court and have that addressed very quickly and very cost effectively.

Mr Zinn—You can still do that, but there are different situations in every state and territory, so—

Senator BUSHBY—I think the officials are sorting through that at the moment, and there are different requirements or qualifications that you need to meet before you can go into the various—

Mr Zinn—There are different names for all of the tribunals, and again that adds to confusion.

Senator BUSHBY—But it does offer a lot more potential for consumers to seek redress—for example, as I just mentioned, for unconscionable conduct—by doing that and not having to go to the Federal Court and spend hundreds and thousands of dollars in legal fees. You can do it at a local, low-cost dispute resolution forum.

CHAIR—Thank you to CHOICE, Mr Zinn and Mr Howarth, for coming in this morning.

Mr Zinn—Thank you.

[10.02 am]

HOLMES, Mr Paul Richard John, Senior Solicitor and Consumer Advocate, Consumer Protection Unit, Legal Aid Queensland

UHR, Ms Catherine, Senior Solicitor and Consumer Advocate, Consumer Protection Unit, Legal Aid Queensland

Evidence was taken via teleconference—

CHAIR—Good morning. Would you like to make an opening statement?

Ms Uhr—Yes, thank you. Legal Aid Queensland welcome the opportunity to present our concerns to the committee. Legal Aid has 14 offices across Queensland and 42 community access points where access to help is facilitated. The experience of the Consumer Protection Unit, in which both Paul Holmes and I work, is from delivering advice and representation to thousands of Queenslanders across the last 10 years.

I intend to address the first of our concerns covered in the outline of position, which should be with your papers. Paul Holmes, my colleague, will then tackle our second concern, relating to the potential to avoid protection by skating around the definition of unsolicited consumer agreements. As you would see from our outline and from our submission, our focus has been fairly narrow and on what we would traditionally have regarded as door-to-door style sales.

Firstly, we reiterate our strong support for the legislation and confirm that our first remaining concern is that tied credit contracts—that is, where you have borrowed money at the time that you have entered into the sale—should terminate automatically when an unsolicited consumer agreement under the bill is lawfully terminated. We have styled this problem as the ‘linked credit problem’. This is where the likelihood is that the salesperson is also selling the credit. We say that consumers subjected to high-pressure door-to-door or outside-of-business sales will be worse off under the bill as compared to the protection currently available, for instance, under our Queensland Fair Trading Act if the supplier sourced finance for their purchase through the dealer—so, this tied credit. The reason for this is that, while the bill’s division 2 processes allow the sales contract to be cancelled—and, when the contract is lawfully cancelled, that will stop harassment and stop negative credit reporting—this will not automatically happen unless the tied credit contract taken out at the same time is also at an end.

I will explain this by way of an example familiar to lawyers in our unit. Imagine that you are the consumer. I do not know whether the committee has the March 2010 research paper by Deakin University and the Consumer Action Law Centre called *Shutting the gates: an analysis of the psychology of in-home sales of educational software*. It also has a short video explaining how it is that you can end up entering into these contracts. There is a picture on page 19 of that research paper which describes what I am about to tell you about. You are at a local fish and chip shop waiting for your order. On a side table there are some pamphlets advertising some out-of-date opera performances and a competition entry form to win a computer. Your teenagers have been whingeing for weeks about how slow the second computer in your house is, so a free computer would be welcome. The competition entry form looks at lot like a docket. The ones we have seen in and our unit are reproduced on page 20 and 21 of that research paper—and I just found those pictures this morning. They are like a narrow docket with printing very similar to the legal contracts I used to see when I first started practicing in the early-eighties. So the competition entry form looks like a docket. It has paragraphs of small print. All you have to do is sign your name at the bottom and then put it in what looks like a cardboard ballot box. That is the end of that. You pick up your fish and chips, you leave and you forget about it.

A few months later your partner receives a call on the home phone. You have won a computer. All you have to do is finalise the win, and that means making a time for someone to come to your house and give one of your children a quick assessment to see how they rate against the rest of the country in maths. A child’s performance in maths is a high-end anxiety trigger for parents across the country. You have been very concerned about your son’s maths results for some time and you would not mind an independent assessment. You do not really know what is going on in school. You have heard the child’s reports of test results but you would love an independent assessment. A salesman attends your home. Within two hours you find yourself signed up for up to $10,000 of maths software. Something you did not appreciate at the time is that you have also applied for finance at 22 per cent with a lender you have never heard of—because there was a large batch of papers and you simply signed where indicated.

Nothing happens for three months other than that a computer and some software which you have not managed to work are delivered. You cannot get the software to work. Eventually, four months later, a debt collector starts to ring every second day demanding payment. They tell you that if you do not pay immediately and bring the arrears up to date you will be listed on Veda Advantage. That will mean you will never be able to get your house refinanced; in fact, you will be stopped from getting mainstream credit. You want to end the contract because there are breaches of the new law and the first page of the contract was so blurred that it was illegible. You are in a position where, if you got legal advice, you would be able to do that. You want to stop the phone calls from the creditor's agents. You want to make sure there is no chance of a black mark on your credit report. Your great concern is the impact this will have on the rest of your life.

In Queensland all of this could be achieved in the first six months after you have signed a contract with one letter terminating the sales contract, provided there was obviously a breach of the door-to-door provisions—and we find that there frequently are. In addition, if consumers are being pursued for payment by the credit provider, they have rights to void the sales contract. Under the new bill, they will not be able to have their dispute heard by an external dispute resolution scheme—which have been set up to deal with financial disputes. So they will not be able to, as a first stop under the bill, go straight to the financial ombudsman in order to stop the creditor harassment and in order to do something about the threat of blacklisting on the credit report—because the suppliers or dealers will not be members of these schemes and they will first have to do something about the first contract. What we frequently find is that the supplier may be out of business but the credit provider is the one pursuing a debt. So, under the bill, one letter terminating the contract will not stop the creditor from harassing you and default listing you, which are high objectives for you as a consumer. The consumer's dispute will have to be dealt with twice—firstly under the new consumer law and secondly as a credit contract dispute. At the very least, the second part of resolving the matter will be a request to terminate the credit contract, because the sales contract is terminated under section 135 of the National Consumer Protection Act 2009, which, of course, is the Commonwealth legislation due to commence on 1 July.

This concern is detailed in our written submission. We are very concerned that currently in Queensland creditors have to put their money up by filing in court for a declaration before they harass or blacklist a consumer, because they are prevented from doing it once you have terminated the sales contract. We propose a simple solution. We advocate the extension of relief offered by section 83 and section 88 of the proposed bill to tied credit contracts. The harm can be rectified simply by an amendment to the bill deleting the words 'but does not include' and replacing those words with 'including' in section 83(2)(c) as set out in line 10 of the bill. In other words, we would include rather than exclude credit contracts.

Thank you for the opportunity to address our first concern. Paul Holmes will now address the difficult issue of when a contract is unsolicited.

Mr Holmes—Good morning. The second issue that we wish to discuss with the committee today is the attempts by door-to-door traders to avoid the protections that are offered to vulnerable consumers under the bill and are currently offered under the Queensland Fair Trading Act. These attempts are a problem because the bill in its current formulation focuses on protecting consumers from unsolicited contact by door-to-door traders and from entering into unsolicited consumer agreements. Our position is that, if a door-to-door trader is able to solicit an invitation into a vulnerable consumer's home, as the bill currently stands it is arguable that the vulnerable consumers that this bill is trying to protect will not have the benefit of the protections that are specifically designed for them.

We could take a moment to look at how traders are currently attempting to avoid the Queensland Fair Trading Act door-to-door provisions, which are very similar to the current formulations in the bill. In the past few weeks we have given advice to clients in the following situations. Firstly, a consumer receives a notification that they have won a dinner invitation featuring a guest presenter on the latest research on sleep deprivation. This led to the consumer signing a contract for a $6,000 financed bed. Secondly, a survey was sent from a child's school, encouraging the parent to undertake an independent assessment of the child's literacy or numeracy. This led to a maths software contract being signed. There was a free cookbook offer at a stand in a shopping centre, which led to a financed cookware contract in the region of $5,000. Perhaps most appalling, there was an approach made to a child at a shopping centre while the mother was putting her weekly shopping through the checkout. The man approached the child who had walked 10 metres further away and then waited for the parent to approach him. Then he engaged her in discussion about the child's proficiency at numeracy.

What we have to question is whether these interactions would be covered by the current protections and the current definition of unsolicited consumer agreements in part 3-2, division 2 of the bill. Specifically, Legal Aid's position is that an invitation by the consumer itself that was solicited and where the trader alleges that the primary purpose of their visit was another purpose—for example, research, offering a seminar or undertaking a survey—may not be covered by the current formulation of the bill. The reason for this is that the definition of an unsolicited consumer agreement focuses on the supply of goods which is made as a result of negotiations on the telephone or other than at the trader's place of business and where there is no invitation into the consumer's home. The gap in the definition is that an agreement for the consumer to give an invitation to visit the home is not in fact covered. We pointed this out particularly with regard to such circumstances as where the child is approached at the shopping centre, the mother is then approached when she approaches the man and then, three phone calls later, she finally gives an invitation for the maths software salesman to attend the home to sell her the product.

In effect, the hard sell of door-to-door salesmen is less and less focused on what actually occurs in the home and instead focuses on obtaining an invitation to our vulnerable clients' homes which will allow them the freedom to engage in their high-pressure sales tactics outside the usual protections offered by the door-to-door sales provisions. The reason for this is that the bill in its current formulation arguably does not protect consumers from traders who are able to solicit invitations into the home. From LAQ's experience, there is no difference in the pressure felt by vulnerable consumers from high-pressure sales tactics in their home when the invitation is obtained or when it is an unsolicited invite into the home by a door-to-door trader. The effect of this is that the vulnerable consumers are still likely to fall victim to door-to-door salesmen in spite of the excellent provisions and protections that are offered by the bill.

So what do we say the solution to this is? We submit that all contracts which are negotiated away from a supplier's business premises should be subject to the door-to-door provisions. Such an amendment would allow all scenarios to do with door-to-door sales to be regulated by the bill and would prevent the avoidance technique that is currently used by door-to-door salesmen. It would also allow both parties to focus on the main transaction here and not avoid the legislation as they are currently attempting to do. Legal Aid highlights that the United Kingdom provides this exact type of protection for all consumer contracts in their regulation Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008. In the alternative, section 69(3) of the bill allows regulations to specify agreements as unsolicited consumer agreements. On this point, Legal Aid Queensland supports the view put forward by the Consumer Action Law Centre on pages 14 and 15 of their submission. They suggest that the definition of unsolicited contact in the draft regulation accompanying the national consumer credit protection act should be adapted and included in the regulations which support this bill.

We would submit—and we have included this in our outline—that the regulation should state that an unsolicited consumer agreement will include contracts that result from solicited invitations obtained from a consumer in the following circumstances: (a) a consumer is contacted in relation to the supply of goods or services after providing his or her name or contact details to a person and (I) the consumer did not provide her or her name or contact details for the predominant purpose of being contacted in relation to the supply of those goods or services or (II) the consumer is not contacted within a reasonable period after making an inquiry in relation to the provision of those goods or services; or (b) a consumer is contacted in relation to the supply of goods or services on or from business premises that are not physically separate from premises regularly used by consumers for purposes other than being contacted in relation to the provision of those goods and services; or (c) a consumer is contacted for another purposes such as a competition, free offer, survey or seminar and then invites that person into their home.

While any definition that is included here is not able to cover the field of door-to-door sales, it is LAQ's position that as many consumers as possible should have the benefit of the excellent protections that are offered in this bill. If these unintended consequence that we have outlined above are not addressed, there is a real risk that vulnerable Australian battlers are at risk of losing their homes from the pressured purchase of high-cost, non-essential, low-value goods which they cannot afford. We thank you again for the opportunity to speak on these issues. If there are any questions, we are happy to answer them.

CHAIR—Thank you. Mr Holmes, the explanatory memorandum says:

> … the ACL will include a single national law covering unsolicited sales practices, including door-to-door selling, telephone sales … and other forms of direct selling which do not take place in a retail context.

You believe that the examples you give would not be covered under that generic description?

Mr Holmes—I believe they would not be covered, and the reason is that the section on door-to-door sales is very specific when it comes to what it says unsolicited consumer agreements are. The circumstances of that I have outlined. Our position is that they may not fall within that definition. For reasons of clarity, we think a specific inclusion would make any uncertainty much clearer.

CHAIR—All right.

Senator EGGLESTON—I was interested in what you just asked, Chair, because obviously door-to-door selling is open to abuse. I think it is an area where there is a need to protect consumers. During the course of what you said you talked about the fact that these people would find that they were frequently held to defaulted payments. Are you implying that when these contracts are made there is no arrangement also entered into for periodic payment of the costs involved? Are you suggesting that the salesmen conceal the cost from the potential buyers? I did not quite follow that.

Ms Uhr—I can probably assist you on this point. The research that was published in March 2010 by Deakin University suggests that in the majority of cases that they looked at the costs of the products are not raised with the consumer until the very end of the one- to two-hour interview in the home, once the sale is close to finalisation. It is expressed to our clients as an affordable fortnightly figure, with almost no discussion of how long the term of the contract or periodic payment might be and, frequently, no discussion whatsoever of the fact that it is likely to be financed, that part of what they are signing is a finance application, that they are going to be paying 22 per cent and that it may take them years after the product is of no use to pay it off.

Our consumers are generally not financially literate. In fact, they know this about themselves. They want their children to be in a better position, which is why they are so vulnerable to maths software products. Consequently, they have no idea what they have signed; they just know that they are going to get assistance for their children and that there is going to be backup, online support and a program that the child is going to be able to operate—though frequently they do not even get to see that demonstrated during the first interview. What happens is they then find out some months later that they have a finance contract. They get a letter from a third party they have never heard of, saying they have their finance approved. They find that the whole deal is totally unaffordable, which is the horrible irony of them not understanding the documents.

Senator EGGLESTON—Thank you for explaining that. I did not follow that very clearly from what you said before. So they are advised of the cost, but there is an element of deception in that they are not advised of the details of the repayment schedule.

Ms Uhr—When I phone the companies up and ask the cost of the products, I am never given an answer. They will not tell you on the phone. They will only tell you after two hours of softening up in the home.

Senator EGGLESTON—Thank you very much. I think your submission is really very good and highlights quite a lot of problems. Do you feel the proposed legislation adequately covers the kind of situations you have described and will protect consumers to a degree you would be satisfied with?

Ms Uhr—The answer to that is yes, except for the two exceptions that we have addressed today.

Senator PRATT—I certainly agree with your concerns about these contracts; however, it seems to me that it is the contracts themselves, as opposed to the tactics that are utilised in endeavouring to get people to sign them, that are of key concern. Can I ask you about your impressions of overall consumer satisfaction with such products.

Ms Uhr—We have not ever had a satisfied consumer speak to us in relation to these products, which is probably not the case with some low-cost products. When given time to reflect, most consumers realise that they have a very expensive product and also a change to their overall lifestyle in relation to the huge debt, and in at least three or four instances this year people have been at risk of losing their homes over the purchase. So for us these are very dangerous products simply because of the high cost.

I would make the point that from all of the discussions we have had with clients over the last three or four years in particular—and I think this is backed up by Deakin's research—from what we have looked at we find that consumers are not able to improve their child's performance via, say, maths software. There are reasons for that. The first problem is to get the child to sit there and do the work diligently; clients have very low success rates in getting their children to sit and do the work. If they are able to do that, in the absence of expert tutoring and support, the minute the child runs into problems the parent does not have the capacity to assist, and they are not able to access the supposedly 'easy to access' help—and a child cannot understand the help over the phone, for that matter.

Senator PRATT—I certainly expected that to be the case, but I put to you on that basis that surely such products would fall foul of being reasonably fit for the purpose for which they were supplied and that under the new regimes they would be the kinds of grounds that you would be looking at to undo such contracts, not to mention the other work that is happening on the nature of product financing. Surely you would be seeking to look to those kinds of remedies rather than simply to ways of preventing people getting into these contracts to start with, which clearly will still happen. When there is a will by the door-to-door salesmen to do something they will continue to do so by hook or by crook. Therefore, it is the fairness of the contract itself that we should be focused on.

Ms Uhr—The issue for us is that we need access to a cheap legal option, which is what we have had if you can terminate with one letter and they are then prevented from harassing and default-listing you and if they have to take it to court if they want to take it a step further. So it is a question of who bears the legal costs. A fitness for purpose argument is a very expensive argument for us to run, and around the country legal aid commissions struggle with this.

Mr Holmes—More to the point, our clients do not have the funds to run a reasonably fit for purpose argument.

Senator PRATT—Surely, once a couple of reasonably fit for purpose arguments have been won with these kind of contracts, similar kinds of contracts would have to be disbanded. Do you think they would just pop up again and again?

Mr Holmes—There are two arguments on that point. Firstly, our experience with door-to-door salesmen is that if we run reasonably fit for purpose arguments they will run them to the ground. The second point is: if we run reasonably fit for purpose arguments, in Queensland they currently take anywhere between six and 18 months to get to court. By that stage, the financial position of our clients is that they will have a ruined credit rating, in some cases they will not have a house and they will be in a debt spiral which is nearly impossible for them to get out of.

Senator PRATT—I certainly agree with those concerns, but I am sure you must be aware of the responsible lending provisions that are also being pursued in other reforms that would see such contracts struck out, with the liability being put back on the lender for not having made an appropriate assessment.

Ms Uhr—The difficulty is that that will also involve a fair degree of assistance. For us it is really a case that the harm is in the signing up of the contracts that are non-compliant, because I am talking here about those that are non-compliant. There is not some sort of blanket ban on being able to sign up in the bill or in any previous law around the country at this point. So, in the absence of that, we are looking for something that is going to mean that we can get quick solutions and put the onus back on the supplier to argue that they have done everything they should have done. We find they then walk away because for them it is a commercial risk of doing business. Whereas, if they see it is going to be a lengthy argument, they stay in and run up our costs and wear out our agencies and wear out the consumers. These are vulnerable consumers. They often have multiple legal problems, multiple issues in their lives. They are worried about how much overtime they will get next week, not about this issue. They just do not have the wherewithal to go through with the cases.

Senator PRATT—Thank you for your submission.

Senator BUSHBY—I apologise that I was out of the room earlier. You raised some very concerning issues regarding the software that you have used as an example. Will the bill as drafted address, in your view, all issues surrounding the way that that is sold and the associated problems?

Mr Holmes—Except for the two issues we raise, yes, it will. Our main concern about the maths software relates to an example I used, possibly when you were out of the room. While a lady was putting her shopping through the checkout, her child was approached in a shopping centre and asked about how she was doing in maths.

Senator BUSHBY—You did give that example. So you are saying that the bill as drafted will not actually address somebody approaching a child and a mother in a supermarket?

Mr Holmes—Following that, in order to get out of the shopping centre, the trader was given the mother's name and number and three phone calls later she did give him an invitation into the home to stop the harassment she was suffering on the phone.

Senator BUSHBY—So that needs to be addressed to complete the protection, essentially; is that what you are arguing?

Mr Holmes—Yes.

Ms Uhr—Another worrying and very widespread concern in Queensland is that school principals are being approached by software suppliers. They get some free software for the school and then a standard letter is sent out, which says: ‘Parents often ask our teachers for advice on ways that would help improve their child’s understanding of maths, English and the sciences. I recently had the opportunity to review a program by this company. It is an Australian company. They provide a personal tutor program which supports the Queensland curriculum. We will be making use of the program in the school for individual and small group remediation and extension of student learning needs and to complement our school maths and English program. While I am not in a position to recommend or promote materials, I believe that parents may like to know that this program is available and for them to decide if it may be beneficial for their children. There is information attached. In order to get your free home demonstration of the tutoring program, fill in and tear off the short survey of how your child is doing at maths. It is **important** that you return the supply slip to your child’s teacher tomorrow or as soon as possible if you are interested in viewing the program.’ Of course, you must act in haste. When schools send letters like this out, they are getting around the current provisions under our law and under the new bill, because then the parent is inviting them, by filling in the slip, into the home. Once they are in the home, shut the gate.

Senator BUSHBY—Some of the other provisions that are contained in the Australian Consumer Law would then protect a parent that did invite them in, was pressured into signing up to a contract and then found later on that it was not fit for purpose, or other aspects of what this bill is providing would still provide some protections for them.

Ms Uhr—Yes. And our concern is that, although it is so, that is an expensive process and in the meantime they are default listed and cannot borrow any money and cannot refinance their home loan. Basically, they are stalemated and held to ransom by the company.

Senator BUSHBY—Education of people who find themselves in that situation might help them to better understand the remedies that are available. Most of the remedies that are available under the proposed ACL will be available through low cost dispute resolution fora such as small claims tribunals. It depends on what each state around the country offers. I am not arguing against what you are saying—and I suspect that that needs to be addressed. Nonetheless, other avenues will be provided under the ACL for people who find themselves in that situation.

Mr Holmes—I accept your point. But from our perspective the issue is the degree of harm to our vulnerable consumers as we look at the various options that can be taken up. Even with a small claims tribunal remedy, when compared to the remedy of the linked credit contract going at the very beginning of this dispute, when they have to wait for a small claims tribunal resolution the harm is far greater. When they are already in such a vulnerable position, the effect of even that small difference in harm often has catastrophic effects on the way they live their lives for the next five or 10 years.

Senator BUSHBY—If it catches the door-to-door activity, how would that provide them with a quicker and more straightforward remedy?

Ms Uhr—If credit contracts were included as linked contracts it would be quick and dirty. You can send one letter saying that the contract is terminated. They are then prohibited under the bill from default listing you with a credit reporter and they are prohibited under the bill from phoning you and harassing you for payment of the debt. It is then up to them to take you to court. The onus is on them to show that they have complied with the provisions or, alternatively, that they are properly outside the scope of the bill. That would obviously be quick and cheap and give some level of certainty. We are then a house that has locked doors and the best crim-mesh screening and they move on to someone else.

Senator BUSHBY—I acknowledge that, in the circumstances and examples you have provided, that would provide a ‘quick and dirty’ resolution to the issue. But, looking at the bigger picture, there may well be circumstances where a consumer has been sold goods with linked credit that are of some value to them. What is to stop the consumer using that to their advantage—in the same way that there are many unscrupulous businesses, there are some unscrupulous consumers—and claiming that the contract is at an end despite the fact that they have got something that is of some value to them?

Ms Uhr—In 10 years I have never seen an example of a consumer trying to get out of a contract where they think there is some value in the goods. I have certainly seen consumers who have changed their minds. In that case they access legal advice, and that legal advice is that they have entered into a valid contract and they have

to comply with it. I do not see that as a problem, as opposed to what I have been discussing in terms of harm that is a problem. As I said, we have now got some research this year that backs up some of our concerns.

Senator BUSHBY—I acknowledge that it is a current problem and that what I have raised may not be a current problem. But I guess in addressing problems we do not want to introduce new ones. I want to fully examine what we are doing to make sure it solves problems without actually opening doors to new issues.

Ms Uhr—What we are asking for has been the law in Queensland since 1989, and I do not know of anyone who has raised a concern that unscrupulous consumers are avoiding their obligations under these contracts.

CHAIR—Thank you for your contribution this morning.

Ms Uhr—Thank you very much for the opportunity. We really appreciate it.

Proceedings suspended from 10.40 am to 10.50 am

MOTTO, Ms Megan, Chief Executive Officer, Consult Australia

CHAIR—Welcome. Would you like to make an opening statement?

Ms Motto—Yes. Consult Australia was formally known as the Association of Consulting Engineers Australia. We are the trade association that takes care of engineering, design and technical services companies in Australia. We employ not just engineers but also architects and many other design professionals and professional staff within the member firms. We have a large head of larger firms that do more commercial business-to-business work, and we have a long tail of smaller practitioners, particularly microfirms, who work primarily in the residential market directly to consumers, and that is the proportion of the membership I am primarily representing today. Outside of the membership there are of course thousands of small engineering and architectural practices operating in Australia that do residential work directly to consumers, and I unashamedly represent them today.

The concern of Consult Australia is the removal of the exemption for engineers and architects from the express fitness for purpose warranty in the new consumer legislation. We would ask that the Senate Economics Committee recommend in its report that the exemption for engineers and architects that currently exists under section 74(2) the Trade Practices Act be reintroduced into the bill. I will briefly go through the reasons for that. There are two primary issues that we see here. I will touch on the first issue only very quickly, and that is the policy process that has gone into the determination to remove the exemption for engineers and architects. The reasoning behind the exemption existing is as valid, if not more valid, today than when it was introduced in 1986. Our concern is that, in the original review paper in March 2009, no indication was made that this exemption was actually going to be something that was looked at. So our understanding is that, of the 30-odd submissions that were made at the time, other than the submission by Consult Australia and the Institute of architects, none made any reference whatsoever to that particular exemption. So there was no complaint against the exemption from any other groups in the original submissions.

Despite that, a decision had been taken in the final report to remove the exemption. However, no further consultation has happened with the parties that may have been affected by that particular provision. And there are not that many of those parties in Australia. There are only really four major bodies that represent engineers and architects in Australia. So it would not have been a difficult task to consult with those four bodies. Despite all that, the exemption has been recommended in the report and is in the legislation. Indeed, we did not get a chance to have a look at the exposure draft of the legislation which would have given an earlier alert on these issues before the bill's first reading.

The real issue, however, is the actual applications of the removal of the exemption. I would like to go through a couple of points with regard to that. Firstly, in Consult Australia's opinion the reasons given in the report simply do not stand up. There were primarily three reasons given for the removal of the exemption. The first was that engineers and architects are not so different from other professional service providers, so why should the exemption exist for them and not for others? The reality is that engineers and architects are, in our opinion, very different from other service providers in that they provide advice which is then interpreted and used by a third party to actually produce the end product. So the consumer does not actually interpret and use the advice of the engineer and the architect. They actually go to a third party—and mostly it is multiple third parties—to interpret and deliver the advice into a final product. So the introduction of a third party, or multiple third parties, in the process is the most significant concern that we have. That is why, fundamentally, engineers and architects are different from other professional services providers, albeit I do not speak for the other service providers today.

Secondly, the reasons for the introduction of the bill in 1986 still incredibly valid, as I pointed out before, and I will go into those in a moment. Thirdly, a similar exemption does not exist in the New Zealand legislation. Not only is the New Zealand legislation currently under review in its own right but also, we would argue, New Zealand as a jurisdiction in the building and construction sector is significantly less litigious than the Australian market. Whilst such protections, though they currently do not exist, may be needed in New Zealand, they are certainly required in the Australian market because of the litigiousness of our market.

Furthermore, the detriment to engineers and architects that would come about as a result of the exemption being removed would be significant and substantial. There would be a far greater risk for engineers and architects to be pursued as a result of third-party fault—that is, the builder does not necessarily build to the specifications of the engineer or architect or interprets their drawings in a slightly different way than another builder would. All builders will interpret drawings in a slightly different way, so the end product is then

affected by not just the builder but also the subconsultants that the builder uses—the air-conditioning subconsultants, the plumbers and the tilers. There are so many other third parties in the process, including local councils and the state government, which has legislation requiring different things of houses. I can use myself as a case study. I am currently building a house. I have expressed to my architect that I would like to do certain things, but they are not able to be done because of local council regulations; I am simply not able to get them through the local planning laws. So, in my mind, the finished product will not be as fit for purpose as I would like it, simply because a third party has placed restrictions on what the final product can be.

There will also be a greater risk through inadequate project scoping. One of the biggest problems in the building and construction sector at large—and this is even more true of the residential market—is that most clients are uninformed purchasers and do not really know what they want. It was said in quite a significant report that most clients want ‘a land based flying submarine’. It is certainly true in the residential market that husbands and wives often cannot come to terms with what each other would like the purpose of particular rooms to be. So how is the architect or engineer supposed to interpret that and come up with a final conclusion? The issue is particularly that the purpose is implied, it is not always clear, and it changes in the client’s mind as the project goes along. For example, if I am building a house and I say to my engineer or architect that I would like it to be sustainable, what does that mean? Does it mean that it meets minimum sustainability requirements as set by the state government? Does it mean that it is going to have a higher degree of sustainability requirement such as a five or six star rating? Or does it mean it is going to win a sustainability award in Consult Australia or Institute of Architects award programs? There is a huge degree of scope in terms of defining what I mean when I say I want a sustainable house. Most clients are not able to adequately explain that to have the engineer or architect understand it, and it changes along the way.

There will always be a huge risk of what we call ‘deep pocket syndrome’ in our market. The Australian market in building and construction is extraordinarily litigious. Particularly in the residential market, many of the building companies are particularly susceptible to market failure and market conditions, yet engineering and architectural professionals tend to have reasonably solid businesses and, more importantly, they have PI policies that are accessible by clients. This particular provision will mean that, if the consumer is unable to pursue the builder for some reason, they will see fit to pursue the engineer or the architect for something which is no fault of theirs but for which, however, the consumer can recover damages. So we are very concerned about the ‘deep pocket syndrome’ that tends to exist in this market.

Finally, and very importantly, we are very concerned about the increased risk of uninsured liability. The insurance market in Australia does not generally provide insurance for fitness for purpose clauses for engineers and architects, because, exactly as I described previously, a third party is involved in delivering the final product of those services. The insurance industry is not there to underwrite builders, subconsultants or others involved in the process, and that is why insurers do not provide fitness for purpose cover in Australia. Even if that cover were to be available in the event that this particular provision in the legislation were passed, the cost of the cover would almost certainly go up and therefore there would be a huge cost risk associated with running a small professional practice. So the detriment to engineers and architects as a result of this particular provision is substantial.

The final point that I would make, and this is the balance of that substantial risk to engineers and architects, is that on analysis of the provision there would be no added consumer benefit. In fact there would potentially be a detriment to consumers as a result of this being introduced, and that would clearly be in direct opposition to the intent of the bill. All of the increased risks and increased costs associated with what is one of the major costs for professional services firms—that is, their professional indemnity insurance—would clearly go up. Most of those costs would have to be passed on to the consumer because the margins in the business would not substantiate the costs being carried within the business, so the cost to the consumer of building residential homes, in particular, would go up. When I say ‘building residential homes’, clearly I am also talking about additions and alterations, retaining walls, cracks in swimming pools—all of the building works associated with a family home. This would also have a direct impact on the affordability of housing. While only a small percentage of houses are architecturally designed, almost all housing in Australian needs the input of a structural engineer, at the very least, and usually other types of engineering services as well. So there is no doubt that the costs of building the family home will go up in Australia if this provision goes through.

Clearly there will be reduced competition in the market because many small businesses will not be able to pass on all of the cost increases to the consumer, and many will close their businesses. We saw this happen in droves in the insurance crisis of 2001, where insurance premiums rose sometimes at a rate of 1,000 per cent. Many businesses, particularly small businesses, were particularly vulnerable and closed. The other aspect of

the increased costs, apart from reduced competition in the market, is that particularly in the engineering sector, because the engineers would become more risk averse, the risk of overdesigning or overengineering in the family home would substantially increase, and that would drive up costs as well.

Finally, there would clearly be reduced innovation in the housing market. Innovation is something that is required in that market; it is something that clients require. The innovation would simply go away as engineers and architects become more risk averse in their design process, to make sure that they have covered every available option for a purpose for a house; therefore, once again costs would go up.

For those reasons, the reasoning given in the report does not stand, in our opinion. In fact, because the detriment to engineers and architects would be substantial and the consumer benefit already exists—because consumers already have very strong provisions under the Trade Practices Act, under common law and under contract to pursue engineers and architects—the consumer would be adversely affected by increased costs, reduced competition and reduced innovation.

CHAIR—Thank you, Ms Motto. In relation to this issue about the number of third-party people that engineers and architects use, I do not think anyone is expecting that the engineer or architect will hold responsibility for any of their work; it is only the work that the engineer or architect themselves performs.

Ms Motto—No, but my understanding of the provision is that, if the final house is not being deemed to be fit for purpose by the consumer for whatever reason—and I will give you the example—

CHAIR—But if that fit for purpose problem is due to a plumber doing the wrong thing then it is the plumber that is responsible.

Ms Motto—Although in the legislation this guarantee is an absolute guarantee, so the engineer or the architect can still be pursued under the fit for purpose clause.

CHAIR—Right. In relation to the issue of specifications and documentation, every engineer I know complains about that. Quite frankly, if everyone knew exactly what they wanted they probably would not use an engineer or an architect very much at all. It seems to me that this is a core part of their business and that most engineers and architects are quite good at getting people to narrow down what they do want and to usually sign off on it.

Ms Motto—To a reasonable level, but the really big difference here is that most consumers of engineering and architectural services do not have the skill-set required to understand fully what they are signing off on. Once again I give the example of the family home. The drawings that you get from the engineer or architect can be explained to you. However, your brief could have been, ‘I want a room to be light and airy,’ for example, and the engineer says, ‘Once you take into account your council considerations and your total floor space and your budget in terms of how big this house can be, we have given you this room that is three by four with this many windows’ or whatever might be the case. In the engineer’s or architect’s mind that might equate to ‘light and airy’ for that room. However, your definition of light and airy and my definition of light and airy may be two completely different things. This is where the ambiguity arises.

CHAIR—Surely it is part of the architect’s or engineer’s brief to explain those kinds of things.

Ms Motto—Completely understandable, but the reality with the family home is that most people cannot envision the final product until they are actually standing in it. It is very hard to look at some drawings—

CHAIR—It is a wonder anyone is pleased with their home in that case!

Ms Motto—But that is the difference with other service professionals and particularly products, where you can see an end product. I can see the pen and say, ‘I want one exactly like that,’ but I cannot see the family home based on a set of drawings in my mind and say very definitively, ‘That is exactly what I want.’ That is why disputation in this sector is so rife.

CHAIR—I am really not convinced that this will add to it a great deal. Senator Eggleston?

Senator EGGLESTON—Architects and engineers have professional indemnity insurance. What does that cover?

Ms Motto—Negligence.

Senator EGGLESTON—Meaning? Give us some examples.

Ms Motto—An example might be if a structural engineer makes the wrong calculations and not enough steel goes into a building to have the second storey stand up. Negligence is covered in the Trade Practices Act in section 74. So if negligence occurs there is still a direct right for the consumer to sue the engineer or

architect based on their negligence, and that is that they have not diligently performed their common-law duty of skill and care.

Senator EGGLESTON—So that is fairly defined. That is very specific and it is easily quantifiable. What you are talking about is the unquantifiable 'concept' of someone's dream.

Ms Motto—Correct. And that is why insurers do not insure it, because it is an unquantifiable risk for them.

Senator EGGLESTON—Might I ask what scale of insurance fees engineers pay for professional indemnity insurance?

Ms Motto—It depends on how soft or hard the market is.

Senator EGGLESTON—And how big the building is, I suppose.

Ms Motto—Not necessarily, because engineers and architects will tend to purchase their insurance on a year- by-year basis as opposed to a project-by-project basis. Most small architects and engineers would have professional indemnity insurance in the quantum of anywhere between what used to be $1 million—although now it is more commonly $2 million at the very bottom of the scale; however, that is rare—up to around $10 million. The premiums can range substantially from the singles or thousands of dollars into the tens of thousands of dollars. So it is a significant cost. In fact, I have had a case given to me just this week, where the market is starting to harden and the premium for a small practice has gone from $2,000 to $8,000, which is a substantial increase, and that practitioner has decided that it is not worth it; he will retire.

Senator EGGLESTON—I understand that sentiment if the insurance costs become too high. With this kind of fitness for purpose concept, is there any scope for some sort of individual insurance for each particular project?

Ms Motto—Project insurance is a very new concept to the market and it has been tested in some jurisdictions but it tends to be for very large-scale civil construction style projects at this point in time. So it might be for an alliance for multiple rail and road and bridge projects. It is not commonly available—in fact, it is not available to my knowledge at all for particular projects, no.

Senator EGGLESTON—I can understand the difficulty with fitness for purpose cases with engineers and architects. I do see the difference between negligence and only coming up with or reproducing a concept and I understand the difficulty therein. But it is hard to find a solution to it. I suppose, if a client produces a picture of what they want, there is something concrete to go on. But if there is nothing more specific than an idea it is very hard to say that that idea has not materialised.

Ms Motto—In our experience, even when the client is given 3D virtual building drawings on a computer, they can still be unhappy with the end product.

Senator EGGLESTON—Thank you. Earlier Senator Bushby raised the issue of game playing by clients who might seek to avoid final payments. I hope I am not stealing his thunder. Is that a common occurrence?

Ms Motto—It is incredibly common. As I said, the litigiousness in our market is incredibly common, unfortunately. Clients will often seek to avoid making final payments of professional fees by deeming something to be unacceptable in the end product, and rather than holding up just the fees for the particular party involved they will hold up all fees. Particularly this is the case when an engineer or architect also works as a project manager on site for a home. They will hold up the final architectural or engineering payments because the cornices on a particular room have not been finished to their liking or a tile is cracked in the bathroom and has not been replaced or whatnot. These are, once again, faults of tradespeople. It is not something that is within the jurisdiction or ambit of the engineer or architect.

Senator EGGLESTON—How are those kinds of disputes resolved?

Ms Motto—Oftentimes, if they cannot be adequately pursued cost effectively by the engineer or architect, they forgo the final payments. It is not unusual for that to occur.

Senator BUSHBY—Presumably one of the fears that Consult Australia has in respect of your members is that, as the ACL currently stands, removing the exemption may actually give some of those less scrupulous clients—not all of them, I am sure, are that way—another option to refuse at the end because, 'It is not as light and airy as I expected it to be' or whatever it was 'when I told you I wanted it light and airy.' It may give them another avenue of refusing to pay that last payment or even worse.

Ms Motto—It is not just refusing to pay the last payment; it is also pursuing another party because they foresee a pocket of funds that may not be available if the builder, for example, is not around or is difficult to deal with.

Senator BUSHBY—That is an excellent point you made, which we will pursue with Treasury later this week when they come back before us. If something is not right and a remedy would probably currently exist under contract law, if they can look around and say, 'Who has got the most money and who has got the biggest insurance—

Ms Motto—And: who is the easiest target?

Senator BUSHBY—that is right—using this new avenue, which may not have existed—

Ms Motto—Correct.

Senator BUSHBY—That is something that I think the government would want to address. That is an excellent point. Taking a step back, currently the exemptions apply to architects and engineers. Do you need to be a member of a particular association to qualify for that?

Ms Motto—No.

Senator BUSHBY—So you just have to call yourself an architect and you are exempt?

Ms Motto—You need to be a professionally qualified architect or engineer under the current exemption.

Senator BUSHBY—Admitted to practice?

Ms Motto—Correct. For the architectural profession the requirement for registration exists, and for engineers that would be a professional requirement—that is, completion of university or a prerequisite for membership of Engineers Australia, which is the professional body for engineers in Australia. So, you would need to be either a member or eligible to be a member.

Senator BUSHBY—That is good. You mentioned in your opening statement that the reason for the exemption is probably even more valid now than it was when it was first put in place. Why is that?

Ms Motto—Because our market has become even more litigious.

Senator BUSHBY—So the litigious factor is why that is the case?

Ms Motto—Yes. Unfortunately, we are going down the path of some of our Western neighbouring countries and becoming much more litigious in our market.

Senator BUSHBY—We had some evidence this morning from an academic that the US did not need to have the same degree of statutory consumer protection because they were more litigious and people were far more aware of their rights.

Ms Motto—Correct, and people are much more willing to pursue those rights in courts, which is why there are the number of claims in courts that we have in the building and construction market.

Senator BUSHBY—You also mentioned that there was no reference to problems in any of the submissions that would lead to the removal of these exemptions. I asked Treasury yesterday and they indicated that there was no mischief that they were aware of that specifically needed to be addressed with respect to either of those two professions and that it was more about seeking to obtain universality in coverage. That was the reason rather than any specific problem that they were trying to address. That is consistent with your comments. I asked witnesses from CHOICE and used the example of architects—that there is a subjective, almost artistic, element to some extent. I used an artist as an example and asked whether, if an artist were commissioned to do a piece of artwork and was told, 'I want to do this and I am commissioning it from you because I want to impress my friends,' and it did not impress their friends, that may qualify as a failure for fitness for purpose.

Ms Motto—Correct. Architects are often given briefs that say, 'I want an element of splendour,' which is completely subjective.

Senator BUSHBY—That is a good example. It is completely subjective. They may well tell the architects that they want to impress the Joneses down the street and, if the Joneses are not impressed, where does that leave architects under this rule?

Ms Motto—That is absolutely correct. That is the sort of subjectivity that you often get, because building the family home is an emotional experience for most consumers and not necessarily such a technical one.

Senator BUSHBY—It is easy with architects. Light in areas is the obvious example which has been bandied around—'I want something that is light and airy, and when it was built it was not as light and airy as I

thought it would be.' But, with engineers, how would fitness for purpose work? I am struggling to think of an example where the same sort of thing would apply, where an engineer would not already be subject to an action under negligence or other aspects.

Ms Motto—I can give the example of an acoustic engineer assisting to design a home under a flight path. The client says, 'I want the home to be quiet.' 'Quiet' is a relative feature, but the engineer may design the acoustics of the building so that it complies with council requirements with regard to noise pollution. However, it might not be as substantially quiet as the client would have liked it to be because they have a one-month-old baby that is trying to sleep, for example.

Senator BUSHBY—I understand. I was thinking more in terms of footings and things like that. If you design footings to suit the soil types and what has been built above it, if there were a problem with that it is not going to be a problem that would be actionable anyway. Your example explains to me how it could be.

Ms Motto—Yes, and even with geotechnical engineering—for example, footings, hydraulics—there are many circumstances where the purpose is actually not well known to the engineer when they are doing the engineering design. So they will design the footings based on what they believe to be a reasonable purpose for the family home; however, the family home is going to have a granny flat put on the back at some stage and it is also going to have a whole bunch of changes made to it over time. So the purpose changes over time and it is not made known to the engineer what the proposed purposes might be.

Senator BUSHBY—I would have thought that in a case like that it would be advantageous for all involved if there were an obligation to get to the point where everybody understood that that was the case.

Ms Motto—It is not often the case in the building and construction sector.

Senator BUSHBY—I am just looking at that.

Ms Motto—I completely agree with you. In the major report that has just been done by the CRC for construction innovation, prior to its closure, we estimated the cost of disputes for exactly this factor—that is, poor scoping and project documentation—to be $7 billion a year to the Australian economy. So if the big end of town is not getting it right, how is the residential sector, with an uninformed client, supposed to get it right? That is the question.

Senator BUSHBY—You also mentioned that there is no added consumer benefit but there may well be cost, without actually providing that. You mentioned that it would lead to overdesigning of projects, a reduction in innovation and a high level of management of projects when it is not necessarily required to deliver a reasonable outcome.

Ms Motto—That is right.

Senator BUSHBY—Engineers are a bit different to architects in some ways. Your acoustic example is a bit different, where maybe there would be overdesigning. In terms of the normal structural elements that an engineer would design for, there is currently a risk that they will be sued if they do not design it to a sufficient standard to do the job that it is supposed to do. I would have thought that in itself would be sufficient to ensure that they design it correctly, and the risk of fitness for purpose, other than maybe in those cases where you are doing something like acoustic or similar examples, is not going to lead to them overdesigning footings and stronger beams and things like that. Fitness for purpose is not really going to impact on that.

Ms Motto—It will impact on that. I give the example of a two-storey house, the second floor of which has so many rooms of so many dimensions. The engineer may not know what the purpose for those particular rooms is going to be. They may overengineer with regard to having two or three times as much steel in the building to be able to have that second floor withhold higher loads just in case the client decides that they want to have a surround sound room with tonnes of equipment or a storage room with heavy air conditioning units or whatever it might be that clients like to store in their house. And who knows these things?

Senator BUSHBY—For fitness for purpose, they would have to assume that 'purpose' could mean anything and therefore design to suit for anything that might be used?

Ms Motto—That is right. The advent of the home office is a perfect example. To most people that means you need a desk and a computer outlet, but it may mean that you need room to store stock.

Senator BUSHBY—The other thing was overmanagement. Presumably, if the risk of designers effectively being subject to fitness for purpose includes subsequent activities by third parties that might be implementing the designs that have been made, then there is going to be a far higher motivation for those designers to micromanage everything that everybody does afterwards.

Ms Motto—Absolutely. One of the issues that you have got with engineering is that it is usually almost impossible for the engineer to check the engineering works because once the walls have gone up most of the engineering is hidden in terms of the structure—

Senator BUSHBY—Presumably engineers will then start saying that they have to have a look at it before—

Ms Motto—Correct. They will ask for site management responsibilities.

Senator BUSHBY—Which is going to have an impact on costs and once again the question needs to be asked: to what benefit for the consumers?

Ms Motto—That is right. On that point, the examples of major market failure in the homing sector currently are reasonably small. There really is not any vast justification for this in terms of market failure conditions.

Senator CAMERON—Could I go back to some practical examples of what an architect does as distinct from: does it look good, does it feel good? An architect has to be able to design a house where the roof does not leak. If the architect designs a flat-top part of a building and the design is wrong, and even though the third parties—the building group—all carry out their responsibilities and build it as designed but the design is at fault, where does the consumer go?

Ms Motto—The consumer would pursue the architect for negligence and they can do so under contract, under common law or under section 74—

Senator CAMERON—What is the difference with this legislation? Why can't they pursue under this legislation? Why shouldn't they be able to?

Ms Motto—If, on the other hand, the flat-top roof was not the reason for the leak—

Senator CAMERON—I am not asking you that. I am asking you: if the design of the flat-top roof is the problem—bad architectural design—why can't the consumer be covered by this legislation? Why shouldn't the consumer be covered by this legislation?

Ms Motto—Our argument would be that they do not need to be because they have other avenues to pursue that are based on fault, which is that the designer was at fault for this particular piece of negligence, and there are multiple avenues for that to be pursued by the client.

Senator CAMERON—Why shouldn't there be another one? Why can't they have options to pursue?

Ms Motto—The options already exist in our estimation. The difficulty is that this particular option opens up a can of worms for architects and engineers that would not be linked to their own negligence or fault, and that is the danger for this piece of legislation.

Senator CAMERON—But if the architect badly designs it and the consumer says, 'I'm entitled to be protected by a national scheme of consumer law,' why should you would have an exemption?

Ms Motto—But there isn't an exemption for negligence for architects and engineers.

Senator CAMERON—This is about having the right under consumer law to pursue that architect. It is just another avenue to do the same thing that is there now, isn't it?

Ms Motto—No, it is not another avenue to do the same thing that is there now. The difference is that this provides a guarantee to the consumer that, irrespective of fault, the building will be as they wanted it to be designed. If there is currently a leaky roof, if it is a design fault then there is a direct and very clear avenue to pursue an architect or an engineer. If it is a building fault, however, then the builder is the appropriate party for the client to pursue. If the builder, however, has gone out of business, it is not appropriate for a consumer to be able to pursue an engineer or an architect for something over which they had no fault.

Senator CAMERON—How do you then determine whether it is a building fault or an architectural fault—for the ordinary consumer? Can you tell me that?

Ms Motto—This is the case law that is pursued in the courts. The courts will bring together professionals, and professionals, through expert witness testimony, will determine whether it was the fault of the builder or the designer and that would be pursued by the courts on an individual basis.

Senator CAMERON—So there is only one option, and that is litigation?

Ms Motto—In the case where there is a dispute between the parties as to whose fault it was, there is only a litigation avenue because every home is a prototype. You cannot predetermine whose fault a leaky roof was, for example, prior to looking at the particular circumstances of that building.

CHAIR—The time has expired. Ms Motto, thank you for coming in today.

Ms Motto—Thank you very much.

[11.30 am]

HEALEY, Ms Deborah Jane, Senior Lecturer, Faculty of Law, University of New South Wales

CHAIR—Welcome, Ms Healey. Would you like to make an opening statement?

Ms Healey—Yes, I would. I come to the committee this morning as a member of CCAAC but also as a senior lecturer in the Faculty of Law at the University of New South Wales. I believe that I have a unique focus on this area because I spent 15 years in large commercial firms providing advice to large corporations, often in their dealings with consumers about consumer goods; and, prior to that, I was a long-term member of the former New South Wales Consumer Claims Tribunal. So I believe I have looked at these issues from a number of points of view.

In terms of the amendments to the bill generally, they are extensive and I will speak only on a couple of issues but I am very happy to try and answer any other questions that you have. I am generally very positive about the overall nature of the amendments. I can confirm from my experience that these uniform amendments will decrease the regulatory costs and the time taken by companies dealing with consumer goods brought about by the sorts of inconsistencies in legislation that have occurred traditionally across the country, and by companies dealing on a national level. I think there is a lot of waste involved in complying with a variety of laws. I also think it will be easier for consumers because the law will be clarified, and I think there are a number of attempts to make it simpler, particularly in terms of the consumer guarantees.

At a very basic level I think the change of name is quite important. I do not know that there is any issue about that, but the current name has no real relevance anymore, particularly overseas. Internationally it is quite unusual to have these two parts, the restrictive trade practices and the competition and consumer protections, in the one act. People are surprised to find our consumer protection law in there. They do not know where to look for it, so I think it is a good idea to have it included in the name. That might be another angle that people have not considered.

Focusing on a couple of areas, I think the statutory guarantees which are proposed are a great improvement on what was there before. They are more simply written and defined. They do not rely on traditional contract law and old cases—obviously, I am quite familiar with those and I will have to rejig my understanding and focus on it all. I feel quite comfortable with it but, generally speaking, I do not think people do and I think it is a very difficult area for your average consumer to understand. I think that the proposals provide a range of practical remedies for consumers, particularly in relation to the issue of 'merchantable quality'. I think the explanatory memorandum says there was not a definition of that before, but in fact there was and it is somewhat similar to the proposal. However, this definition looks at a broader range of factors, and I think it is a much better definition of 'acceptable'. It was always a case of looking at the surrounding circumstances, but I think that the new definition provides concrete examples of what might be relevant circumstances.

I also think that the issues in relation to remedies for consumers, these consumer guarantees, are important. That has been the major failure of the existing system. I think that the proposals are very helpful and much more clearly written; they do not depend on contract law. Also, the new focus on time for repair or time for replacement is fairly important. It was never really in there before.

One of the issues that I would also like to focus on in this context is the ability to exclude liability where recreational services are involved. This is a personal view. CCAAC did not comment on this and really did not have time to. It was a fairly demanding timetable, and there was so much to consider that this one did not go forward. My view on it is that the definition of recreational services in the existing legislation, which is mirrored in the new proposals, is too broad. You would be aware of the history of this. The inclusion of section 68B, which is in the current provisions, came about because of the civil liability amendments in 2002, which were very wide ranging and were originally intended to be uniform across all jurisdictions Australia wide. They were based on the concept that those undertaking risky recreational activities should undertake some responsibility for their choices. A lot of the law on this, both in relation to Civil Liability Act reforms and the approach taken in the current trade practices definition of 'recreational activities', came from the report prepared by Mr Justice Ipp.

The uniformity did not eventuate. There are considerable differences in the way the civil liability reforms were implemented Australia wide, and that creates a number of anomalies in the application of the various civil liability provisions and their interaction with the Trade Practices Act. As background, in all states, under the Civil Liability Act provisions there is no liability for materialisation of an inherent risk, although it is

questionable whether that would ever have been the subject of a successful negligence action. Inherent risks are defined in the civil liability acts as risks which cannot be excluded by the exercise of due care.

When you are looking at what consumers are signing up for, a sport or recreational activity, and thus getting a supply of services, accepting the sorts of risks that they accept is quite problematic. Some jurisdictions restrict or minimise liability of those involved in a dangerous recreational activity and allow other exclusions, but the big consideration in relation to civil liabilities so far is that the identification of the risk is the most difficult question. If the courts cannot agree on what a risk is, it is very hard for a consumer to understand the nature of the risk they are allegedly accepting when they undertake the activity, and it is always a bit of a subjective determination for consumers. It is unlikely that, when they actually undertake the activity and they look at the clauses which allow for exclusions, they will have any idea about whether or not they are signing away their right to take action in any particular set of circumstances.

When section 74 was amended to allow for exclusion of liability for dangerous recreational activities, the supporting documents talked about 'inherently dangerous' activities. That was what the focus was supposed to be, but the definition covers a far broader range of activities. The definition currently talks about 'undertaken for the purpose of recreation, enjoyment or leisure' and requiring physical exertion, basically; but there is no additional requirement that they have a significant risk of physical injury, which would be a good addition and a good way to amend the provision to narrow the application. The way it is done now means that the provider of services which are really not potentially risky can exclude liability in a way that no other service provider can. It is all based on the concept that the consumer is actually accepting that risk because they know they are engaging in a dangerous recreational activity or in a risky activity. But a lot of them are not risky.

The other thing is that, as it stands, it appears that the definition allows gross negligence to be excluded. In Victoria it is not possible to exclude gross negligence. One of the pieces of legislation—I think it is in Queensland—talks about gross negligence in the context of obvious risk. I will give you an example: we go parachuting and we may be asked to sign a form or we may be told that risk is excluded because it is a recreational activity and risk can be excluded. I would say that, if I were going to parachute, I would think that if the wind blew the wrong way or I fell the wrong way and I was injured, even if I was significantly injured, it may be reasonable to exclude risk. But what if the parachute is not packed into the pack? What if the bungee chord snaps because it has been inappropriately maintained? Those are examples of gross negligence and, as things stand, it seems that liability for those sorts of things can be excluded as well as the example where I go on the bungee with a heart problem, I take that risk and I have a heart attack. Maybe I should allow that liability to be excluded, but not if the bungee chord snaps because it should have been replaced every three months but it is six months and it has not been replaced.

So I think the definition of recreational activity in the existing act and the new law, which is the same, should be narrowed and I think that some thought should be given to the place of gross negligence in all of this. That may need to be considered in conjunction with the civil liability laws of the states. I really wanted to raise it because I think it should be kept on the agenda. That is really all I wanted to specifically say. I am happy to answer questions.

CHAIR—Thank you, Ms Healy. I have got a question that was raised by CHOICE and also by Associate Professor Nottage about the general duty on suppliers to report incidents where are a consumer good or related service is associated with some injury or problem. CHOICE's view was that the same duty should apply when a supplier becomes aware of facts or circumstances that indicate death, serious injury or illness would be likely. In other words, they want to put the onus on suppliers to provide information if they think there may be a problem rather than when a problem actually occurs.

Ms Healey—I have not had a good look at that provision. I can take the question on notice, but my recollection is that under the existing legislation there is an obligation to do both. I can check that up.

CHAIR—Thank you. That would be good. That is my main question.

Senator EGGLESTON—I was quite interested in what you were saying about gross negligence. I suppose one must ask to what extent could negligence cover a lot of the issues that are raised under this particular piece of legislation? Going back to the engineers and architects, it seems that there are specific cases of negligence which would cover a lot of the gaps which seem to have been raised.

Ms Healey—I suppose section 68B and the amendments to section 74 originally took place because all of the civil liability acts were being amended to exclude liability for negligence. So it was not done in a totally consistent manner and there are gaps. The underlying proposition was the same—consumers ought to take

responsibility for those risky activities that they chose to engage in. So I do not know that negligence takes up the slack.

I think a lot of things will be excluded. There is a lot of difficulty in interpreting civil liability acts. People and judges have real difficulty in determining exactly what the risk is that we are talking about in any particular situation, even for the purpose of determining whether exclusions apply or liability applies. It is actually quite striking that, even in a full bench case, you have three eminent judges who cannot agree on the nature of the risk, whether or not it is obvious. And there are a number of cases where that has occurred. How that can translate into a situation where you are trying to say that consumers are accepting these risks and that they know that when they undertake the activity becomes a little difficult. So what I would be saying is that I do not think that negligence will take up the slack in respect of civil liability for personal injury. I do not know whether the engineers were talking about the same issue.

Senator EGGLESTON—No, they were talking about fitness for purpose rather than the issue of professional negligence. Thank you.

Senator PRATT—I want to ask you whether you have any particular insight into the differentiation between consumers as individuals and what are, I suppose, business to business transactions.

Ms Healey—I think there are arguments that can be made both ways, but I think that it is very important that the definition is consistent across the whole legislation. Traditionally, there has been that small business application for the definition of 'consumer' in existing section 4B for goods purchased under a particular value, regardless of their nature. That has now been excluded. I can look more into that, but I think it is unusual for consumer remedies to be extended to small business, even though in some contexts they are akin to individual consumers.

Senator PRATT—In that context we had some discussion from architects and those representing the interests of architects and engineers that, to some extent, the nature of the service they provide, even though it is for an individual consumer it is unusual for an individual consumer to commission such things and it is a once-in-a-lifetime investment. It might be akin to the kinds of investment that business make. They are not your typical everyday consumer product in that they are commissioned for a particular purpose. Do you have any sympathy with that argument?

Ms Healey—I do not, because I think everybody always has a special case. Architects in particular are regularly employed for domestic contracts. In fact, those contracts are often very large, relative to the purchaser's means and it is one of the largest purchases they will ever make. So I would think that that would also sway me against it. I would have thought that if exemptions were to be granted—and I am particularly interested in the concept of exemptions from all of the provisions of the existing act—then there would need to be very sound guidelines for determining when an exemption ought to be granted. In relation to other provisions of the act we demand a weighing up of the detriment and the public benefit. I would have thought that, if we were going to grant exemptions from these provisions, we ought to be doing something similar in a structured way.

Senator PRATT—I am inclined to agree with you. How does that compare to a small business that is in exactly the same position? For example, you could be a hairdresser who commissions a computer program and, at the end of the day, it does not meet your expectations in terms of, perhaps, the way you flow through the particular screens and collect the information you are looking for. It could be subject to the same kinds of arguments about subjectivity, in terms of how fit for purpose it was. Where does that line between the consumer and other transactions, in an example like that, sit in your opinion?

Ms Healey—I would say that there are a multitude of other remedies available to a small business. I know that small business has its own problems, but I would think that you would have to draw the line somewhere, and I would be happy with where it has been drawn in this draft.

Senator BUSHBY—I note that in your opening comments you made some comments about how the overall ACL will reduce regulatory costs and time for companies due to removing a lot of inconsistency. All witnesses have said that. That is one of the central aims of the overall scheme. Those decreased costs—and correct me if I am wrong—could have been, in large, achieved without necessarily making a lot of the policy changes that have been made. That is a separate question. Agreement could have been achieved to bring in line the state laws with the federal laws without necessarily making some of the changes that have separately been decided to be made.

Ms Healey—Did you have any specific changes in mind that you would like me to focus on?

Senator BUSHBY—There are a number of things that have been introduced. A lot of the stuff that is in the ACL, I acknowledge, exists in one or other of the jurisdictions, but there are some things that have been added as well and there are also things that exist in jurisdictions that have not been included. So policy considerations have been made as to what is the appropriate balance to strike between consumers and business, in terms of consumer protection. There is a clear benefit for business through the consistency. You raised that and a lot of the other witnesses did. I am trying to establish whether that benefit could have been achieved with a different balance between business and consumer.

Ms Healey—I do not know that I can really comment on that. I can possibly provide you with some further comments on that. It is just not something that I turn my attention to. I have tended to look at this and see it as a bit of a win-win situation and a very positive outcome. There are a lot of things in there for which, over the years, I would have thought, ‘Gee, if only we had X,’ or ‘If only Y would happen.’ A lot of those things are in there. I believe that there is an awful lot of common sense and that a good balance has been struck. I can go back and see if I can elaborate further.

Senator BUSHBY—I do not think I need you to do any more work on that. Given that you are in front of me, I thought I would ask. We had an academic witness this morning—going on from what you just said, that a lot of what is in here had as its genesis a Productivity Commission report from about five years ago—and his view was that the rest of the world has since moved on and that consumer protections that are included in the EU, the US and Canada are not here. He thought that, given the difficulty that we will face in changing this, because of the way it is set up, we would be better off getting it right now and maybe looking at including some of those things. My question is: are there any aspects of the Australian consumer law that you are aware of that should be tweaked or could be better?

Ms Healey—I suppose I have spoken about one.

Senator BUSHBY—Yes. Actually, in my notes I said: in addition to the recreational activity one.

Ms Healey—Not off the top of my head. There are always going to be people who are doing something better than us, but, on the other side of that, we are probably doing some things better than they are. I am fairly positive about this.

Senator BUSHBY—That is good.

Ms Healey—It is so hard to strike a balance.

Senator BUSHBY—I have one final question. You said there need to be sound guidelines for exemptions. Would you acknowledge that a general application of a law like this to all industries and all goods and services that are provided in the economy places a vastly different level of obligation on some businesses compared to others because of the nature of the goods and services they provide?

Ms Healey—In some contexts.

Senator BUSHBY—I use an example from the architects and engineers who have made representations to us. If your obligation is to provide a toaster that is fit for purpose, it is pretty clear that the purpose of the toaster is to toast bread to people’s liking on a consistent basis for the life of the toaster. But fitness for purpose for a house, if it has been provided by an architect or has input from an engineer, is a much more subjective thing than having a piece of toast that is nicely cooked. That can vary to a huge extent depending on the unexpressed expectations of the customer. When a customer says they want their house to be ‘light and airy’—that is the most common example—the architect might design it to be light and airy but it might not be what that means to the end user. They do not realise that until the whole thing is built and they can see it in scale and walk around and see it. That may impose a far greater obligation on the architect to follow that project through, to micromanage it and ensure that the end result includes things that are as subjective as ‘light and airy’. But if a toaster does not work, if it does not toast your bread, it is pretty simple to see that it does not meet the ‘reasonable fitness for purpose test’.

Ms Healey—I have two responses to that. The first is that these people are professionals and this is their job. They are significantly more trained than a person selling a toaster. It is something they are trained for. But, in any event, if an architect has done a reasonable job it does not necessarily have to satisfy all the whims of the customer. It is a matter of striking a balance. There are any number of things that are incredibly complex. If we sought to exclude all complex things from the ambit of this, we would just have toasters left!

Senator BUSHBY—Engineers and architects have been excluded for various reasons since, I think, 1986.

Ms Healey—With all due respect to them I have never quite understood why.

Senator BUSHBY—But there has not been any mischief exposed. It has not created any problems for consumers, according to Treasury evidence. The only reason for removing the exemption is because they have got one and why should they. It seems to me that they have a reasonable argument that they are different. Regardless of that obvious example, you made the point that you need to have sound guidelines for when you would actually apply an exemption. Can I take it from that statement that you think that, if there is a strong, commonsense argument for something to be treated differently from the rest, it should be considered?

Ms Healey—I have fairly strong views on this. I have done a lot of work on the competition parts of the Trade Practices Act and exemptions in overseas competition laws. The OECD and UNCTAD have done analyses of when you should think about excluding people. They all say the exclusion should be very narrowly drawn, they should be very well supported by evidence and they should be complying with some set of rules that you decide on. It should not just be a case of 'this is a good idea because it seems a bit unfair'. With all due respects to the architects, from my recollection there has never really been much analysis. I can remember when this came in.

Senator BUSHBY—It was a Democrats amendment, apparently.

Ms Healey—Yes. Why it had been done was never very thoroughly expounded. There might have been a small amount of analysis. There have been no principles developed. If we are going to think about doing things like this we need to have principles, and then it would not necessarily even apply to architects and engineers but it might apply to someone else. I think it needs far more consideration.

CHAIR—Thank you very much for your assistance.

[12.00 pm]

HENRICK, Mr Kenneth Michael, Chief Executive Officer, National Association of Retail Grocers of Australia

van RIJSWIJK, Mr Gerard, Senior Policy Adviser, National Association of Retail Grocers of Australia

CHAIR—Welcome. Would you like to make an opening statement?

Mr Henrick—Yes, very briefly. I have with me our senior policy adviser Mr Gerard van Rijswijk. My chairman, Mr John Cummings, has asked me to pass on his apologies for not being here today. He had prior commitments in Perth. He generally like to appear before the committee in person if that is possible. We support this bill and we think it sets a good statement of principle for the way relationships should occur. We also think it should be extended to the relationships between small businesses and larger suppliers. There are a number of precedents for that in other jurisdictions. We have attached one precedent from Japan to our submission. It sets out the sorts of issues that should pertain to those interbusiness relationships. If the committee wishes, I would also be happy to put in tomorrow a supplementary submission attaching the 'Grocery supply chain practices market investigation order', from the UK competition commission, which goes into a great deal more details. That in fact picks up many of the issues we raised in 2008 in our submissions to the ACCC's grocery price inquiry. Nothing much came of that at the time but, slightly before the ACCC reported, the UK competition commission released its own report on its grocery industry inquiry. This document flows out of that process, and it picks up pretty well everything we mentioned in our submissions. We welcome the government's indication that it intends to bring forward another bill, presumably later in the year, to set up the interpretive principles relating to unconscionable conduct in relation to small business. That is all I want to say at this point.

CHAIR—Thank you. Your submission deals with the problem of large scale suppliers having an unfair advantage over smaller scale suppliers in the provision of services to them. This relates to the actual title of the Japanese law on specific unfair trade practices. Would you say it is more related to unfair trade than to the issue of consumer warranties?

Mr Henrick—That is correct. I think what we are saying is that the principles that apply in this bill ought to be extended to those relationships as well as to the relationship between a business and a consumer.

Mr van Rijswijk—Where we are coming from is that the changes to the act at the moment rely on the fact that there is a vast difference in power between suppliers and consumers, and this amendment to the act deals very well with that difference in power. What we are also saying is that a difference of power exists between large businesses and small suppliers, and the current act does not deal with that adequately. As a result, small businesses are being massively disadvantaged. The act was first introduced in 1974. It has taken 35 years or more for the government to come around and actually try and grapple with the meaning of unconscionable conduct. We are starting to grapple with it now. The ACCC in its inquiry made the surprising statement that there was little evidence to substantiate allegations of buyer power being exercised in an anti-competitive, unconscionable manner. I do not know what planet they are on but, as we have indicated in our submission, there are many, many practices which we believe are based on the power differential and are in effect unconscionable. The difficulty we have with the whole question of unconscionable conduct—and it is also in the current amendments to the act—is that there have not been sufficient cases taken to the courts by the ACCC to get that definition finalised. Even if the actions between the large parties and the small parties are unconscionable, there is not a simple mechanism they can use to address that, and we have an ACCC that is reluctant to act on that. So small business is left out in the cold. While this amendment does address the consumer aspect of this kind of conduct, there is a massive gap in the legislation in relation to small business.

Mr Henrick—We believe that if consumers are to benefit to the extent that they should then the entire system needs to work competitively and fairly so that lots of businesses have the opportunity to deliver benefits to consumers down the chain without being unfairly targeted by larger businesses, for example.

Mr van Rijswijk—That is where the example we gave in relation to the Japanese legislation is significant, and the paper that we will provide to you from the UK competition commission is significant because their code of practice for the grocery sector actually came from the Australian code of practice. When the UK commission was doing its inquiry into the grocery industry, they sent people from the UK to Australia to study the Australian code. They met with us and they met with the ACCC. What they have done is take the Australian code and add to it all the things that really need to be in it to stop these practices occurring. For

example, the code prohibits variations of terms of supply. It prohibits changes to supply chain procedures. It requires that there are no delays in payments. It requires that there are no contributions to marketing costs. It requires the large grocery chains to run their own promotions rather than asking the supplier to substantially fund promotions and specials, unless they can demonstrate that there is a benefit to the supplier. There is a whole range of activities specifically addressing the power imbalance that exists between the large companies and the small suppliers. There are a whole range of activities that are now precluded through the grocery code. The Australian grocery code goes nowhere near that. That power imbalance has a major impact on competition in the sector and a major impact on small business.

CHAIR—I understand the point you are making but I want to go back to some points we have been discussing on the specifics of individual consumers. From NARGA's point of view, there is no issue with consumer guarantees? A lot of what the committee has been dealing with so far is about unsolicited selling and so on, which clearly does not involve your members, but how about the consumer guarantees and the way they are structured?

Mr Henrick—That does not raise issues for us. In fact, in some respects, within the grocery industry, suppliers are very proactive in protecting their own brand, so if there is a problem with a brand or a particular batch, the recall procedures are in place with everybody, right across the chain.

Senator EGGLESTON—I am just interested in the Japanese experience. They have obviously addressed the kinds of issues that exist between larger organisations and smaller organisations and the power and balances. I think the points you are making about that are quite valid, and I hope the government does pay due attention to the submissions you have made. Beyond that, I do not have anything to add except that those sorts of principles should be addressed in this law.

CHAIR—Just on the point of delisting products in favour of house brands—and that is a particular issue I am interested in—with respect to replacing a branded product with an equivalent house brand, even though there is market demand for the branded item, do you see that happening quite regularly?

Mr Henrick—Yes, it has happened in the past few years. I cannot remember what the product was, but I went looking for a particular product in one of the chain stores one day and found no branded product in that category, only the house brand. I do not know where they got the house brand from. I did not bother checking that.

CHAIR—Of course, that has the effect of making it dearer for other stores that stock up—

Mr Henrick—Yes, indeed. If that house brand is an imported brand, it probably means that the previous domestic supplier has been pushed out of the market.

CHAIR—That is very much a side issue, but one I am very interested in.

Senator BUSHBY—Following on from a question that Senator Hurley asked, in terms of the impact of the general ACL on you, are you across the obligations that the ACL will impose upon your members in terms of product reporting and warranties and all those sorts of things? Are you comfortable with all of that?

Mr Henrick—Yes. Most of the product that we sell is branded product in our sector.

Senator BUSHBY—That is right. But if you were selling a product, perhaps a tin of something or other that has been tainted, that is causing illness and you become aware of that, there will be obligations with penalties if you do not comply in terms of reporting and things like that?

Mr Henrick—There are now. Within the industry we take that sort of thing very seriously. It is not just within our own organisation or sector; the food industry, in particular, is very conscious of keeping consumers safe.

Senator BUSHBY—I am just underlining it: there are consequences for your members, even though the problem may actually be further up the supply chain, if you do not report?

Mr Henrick—Yes.

Senator BUSHBY—One of the other aspects of the ACL which I quite like is that it actually provides avenues of dispute resolution for things like unconscionable conduct through state based dispute resolution fora. So depending on your ability to meet the monetary limits et cetera you could even go to a small claims court and bring an unconscionable conduct action. That would open up a whole plethora of new opportunities, I would have thought, for your members to be able to test things, not necessarily in small claims, but you could use local courts and county courts or whatever in your various jurisdictions—

Mr Henrick—That is correct.

Senator BUSHBY—to run these actions with a lower cost and in a much more reasonable way. You are nodding and you are saying that is correct. That will open up a whole new avenue. I note in your submission, in respect to suppliers, you state:

The question is, given their dependence on the larger retailers, are they in a position to take advantage of them …

In that respect, you are talking about remedies in the case of unconscionable conduct. Am I correct in understanding there that, even if the remedies were available to you in a low-cost way, the fear of retribution or the consequences between the large retailers and the decisions they may make, some of which you have talked about in here, may lead to people still not taking actions against them for unconscionable conduct?

Mr Henrick—Yes, I think that is true. In the evidence that was given to the grocery inquiry the ACCC acknowledged that there was fear of retribution. Nothing has changed and, even though that avenue of action is now there at low cost, the retribution would follow.

Senator BUSHBY—But theoretically you could take action then for the retribution but, in the meantime, your business is suffering?

Mr Henrick—Yes. At the end of the day in many of these cases the appropriate organisation to take action is the ACCC but, in many instances, it seems reluctant to act.

Mr van Rijswijk—Take as an example retail leasing. We have seen a plethora of retail leasing legislation at the state level to try to address the problem of the power imbalance between large shopping centres and small lessees. The reason that the states have had to do that is that nothing is happening at the ACCC level. If there were, for example, provisions in the act which were enforceable under unconscionable conduct or price discrimination legislation which, as we said in our last appearance before the committee, was removed, following the Hilmer report in 1993, then you would not have these problems. The real problem we have with the commercial aspect of the Trade Practices Act is that it is not working. The evidence that it is not working is that Woolworths is 44 per cent of the packaged grocery market. Recently, there was an interesting item in the news where the major wholesaler Metcash met with 45 major suppliers and asked a simple question: if we were to back your innovative product and Coles were to back your innovative product and that, together, the two of them make up just over 50 per cent of the market, would you proceed with that innovative product if Woolworths said no? The majority of those suppliers said no, they would not. The market has become so concentrated—

Senator BUSHBY—If you do not get both the major retailers then—

Mr van Rijswijk—We have got to this stage: that is the big elephant in the room. With our various submissions we have been trying to say, ‘These are little things we can do to improve things.’ But at the core is the fact that the Trade Practices Act, in a commercial sense, is not working and the ACCC is not doing its job.

Senator BUSHBY—I understand the issues you are raising. What the UK has done, I think, is very illuminating for policymakers in Australia. I guess the question, given that we are sitting here today, is whether tweaking the ACL is the answer to your problem—not necessarily your problem, but to these problems—or whether separate action needs to be taken. Consumer law is designed for consumers. I think there is a strong argument that a lot of small businesses are, in effect, consumers in a lot of ways, particularly in things like telecommunications. You get small business people, sole operators even with a few extras who get rung up, harassed, and harangued by telecommunications sellers and are just as vulnerable a consumer in that sense as a lot of other people who are not in business. Generally, this legislation is designed to address consumers. To me, your problem seems to be a larger problem than that and probably needs to be addressed separately.

Mr Henrick—Yes.

Senator BUSHBY—You do not argue with that?

Mr Henrick—No, I do not. There is no single, simple solution to the problems of market concentration in Australia. There are a whole lot of things that need to be done. This is part of it and, in our view, other amendments to trade practices law, which we have mentioned in other committee hearings, also need to be pursued.

Senator BUSHBY—The other thing to remember is that consumer law does apply to businesses? It is only specific things that have been cut out like the standard form of contracts which apply only to consumers, but most of the Australian consumer law regime will actually provide benefits to you, provided you feel comfortable in taking the action you are looking to take?

Mr van Rijswijk—Sure.

Senator EGGLESTON—Do you as a group use standard form contracts with your suppliers? Just out of interest, are they all individually—

Mr Henrick—The general pattern is that independent retailers would take something like 50 per cent of their branded grocery products from Metcash, the major wholesaler, but the rest of their offer is often sourced from individual local businesses, which might be local farmers, dairies or whatever. Those contracts are sort of standard in a sense, but there is no single contract that is standard for the industry.

Senator EGGLESTON—When you go in with Metcash, is there a set contract and you just fill in the figures for the volumes and type of product?

Mr Henrick—I believe so. I do not do that personally so I am not absolutely certain, but I believe that is the case.

Senator CAMERON—Mr Henrick, I think Senator Bushby has covered most of the areas that I wanted to traverse but I would like to congratulate you on your innovation in putting the submission to this inquiry when you have put the same submission, predominantly, to other areas of government and Senate inquiries. The previous witness, Ms Healey, when asked by Senator Pratt about business-to-business issues, said that you have to draw the line somewhere. I suppose that is the problem for us. Even though it has been argued that businesses are consumers, they are a different type of consumer, aren't they?

Mr Henrick—Yes they are. But, as Mr van Rijswijk said, the same power imbalance can occur. What we are looking for, as ever, and as we have argued for many years now, is a level playing field in competition.

Senator CAMERON—If we accepted your submission and recommended the inclusion of small business under the definition of 'consumer', it still would not solve this problem of intimidation, would it?

Mr Henrick—No, it would not. But it would allow the basis for the business relationship to be fairer.

Senator CAMERON—That might be your view, but I am not convinced of that because, if you go back to 51AC and 51AA of the Trade Practices Act and read them, on the face of it you find there are quite significant opportunities for small business to deal with the different strains, such as: the imposition by big business on small business, undue influence, unfair tactics, the willingness to negotiate, the implementation of accords, unilateral variation. In my view, whether it is operating effectively or not, I think all of those are more comprehensively attempting to deal with the problem you have raised this morning than this other area of consumer law. I am not unsympathetic to the position you find yourself in, but I cannot bring my mind to the fact that you should be treated exactly the same as a consumer.

Mr Henrick—I take your point, Senator. The reality is that the Trade Practices Act is not easily accessible to small business because of the cost in terms of both money and time of the small business operator. Many of these cases take 10 years to get to the High Court because they are appealed. I think it took 10 years for the Boral case to get there; it was a section 46 decision that effectively gutted the section. It is just not practical. The only way is that these issues can be raised is if the ACCC takes the case, and the ACCC has been reluctant to take cases. Just last evening I sent a supplementary submission to the references committee and made the point that section 49, which was repealed in 1995—Senator Eggleston had asked that we put in some supplementary information about that—had been in place since 1974, and no single case had been taken on by either the Trade Practices Commission or the ACCC in that time yet it was repealed. The only case that was taken was a private case; indeed, Justice Feeley in the Federal Court found that section 49 had been breached so it was so successful case, and it was the one case that was taken on. Small businesses cannot take cases because they cannot afford it. If the regulator will not take a case then it is not an accessible law.

Senator CAMERON—Does your organisation have any view on Coles? That is not a fair question for you in any forum, I do not think. Coles have submitted that the infringement notices under section 134A, when they are assessed by an enforcement officer, are subjective rather than objective. You have generally said that you do not have a problem with the broad scheme of the act. Do you see an issue with 134A?

Mr Henrick—Not for us. I am not aware of what Coles said in detail, but one would assume that in every case any officer investigating a possible breach is going to be subjective to some extent. That is the way the world is.

Mr van Rijswijck—In any case, if the infringement notice is issued and it is incorrect, there is always recourse to the courts to say, 'Sorry, it's not right.' There are issues of reputation, of course, but they would only be triggered if there were a series of such infringements which came to the notice of the media.

CHAIR—Thank you for coming in this afternoon.

Proceedings suspended from 12.26 pm to 2.00 pm

DOWNES, Ms Jacqueline, Partner, Allens Arthur Robinson; and Trade Practices Committee, Business Law Section, Law Council of Australia

RIDGEWAY, Mr Stephen, Deputy Chairman, Trade Practices Committee, Business Law Section, Law Council of Australia

CHAIR—The committee will recommence. We are continuing with the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010. I welcome representatives from the Law Council of Australia. Mr Ridgeway and Ms Downes, would you like to make an opening statement?

Mr Ridgeway—Yes, thank you. The opening statement will be made by my colleague Jacqueline Downes.

Ms Downes—The Trade Practices Committee of the Business Law Section of the Law Council of Australia thanks the Senate committee for the opportunity to participate in this hearing. As the Senate committee is aware, the Trade Practices Committee made a written submission to the Senate committee in relation to the Australian consumer law bill No. 2 on 16 April 2010. The Trade Practices Committee of the Law council wishes to reiterate the general comment in its submission that it welcomes and supports the introduction of consistency across federal, state and territory consumer protection laws. However, the Trade Practices Committee respectfully submits that there are aspects of the bill that warrant reconsideration and amendment. This opening statement briefly addresses those matters as a summary of the issues raised in more detail in the Trade Practices Committee's written submission.

The Trade Practices Committee made four broad submissions on the bill: first, that the provisions relating to the reversal of the onus of proof should not apply in relation to criminal prosecutions; second, that the narrower definition of consumer may leave certain vulnerable consumers unprotected, contrary to the policy objectives of the bill; third, that the drafting around the unsolicited selling and consumer guarantee regimes requires further refinements to avoid unintended consequences; and, fourth, that the meaning of reasonable, foreseeable use in relation to product safety needs to exclude deliberate use of consumer goods for unintended purposes. A common theme of the committee's submission is that the consumer protection provisions should apply to all consumers and similarly the protection should not extend to corporations or large businesses.

Firstly, in terms of the reversal of others of proof, some of the provisions in the bill have the effect of reversing the usual onus of proof. The committee is generally of the view that reversal of the onus of proof should only be used where there is sufficient empirical justification and should not apply for the purposes of criminal prosecution. The committee considers it is not appropriate to reverse the onus of proof unless there is clear evidence that consumers require the reversal to achieve the benefit of a protection under the bill. For example, the bill provides that where an agreement is asserted to be an unsolicited consumer agreement, it is presumed to be an unsolicited consumer agreement unless proved otherwise. The committee does not consider this reversal necessary as it should not be unduly difficult for the consumer to establish that a particular agreement fulfils the elements of an unsolicited consumer agreement. Even more concerning, the evidential burden regarding testimonials has been reversed for criminal prosecutions. The committee does not support the reversal of the evidentiary burden in relation to the proposed subsection 151(2). Although the imposition of an evidentiary burden stops short of an actual reversal of onus, the finding of a criminal contravention is a very serious matter and should require all elements of the offence to be proved against the accused.

Turning to the definition of consumer, currently there is a threshold of $40,000 in relation to purchasers of goods or services, below which the purchasers are deemed to be consumers regardless of the kinds of goods. The new definition, however, removes this monetary threshold and applies generally only to goods of a kind ordinarily acquired for personal domestic or household use or consumption. By removing the monetary threshold, the proposed definition is now relatively narrow and may have the effect of denying protection to some genuinely vulnerable consumers. For example, people with special needs may acquire specialised goods which are not ordinarily acquired for personal household or business use such as a lift, providing access to the upper story of their home.

The proposed new definition on the other hand continues to exacerbate the odd result already present in the current legislation that large businesses who acquire goods or services for business use which are ordinarily acquired for personal use are protected. The committee submits that the definition of consumer should not extend to bodies corporate or businesses acquiring goods or services for business use. So the committee believes that the definition of consumer should take into account both the nature of the goods and the purpose

of their acquisition where this is made known to the supplier. We have set out in the submission a table of how this might work in practice.

The committee supports further clarity being given to consumer guarantees under the proposed new legislation; however, it has a number of concerns with some unintended consequences. Firstly, the new guarantee as to fitness for purpose requires goods to be reasonably fit for any purpose disclosed to the supplier or to any person by whom prior negotiations or arrangements in relation to the acquisition of goods was made. This creates the possibility that suppliers may be held to have failed to fulfil the guarantee as to fitness for purpose where the supplier is not actually made aware of the purpose.

The bill also does not permit a supplier to contract out of liability for consumer guarantees where goods are required for a business purpose. Not only will large businesses which purchase products ordinarily acquired for personal use therefore be protected by the regime but the parties cannot willingly contract out those guarantees in order to, for example, lower costs.

The committee has also identified some potential gaps in the indemnification process between a supplier and a manufacturer. Under the bill, as now, a consumer has the ability to bring an action against the supplier or the manufacturer. Where the consumer chooses to bring the action against the supplier there is a statutory indemnity by the manufacturer to the supplier. However, there are some exceptions to the indemnity which are proposed, including where the goods are not of acceptable quality by reason of the price charged by the supplier. Removing the ability of a supplier to claim an indemnity from the manufacturer in this circumstance may open the system to abuse, as manufacturers may set their recommended retail prices unrealistically low.

In relation to unsolicited selling, the committee submits there is a lack of clarity in relation to whether or not suppliers are entitled to be paid for services they have provided to consumers within the initial 10-day period if terminated after that period. The committee submits that suppliers should be entitled to receive payment for goods or services used by consumers if it is terminated after the 10 days; however, at present the legislation may prevent this.

A supplier is also liable if a third-party dealer responsible for negotiating relevant unsolicited contracts contravenes these provisions. While the committee agrees that suppliers who use third-party dealers should to some extent be responsible for their actions, the committee submits this is too wide and should be subject to defences against civil remedies where a supplier has done all things reasonable to ensure its authorised dealers comply with the provisions or there is not a sufficient nexus between the supplier’s conduct and the dealer’s conduct.

Finally, the committee welcomes the introduction of a nationally consistent product safety regulatory regime but has some concerns in relation to the new element of reasonably foreseeable use. The committee is concerned that it is not clear on the face of the legislation what is meant by this term and in particular the inclusion of the term ‘misuse’, as it may extend to deliberate misuse of the product in an unintended manner. This could mean that a good is subject to recall or ban which is unrelated to the inherent safety of the goods such as ordinary items, like knives or scissors, which can be harmful to people if misused. The committee submits the concept of reasonably foreseeable use ought to exclude instances where harm is likely to result only if there is a deliberate misuse of a product and where the use is not the intended use of the product.

CHAIR—The onus of proof I think is interesting. I think the government would say that the onus of proof is reversed only where it has good reason, and you mentioned particularly the unsolicited contact. I would have thought the presumption there was that, if the contact was solicited, the supplier would have evidence of that contact—a letter, a form or a note of telephone contact—rather than the consumer.

Mr Ridgeway—Yes, Senator. The Trade Practices Committee of the Law Council accepts there are some circumstances in which it is proper either to reverse the onus of proof or to create an evidentiary presumption, as the bill does. In our written submission, which was lodged on 16 April, we do acknowledge that in the case of testimonials that is a proper case but there is evidentiary difficulty for the prosecutor, for the regulator, in that there is not a witness to these testimonials other than the company that is passing them on as part of the advertising. There you can see there is a difficulty, and we understand that the commission may have had some difficulties in the past with prosecution because the advertiser says, ‘We received these testimonials, but we have kept no evidence of them.’

In cases where the matter is being prosecuted by the consumer, the consumer probably has the best evidence and recollection of the circumstances, in many cases better than the company with which the consumer is doing business. If there has been oral contact between the consumer and the business at some prior time, with

the breadth of the way the bill is drafted to refer to any prior negotiations or contact—which is drafted in a very broad way for the purposes of inducing the contract or even for the purposes of promoting the product—the bill potentially proposes a very significant burden on business to keep very extensive records. The consumer in the circumstances for the transaction will probably have a pretty good recollection of what happened. Salespeople, who deal with any number of consumers in a day or over time, may not have the same recollection.

This could pose a very significant burden on businesses, particularly in the case of criminal prosecution in terms of keeping sufficient written evidence of any sort of contact to establish whether the contact was unsolicited or not. In those circumstances the Law Council submits that the consumer is likely to be in a position to be able to establish and get past that evidentiary burden with reasonable ease whereas businesses face developing quite potentially elaborate systems of record keeping for the most minor of transactions.

Sometimes there is a tendency to focus on the scam situation or the most egregious examples but when you introduce amendments like these, particularly with significant civil penalties and criminal prosecution, businesses will need to introduce very elaborate mechanisms to avoid the possibility of prosecution, particularly in the early days of the new legislation when the meaning of some provisions is not understood. That runs the risk of imposing a lot of costs on business which most likely will be passed through to consumers and quite a bit of red tape in some transactions that do not warrant it, particularly when there is no monetary limit. These could be quite minor transactions.

In those circumstances we are not quarrelling with the introduction of the substantive amendment itself. Procedurally in that case the Law Council is not satisfied that there is sufficient evidentiary difficulty that warrants what traditionally in our law and in English law is regarded as a fairly dramatic change in process.

CHAIR—Certainly I agree it is difficult to bear in mind that you are dealing with the overwhelming majority of cases rather than the egregious cases, but it does seem to me from the examples we have had it is often difficult for consumers in some cases to even know that they have had contact which could be described as soliciting further invitation to a house in the form of surveys or forms. It seems to me not unreasonable that a business might keep that one piece of paper.

Mr Ridgeway—If it is the recollection of the consumer that they have not and if there is some doubt—and onus of proof is often all about the benefit of the doubt, particularly in criminal prosecution—the consumer can make that allegation. The business will then be called upon to rebut it. One of the most difficult allegations to rebut is a personal recollection. The consumer may make that allegation mistakenly and say, ‘No, I had no contact with this business,’ not recalling. We say it is then a very substantial imposition on the business to have to keep sufficient records of the myriad transactions to rebut that. We in the Law Council have not seen the empirical data to suggest that there are a substantial number of failed prosecutions on that basis sufficient to warrant what is a pretty significant change.

CHAIR—Thank you.

Senator BUSHBY—With regard to the onus of proof conversation that we were just having, how would a consumer go about proving it? Really, they would only have the option of an affidavit saying, ‘This is what I recall of what happened on that day.’ That is basically all they could do unless they were taking notes at the time and filed them away somewhere.

Mr Ridgeway—Yes. It is my personal experience—I was a prosecutor for the ACCC before I went into private practice—that in many cases the best evidence is regarded by the courts to be personal recollection and testimony.

Senator BUSHBY—Which can be put into an affidavit and, if required, sworn evidence.

Mr Ridgeway—Correct. And many businesses would react against a statutory declaration or an affidavit. The testimony could be the oral testimony of that person. If the company does not have a written record to rebut that on a substantial basis, they are not going to contest the situation, because they have to put up a witness who can say there was contact and produce that positive proof.

Senator BUSHBY—You touched on my next question in terms of how the onus might assist the judge in deciding which way to go with conflicting evidence, but in practice I do not see how it makes a lot of difference in that situation other than with the judge’s decision. If the onus is on the other side, what is the difference between a consumer making an allegation that it was unsolicited and the other side having to disprove that and making an affidavit which then constitutes their case and the other side having to disprove it?

Mr Ridgeway—Part of that is the points of contact. This can be any communication at any level of the company. In the case of the consumer, you are dealing with one person who has a recollection of all the events, but what you are asking the business to do is produce an affidavit of someone—

Senator BUSHBY—But if the onus is with the consumer and the consumer fills out an affidavit, the business is still going to have to try to defend that and would still need the same evidence to do that.

Mr Ridgeway—That is correct, but if you tilt the presumption in favour of the consumer and against the business—

Senator BUSHBY—Which is what the reversal of onus does, based on what you said earlier.

Mr Ridgeway—Yes. Then all you need is the allegation from the consumer. The business carries that onus.

Senator BUSHBY—Presumably it is only those businesses that are not breaching the requirements that would be able to prove such. Therefore, it is only those businesses doing the right things that would have to maintain that extensive recordkeeping, because no businesses deliberately doing otherwise would be able to.

Mr Ridgeway—That is correct. It is the impact on the general run of business this potentially has. The businesses that are of lesser concern will often have that recordkeeping but when facing significant pecuniary penalties and criminal prosecution will feel that they need to go another level, particularly to protect their employees even in situations that they would regard as innocent.

Senator BUSHBY—You mentioned those four areas in your submission. Looking at them, they seem to move from well argued and justified policy decisions right through to practical problems with the bill as it is drafted and the potential intended consequences. The further down you go, the more you get away from policy and the onus of proof. I understand there is a lot of history behind that, but, nonetheless, it is a matter of policy for government to decide where and when to change that. The third and fourth areas you mention are situations where you think it could actually have practical problems in the implementation if it is passed as it is. Those last two, in particular—and even be the narrower consumer one—I think make a lot of sense. There are some good examples in your submission of problems that may well arise. Have you had any discussions with officials, either before or after you put in the submission, where you have outlined these areas and explained what you thought? Have you had any interaction with anyone or explanation as to why the bill has been drafted in the way it has been?

Mr Ridgeway—No. It was only launched on 16 April.

Senator BUSHBY—So there was no consultation with the Law Council on any of this prior to the inquiry being set up?

Mr Ridgeway—Not since the issue of bill No. 2, no.

Senator BUSHBY—So there has been no consultation.

Mr Ridgeway—No. There has not been any opportunity.

Senator BUSHBY—You also mentioned, as one of the unintended consequences, that the removal of the $40,000 threshold makes the definition of what is a consumer more narrow. You suggested that we should also take into account what the consumers are buying something for. How would that work in practice? I mean your proposal to take into account both the purpose and the type of good.

Ms Downes—The suggestion was that the $40,000 be removed. The Law Council still believes that the $40,000 does provide a good threshold under which supplies could be caught as genuinely applying to smaller business. As to how it would work for the purpose, this would be in addition to looking at the nature of the good. There is a table on page 7 of the Law Council's submission which sets out some scenarios of when an acquirer may be considered to be a consumer or not. Our submission is that the purpose would need to be made known to the supplier. For example, this would be where the supplier is aware that a good that may ordinarily be a business good is actually being supplied to a consumer who is acquiring it for a personal reason. So it is subjectively made known to the supplier of the good. We submit that in that case, if the supplier of the good does not believe that the good is suitable for that personal purpose, they could have the option not to in fact supply the good. This would apply on a case-by-case basis, where the supplier of the good is aware that the good—which may otherwise be of a kind for business—is being used for personal reasons. If they continue to be aware of that purpose and are determined to still supply that good to the consumer, then our submission is that it would be appropriate for the consumer to be protected by the provisions of the act, in particular the consumer guarantees. Conversely, if a good that is ordinarily used for domestic purposes is

supplied to a large business customer or a corporation, or for a business purpose, then they should not be afforded the protection that is provided to consumers under the act.

Mr Ridgeway—Senator, I am not sure if your question was directed just to the definition of consumer. I think we have covered both.

Senator BUSHBY—It is unclear in both directions to some extent. I would have thought fitness for purpose would have covered some of that. As the bill is currently drafted, if a good is supplied to a consumer that might normally be considered a business good and they are aware of why it is being supplied then I would have thought the fitness for purpose provision would kick in there anyway. The supplier would need to ensure that it was fit for purpose.

Ms Downes—Yes, to some extent in terms of the guarantees there may be an argument to that effect. But still a business must then consider when it is supplying the good to particular individuals what their business use is, and different standards may apply for different uses. Certainly in terms of the definition of 'consumer' what we have suggested on page 7 is an appropriate matrix for a combination of the nature of the goods and the purpose for which they are being used.

Mr Ridgeway—That is a bit of a gloss on the current position in the act. There is a two-pronged definition currently in the act: goods or services which are of a kind ordinarily used for personal household or domestic use and then the $40,000 threshold which applies whenever, regardless of the use. One of the main purposes of that threshold is to remove that inquiry and to say that, in view of the value of the goods, even if acquired by business—subject to one exception I will mention in a minute—they are more likely to be a consumer-type good, a low-value good, and that businesses could get the benefit of some of those provisions when they are below the described limit. It removes that need for an inquiry about what you are buying the goods for and whether they are used, because there are some goods where it is very clear and there are other goods where it will not be clear. If you are talking about small-value transactions, there is a risk that you complicate the provisions by introducing this need for an inquiry about what the purpose is when some businesses, particularly small businesses, might get the benefit of those provisions.

Senator BUSHBY—Monetary value is pretty black and white really when it comes down to it.

Mr Ridgeway—Yes. In our submission I think our main focus is on the monetary limit as having the ability to remove the need for that inquiry, but if the government is minded to exclude the benefit of these provisions from larger business—leaving the position of small businesses a bit unclear with those provisions—then that would be the point of introducing a purpose provision. There is already a purpose provision in this bill and in the current act, where goods are excluded for the purposes of resupply or for using up or transformation in production or manufacturing processes. So that is one purpose provision that is already there. But it is obviously much narrower than a general one of how you might use these goods. You can think of other examples with problems of characterisation—is this a business laptop or a personal laptop and circumstances like that. That might not be a good example.

Ms Downes—If you have a look at the table that we proposed, the Law Council's submission is that, where the nature of the goods and the purpose of the acquisition align, the monetary threshold is in a sense irrelevant. However, where there is a difference between the nature of the goods and the purpose of the acquisition, then the monetary threshold can provide a guide there as to whether or not the acquirer should be considered to be a consumer.

Mr Ridgeway—I think the senator's original question was: how would this work in practice?

Senator BUSHBY—Yes.

Mr Ridgeway—We have not gone to that in our submission. I am just talking from a personal point of view and without wider consultation, but it could be something like for use in trade or commerce or some such provision. There could be some drafting. But we have not gone to that level of detail in our submission.

Senator BUSHBY—You have adequately pointed out some of the issues and suggested direction for possible solutions. As I mentioned, I think that you have argued well in here, particularly on the indemnification of suppliers by manufacturers and the potential problems that you have highlighted there. I think that there are some real problems there and the potential for manufacturers to recommend retail prices below realistic prices, which could lead to them escaping liability. And there are some other issues there which I think are well argued. I thank you for your submission.

Mr Ridgeway—Thank you.

Senator PRATT—I want to return to the question of the definition of a consumer. You have not looked specifically at how such a definition could be redefined, but you have offered some suggestions. I appreciate the very significant and valuable issues that you have raised, but I question at this point in the process how, without opening up the whole debate on the object of the bill, we can properly tackle this, particularly in negotiation with the states. Do you have any comment to make on that?

Mr Ridgeway—We appreciate the senators' dilemma there, and we understand the government's desire to introduce these amendments at the earliest feasible time. But when you make quite significant changes to the law that are going to have an impact broadly across business, it may mean sometimes that you need to stop. I understand that on the consultation issue, but we do think that this amendment creates some gaps which are not in the current law and that some consumers may miss out on the benefit of these amendments in some circumstances. The actual drafting to change the situation is not necessarily that complex. It may be a question of process and whether it is something that is caught in subsequent amendments. The difficulty then is that that introduces a level of complexity that is not desirable.

Senator PRATT—I want to ask you about false and misleading representations in relation to warranties and guarantees. The committee has had some discussion about this. I want to clarify the intent of your suggestion. Are you are arguing that topic specific prohibitions are not necessary in relation to extended warranties and guarantees?

Ms Downes—The Law Council's submission is that any issues relating to extended warranties would adequately be dealt with by the existing provisions in section 53, which already prohibits false or misleading representations in relation to the existence of warranties and that this would also include any misrepresentation by suppliers that a consumer needs to pay for an additional warranty.

Senator PRATT—It has been put to the committee that consumers are routinely being misled under current provisions. Would you agree or disagree with that?

Mr Ridgeway—It is certainly the case that consumers may be being misled. Senator, are you saying that there are some circumstances which are not covered by the existing legislation?

Senator PRATT—It does not appear that any remedy for the fact that they are being misled is being implemented to any degree.

Ms Downes—The Law Council is not aware, for example, of any prosecutions that rely on the current provisions that have failed. We are not aware of whether there is some sort of perceived concern in the current provisions. There is a current provision that would extend, we say, to cover that situation, and we are not aware of that having been tested and failed or of any concerns in relation to the application.

Mr Ridgeway—An example of that provision is the 'no refund' sign representation. The ACCC has been very diligent in bringing actions for breach of that provision—53G, I think it is. In a number of circumstances, and it is one of the bread-and-butter types of litigation that they do, the more significant development is the introduction of civil pecuniary penalties. That is the main thrust of the substantive response. This is not a point that the Law Council is making particularly strongly about this provision. To introduce a new provision such as this may create a bit of duplicity. We were a bit concerned about the wording, and it is probably not the appropriate venue to go into the technicality of that, but it is caution in introducing a new provision with unusual wording if there is not an established need. But this is not one of the main points.

Ms Downes—The Law Council's concern with a specific provision that deals with representations concerning a requirement to pay for a guarantee is that it may confuse consumers and, potentially, some businesses into thinking that paying for guarantees is always deemed to be false and misleading. We do not understand the intent of the legislature to essentially prohibit extended guarantees. It is a question of what is being represented when they are being offered to consumers in terms of whether they are necessary or not. I think the main thrust of the committee's submission in relation to that aspect is simply that putting in such a specific provision relating to payment for guarantees may cause that confusion as to whether they are always prohibited.

Senator PRATT—I suppose it depends on whether paying for a contractual right is wholly or partly equivalent to any condition, warranty or guarantee, and I suppose the question is in the 'wholly or partly'. If it is wholly equivalent then you are paying for something that you have anyway. If it is partly, then the consumer would need to be able to distinguish what was covered and was not covered under both scenarios.

Mr Ridgeway—The adoption of the New Zealand formulation for 'acceptable quality' rather than 'merchantable quality' is to be much applauded. You have disagreement amongst lawyers as to what

'merchantable quality' means and 'acceptable quality' is a better definition, but then if you introduce another provision that has some complex words, such as in the current bill, our point of concern is: are they necessary or are they going to introduce unnecessary complications that consumers will not understand?

Senator PRATT—I would contend that currently it is already unnecessarily complex. If you buy a washing machine, you expect it to last at least five years or so. That is a very short life for a washing machine, even these days. You have got a warranty only for the first year, so the retailer says, 'Do you want to buy an extended warranty for three years?' Logically, as a consumer, you should be able to have that product replaced within a reasonable lifetime. An important question is why the consumer should be conned into paying for an extended warranty for something that they should otherwise be entitled to—a right to consume that good. That is an important question in this day and age, when this kind of conduct is common, to try and resolve. Would you agree with that?

Ms Downes—Yes, we would agree with that. We are just talking about one aspect but, as Mr Ridgeway was saying, the broader provisions that have been introduced into the bill we broadly support in terms of clarifying aspects of guarantees—and particularly concepts such as 'merchantable quality' and what that means in a particular circumstance—and replacing those with a more common concept that both businesses and consumers will understand in relation to what is acceptable quality, and that takes into account factors such as the type of good, the nature of the good and all of those concepts.

The comment in relation to the misleading representation in section 53 is simply that we believe it is adequately dealt with under the current provisions and that adding in a further provision specifically to deal with that issue may cause confusion.

Senator PRATT—Thank you for taking me through that.

CHAIR—In that case, that concludes this session on consumer law. Thank you, Ms Downes and Mr Ridgeway, for coming in this afternoon.

Committee adjourned at 2.40 pm