COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

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

FRIDAY, 30 APRIL 2010

CANBERRA

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SENATE ECONOMICS

LEGISLATION COMMITTEE

Friday, 30 April 2010

Members: Senator Hurley (*Chair*), Senator Eggleston (*Deputy Chair*) and Senators Bushby, Cameron, 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, Hurley, Hutchins, Johnston, Joyce, 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, Eggelston, 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

WITNESSES

Committee met at 8.33 am

CHAIR (Senator Hurley)—I declare open this fourth hearing of the Senate Economics Legislation Committee into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010. On 18 March 2010 the Senate referred the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 for inquiry and report. The bill is the second step in introducing a single national consumer law in relation to general and specific consumer protections, misleading and deceptive conduct, unconscionable conduct, unfair practices, consumer transactions, statutory consumer guarantees a standard consumer product safety law for consumer goods and product related services. The bill will amend section 61 of the Trade Practices Act 1974 to rename it as the Competition and Consumer Act 2010. The committee is due to report on 21 May 2010.

These are public proceedings although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the ground on which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera.

[8.35 am]

FREEMAN, Ms Elissa, Director, Policy and Campaigns, Australian Communications Consumer Action Network

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

Ms Freeman—Thank you for the opportunity to appear today. The Australian Communications Consumer Action Network, or ACCAN, is here today to raise two main issues. The first issue relates to the consumer guarantee provisions of the bill and specifically the provisions that propose to exempt telecommunications services. Our second message is that, while the introduction of nationally consistent consumer protection laws is an important step in improving the lives of Australian consumers, we believe that there is still much work to be done to bring consumer protection laws into the 21st century.

While there is much to recommend this bill, ACCAN is very concerned that basic consumer guarantees may be excluded from applying to telecommunications services. The consumer guarantees that would not apply in this case include the most basic of consumer rights. I want to provide you with a few reasons why this carve-out needs to be removed. Firstly, this provision has come out of nowhere. Neither the Productivity Commission's inquiry into consumer protection nor the Commonwealth Consumer Affairs Advisory Committee investigation into warranties recommended that this carve-out be written into the new national Consumer Law. Secondly, this provision weakens the existing trade practices law, in our view creating greater confusion and fewer protections for consumers. Thirdly, the government has failed to be sufficiently clear about how this provision would be applied. The explanatory memorandum states that the carve-outs would only be applied in circumstances where the relevant minister is satisfied that other laws make adequate provision for consumer protection in relation to the relevant services, being telecommunications services. Yet this is not actually reflected in the bill itself. Next, there are no telco industry specific regulations that relate to consumer guarantees, nor are there any such plans to develop these rules—nor would we support that particular approach. Lastly, once created, exemptions such as these have proved notoriously difficult to reverse.

Consumer guarantees are one of the bedrocks of consumer protection. Our observation is that the telecommunications providers have a history of failing to protect their customers and we would hate to see that failing expanded to include consumer guarantees. The intention of the new Australian Consumer Law is to provide Australian consumers with the laws they deserve, making their rights clear and consistent and protecting them wherever they live. Supplanting basic consumer guarantees in the Australian Consumer Law with industry specific regulation flies in the face of this notion and should be removed.

The other point I make is that, while these reforms are welcome, there is still much work to be done. We encourage the committee to seize this opportunity to create real reform that comprehensively addresses future consumer concerns, including key digital rights issues. The introduction of a prohibition on unfair conduct will be one step in providing comprehensive, future looking consumer protection. In relation to the unsolicited sales provisions, we see this process as an exciting opportunity to embed more robust protections that promote informed consent processes. I am happy to take questions.

CHAIR—Thank you, Ms Freeman. Your submission says that ACCAN is very disappointed that the sum total of the timid reforms proposed is a business as usual approach, essentially limited to the creation of nationally consistent consumer laws. Over the last four days we have had a large number of submissions from people who think that the reforms are not timid, that they are going to cause problems for their business sector. I am wondering on what basis you say it is timid. Do you think that this reform does not bring any advantage to consumers?

Ms Freeman—To be clear, we support these reforms. The creation of a single national consistent consumer law is long overdue and is a welcome change in the consumer protection settings in Australia. Our concern is that it has been a timid process. It has looked only to the existing provisions that already apply in various states. We do see opportunity to go much further. Indeed, our organisation is very much involved in the government's National Broadband Network and we very much look towards the sort of digital economy and the sort of transactions that consumers will be undertaking in that setting, and we are concerned that consumer protection simply are not keeping step with the rest of the world.

CHAIR—Telecommunications and communications generally are one area in which there is huge change and it is probably difficult to write right now write a general law covering all consumer sectors that is adequate

for telecommunications. Perhaps that is a good reason not to include it but to include an industry specific regime that will give the flexibility required without affecting all consumer sectors.

Ms Freeman—We know that there will be more industry specific regulation coming. Our point is that we want to get the best possible general consumer protection laws that we then build on. It is certainly the case that there are opportunities for Australia's consumer protection law to be broader, to be more ambitious and to look overseas at some of the provisions that have been already implemented, for example in Europe.

CHAIR—Have you read the other submissions from people who say that this current law goes too far? Do you dismiss their concerns entirely?

Ms Freeman—I do not claim to have read every submission. I am sure people are raising legitimate concerns and I accept that the committee has a challenging process to go through to digest all of those concerns. We are not concerned that it goes too far. That is not a view that we are presenting here today, with the exception of the carve-out of telecommunications services from the consumer guarantee provision. This is a challenging process. It is the reason it has taken a number of years to synchronise Australian consumer protection laws. That does not change the fact that it is needed and that the government is doing the correct thing by working with the states and territories to ensure that we do have a single national consistent consumer law. Indeed, the Productivity Commission found sizeable benefits flowing to the economy by adopting these reforms. I am sure there will be a bumpy road but ultimately a beneficial road for consumers and the entire economy.

Senator EGGLESTON—In your introduction you say that you are really disappointed that the sum total of the timid reforms proposed is a business as usual approach, essentially limited to the creation of nationally consistent consumer laws. Even important reform such as unfair contract terms are only bringing Australian law into line with reforms introduced overseas almost 20 years ago. What would you like to see? What, for example, would be an ideal for you?

Ms Freeman—One particular area of reform that we identify in our submission is about a prohibition on unfair conduct. This is one of those reforms that has already taken off overseas and it is a reform that has not been able to gain traction in Australia. It was not a recommendation from the Productivity Commission review, it has not been considered throughout this COAG process of developing a nationally consistent Consumer Law. But it is certainly one of those reforms that is sitting there waiting for consideration. I realise it would be a challenge to build this particular protection into the bill at this point in time and I would hate to see the bill held up for another lengthy debate about the pros and cons of this particular provision. But it is absolutely the case that we need to have this conversation. The bill talks about specific unfair practices being prohibited, but we see the opportunity for a general provision to prohibit unfair practices. It has been adopted in other jurisdictions overseas and we see it as a measure that would really start to bring Australian consumer protection law into the league of best practice internationally.

Senator EGGLESTON—They are very interesting comments, because what you are really saying is that this law is a long way behind the rest of the world and Australia is not advancing very far by the introduction of this law. Is there a case for going back to the drawing board and bringing this law into line with practice in the European Union and the United Kingdom?

Ms Freeman—I think this bill is a good job. I do not think it is a job done. I would hate to see this bill held up any further. I think we do need to have a single, nationally consistent consumer protection law. However, I do think we need to be doing much more to bring consumer protection laws in line with international best practice. I would like to see these issues immediately referred for consideration to the Productivity Commission, the Treasury or the Commonwealth Consumer Affairs Advisory Council. There are many bodies capable of giving serious attention to these issues. If there is a consensus view that the time is right to introduce these laws, by all means put an amendment in this bill now, but I do not think it is the case that this bill needs to be put onto the scrap heap. This bill is an important step in the process of getting to international best practice in consumer protection.

Senator EGGLESTON—Item 3 in your submission relates to unsolicited selling and informed consent, which includes door-to-door selling, I suppose. Yesterday we had a lot of evidence about this, and we heard from Telstra, who said that they engage in door-to-door salesmanship, which I found rather surprising considering the size of their company and the number of people they service. Do you feel that we should not unduly restrict door-to-door selling?

Ms Freeman—I do not think that at all. I think that there are appropriate and necessary restrictions that are required for door-to-door selling, telemarketing sales and indeed any unsolicited sales whatsoever. The comments that we make in our submission are largely drawn from a research report that our organisation commissioned last year into conformed consent. I would be pleased to table that report to the committee. In that report, we look at the breadth and depth of consent issues that arise in the telecommunications sector. It does not surprise me that Telstra is doing door-to-door sales, simply because of the significant size of consent issues that we see in this sector. The telecommunications sector is probably overrepresented in terms of consent issues that arise across the economy. A good part of the reason for that is the unsolicited sales. There is absolutely a need to curtail the practices of door-to-door sales at this point in time. Our report looks at the specific concerns of disadvantaged and vulnerable communities. Particularly in Indigenous communities, it is clear that door-to-door selling is a big problem, even within the telecommunications area.

Senator EGGLESTON—The other thing you talk about is consumer guarantees, in section 65. What guarantees apply within the telecommunications industry?

Ms Freeman—At the moment, the warranty provisions—as they are known at this point in time—that apply in the telecommunications industry are simply those in the Trade Practices Act. There are no industry-specific warranty or consumer guarantee provisions. The ACCC is quite active in the area of telecommunications. Just last week the ACCC issued a press release dealing directly with mobile phone providers and the warranties that apply for bundled contracts where a consumer buys both the handset and the service at the same point in time. This is a very contentious area, a very live area and an area that the ACCC actively enforces using the current provisions of the Trade Practices Act.

The proposal in the bill basically establishes a framework where telecommunications could be carved out of the new Australian Consumer Law provisions for consumer guarantees. That is greatly disturbing to us. As I said in my opening statement, it comes out of nowhere. We have been provided with absolutely no justification and it makes no sense in the context of both the current operations of the industry and the future proposed operations of the industry.

Senator EGGLESTON—So why do you think it has been carved out? What is the government policy rationale for this?

Ms Freeman—The bill is largely informed in this area of consumer guarantees by the Commonwealth Consumer Affairs Advisory Council report into warranties. That report did note that the electricity, gas and telecommunications industries can operate somewhat differently from other sectors of the economy. That was something that was noted in that report. But the report did not go so far as to say that that warranted those sectors being carved out of guarantee provisions. I suspect this is lazy regulation that is trying to accommodate the fact that the sectors have been acknowledged to be different and have left this to be dealt with in regulations and a tick-a-box approach to building up this bill. I have asked quite directly for a further explanation about how we have come from the recommendations from CCAAC to the provisions in this bill, and I have not been provided with any clear explanation. As I say, we certainly do not support these provisions being included.

Senator CAMERON—Madam Chair, before I put questions to Ms Freeman, I would like to make a brief statement. Yesterday in questioning on this issue, I linked the company People Telecom with Telstra. Telstra have advised me since then that People Telecom are not part of Telstra and in fact I have misrepresented Telstra's position in the field. I just want to put that on record to correct any misunderstanding from my questioning yesterday.

Coming back to, you, Ms Freeman: are you aware of the ACCC decision in relation to People Telecom?

Ms Freeman—I am sorry; I am not.

Senator CAMERON—This goes to the issue of door-to-door sales. The ACCC found that People Telecom agents were misrepresenting their position to customers and, in that misrepresentation, they were obviously in breach of their obligations. In evidence we had yesterday from some of the door-to-door salespeople in the telecom area, they said they have proposed a minimum set of standards for door-to-door sales. Have you got an interest in that issue?

Ms Freeman—Could you just clarify—is it Telstra that is proposing this?

Senator CAMERON—No. It is the organisation who do door-to-door sales—Salmat and people like that.

Ms Freeman—I am not familiar with that particular proposal.

Senator CAMERON—Are you interested in what these minimum standards would be for door-to-door salespersons? Is that something your organisation would be interested in?

Ms Freeman—Yes, we would be interested, because of the extent of problems that we ourselves see in the telecommunications space in relation to the full breadth of unsolicited sales that take place. We would not oppose industry developing codes of conduct, but those codes of conduct should be built on strong, enforceable provisions that are built into legislation that enable the ACCC to take the sort of action has been taken against People Telecom so recently. There is quite possibly a role for the industry to be showing some leadership and taking initiatives and building on the law. My organisation would certainly be prepared to work with those organisations, but that does not, in our view, change the fact that strong door-to-door protections are required in the Australian Consumer Law.

Senator CAMERON—The Australian Direct Marketing Association tabled these standards yesterday. Could I ask you to take it on notice to have a look at these minimum standards and advise the committee whether these standards would—

CHAIR—If I am right, the association said they were not a public document at this stage.

Senator CAMERON—I thought they had tabled them yesterday. Can we check that?

CHAIR—We will let you know if that is available.

Ms Freeman—I would be very happy to. My organisation has worked closely with ADMA on issues around the telemarketing code, so it is certainly an area that we are happy to engage with. If and when those details are made available, we would be very happy look at them.

Senator BUSHBY—Thank you, Ms Freeman, for assisting us with the inquiry. You mentioned in your opening statement that in respect of the exemptions that have been granted to telecommunications and energy and gas that you are not aware of any reason why, that they had not been flagged in advance, that they had not been recommended by previous inquiries like the Productivity Commission. You also mentioned that you were not aware of any planned specific addressing of the issues that are in those particular industries. We had evidence not from Treasury, and I imagine we will try and ask them later today, if we can, that the reason why they have been carved out is that they did actually plan to have specific regulation to address these industries. But you are saying you are not aware of any plans at all in that area?

Ms Freeman—No, absolutely not. The key protection for consumers in the telecommunications industry is provided through the industry code, the Telecommunications Consumer Protection Code, and that is completely silent on the issue of warranties. That code is due for review this year and my organisation will be participating in that code review, but it is not the place of this code to be dealing with warranties. Warranties are a general consumer protection that should apply economy wide and they are in fact operating quite successfully in the telecommunications industry at this point of time. As I said, the ACCC has taken action just last week and put the industry on notice again about insufficient attention to warranties in the telecommunications arena. So it strikes me as incredibly perplexing that the notion would be put forward that warranties should be industry specific and that specific provisions need to be applied in the telecommunications area. There needs to be a broad-based general protection that applies across the economy. If there are legitimate specific issues that relate to the specifics of the telecommunications industry, by all means there may in fact be consideration of further specific rules. But in terms of the general provisions that apply, I cannot see why anything in a code would supplant them.

Senator BUSHBY—And there have been no discussions with you as a recognised representative organisation on behalf of consumers in this particular industry about how that might be done in terms of the fact that it has been carved out of this?

Ms Freeman—The Australian Communications Consumer Action Network, my organisation, is the peak body for communications consumers and we have had absolutely no indication that this is under consideration.

Senator BUSHBY—That leads on to my next question, which is what degree of consultation has your body had with the government or Treasury officials or any officials in the government responsible for this in terms of the Australian Consumer Law second tranche?

Ms Freeman—It is probably worth pointing out that my organisation is in fact a new organisation and we were only formed in the middle of last year, so we probably have not been as engaged as other consumer organisations you may have spoken to. I would say that we have had limited involvement in this particular

area. We have kept a watching brief going right back throughout this process. Our predecessor organisations were certainly involved—

Senator BUSHBY—Presumably you watched what was going on with the COAG process, the agreement that came out of that, the first round of Consumer Law legislation that was put through. In terms of the second round, are you aware of any consultation specifically looking at that example of the carve-out of the telecommunications industry for warranties? Was that a surprise when it came out in the bill?

Ms Freeman—It was absolutely a surprise. After this bill was referred to the committee we had direct conversations with Treasury officials to attempt to understand where this had come from.

Senator BUSHBY—What did they tell you?

Ms Freeman—We were referred back to the explanatory memorandum.

Senator BUSHBY—They just referred you back to that?

Ms Freeman—They referred us to the explanatory memorandum and the Commonwealth Consumer Affairs Advisory Council report, which is also referred to in the explanatory memorandum. As I said, the explanatory memorandum in our view is at odds with the bill itself in regard to this particular provision. The explanatory memorandum says that there are specific circumstances under which the carve-outs would be enacted—namely, that the relevant minister would only enact these provisions if and when there were equivalent or higher provisions in industry specific regulations.

Senator BUSHBY—But that does not exist yet, and theoretically this could all become law in the next few weeks.

Ms Freeman—Absolutely. It is of deep concern to my organisation that this concept is in the explanatory memorandum but not reflected in the bill itself. I am not prepared to simply hope that the intent is reflected down the track. If you are going to carve out these sorts of exemptions, and they are very important protections that apply to consumers, any caveats around them need to be built into the act itself.

Senator BUSHBY—Given who you represent, it is your job to make sure of that and stand up for that.

Ms Freeman—That is why I am here today.

Senator BUSHBY—Interestingly, commercial law firm Freehills also agree with your view on the carve-out. But they also said that, even if the carve-out was going to proceed, it should be limited to the services and not include hardware. Surely you should at least have a guarantee on the handset that you have as part of your package deal.

Ms Freeman—I agree that in theory, but the way that we deal with telecommunications services is changing so rapidly that to try and define that at this point in time would be very challenging. This relates back to the point that we made about the fact that these laws still have a long way to go. We have not adequately dealt with some convergence issues—my computer, my iPhone, what is a telecommunications service, where does the service stop and the product end? I suspect that to be carving out so broadly the services as they are being carved out in the act at the moment would exclude in the future the vast majority of digital devices that consumers use.

Senator BUSHBY—There are connectivity provisions in the ACL which caused Telstra yesterday to complain. They did not mind if it was their own package, but they did not like the idea of connectivity between their services and things that other people provide, another area of consumer problems which I think they were trying to directly address. There are a number of other issues that have been raised about this, like the definition of 'consumer'. Academics, legal groups and commercial law firms have all raised this as a problem and are saying that the consumer law as drafted could actually narrow the definition of consumer and limit rights in that sense. Have you had a look at that issue at all?

Ms Freeman—That has not been a priority issue for us. I would be prepared to support that concern at a very broad level. Our organisation reads 'consumers' quite broadly. We have a specific agreement to advocate on behalf of small business customers as well as consumers using communications services for personal services.

Senator BUSHBY—I have had a lot of emails raising concerns from small business customers in this particular area.

Ms Freeman—In many regards, particularly with communications services, a small business operator running from home has precisely the same, if not greater, difficulties when using internet and other telecommunications services.

Senator BUSHBY—In particular, sole small businesses operators, who are very busy and focused on their business, can be more vulnerable than well-informed consumers.

Ms Freeman—Yes. The power dynamics are such that you are not talking about sizeable business that can be leveraged effectively against the likes of Telstra, Vodaphone, Hutchison and Optus.

Senator BUSHBY—To come back to your comment that you do not think it has gone far enough, we had some evidence earlier this week from an academic who was saying that a lot of this stems from the Productivity Commission review five years ago and that the world's consumers have moved on significantly. He was also bemoaning the fact that it has not picked up some of the things that have happened since. I guess that is the sort of thing you are talking about: there are further developments in how consumer law is being applied in the rest of the world, and here they have not looked at that. They have just gone with something that was looked at five years ago based on things that were going on before then.

Ms Freeman—That is right. We are very close to having a consumer protection framework that is perfectly suited to the last century. Our concern is how well the framework is going to deal with this century's consumer concerns. It is certainly the case that we continue to slip behind international best practice standards. Our submission outlines the particular provisions against unfair trading that we would like to see, but there are many wonderful initiatives taking place outside of Australia. We have a lot to learn and we have a long way to catch up. We need this bill in order to have the right basis on which to build our consumer protection laws.

Senator BUSHBY—Thank you.

Senator CAMERON—These minimum standards have been established. We should be able to give you a copy to have a look at and would certainly appreciate your organisation's comments on whether this would remove the necessity for legislation of the direct marketing groups. This was presented by Salmat, AEGIS Direct and CPM in association with the Australian Direct Marketing Association. That is where the document came from. Their submission yesterday was that the issue of complaints from customers about direct marketing is extremely small. I suppose the point they are trying to make is that it is not a problem. Do you have a view on that?

Ms Freeman—Yes. I referred earlier to a report that my organisation has produced on informed consent. I will table that for the committee because I think it provides a useful context about the extent to which consent issues arise in the communications industry. Our report estimated that there were over 40,000 issues that arose within the communications industry. I think that was in the 2007-2008 period. In my mind, that is a significant number. I am not saying that all of those relate to door-to-door sales, but it is certainly the experience in the consumer movement quite broadly that consent issues are a problem at the point in which door-to-door transactions take place.

The typical situation that arises in the communications industry is that a door-to-door salesperson knocks on the door, gives a great sales pitch and signs up a customer, but of course they are not necessarily the right person to be talking to; so, even though there has been consent, it is not actually the consent that is required to switch a service. There are capacity issues, as well, which the industry has not been very effective in dealing with. Our submission points to the fact that there is very broadly insufficient guidance on what good consent means. I would be very interested in seeing what the industry is proposing here and seeing whether they have been able to pick up on concerns that my organisation has been raising about the lack of clarity of consent.

Senator CAMERON—We have had submissions in relation to the complexity of the proposed legislation. We have also heard from consumer groups evidence about complexity of products. I took the view yesterday with Telstra that maybe their concern for complexity should be about trying to remove the complexity of the products that they sell so you can compare apples with apples across the communication industry—so you know what you are buying. We have a similar problem in the health industry. In communications it seems to me that that is a big issue for consumers. How should we deal with that?

Ms Freeman—I think you are absolutely spot on there. The complexity is out of control, and in our view it is unnecessary complexity. It is complexity that has been built into products quite purposely to confuse customers, to make it very difficult to make good choices and to enable products that are not necessarily in people's best interests to continue to be sold. There is certainly a role here for the regulators to step up and enforce the law much more strongly. The quality of advertising in the telecommunications industry is abysmal.

My organisation has made a series of complaints about recent advertisements by major operators. It is quite clear that the use of small print and the use of terms that are misleading are out of control. We have terms like 'unlimited' being thrown around completely inappropriately. Even the notion of a 'cap plan' is misleading. It is a floor, a minimum price, not a ceiling, a maximum price. Consumers understand these terms quite intuitively and in an appropriate way, but that is not the way in which they are used. So there is a need for regulators to step up here, to tackle practices that have been slowly degrading and to enforce the law to its highest standard.

I do not think that is going to solve everything, because complex advertising is just one of the problems. We will certainly be applying significant pressure to telcos to make their products more transparent and comparable. Our organisation has been campaigning against hidden fees and charges such as fees to pay your bills at the post office. They are all aspects of unnecessary complexity in telecommunications products. I do not think there is a simple answer here, but I agree with you that it is a major problem in this industry.

Senator CAMERON—Thanks.

CHAIR—If there are no more questions, thank you, Ms Freeman, for coming in this morning.

Ms Freeman—Thank you.

[9.12 am]

GREIG, Mr Anthony, Chairman, Direct Selling Association of Australia

HOLLOWAY, Mr John William Andrew, Executive Director, Direct Selling Association of Australia

CHAIR—Welcome, Mr Greig and Mr Holloway. Thank you for coming in today. Do you have an opening statement you would like to make?

Mr Greig—Thank you, senators, for providing the opportunity for us to speak to you today. Subject to clarification of the pyramid selling provisions, and with the exception of the unsolicited selling provisions, the DSAA supports this second tranche of the Australian Consumer Law. In fairness to its members, the DSAA records its disappointment at the lack of adequate consultation on the unsolicited selling provisions. Its only opportunity to comment on this threat to the direct selling industry has been a 10-day turnaround period for submissions on generalised commentary on proposals in the draft regulation impact statement last November and, within DSAA constraints, literally days to analyse almost 400 pages of proposed law and 700 pages of explanatory memorandum. The unsolicited selling provisions, particularly the prohibition on supply of and payment for goods during the cooling-off period, will destroy or irreparably harm businesses that can best be described as store selling without the store. It is against this background, then, that the association has made its submission to this inquiry. The DSAA is on record as acknowledging that previous studies in New South Wales and Victoria established the preference for cooling-off periods and cooling-off rights over general remedies for some trading circumstances. The unmet challenge for policymakers has been to limit the proposed unsolicited selling provisions to meet these circumstances.

The DSAA has long been a strong supporter of consumer protection measures. Our industry is built on establishing and maintaining personal relationships. Our members are bound by a code of practice which assures consumers of a 10-day cooling off period. That code of practice is overseen by an industry ombudsman, who is a person of repute. Our members value complaints; they are an essential part of their quality assurance programs. Complaints to the DSAA and, as far as we can establish, complaints to regulatory authorities about our members are virtually nonexistent.

Our major concerns with the unsolicited-selling provisions, not in any particular order, are: the prohibition of supply and payment for goods during the cooling-off period; the application of highly prescriptive, excessive and grossly uncertain regulation to what is essentially store selling without the store; the generalised application of new laws to a significant retail presence without obvious analysis of the structure and impact of the proposed regulation on constantly changing business models; competitive issues; the effect on small businesses engaged as direct-selling companies and resellers; the effect on consumer choice; the effect on the independent contractor status of these independent distributors; significant penalties for technical or innocent breaches; the failure to differentiate transactions conducted within established business relationships; and the lack of understanding or acceptance of legal characteristics in the direct-selling supply chain.

The bill misses the opportunity for a principles based approach to managing the real detriment in unsolicited selling. There is lack of balance of consumer and business interests. We are dramatically concerned that, with anticipated subordinate laws, the full regulatory impact is not yet known to our industry.

CHAIR—Thank you. Direct selling, as you say in your submission, is principally conducted by people who are not cold calling; it is more the party plan type people. Is that right?

Mr Holloway—We have tried in the submission to illustrate the supply chain. Essentially, within our industry the supply chain comprises the direct-selling organisations, which are the companies that we represent—Avon, Amway, Nutrimetics and those sorts of organisations—and the independent salespeople. In many respects the DSO is the wholesaler and the ISP is the reseller. These laws are really focused on the relationship between the ISP and the consumer because it is ultimately the ISP that has the legal title in the goods and onsells them to a consumer.

The ISP, the independent salesperson, can be categorised in one of five categories. They can be no more than a consumer. We are told about 60 per cent of the ISPs with some companies join the company for no reason other than to acquire goods at wholesale prices. Others buy goods in a group dynamic. In other words, they simply buy products through those wholesale arrangements for friends and family. You get people who join the organisation—an Avon, for example—simply to sell products and who do no more and no less. You get people who join organisations to create what they term downlines. They literally train, motivate and have people out there selling products. They derive reward through their own efforts in selling products but also

through these people selling their products. Finally, you get ISPs who do not sell products at all and simply manage downlines.

The point I am really making is that it is a very little-understood business model. It is an emerging retail model; there is no question about that. There is this notion of direct selling being doorknocking, but in the context of our members that is virtually nonexistent. Only Avon knocks on doors these days, and only about 10 per cent of its business is doorknocking. The rest of our members have found their way into models which are premised on network marketing, party plan and door-to-door selling, but they have found their way through convergence into other retail models, particularly distance selling and, in my colleague's company, even an element of store selling. The point we are making is that to adopt the approach in the legislation where you are defining door-to-door selling by reference to anything that is non-store selling is catching a whole dynamic in our market which the regulators, with respect, simply do not understand.

CHAIR—On that point, I would like to go into case study 2 in your submission:

Carol promotes and sells cosmetic products … At Carol's invitation Homeowner Alice invites eight women she knows to her home for a demonstration …

As is the usual process, some of them order and buy some of those products. You say in your analysis that most of those transactions count as unsolicited.

Mr Holloway—Correct.

CHAIR—You have confirmed this with the—

Mr Holloway—That is on our interpretation of the provisions in the bill that relate to unsolicited selling. I have had some experience in this field for a number of years, so I am confident in my own assessment of it, but at the end of the day it is going to be a court which will definitively say whether my interpretation is right or wrong. Therein lies, I suspect, a large measure of the criticism that we have about the provisions: they are highly prescriptive. It takes us back to the 'command and control' mentality of the sixties and seventies. It runs contrary to the general theme within the trade practices legislation and what has been replicated in the Australian Consumer Law in terms of a generic approach, which I would have thought would have been, within the bureaucracies around the states these days, a welcome compliance tool, going into a very highly prescriptive regime which is so uncertain that it will defy any business development.

CHAIR—That was my next question. That sort of transaction is not caught under existing state laws, you say?

Mr Holloway—It is. Each of the states and territories currently regulates what they term 'door-to-door selling'. They have different definitions of that term, but essentially they do regulate it. Please do not misunderstand us. We are saying there is a need to regulate door-to-door selling; there is no question about that. It is a question of the quality of the regulation and the targeting of the regulation to make sure you are not covering what is essentially store selling outside a store. That is what we are saying. But each of the states and territories currently has its own measure of regulation. They are disparate. There are elements of inconsistency in their application, and for a nationally operating organisation it is manna from heaven to think that we have uniform regulation of our industry across Australia. The point is that it has to be the right regulation, and frankly it is not there at the moment.

I personally think that when you are looking within the context of direct selling, where these ISPs can range from someone who is earning $200 or $300 a month to supplement a family budget to someone who is earning six-figure sums, the choice is theirs. It is like any small microbusiness setting. I question what the level of compliance is at that level. Look at some of these laws at the state level. They have now been in place for the best part of 10 years, and still we hear that the problem exists. So how efficient have these laws been in addressing what has been a problem for some time? I personally—and this is certainly the view of my organisation—do not think that the answer lies in a highly prescriptive regulatory response to what we accept is a known problem in some areas.

CHAIR—I must say that we have, as you say, been trying to get on top of quite a large bill. Certainly our discussions up to date have talked about unsolicited calls—more in the case of cold-calling—and this is certainly a question that we will ask Treasury later on—whether that type of arrangement is covered as an unsolicited call.

Mr Holloway—I will just make one point, if I may. A lot of the regulation impact statement centres on the three determinants, if you like, of the need for this regulation. One is the information asymmetry issue, which we accept. The other gets down to the unfair conduct and the unfair practices and, basically, the potential for

that occurring within a home or a workplace and the impact of it—in other words, what could be a big-ticket purchase of something you just do not need.

We accept all that, but that is not the norm of direct selling. It has just moved on from there. The last 10 years have changed this industry dramatically. The problem is that the regulators are regulating this industry as if it was 10 years ago. Therein really lies the problem for us. Our view is that no amount of surgery on this bill between now and whenever it finds its way back into a place and then back, I suspect, before you good people is going to fix this. We would love to see the Australian Consumer Law in place from the beginning of next year. We do not have a problem with it subject to clarification of an element of pyramid selling and this being resolved. But frankly we just do not think that any amount of surgery to these provisions is going to overcome within the timeframe we have got the problem we have got and I suspect a number of other industries will be telling you they have got as well. Our recommendation is that this be excised from the bill so that the rest can go through, achieve the timeframe so that the Ministerial Council of Consumer Affairs can have a closer look at this within a more contemporaneous context.

CHAIR—There is one area that I might diverge from your view on, and I think that is probably best illustrated by your case study 1 where you have a person approaching a friend of a friend at a football game. I think this really does illustrate some of the problems in your model. People can often feel under some obligation when a friend invites them or a friend of a friend and they can feel quite pressured into agreeing to something that they do not really think through, particularly if it is at a football game or a party for some social gathering where they do not think through, and it seems to me that in those kinds of cases people do need some opportunity to have a breathing space and to reconsider without too much embarrassment on their own behalf. It seems to me that the kind of models you are talking about might in some ways produce more psychological pressure on a person to do something they really do not want to do.

Mr Holloway—I agree totally with you. I accept that. Frankly, within the context of our code now that protection exists. We have a 10-day cooling-off period under our own code of practice. We have members who offer money back guarantees, they are so confident in the quality of their products. We are not talking about in the context of our membership products of several thousand dollars or whatever the large ticket items are with cold canvassing. We are talking about the source of products you can literally buy from a high street store—

CHAIR—If I can interrupt, I do understand that if you are at a party and you buy cosmetics or some Tupperware, fine, even if you feel a little pressured it is not generally going to cost you a whole lot of money. But your case study 1 applies to the case where someone is being asked to be a seller. Quite commonly in these schemes, I understand, you buy the products you are going to start to tell upfront and then you make a commitment to do a certain amount of selling. It might well be, even though we are only talking about $200, $300 or $400 worth of goods, that that is still in many families a commitment that puts strain on the family budget, especially if they did not then on-sell them.

Mr Holloway—I totally agree with you. The reality is that with respect to our members if someone chose within the 10-day cooling-off period to return those products there is not a problem. They have got their 10-day cooling-off period. What we are complaining about here is the prescriptive approach that has been taken in this law, which is really taking that general concession into a whole new level which does not fit our business models. More particularly the showstopper, if I could term it as such, for us is the prohibition on supply and payment within that cooling-off period. One of our members, for example, in the cosmetics field is competing very actively with retail. They have managed now to get their logistics to the point where they can fill an order the same day. So someone makes an order one day and the cosmetics are supplied that day. Under this legislation they will be precluded from matching the competitive demands of retail by not being able to supply their product for at least 14 days and potentially 17 days, and however these three-months and six-month periods work their way into play it could even be six months. It is just competitive nonsense, in our view.

CHAIR—I acknowledge that that may be a problem if the contact is regarded as unsolicited, and I think that is what we have to—

Mr Holloway—That is a very good point you raise there too, because the way this legislation has been drafted it gives no recognition to established relationships. You could literally have a relationship with a company for two years and if technically the approach is made in an unsolicited way it brings that relationship into the regulation of this.

CHAIR—Yes. Indeed, that was raised by other submitters, and again we will explore that with Treasury.

Senator BUSHBY—You mentioned in your opening statement that there had been a dearth of consultation on the impacts of this. You said you had a 10-day opportunity last year. What was put before you to look at at that point?

Mr Holloway—Yes. I have not got the precise dates in front of me. I noticed that in the submission that was made to your committee by the Consumer Action Law Centre from Victoria they made the same point. There was a draft regulation impact statement released last November. It contained, in the context of unsolicited selling, just an outline of the existing state and territory regulation. I think from memory that the document was over 100 pages. There was, from memory, about a 10-day turnaround time, or it might have been 11 or 12 days; it was in that vicinity. We made a very general response to it, which is included as appendix D in our submission. We are told that within five days of the closing date the regulation impact statement had been signed off by the Ministerial Council on Consumer Affairs. By any stretch of the imagination, that could not be construed as any consultation. More to the point, there was no consultation and no assessment from an RIS perspective of what is in this bill; it was simply a—

Senator BUSHBY—That is why I was asking you what was before you at that point. I was interested in knowing whether you had any understanding in any depth of what actually arrived in the bill.

Mr Holloway—No. The first we saw of this bill was when it was tabled in the House of Representatives.

Senator BUSHBY—That was my next question. So the first time you saw it what was actually in here was in the House of Representatives. It was too late to consult before it was passed through there.

Mr Holloway—It is still before the House; it was referred to this inquiry the following day, 18 March.

Senator BUSHBY—Yes. I think they have had the second reading speech by the minister.

Mr Holloway—Correct.

Senator BUSHBY—But it was too late to consult before it was put through there or put before the House. You have the opportunity of this inquiry—

Mr Holloway—Yes.

Senator BUSHBY—and also, I guess, direct lobbying of relevant decision makers. But that is the extent of the consultation, and the first you knew of the actual implementation of the unsolicited selling provisions was when you saw that bill.

Mr Holloway—That is correct.

Senator BUSHBY—And the first you knew of how it was actually going to impact on your industry and how they had interpreted the intention to legislate to address this issue and its potential impact on your industry was when it was tabled.

Mr Holloway—In fairness, the draft regulation impact statement set out a whole series of proposals, but they were very generically based; they did not actually give us the legislation.

Senator BUSHBY—Presumably you made some representations in response to those proposals where they seemed as if they were inconsistent with your selling practices or your business.

Mr Holloway—Given the time frame—literally just over a week to make a response to the whole of the RIS, not just the part relating to unsolicited selling—we made the generic response that we have included as appendix D to our submission. It advocated a principles-based approach to this issue, but obviously that has not been accepted.

Senator BUSHBY—You also mentioned that there is one element of pyramid selling that you are unsure about.

Mr Holloway—Yes. In 1999, as I understand it, the ministerial council resolved to introduce new pyramid selling provisions in all state, territory and federal law. My understanding is that it was adopted in the Trade Practices Act and in New South Wales and the ACT but nowhere else. So this is a renewed attempt, as I understand it, to get harmony in the regulation of pyramid selling provisions. There has been quite a body of judicial analysis of those Trade Practices Act provisions in the intervening period, particularly in the ACN case. We were assured in the explanatory memorandum that the redrafting of the provisions in the new bill was literally clarification of existing provisions, but there is a substantive change, and that is to the extent that the discretion that is vested in the Federal Court to take a certain matter into account is now mandatory. Personally I do not see a huge issue in that, but I am curious as to why a discretionary power of the Federal Court is now a mandatory requirement and no explanation of it has been given in the explanatory memorandum.

Senator BUSHBY—Okay. The other issue of interest you raised is the cooling-off period and the ability to supply during that period. You are not the only witness to have raised that issue. In fact, there were some extreme circumstances that were highlighted. For example, depending on how you read the bill, it appears that if you have a contract which is for a fixed term and you are rung unsolicited by your current provider to ask whether you want to continue and sign up to keep it ongoing and it is very close to the end of that term then you may actually face a period where they have to stop supplying an existing, continuing service for 10 days. So there certainly are some issues that have been raised around the supply within that period. One of the other suggestions was that consumers could have the option to sign something saying, 'We waive that right and choose to receive supply, knowing full well that we still have the right to cancel the contract within 10 days.'

Mr Holloway—From our own perspective, we would not advocate the waiver. We are confident about our products, we are confident about our service and, frankly, our industry and our members particularly have had cooling off periods in place for a long time now, certainly in many respects more than what you get at the state level. Frankly, we have lived with it quite easily and we are prepared to live with it. What we cannot live with is the prohibition on supply and the prohibition on payment within those—

Senator BUSHBY—If the prohibition on supply remained but the consumer could choose to waive that and actually take supply, would that go some way to solving your issues?

Mr Holloway—No doubt it would. I suspect it would simply be built into a business model; it would become axiomatic in terms of their process. I just wonder where it would lie in terms of the application of the law to some of the real problem areas.

Senator BUSHBY—Thank you.

Senator CAMERON—I would like to get a bit more of an idea of the nature of your industry. How much is your industry worth to the economy?

Mr Holloway—The first thing I should say is that we do not represent the whole industry. We would like to think that we have the good players in the industry, and we are very selective about who we admit to membership. What percentage of the industry we represent we simply do not know. Sixty per cent of our members now comprise companies with a turnover of less than $5 million a year. These are companies that are trying to get products to market, that cannot go through the usual retail channels and that use direct selling because of the obvious marketing savings and because of the logistics and infrastructure of being in retail. We do not know precisely how many there are out there. Within the players of our size, we represent around about 60 to 70 per cent of the market. We think we have about 80 or 90 per cent of the turnover. The number that is quoted in our submission is $1.2 billion in annual retail sales. We are currently finalising research with Monash University to get a better number. The tentative finding is $1.6 billion. Direct selling is a countercyclical industry. Some describe it as being recession proof or recession resistant, so what we have experienced in the last two years may explain why that number has jumped a bit. We still have more work to do, but the preliminary number is $1.6 billion.

Mr Greig—And approximately 500,000 contracted distributors nationally.

Senator CAMERON—Are the 500,000 contracted distributors the ISPs, the independent salespeople.

Mr Greig—Correct.

Mr Holloway—Again, it is very hard to get a handle on what that precise number is because a lot of people join the industry between September and December to earn money going into Christmas and will only be selling for three months of the year.

Senator CAMERON—You say some of these independent salespeople would make $100,000.

Mr Holloway—Very few make $100,000.

Senator CAMERON—But you did say that some could earn $100,000.

Mr Holloway—Yes. The Monash study, and again these are preliminary figures, suggests that 10 per cent earn $50,000 or more a year and, also as quoted in the paper, about 70 per cent earn less than $10,000 a year.

Senator CAMERON—It would cost some of them some money, wouldn't it? Some people would sign up as an ISP and end up losing money.

Mr Holloway—I do not know about losing money. A lot of people sign up as an ISP simply to buy products at wholesale prices.

Senator CAMERON—I have known of young people being encouraged to buy quite expensive cosmetic boxes to sell products. These young people go to their parents and put pressure on their parents to give them the money to do this, and it all falls in a heap. I have seen that a couple of times.

Mr Holloway—I cannot say that would not happen, but in our code, again, there is a compulsory inventory buyback requirement on our members.

Senator CAMERON—Is this a recent thing?

Mr Holloway—No, that has been there for years. It is part of a worldwide requirement.

Senator CAMERON—You said that you have constantly changing business models and that is a reason for us not to legislate.

Mr Holloway—No, I did not say that. I said it is a reason to get the right level of regulation.

Senator CAMERON—So, in your view, the government is entitled to legislate; your business models need to fit within the laws of the land. Surely that is the position.

Mr Holloway—Correct, but our submission is that the laws of the land need to recognise legitimate business activity.

Senator CAMERON—How many complaints have been received by authorities against your members?

Mr Holloway—You can never get those numbers out of the authorities. We have asked for them from time to time. My view is that there is virtually none. We have our own code administration system within the DSAA. You could count on us getting less than one handful of complaints a year that relate to these sorts of things. We get complaints from some consumers about environmental concerns in terms of the practice of leaving catalogues at doors and so forth, and they are dealt with. But, in terms of the high-pressure selling tactics, the information asymmetry issues and the unfair conduct issues, you can count them on less than a hand each year. Our members are in a relationship management business. They value their relationships. If a customer is unhappy with a product, they simply take it back. That is the nature of it. The point I have been trying to make a number of times here is that, and I know it probably sounds a little glib, we are store selling without the store. The difference is that the stores do not have the same regulation that we are now facing.

Senator CAMERON—So you are saying there is a lack of balance in the laws at this stage. If this was a small, niche industry and there were specific business models that were unique, then you may have an argument. But this is a $1.6 billion industry. Lots of people are buying the products. Those consumers need protection, don't they?

Mr Holloway—We say that they have protection now. We are saying that what we have within our code is ensuring the right level of consumer protection, and that is borne out by the continued patronage of our members by these consumers and by the lack of complaints to us and, we are almost certain, to regulatory authorities. Within the regulation impact statement, there was quite a bit of emphasis placed on the level of complaints to the fair-trading organisations, particularly in Victoria and New South Wales. But there is no analysis of those complaints. We do not know what products they relate to. We do not know whether the complaints were justified; they are just statements of complaints being made. There is content in there which relates to the level of inquiries about door-to-door selling, whatever that means. But, again, there is no analysis of what the nature of the inquiries is. It is just something that is thrown out there and, of course, when it is thrown out there it sticks on us, even though we are not part of that scene.

Senator CAMERON—You have your own ombudsman, have you?

Mr Holloway—We have a code administrator, yes, a retired magistrate of New South Wales

Senator CAMERON—What training do your independent salespeople get about that?

Mr Holloway—Again, there is another issue here, which Tony briefly alluded to—that is, the lifeblood of this industry is the independence of these salespeople. Our companies cannot tell them what to do, when to do it or how to do it. It is literally an independent-contracting relationship. It is not employment. We could not possibly supervise the activity of these people.

Senator CAMERON—That is not the question that I am asking.

Mr Holloway—My point is that this legislation, by imposing a vicarious liability on our members, is making our members control the activities of these people.

Senator CAMERON—Maybe they should. Let me go back to my question.

Mr Holloway—Yes, I am coming to that. Our members engage in an enormous amount of training about the rights of consumers. In other words, the distributors, the ISPs, owe the right to consumers, and our members literally prepare the documentation for them to use in their transactions and educate them in the way that documentation should be used.

Senator CAMERON—In terms of your ombudsman—what was the name?

Mr Holloway—Code administrator.

Senator CAMERON—What do your ISPs tell potential customers about the code administrator?

Mr Holloway—Our documentation has the cooling-off period disclosure right on the front page of the order form. It makes reference to our website. The companies, within their own training programs, educate their distributors about the code, the code administrator and how the whole complaints management system is handled by the DSA. I personally attend as many member events as I can, and part of my presentation to distributors at those events is our code administration.

Senator CAMERON—But you could have an independent salesperson who does not receive any training about the code administrator and the operation of the code administrator—is that correct?

Mr Holloway—That is possible, yes.

Senator CAMERON—So how can you then argue that the code administrator is a legitimate and effective means of dealing with complaints if people do not even know about it?

Mr Holloway—The very point you make: the code administrator is there to deal with the complaints that are received.

Senator CAMERON—But if your independent salespersons do not even know about the code administrator for the industry, how can the consumer know about it?

Mr Holloway—Because the documentation the consumer gets discloses it.

Senator CAMERON—Where?

Mr Holloway—On the front page of the documentation.

Senator CAMERON—Could you provide a copy of that?

Mr Holloway—Sure. It varies between companies, obviously, but there is a generic—

Senator CAMERON—Can you give us a number of samples of how that works?

Mr Holloway—Yes.

CHAIR—As there are no further questions, thank you to Mr Greig and Mr Holloway for coming in this morning.

Mr Holloway—Thank you, Senator.

Proceedings suspended from 9.48 am to 10.04 am

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

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

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

SPIER, Mr Hank, Consultant, Motor Trades Association of Australia

CHAIR—Welcome. Thank you for coming in this morning. Mr Delaney, do you have an opening statement you would like to make?

Mr Delaney—I have a brief one. Thank you for another invitation to appear before you. The Motor Trades Association of Australia welcomes the opportunity to assist the Senate Economics Legislation Committee in its inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010. MTAA has a long history of representing Australian retail motor traders' interests in a broad range of policy areas and matters of Trade Practices Act reform and has always been at or near the forefront of these endeavours. In principle MTAA supports and encourages Trade Practices Act reform, and the association has indicated in the past to this committee its in-principle support for the introduction of the national consumer law. While the association thus supports in principle the guiding principles and overarching policy intent of the suite of consumer and product safety law amendments outlined in this No. 2 bill, it nevertheless remains concerned about aspects of the bill, its operation and the potential clients burden that may befall retail motor traders as a result of that operation.

MTAA believes that businesses that act as consumers need to be afforded the same protections in the law as private consumers when they are acquiring or purchasing goods and services, and this is particularly so for the over 100,000 small businesses we represent. It is some disappointment to the association then, that the proposed changes as outlined in the bill seem to significantly weaken the position of small businesses as consumers by removing existing protections against faulty equipment those businesses may inadvertently have purchased. The association fails to see any compelling reason why the small businesses it represents ought to be faced with the prospect of enjoying a lower standard of product protection than other members of the community and society. A purchase made in good faith with the anticipation of specific performance from a product or service ought to be universally available. MTAA believes that the issue of small-business rights under the warranty provisions needs to be revisited by the government with a view to restoring the arrangements currently set out in the Trade Practices Act, where they have been for the best part of 30 years.

MTAA is also most concerned about the operation of the proposed section 131 of the bill. As far as the association is able to ascertain—and we have not found any party to contradict—section 131 as it is currently drafted would capture the entire retail motor trade sector and place it under reporting obligations when it or they became aware that a product in which they deal is associated with a death or serious injury. The association understands the government has a certain responsibility and role to play in protecting citizens from unforeseen hazards to health and wellbeing arising from the innocent, appropriate use of a product. The association would agree that mechanisms need to be in place whereby goods identified as dangerous need to be recalled, removed from sale or prohibited from sale. The association would contend, however, that in the automotive sphere those mechanisms already exist and function adequately. The association, therefore, sees no palpable benefit that can be derived from the imposition of the sphere of section 131 of the bill and its attendant sections upon our sector of the economy.

MTAA believes that this issue of mandatory reporting by suppliers of goods associated with serious injury or death needs to be reconsidered. There needs to be some causal link between the serious injury or death and a manufacturing fault. The bill as currently drafted in that respect is far too widely drafted and imposes an unreasonable burden on retailers. MTAA is also disappointed with the level of consultation undertaken by the government in relation to these changes. The government appears to have adopted the report of the Commonwealth Consumer Affairs Advisory Council without any discussion with business of the impact of the views contained in that council's report. I thank you.

CHAIR—Thank you. First of all there is the question of warranties and guarantees and small business not being able to access the consumer protections. Do you have much understanding of how much this affects small business? How do they utilise their consumer rights? Would they normally go through the consumer tribunals or would they pursue claims through small business claims or other avenues available to business?

Mr Delaney—From my experience, they generally, if not invariably, simply deal with their warranty rights like any other consumers. They take the specific warranty on the product. They take the implicit statutory

rights regarding warranties under the Trade Practices Act. If beyond that there were need of other jurisdiction, yes, they certainly use the tribunals where they exist.

CHAIR—Given that small businesses will not be protected under the consumer remedies if this bill passes, what would they now do? What would be the difference?

Mr Spier—Are you talking on the basis of the bill being law?

CHAIR—Yes.

Mr Spier—Someone who supplies a small business can offer them a warranty on a voluntary basis. At the moment, if it is under $40,000 or goods of a kind that are normally bought for private or domestic consumption, there is a statutory warranty which cannot be excluded. Say you are a small shop and you are having a fit-out done at the moment. If it is under $40,000, you are protected by the implied warranties. They cannot be excluded. Post the bill, if it is under $40,000, the supplier to the small business can do two things: offer a warranty totally voluntarily or exclude the warranty. They do not even need to formally take the warranty out, because there is no implied warranty, whereas at the moment there is. That will come with computer equipment that is normally used for business purposes and with all kinds of other business purchases which are for normal business use. If it is a fridge—a fridge is a consumer product, so before and after the bill there would be the same warranty. It is those goods and services that a small business buys that are business products. Consumers do not buy them.

I will give you an example that is in one of the submissions. It takes it a bit further than just a business impact. If I go to a hire company and get an industrial sander, it is under $40,000. At the moment, there is an implied warranty. After the bill, even though it is a consumer who is leasing that sander, they lose the protection. If that sander blows up in my face, I have little recall because it is an industrial product.

CHAIR—I understand the problem. I am trying to ascertain the scope of it. I think most small businesses, if they were to buy a computer, fridge or whatever, would inquire about warranties. It is a fairly standard practice. If they had any kind of fit-out, they would inquire about the quality of the workmanship and the guarantee. It would be pretty much standard practice. In the instance of the sander, if it did blow up I think you would have some action against the supplier through small claims or whatever.

Mr Spier—Not necessarily once this bill becomes law.

CHAIR—So you are saying that once this bill becomes law anyone can sell a defective product to a small business person and there is no recourse.

Mr Spier—Unless you get into things like tort law—say, negligence. This is about contract law. The Trade Practices Act has since 1974 implied non-excludable conditions in contracts. Post this bill there can still be voluntary warranties. A supplier can of course offer a warranty, and that is probably good commercial sense. But what they will be able to do is limit that warranty. They can say, 'If something goes wrong, we'll give you $50 compensation.' If that went to a small claims court, assuming there were jurisdiction, it might be $1,000. They can limit their warranty.

CHAIR—Yes, that is true, and then whether or not you accept that is a business decision.

Mr Spier—Of course. There would be a natural inclination—and I am not saying that businesses would actually collude—for businesses in the same industry to offer the same warranty to business customers. I will give you an example; it happened to me. I was building a house and bought a fancy front door. It went wrong and I went to the supplier, who said, 'Okay, I will fix it,' and they offered something which was not a full compensation. When I asked why not, they said, 'We all do that. All the people in this industry who supply doors have an understanding that they will only offer X compensation.' I think that will be a natural tendency. Someone may break ranks and say, 'Look, if something goes wrong we will just replace it,' but they may not.

At the moment, there are conditions for suppliers to small businesses—and to big businesses, if it is under $40,000—to lead them to think that they have a liability. Once this bill becomes law, lawyers will tell them that they do not have a liability anymore and they will be advised to think about what they want to offer in a commercial sense. They will be told that they may offer nothing or they may offer a bit, or they may be very generous—

Mr Delaney—Or it may be entirely conditional.

Mr Spier—Yes.

CHAIR—What about the mandatory reporting? Have you had contact with the department at all about where the reporting requirements lie?

Ms Scanlan—We have had a couple of discussions with Treasury officials about that provision and the impact of it, yes.

CHAIR—Do they concur with you that the reporting requirements are all along the line and—

Mr Duckworth—I am not sure I understand what you mean, Senator.

CHAIR—You were saying that the problem is the broad definition of:

… 'supplier' and the widely drafted phrase 'associated with the death or serious inquiry or illness of any person' casts a very broad net in terms of reporting compliance and indeed a very wide net in terms of what is required to be reported. This is particularly so for motor vehicles, where the cause of serious injury or death is most often not related to a manufacturing defect in the vehicle.

Have you had discussions with the department about that problem?

Mr Duckworth—Yes, I have had discussions with officers of the department and I have expressed my concerns with them. They have done the right thing and basically said that there is a Senate inquiry coming and that that would be the forum to raise those concerns further.

Mr Delaney—But, with respect, Madam Chair, we have not been contradicted. If we are drawing too long a bow, do tell us and give us an assurance that, as it literally appears to be at the moment, it is not intended to be and will not be.

CHAIR—Thank you. We will raise those issues with Treasury when we get to them.

Senator EGGLESTON—You refer to section 131, the mandatory reporting of goods associated with serious injury or death, and you seem to feel that that is too broad in its impact on your industry—is that not the case?

Mr Delaney—Yes, indeed.

Senator EGGLESTON—I suppose the focus of that is really something like the recent Toyota episodes where there have been problems with their cruise controls and carpets locking in on the accelerator and, I think, causing nearly 100 deaths in the United States. Would you like to see an amendment in some way limiting your reporting requirement to a fault in the vehicle? You give an example where somebody kills a pedestrian, which obviously is a road accident not related to a fault in a vehicle—

Mr Delaney—I would accept the distinction. I would say our circumstances are somewhat different from those of the US jurisdiction in that we have had for a long time a very comprehensive, effective and speedy alert system for faults or failures in motor vehicles in Australia. It is run by the departments of transport, with the full cooperation of every supplier of motor vehicles into the market and all retailers of motor vehicles. At the core or base of our system is mandatory recall done upon the slightest evidencing of a failure of some sort in the market. Interestingly, the shortcoming that is reported in the Toyotas in the US has not, to our knowledge, been reported here in a similar fashion.

The second element that is somewhat different is that the US would seem to rely upon tort law a lot more than we would. We have extensive product liability laws in place, within the TPA and otherwise, and I would propose to you that they are really very effective in demonstrating to all purveyors of goods, whether wholesalers or retailers, just what the liabilities are at law and what the penalties are for not complying with the moral and statutory obligation to deal with shortcomings in our goods.

So we just do not see that, for us, this dimension—if it applies as we believe it does—adds anything much in the way of supplementarity or efficaciousness. I have to say to you that the system now is near enough for owners of vehicles who are affected in some way to be unavoidable, in that the dealer requires you to bring it back and if you fail to bring it back we have to report the fact of that. The vehicle I drive at the moment has at least three very bright stickers that cannot be removed saying for recalls that it has been in three times and been rectified in respect of whatever the notifications were.

The other thing that happens is that just about every publication of any strength of character in Australia carries notices of recalls that are in a standard format in a very large area of advertising and done in plain English to a formula that applies whatever the goods are. We think we can understand what 131 is getting at in the broad, across the society, because we have all seen a pram that was defective and a child could be injured for a reason that had never been anticipated or addressed otherwise. With our goods, however, I think it is really quite different, for the reasons I have addressed.

Senator EGGLESTON—You are an example of an industry which has been caught by this provision when there is already an adequate reporting system. Would it be a fair comment that this provision is probably too broad in general terms? There must be lots of other industries which might be caught up. Do you think this should be refined down in some way? If every industry in this country started reporting deaths associated with defects of some sort or by a simple occurrence which might not be related to a defect, somewhere there are going to be a lot of bureaucrats typing a lot of incidents into computers which are not going to really help in correcting defects in goods provided to consumers and there is going to be a lot of irrelevant information there. So should this in some way be refined?

Mr Delaney—Can I answer in the broad and then, briefly, specifically. We are great supporters of the uniform national consumer law—absolutely. We think it is one of those things that makes you wonder why it has taken a hundred years of federation to get to the point of something as sensible and good as that. So we have applauded it in all other respects. I cannot say personally, though, that I am aware of all of the reasoning in the Consumer Affairs Advisory Council's report as to why it is there, so I do not know what, of all the circumstances sought to be comprehended and addressed by this, that committee had in mind. So I have to leave myself out of that a bit. But what I can say is that I would be unsurprised if there are industries other than ours that get caught up in a way that we fear we are here. I am not sure if I can help much beyond that, but it would be good to know from the evidence of Treasury and other officers what their reasoning is and what the answer to that question is.

Senator EGGLESTON—We will ask Treasury that, but I take your point that there must be lots of other industries where there are other mechanisms in place for reporting faults causing death or injury. This seems to be an area which perhaps needs to be addressed by way of amendment or by way of redrafting before the bill actually ends up in the parliament.

Senator BUSHBY—Thank you for coming along to assist us today. On the reporting requirements, your reading of that means that, if an accident occurs which causes death or serious injury associated with a motor vehicle, then everybody who has been associated with the supply chain, presumably, if they are aware of that accident, has to advise the relevant minister. That could include the person who put the tyres on, the seller or, if it is a hire car, the hire car company—anybody who is associated with the supply of that motor vehicle or any component of it.

Mr Delaney—We do take it to mean that. May I just add that we are a party to a thing called the Committee Advising on—vehicle—Recall and Safety, or CARS. That is a national committee convened by the transport departments. Its membership is made up of consumer affairs authorities, motor vehicle authorities, safety authorities, workplace safety persons, emergency authorities and just about everybody else who would be what the Americans call an 'attender' to an event. I think it meets quarterly or maybe even monthly and the reporting that comes in is voluminous in respect of absolutely everything about the ownership and operation of motor vehicles that cause morbidity or mortality. It is very hard to see, with that further counterpart entity CARS, how events in relation to motor vehicles that cause injury or death can get through the net without being caught extremely quickly.

Senator BUSHBY—So that is fairly closely examined. If there is a death, there is usually a coroner's inquiry.

Mr Delaney—It is indeed.

Ms Scanlan—And it is reported to the police.

Mr Delaney—It is reported to the police and to other emergency authorities. It is also not a matter of waiting until there is a death or serious morbidity; it is actually event and experience based. If the event or experience in relation to the motor vehicle comes to notice, it is that that goes straight through if it has got any—

Senator BUSHBY—Given how you view the obligations that this would create for members of your organisation, the question is whether you think that the intention of the drafters of the legislation was to require you and your members to undertake such onerous reporting requirements—in which case it is a matter for policy and it is something we can address—or whether it was an unintended consequence to require your members to go to that extreme.

Mr Delaney—I can only hope it was unintended, because I cannot see, in policy terms, that there is any sense to it at all.

Senator BUSHBY—You also mentioned the lack of consultation. For the record, consultation did occur. When did you first find out about these reporting requirements and the extent to which they would place obligations upon your members?

Ms Scanlan—There was a draft RIS late last year which put that proposition in general terms, but I do not think it gave specific drafting of the clause.

Senator BUSHBY—Did those general terms raise your concerns at the time that you might well need to—

Ms Scanlan—We responded to the RIS saying that we felt that something which required the reporting of every accident with which one of our members had been associated was perhaps casting the net somewhat too wide and that—

Senator BUSHBY—And you put a submission in pointing that out?

Ms Scanlan—We did.

Senator BUSHBY—So the officials putting this together were aware of the concern from that point in time.

Ms Scanlan—That is right, but that draft RIS was the first occasion that we understood that there was that change proposed.

Senator BUSHBY—That RIS was released late last year, wasn't it?

Ms Scanlan—Yes.

Senator BUSHBY—If you made representations pointing out those issues to the drafters of the bill prior to the bill being released, then the consequence cannot be unintended. They must have been aware of it.

Mr Delaney—I was a bureaucrat for a long time, and it could still be unintended!

Senator BUSHBY—In any case, it raises the question of whether it is unintended, because the potential consequence has been raised. We will ask Treasury later on today. They may have a different interpretation of the obligations and they may have an explanation of why it will not apply in the way that you think it will. You put your concerns to them, but they do not appear to have been taken up and built into the legislation, whether for deliberate reasons or otherwise. The legislation has come out and you believe that obligation would still exist if this legislation were passed.

The other aspect you were talking about was the fact that it does not apply to small business and that, if it is passed as it currently stands, it has the potential to weaken the position of small businesses that engage in consumer activities. A number of submitters have raised the issue of the definition of 'consumer' and removing the $40,000 limit and replacing the financial test with a use test. Can you go into that a little bit further? I know we discussed it to some extent, but basically your position is that currently a lot of small businesses involved in your industry buy consumer goods and have protection now because of the $40,000 limit but that, under the bill, the protection will cease to exist should they continue to buy the same goods for the purposes of the business.

Mr Spier—The current definition of 'consumer', which is what this is about, was put into the Trade Practices Act in 1977. It was seen as a fairly dramatic thing because it brought small business purchasers into the definition of consumer. The limit at that time was $15,000. Over the years that was changed, and of course now it is $40,000. It applies to all purchases under $40,000 not of consumer goods but of any goods. The business can be big or small: it could be BHP buying something for under $40,000. All suppliers should know that they have an obligation if the goods are under $40,000. There are some exceptions if the goods are for resale or to be used up, but let us not get into that kind of detail. So there is an obligation at the moment, a statutory warranty which cannot be excluded or modified. The '77 change was seen as a very big change, and it was. To partly answer one of the things that were raised by Senator Hurley, the supplier knows they have an obligation to any business for virtually any purchase under $40,000. It is that which is being taken away, and that is a pretty big change.

Senator BUSHBY—So in the introduction of the Australian consumer law some consumer rights that currently exist will be extinguished, effectively.

Mr Spier—Maybe we should call them purchaser rights.

Senator BUSHBY—To the extent that these purchasers are buying consumer goods as currently defined, those rights will be extinguished and they will have to seek redress elsewhere if they have problems with goods under $40,000.

Mr Spier—Redress will not be easy. As I say, the supplier may be able to offer something on a voluntary basis; most hopefully will. There is product liability law, as Mr Delaney mentioned, but that is only for when there is a serious injury.

Senator BUSHBY—Presumably a supplier could contract out of any liability as well, because it will not apply to the same extent.

Mr Spier—To go back to a shop fit-out, if it falls down a week after it is finished, there will be no statutory warranty unless the fit-out supplier is prepared to offer something.

Senator BUSHBY—So your solution to this is to retain the status quo in terms of the definition of 'consumer', to keep a financial limit rather than define it by what the goods are intended to be used for.

Mr Delaney—It has worked pretty well for 35 years, so we would prefer the status quo, unless there are better policy instruments. To give more point to our concern, at the moment the burden of this part of consumer protection rests with the supplier of the goods—that is, they have to show why they are not liable in the ways we are talking about. The bill reverses that and makes the acquirer have to prove to the supplier that there is something that is covered by a warranty and not excluded by contractual exclusion and so on. But it also takes away the opportunity under the TPA to go to the ACCC and say, 'This is what happened.' You then have to look for another tribunal, occasion or place where you can pursue your claim, as against what used to be your right. We think that is a pretty substantial change.

Senator BUSHBY—There are a lot of substantial changes in this bill. That is certainly one which goes against the overall intention, which is to improve consumers' access to their rights. Finally, and you might have mentioned this previously, I want to go to standard form contracts and unfair contracts. You are of the view the provisions there should also apply to small businesses?

Mr Spier—The MTAA is on the record as having said yes, most definitely.

Senator BUSHBY—Thank you.

Senator CAMERON—Mr Delaney, you indicated that things have worked well for the past 35 years. I suppose Toyota said the same thing in the US.

Mr Delaney—I do not know that the US jurisdiction has quite the features that I have described ours as having. Indeed, the National Highway Traffic Safety Administration is prosecuting Toyota and others apparently for failure to meet obligations that are in the US arrangements. I do not know the circumstances of why they might have been evaded. While it is the same brand name and the same owner, I do not believe any behaviour of that sort has gotten past our system in all my time, and I have been with MTAA for 22 years.

Senator CAMERON—Toyota would have said in America that they are one of the safest car companies in the world, wouldn't they?

Mr Delaney—I am not wanting to defend Toyota in any way. I am simply saying that I do not know if it is the intention of the drafters to do what has been produced.

Senator CAMERON—The MTAA come here and give examples about grinders; I would rather be talking with you about cars, consumer safety in cars and consumer rights in cars.

Mr Spier—I do not think anyone is saying that there should not be a reporting system when it comes to faults in cars. It is really about whether the net as to who should report should be as wide as it seems to be. No-one is saying it should not be there; it should be.

Senator CAMERON—The National Highway Traffic Safety Administration had 124 reports about jammed accelerators in Toyotas. There were four crashes and, I think, one death in relation to that. I notice that we had reports in the media here about jammed accelerators. One was I think on the freeway up to Newcastle. A lot of this stuff ends up saying that the driver may have been at fault. This is an issue. It is not simple in terms of saying that these reports should not been made. The figures you have given in your submission say that about 26,500 reports would need to be made—that is, 26,500 accidents across the country. If 26,500 reports had to be made, is that too onerous a task for the industry if it saves a life?

Mr Delaney—If you do not mind, I will just find that reference.

Senator CAMERON—I can tell you that you said that there are 1,509 deaths and 25,000 serious injuries per year from car accidents.

Mr Delaney—Yes, we do provide that. We do not diminish the seriousness of that at all; we are simply saying that, if we are right in our contention, there is going to be an awful lot of work involved on the part of the report to the minister. I suppose what I am saying, with respect, Senator, is—

Senator CAMERON—Just on that point: so if the minister has a lot of work to do, the department has a lot of work to do and the authorities have a lot of work to do and it saves one life—if kids can come home from school one day and their father or mother are still alive, as distinct from being dead because of lack of reporting—isn't it worth the effort?

Mr Delaney—If that were the case, I would have to agree with you, but I took myself to be proposing that there is already a reporting regime that attends to all of this in the Australian jurisdiction at every level—the committee on recalls and safety. If there comes to be a potent shortcoming or event or causality in relation to motor vehicles, I propose that it comes to notice already through the departments of transport, through the national committee on recalls and safety that I have just described. I wonder whether, in relation to this section and the extent of deaths and injuries that we report here, whether it is recognised and realised that they are comprehended by a system in our road transport safety regime that is already in place.

Senator CAMERON—So you are basically saying that, if Toyota had the problem here and had covered the problem up, we would have found out about it different from the US?

Mr Delaney—No, I am not saying that a cover-up would be corrected by our present arrangements.

Senator CAMERON—But there was a cover-up, wasn't there, in terms of this problem that was putting consumers' lives in danger?

Mr Delaney—I have not researched the American experience all that closely so—

Senator CAMERON—Really? Truly?

Mr Delaney—I have followed it very closely, so much so that I can say that Toyota denies that there was a cover-up, but I have not researched it sufficiently to be able to prove or find for myself that there was a cover-up. Certainly the sanction that has been brought by way of action against Toyota suggests the government and its agencies in the US are pretty confident.

Senator CAMERON—So if there is an accident now—say, an accelerator got stuck and someone was seriously injured—under the existing situation it would go through the process that you say is covering all of the issues. If this legislation came in, there would also be a requirement for the consumer area to be advised of this problem. When would consumers be aware under the existing process that there may be a systemic problem with brakes or something like that? How long is it churned around the safety investigations within the industry at the moment?

Mr Delaney—First of all, just to be complete on Toyota: it is Toyota that is being pursued not the dealers in the US. In addition to the case of an accelerator being stuck that you mentioned on the northern freeway, there was the one in Melbourne, which was a Ford car, and Ford said it had no reports of any like event. In the Australian jurisdiction, I believe—and I stand corrected by evidence of officers who come before you—the dealer would first have reported defects that would engage the process of recall if it came to that. If a dealer reported to Toyota something as notorious as a sticking accelerator, Toyota would have an obligation near enough to immediately to report that to the process on recalls and safety. Certainly our counterpart body for the manufacturers and importers, FCAI, is a party to that process. My belief is that the consumers are represented on that committee on recalls and safety.

I do not know that we can sort of see whatever transpired in the US jurisdiction compared with what we have got. I am aware as well that across all of the states there is a plethora of arrangements in relation to vehicles and safety matters that might be a contributing factor. I do not know.

Senator CAMERON—What do you mean by a 'plethora of arrangements'?

Mr Delaney—Across the states of the US there are variations as well.

Senator CAMERON—Yes. So you are saying there is one reporting process in Australia that is efficient, effective and fail-safe?

Mr Delaney—I believe the parties to it think it to be so and there does not seem to be evidence that suggests that absence of action in the way of recalls and safety issues has contributed to deaths and injuries that we report in relation to motor vehicles. Quite the contrary. My observation of the committee, its membership and its representativeness over all the time I have been involved is it has been able to be

described as you say. Were it able to be shown in sort of evidence based policy terms that it is not as good as we think it is then we may have a different view about this process.

Senator CAMERON—I suppose the US experience has to be taken into account. I am surprised that the MTAA has not looked at that really closely other than through the media reports because there has to be lessons for the vehicle industry in this country on what happened there. You also say:

… vehicles, on their own, are rarely, singularly and wholly responsible for death and / or serious injury.

I agree with that comment that you have made, but when they are responsible for death and serious injury shouldn't we have a responsibility to make sure that the reporting of that link is done as quickly and as effectively as possible to the consumer? By having another layer of reporting through this legislation the issue may quickly be resolves.

Mr Delaney—I will do two things. With respect, Senator, I think you have verballed me on saying that we have not bothered to pursue the Toyota stuff in the US—quite the contrary. We have gone through it.

Senator CAMERON—You said to me you had not followed it that closely.

Mr Delaney—May I withdraw that sentence and substitute another one, which is what I really meant to say.

Senator CAMERON—Sure, that is fine. If you do that, that is okay.

Mr Delaney—What MTAA has done is to research it as closely as it can through the net, the web or whatever. It has all the data that is publicly available—that is, we have researched the public domain. My reference to not having researched it that far was only to the effect that I do not know whether the National Highway Traffic Safety Administration is correct or whether Toyota, which denies its culpability, is correct. I just do not know, because I do not have access to the pleadings and the charges as they stand.

Coming back to your second point—the proposition that motor vehicles on their own are rarely singularly and highly responsible for death and/or serious injury—all I am saying in answer to the question that you posed in reciting that is that I believe that the arrangements in place do precisely what you seek to have them do. I believe them to be speedy, of quality, efficacious and well conducted. But, as I have said as well, if someone can show that we are wrong on that and that it does not work as well as it should—and it may be that that the drafters of the particular section are proposing that that is the case—then we would no doubt have to alter our views.

Senator CAMERON—In relation to the generalities of the legislation, does MTAA have a view, as distinct from these issues you have raised of particular concern?

Mr Delaney—We certainly do. As I said earlier, we welcome the legislation. We think 'triumph' is not overstating it. In the case of our federation, getting something like this cleaned up and made uniform, operative and sensibly done will reduce costs right across the economy, enhance consumers' rights and clarify things for retailers and wholesalers in a really good way. That is why in the broad, from the absolute outset and in other evidence to this committee, we have said we welcome it. We think it is a marvellous national reform endeavour.

I then proceed to our self-interest in why we believe that. In the case of the ownership and operation of motor vehicles, let alone the retailing of them, having eight different arrangements across the nation is just impossible and always was. We, of course, have members who operate across borders. We have this plethora of things that have now been cleaned up, so we think it is terrific. We are simply saying that our enthusiasm is diminished only by the couple of points in there that may not be intended. In effect, what happens is that there is a sort of parallel circumstance or asymmetry. On the one hand, we lose our warranty rights as small businesses. On the other hand, we now have to give a warranty or assume a further liability that may not have been intended. That is the circumstance for us.

CHAIR—Thank you. If there are no further questions, I thank the Motor Trades Association for coming in this morning.

Mr Delaney—And we thank the committee. Thank you all.

[10.54 am]

McCREDIE, Mr David Cameron, Hasbro Australia Ltd

PEATTIE, Mr David, Managing Director, Australia and New Zealand, Hasbro Australia Ltd

CHAIR—We welcome Hasbro Australia. Do you have an opening statement you would like to make?

Mr Peattie—Yes, I do. Thank you for the opportunity to come and talk to you today. I have invited David McCredie, who is a partner at Baker and McKenzie, to help me present our case to you and to help draft our submission. I am a commercial person, so I do not have the skills and I needed to go outside to get that help.

Our company is very active in the Australian market and we are the No. 2 distributor. You might not necessarily know the Hasbro name but you know our brands. We are Monopoly, Tonka, Play-Doh and Playskool. We say that we are the brands of our children's childhoods and we have been around for 85 years.

We welcome quality regulation and it is our credo and our driving mantra that we are responsible in all areas of children's standards, and that comes as the culture of the organisation and is very high on our priorities. We are very aware and supportive of the need for consumer safety mechanisms and we applaud the government's initiative but we have some suggestions that we think would strengthen the proposal and help take out points of ambiguity because, as we know, when things are open to interpretation sometimes they can be misinterpreted. Our company welcomes the opportunity to put our position forward and support that of the Australian Toy Association, of which we are a member.

You have our submission. We are happy to talk about the points. One of the areas that concerned us in particular was about incident reporting, so we would like to elaborate on that. We think there is a substantial weakness within the proposal which we would like to explore and offer an alternative which we believe could be based more around hazard reporting rather than necessarily single incident reporting. Today I would like to ask David to help me to elaborate our point of view concerning that incident reporting and then I would be happy to answer any of the questions that you might have.

Mr McCredie—Where we are coming from is we wholeheartedly agree with the objectives of the mandatory reporting requirement, which is to have earlier access to information about product risks and to get that information from the place where government has said it can be most reliably obtained, which is from business, from the suppliers. However, under the current proposal, which is a proposal that all incidents, all accidents, be reported, the focus of the information which is being sought is the accident; it is not the risk with the product. The concern we see is that there is some valuable information which will be reported and that is the information about the product risk but there is an enormous amount of extra information which is going to be reported for these reasons. Firstly, there will be reports about known risks. Products have risks. We have just heard from the motor vehicles people and we know that there are going to be accidents associated with motor vehicles, but unless the report relates to a defect with the product, it is not of assistance, and unless it is a new defect, it is not of assistance.

Secondly the number of people who are being asked to report, we think, is excessive, and that is for two reasons, one of which I think is intended by the drafters of the bill and one of which I think is not intended. Firstly, all suppliers in the supply chain of a particular product will be required to report. It is clear from the regulation impact statement that that was intended, but we think there is duplication there that is unnecessary. Secondly, all other suppliers of the same kind of product also have to report if they hear about an incident. That means competitors of the supplier of a particular product if they hear about an incident also have to report it. That comes in the drafting of the words 'if a person supplies goods of a particular kind and the person becomes aware that goods of that kind'—but not necessarily theirs—are involved in an incident'. So that has the consequence that everyone within a market for the supply of a kind of product will have to report every single incident. We think that consequence is unintended and could be simply remedied by including in the bill wording so that you only have to report incidents relating to products that you supply.

Secondly, it is clear that the minister intended from his second reading speech to narrow the reporting requirement. I think it is generally accepted that it is a broad one, this association based test rather than a product risk based reporting test. There was an attempt foreshadowed in the second reading speech by the minister that businesses would not have to report incidents where the product design flaw or defect is clearly not the cause of the incident. However, when those exceptions have come through into the draft bill the exception does not operate in that way. The trigger for reporting is if a product is associated with an incident you have to report, but the exception says if your product is not associated with the incident you do not have to

report. The exception has no work to do, it is meaningless in that context. It is clear from what the minister said that the exception was supposed to be if it is clear that the product did not cause the incident then you would not have to report. That is a more sensible carve-out from it.

In summary, what we are saying is that there is some valuable information that should be required to be reported. We think there is a better way to do it, and that is to require suppliers to report product risks. If they become aware that their product has a risk they must report that and they must report it quickly, but they should not be required to report incidents where, even though their product might have been associated with it, like a toy which is tripped over, causing an incident, but was not the cause then that should not have to be reported.

CHAIR—Thank you. I would like to explore the point you raised about product report where it is not your own product but a competitor might raise it, for example. It would seem to me—and I think all of us would take the issue of safety, particularly in toys anything involving children very seriously—that this might be in the nature of intelligence from the industry. For example, someone might go to another product supplier and say, 'This product is terrible. This small part came off and I need another one and I will get it from you if you can assure me that your product does not have this risk.' So in that circumstance it would seem to me perfectly reasonable that that alternative product supplier should report that there is a risk with product A, that that intelligence from the industry might not go directly to the supplier of the product, simply because the buyer does not think of it that goes and gets something else. What would be your response to that?

Mr Peattie—It is a very good point but I think the perspective from my company would be that, because we have a unique style of toy which is our design or whatever, we are thinking about the application of that fault to our particular product. I might cite an example where there was use of magnets in toys which were harmful for children. There was one product that was an issue and that caused an ingestion problem for children. Others of us who had magnets in our product reacted by having a look at design whether those magnets were captured. The hazard was that the magnets became separated from the toy and the child ingested and in the tummy and intestine they adhered together, as magnets will do. The industry reacted to that as a consequence of one product being cited and shown to be a design fault. That mechanism is in place now through the CPSC in the US; that is very much part of the structure there. We have our own checks and balances from a company perspective that we have ourselves. It is a very valid point but I think that the consequence of single incident reporting is the plethora of information that will be reported rather than the quality of that and the ability of the solution being able to be acted on quickly. We just believe there would be a lot of information going into the system, and the ACCC would obviously be monitoring this. But we will not diminish our responsibility. We will be giving that information. We will be instantly reacting to any injury or harm that is reported to us. Thankfully, it is infrequent.

CHAIR—We have had this issue raised with us before in this committee, that there is a balance in making law for the exceptions. But I suppose in the issue of safety most people in Australia do expect that our laws and regulations cover safety as a priority. That is the problem. You have a company such as your own which may be very concerned for its reputation and very meticulous about these issues, but we are required, I believe, to make regulation for companies that may not be so meticulous, because the public does expect us to. So I do understand the difficulties for your company particularly where the companies that are not quite so concerned about safety may gain an advantage because—

Mr Peattie—They are not complying to the rules.

CHAIR—That is right. So I appreciate your difficulty but I also very much appreciate ours. I want to deal with another issue raised by another party. In terms of product safety the legislation refers to something like injury or accidents in terms of safety reports, but they raise the issue that it does not actually refer to disease and so on. An example that springs to my mind is that you might have lead-based paints or something like that—

Mr Peattie—We don't, but we know it is a hazard of our industry.

CHAIR—Not you particularly but there may be products coming on the market that contain lead-based paints. Under the legislation, because they have not caused accident or injury but an ongoing chronic deficit, it would not be required to be reported. Is that your understanding of the legislation?

Mr Peattie—My interpretation would be that we have our own standards and as an industry have regulated standards regarding inputs into products. I have to rely on the rigour and the integrity of that testing process that those are not going to be in toys. You might remember two years ago there were some lead paint concerns

in the toy industry. Thankfully our company was not involved with that. We believe that was through our own internal regulation. But some other major companies were. From that has now come a regime whereby all companies and all factories in China and any manufacturing point are accredited and monitored.

To come back to your particular question, I think there are the mechanisms already within the system and within the consumer laws whereby if we are alerted to problems with our paint composition we advise the current state-based authorities and in the new regime we advise the ACCC. We are not resiling from that at all. We believe that we really need that rigour and we need that accountability from an industry perspective and particularly I talk from Hasbro, that that is our belief. Does the proposed legislation mean that we are going to catch everything? I think the reality is that we are not, human nature being human nature. What we do, though, is hopefully have an environment whereby it will be the culture of the suppliers, even the unresponsible suppliers, that there will be this overriding understanding that consumers have their rights and they are represented in the legislation but it is not overly restrictive on us as suppliers.

Mr McCredie—I would add that the situation which I understand you are talking about is for diseases and so forth, which are slow-onset situations. They are not going to be picked up by the current proposal either. The current proposal requires reporting, once you find out that someone has been injured or become ill or contracted a disease—it is only then that you have a two-day obligation to report. We think our proposal overcomes that to a degree. Requiring the reporting of product risks will result in some situations being reported earlier than under the current proposal, because you do not have to wait until someone is hurt or gets a disease. If you identify a risk or if someone points it out to you, you have to report that and you have to report it quickly. So that is an advantage of the product risk based reporting over incident based reporting.

Senator BUSHBY—So, essentially, you are saying that there is more than one way. We all agree that, for products that actually have hazards associated with them—particularly in the context of children but for consumers in general—there should be reporting requirements and we should be able to identify those as quickly as possible and get them off the market.

Mr McCredie—Yes.

Senator BUSHBY—But you say that there is more than one way to do this and that the approach that has been taken in this bill, which is the incident based one, is likely to result in a significant amount of information being provided that is probably irrelevant, which may actually, I presume, make it harder to see the wood for the trees—to actually identify where the real problems are—and essentially it is just not going to assist the government in early identification of true product risks in the same way that other approaches might. And your argument is that we should look at the product hazard system. So I would be interested in knowing why a system like that would be preferable, in general, and also whether the system is used in any other countries and the success of it there.

Mr Peattie—Do you want to lead? I can answer on the context to it.

Mr McCredie—Certainly. We think it is preferable because the quality information will be reported. Under the incident based system, you would get some quality information; you would also get an enormous amount of less valuable information where there is no relationship between a product defect and the incident, or because you are getting multiple reports about the same incident and the same type of incident over and over again. Under a product risk based reporting system, you would still get that valuable information and you are likely to get more, as I just explained to Senator Hurley, but you do not, as you said, miss out on seeing the wood for the trees. You are getting the valuable information; you are not getting clogged up with the rest.

Senator BUSHBY—Is there any risk with your proposal that things could go through to the keeper—that you might miss things that you would not miss with the more comprehensive, send-everything-in approach?

Mr Peattie—I would argue that it would not because, whether a consumer reports it to a retailer or reports it to an authority, it does get channelled to us straight away. So, as to the communication lines: because we are obviously responsible for the product, it does make it to us very quickly because, particularly in the case of a retail partner, they want satisfaction for their customer and we want resolution for our consumer.

Senator BUSHBY—You represent certainly the very legitimate side of the industry. The unfortunate reality is that there are businesses out there that are not as scrupulous as some. Would your approach address issues that might arise with them to the same extent as the incident based scheme?

Mr Peattie—I believe it would, yes. It would have the same effect and the same response time. There was one question where you said ‘other jurisdictions’ or ‘other countries’: to our knowledge, only Japan does incident reporting, and it is currently under consideration in Canada—it is being reviewed.

Senator BUSHBY—I have asked whether there would be things that would be missed using your proposal compared to what is in the draft bill. Would your proposal improve the prospects of identifying safety risks that incident reporting would not? Would it go the other way? Quite apart from removing a lot of the churn, would it be an improved system in any way?

Mr McCredie—I think it would for at least the reason that I spoke to Senator Hurley about. There will be product risks that you can identify and which you will be obliged to report even before they cause an injury. So if you hear about that through a report from a consumer or through your own internal monitoring and so forth, you would be obliged to report that even before someone is hurt, which is earlier than the proposed system.

Senator BUSHBY—So how in practice might that work? You sort of touched on it with the lead, but just clarify it.

Mr McCredie—We have talked about the example with motor vehicles and with sticking accelerators. If someone comes in and says, 'My accelerator's been sticking, I think there's a problem,' you have to report that. You do not have to wait until the accelerator sticks and someone is injured.

Senator BUSHBY—Okay, I get you. That is a fairly clear example. Presumably also—motor vehicles are a good example, but it could apply just as well to toys—under the incident based regime there are all sorts of circumstances where somebody might be injured or even killed associated with the use of a motor vehicle which would have no relationship whatsoever to the quality of the vehicle. Under the incident based reporting system, presumably if a lot of people were for whatever reason having accidents in Toyotas then that may cast aspersions on the reputation of Toyota even though it may have nothing to do with the quality of the Toyota itself. So there is potential under incident based reporting, I would have thought, to have an impact on reputation of industry when there is actually no fault in terms of what those particular companies might be doing. Do you agree that that is the case, that under incident based reporting there is a potential for unwarranted damage to reputation?

Mr Peattie—Yes, and that is one of the points in our submission, that inaccurate information could well be misinterpreted. We are also concerned about the confidentiality of that information, which is one of the other points that we raised. We totally understand that the relationship between us and the regulator, us and government should be open and frank dialogue. I think we all know that a bit of the mud might stick, but there is a real concern that a brand or a company's reputation could be detrimentally—

Senator BUSHBY—Particularly when you have a media that can get very excited about a particular issue. If Toyota has had some issues in the United States—I am just carrying my example forward; I am just using Toyota because it is a convenient name—and there was a high incidence of people having accidents in Toyotas but completely unrelated, an excited media might be looking for a good story and they might run with that and it could have severe consequences on Toyota when it should not have.

Mr McCredie—That is exactly right.

Senator BUSHBY—The other thing about suppliers' reputations, and this was touched upon, is where you have competitors who have an obligation upon them to report incidents. That may also lead to the potential for some skulduggery with false reporting, which can have impacts on reputations to their advantage. So do you consider that the way it is drafted at the moment that is a risk?

Mr Peattie—It leaves the opportunity open for that to happen.

Senator BUSHBY—The less scrupulous end of business, once again, but they are out there.

Mr Peattie—Yes. Unfortunate as it is, that could be the way.

Senator EGGLESTON—I want to make the comment that your remarks about the multiple reporting leading to a lot of over collection of data is an opinion that I agree with.

Mr Peattie—Thank you for sharing that with us.

CHAIR—As there are no further questions, I thank Mr Peattie and Mr McCredie for coming in this morning and giving their evidence.

Proceedings suspended from 11.19 am to 11.39 am

MAGENNIS, Mr Darren, Policy Analyst, Infrastructure, Competition Policy Framework Unit, Competition and Consumer Division, Department of the Treasury

PAINE, Mr Bruce, Principal Adviser, Infrastructure, Competition and Consumer Division, Department of the Treasury

WRITER, Mr Simon, Manager, Infrastructure, Competition Policy Framework Unit, Competition and Consumer Division, Department of the Treasury

CHAIR—We welcome Treasury to the table. Would you like to make an opening statement?

Mr Paine—We do have a brief opening statement. Thank you for the opportunity for the Treasury to come back before the committee to assist in its consideration of the bill. Dr Kennedy, who appeared before you earlier this week, apologises for not being able to attend today. The reason is that he is assisting the Minister for Competition Policy and Consumer Affairs at a meeting of the Ministerial Council on Consumer Affairs in Perth. In responding to questions today, I wish to inform you that the Treasury intends to provide the committee with a written submission which addresses in more detail the issues raised in the committee's inquiry process. We will also respond to questions on notice provided by senators, and we have already received some of them. In the event that we cannot provide information to the committee today, we will endeavour to provide that information in the submission I just mentioned. We will also endeavour to provide information on any other specific issues that have been raised in this week's hearings after the transcripts become available.

CHAIR—Thank you. It is clear that most, if not all, the submitters that we have talked to so far have been very supportive of national consumer law legislation. They are all very keen to have something put in, and the reason they submitted is that they have some specific concerns related to their industry. Some of these are issues for future consideration, where the bill might go further. In other cases, they have specifically said that there are matters of drafting or of policy that they would like to see altered in this bill because it will adversely affect their industry. So, first of all, we would like to be clear on what happens if this committee recommends amendments, or if the Senate amends the bill in some way, given that part of the process has been to get agreement by the states and a drawing together of state legislation. I am aware that there will be differences between minor and major amendments, but what will the process be if the Senate amend the bill before us?

Mr Writer—We have been through this experience before with the first bill, particularly on unfair contract terms. The states are obviously very enthusiastic about this reform and are keen to support it. We have been asked to take suggested amendments back to the states and seek their agreement, and we will endeavour to do that in the shortest time possible to ensure that we do not unduly delay things.

CHAIR—I understand it is the government's intention to try to get its legislation through in this session of parliament in order to give the state parliaments sufficient time in the remainder of this year to do the necessary amendments to their own legislation. If that process means the states do not have time to go back to their own parliaments, we will not be looking at implementation on 1 January next year.

Mr Writer—There is obviously a risk that, if this legislation is delayed, that may pose an issue in terms of states applying this law themselves because they are clearly keen to have a finalised package of legislation to present their parliaments. You are correct in saying that we are keen to provide state governments and state parliaments as much time as possible to consider these reforms before they are implemented. The intention is to have a single national implementation date so that the law applies as a law of the Commonwealth and of each state and territory from the same date. That is probably the critical thing.

CHAIR—Yes, clearly, because otherwise there will be confusion as to which states it applies in and whether it is truly national legislation and whether there will be state laws to be applied as well.

Senator BUSHBY—We heard evidence yesterday from the Consumer Action Law Centre Victoria. Their understanding is that, under the COAG agreement, there would be consultation from April to June. I do not know whether that is the case. I have had my office trying to find out the actual details. Can you tell me the time lines set out in the COAG agreement that were supposed to be met to reach that common legislation date?

Mr Writer—I am referring to the National Partnership Agreement to Deliver a Seamless National Economy, which was agreed by COAG in November last year. That set out some time frames for implementation of this reform and many others. The overriding time commitment was to have the laws implemented on 1 January 2011, but there would be a number of steps undertaken.

Senator BUSHBY—Did that agreement set out those steps in anyway?

Mr Writer—Yes, although not in great detail. You are correct that one of the steps is that there be public consultation on the legislation. The view, I suppose, is that we have done what we can to consult up until this point in terms of public processes, and obviously the government also takes this process seriously as a consultation exercise by the parliament on the legislation.

Senator BUSHBY—For the record, did that agreement set up April to June—

Mr Writer—That is correct. It said that there should be public consultation from April to June. It did not specify what form that public consultation should take.

Senator BUSHBY—Did it set out when the bills were likely to be introduced?

Mr Writer—I do not have the agreement in front of me at the moment.

Senator BUSHBY—I would appreciate it if we could find that out. I would like to know the sequence of events that were set out in the agreement.

Mr Writer—The obligation is that the Commonwealth and all the states and territories will have passed their legislation by the end of 2010. Obviously as the lead legislator we are mindful that we should give the states as much time as possible.

Senator BUSHBY—Is the potential for an election intervening and cutting the number of sitting days a factor in the timing?

Mr Writer—No. We simply have to deal with those things as they arise. We cannot make that a specific consideration.

Senator BUSHBY—Was there any direction provided to you by the government, as opposed to the bureaucrat level, in respect of the timing?

Mr Writer—This reflects a COAG agreement.

Senator BUSHBY—The COAG agreement talked about consultation on the draft legislation between April and June. I presume that means the legislation would be introduced after that. So this reflects a variation from the COAG agreement.

Mr Paine—I am involved in other areas of the National Partnership Agreement to Deliver a Seamless National Economy, often referred to as the SNE. Unfortunately, I do not have the agreement here. I would be surprised if it goes into a lot of fine detail. They are usually written at a reasonably high level, but it may well have something on consultation. The experience elsewhere is that it is essentially at an officials level, so it is senior officials that count back from the date that the governments have agreed it will be implemented. We obviously take into account the potential for elections because we all know that they do occur at certain times. People do what they can to consult. You have seen all the submissions. There is a lot of engagement and we are taking it very seriously.

Senator BUSHBY—There is a lot of engagement. One of the reasons for that is that we got a lot of criticism from just about every witness—including consumer action groups, commercial law firms, academics, the Law Council and Motor Traders—that there was insufficient consultation for a bill as significant as this which introduces in its implementation at lot of aspects that were not clear from the regulatory impact statement or from statements made by the minister previously. There is a huge concern for people from both the consumer side and the business side as to how this is going to be implemented and about some of the problems. In the coming minutes we will be discussing some of the practical problems that have been highlighted, and no doubt some of those could have been addressed if there had been consultation and a better bill put before the parliament.

Senator EGGLESTON—The consumer law group yesterday said there was no stakeholder consultation and that, in effect, the Senate process is being used as the public consultation process. That is not really appropriate because we are not active in the field. A number of issues have been raised by a number of witnesses about practical problems, oversights and unduly broad provisions such as the reporting of deaths. We have heard that from Motor Traders and others. It seems to us that there is undue haste here—

Senator BUSHBY—In contravention of the COAG agreement.

Senator EGGLESTON—Yes, in contravention of the COAG agreement. This is a very important piece of legislation to protect Australian consumers. We find it very hard to understand why you did not go through a process of consultation with the stakeholders, which would have revealed some of the inconsistencies that

have been put to us. I repeat: we are not experts. We have had witnesses before us who are more qualified than senators to deal with the issues. We find it a curious approach on the part of the Treasury. I presume the Treasury drafted the legislation.

Mr Writer—The Office of Parliamentary Counsel drafted it with us as the instructors, yes.

Senator EGGLESTON—So, in effect, you drafted it, yet you did not go through a process of consultation with affected and interested parties. I find that a little hard to understand with a piece of legislation as important as this.

Mr Writer—Prior to the legislative process, there has certainly been quite a deal of consultation on these issues in terms of the Productivity Commission's reports—one report on of product safety, which was published in 2006, and dealt in detail with recommendations on legislative approaches which by and large have been reflected in their provisions is drafted; and another report on its more general inquiry into consumer law issues. As we discussed with the committee on Tuesday, we have stuck fairly closely to the issues that the Productivity Commission recommended in terms of preparing this legislation. We have had discussions with the individual stakeholders throughout the process of preparing the legislation, including in particular on the issue of mandatory reporting, where we have had quite a number of discussions with the motor vehicle industry. I appreciate that they may not have had the provision in front of them, but they have certainly had the Productivity Commission's recommendation, which is essentially the same as what has been drafted—that is, that we include a mandatory reporting obligation for situations where suppliers become aware that a consumer good is associated with a death, injury or illness. So that has certainly been out there for a long time. Otherwise, governments make decisions about whether or not to put bills out for public consultation, but it is not for me to reflect on why they do that.

Senator EGGLESTON—We were given evidence yesterday by the consumer law association that there was a requirement that there be consultation with stakeholders from April to June, which did not occur. The Productivity Commission is hardly public consultation.

Senator BUSHBY—And that was five years ago.

Senator EGGLESTON—And that was five years ago. It is a very curious approach on your part. The outcome of the evidence we have heard is that there are a lot of inconsistencies and areas which people feel should have been refined and which, as the consumer law group said yesterday, could have been refined had there been consultation with the stakeholders. It does, as I said, seem very curious that there is this inordinate rush to get such an important piece of legislation through without making sure that the terms of the legislation are appropriate and correct.

Mr Paine—Another thing that could be said is that the draft was not starting from a blank sheet of paper. There was existing law, the effect of which was carefully considered before this bill was drafted. So it may be that some of these issues reflect essentially a policy difference that has been around for some time and is being re-aired. At the end of the day my understanding is that these consumer things do have to strike a balance between various competing factors.

Senator EGGLESTON—But you have not sought to consult to talk about the differences at all, it seems to us.

Mr Writer—There have been processes. I should have mentioned also that on the consumer guarantees part of the bill there was quite a detailed consultation process undertaken last year by the Commonwealth Consumer Affairs Advisory Council, which itself made detailed recommendations about what form the legislation should take. So stakeholders have certainly had the benefit of that for around six months.

Senator EGGLESTON—You seem to be scraping around for little bits of evidence that you have consulted. The Productivity Commission was five years ago.

Mr Writer—One Productivity Commission report was five years ago. The other was published two years ago.

Senator CAMERON—You had 11½ years to do something about it and did nothing.

Senator EGGLESTON—Senator Cameron, I have the call.

Senator BUSHBY—We actually started the process, Senator.

Senator CAMERON—Oh, you started a process, did you!

Senator BUSHBY—Yes, this started under us. You are just finishing the job we started.

Senator CAMERON—Oh, you started a process!

CHAIR—Order!

Senator EGGLESTON—We simply make the observation that the Consumer Law Group yesterday expressed the view that stakeholder consultation had not occurred—

Senator BUSHBY—As did just about every other witness.

Senator EGGLESTON—to the degree it should have occurred. We find that very curious.

Mr Writer—All I can say is that it is the case that there has not been an exposure draft published on this bill.

Senator EGGLESTON—Yes, no exposure draft, which is the usual process. What is the process? Why didn't you follow the usual process?

Senator BUSHBY—That was discussed under COAG.

Mr Writer—I think you are getting really into policy questions there.

CHAIR—Yes, I think so.

Senator EGGLESTON—No, we are not. This is the mechanics of legislation, with respect, Chair, and Treasury has not followed the usual mechanical process.

Senator BUSHBY—Or even the processes agreed at COAG.

CHAIR—Senator Eggleston, Treasury has expressed the view that they are responding to a government time line. I think they did say that. Therefore—

Senator EGGLESTON—There is still an issue about mechanics and process. There is usually an exposure draft and a process of consultation with those involved. That did not occur. We have not heard any really satisfactory explanation as to why that did not occur.

CHAIR—The officials here said that that was in response to a government time line—

Senator EGGLESTON—In other words, it was a government decision.

CHAIR—and explained that that was due to the process of consultation with the states and the requirement that the states be given enough time to pass their legislation. I think we have explored that as far as that can go with these officials here at the table.

Senator EGGLESTON—I am not sure that we have, with respect, Chair.

CHAIR—I understand that you may want to explore it with government people, but I think that we, really, in terms of the process, have gone far enough.

Senator EGGLESTON—It is quite obvious, Chair, that you are defending the government's decision.

CHAIR—No, I do not believe I did, Senator Eggleston. I merely said that it was a government decision.

Senator EGGLESTON—One has to wonder why this government is trying to force through this legislation without adequate consultation with the stakeholders involved.

Senator CAMERON—Because we want to look after consumers. Something you never did.

Senator EGGLESTON—Senator Cameron, we are not interested in your rather ideologically based opinions.

CHAIR—Senator Eggleston, I think the fact that we are starting to argue among ourselves rather than asking questions indicates that we are getting in a circular.

Senator EGGLESTON—With respect, Chair, you are interrupting the questions.

CHAIR—I will put back your question once more to the officials and then we will move on.

Senator EGGLESTON—Again, you are trying to curtail this line of questioning, and that must have a political motivation.

CHAIR—Mr Paine?

Mr Paine—Let me try to understand the question that was asked, and please correct me if I have misinterpreted. The question was, essentially: why wasn't a consultation draft issued? They are issued at times and that could be seen as best practice, but there are plenty of exceptions and in this case we were responding to a decision by governments, plural—essentially there were nine jurisdictions that decided that time line.

Senator BUSHBY—With respect, those 'governments, plural' had in the agreement that there would be consultation between April and June, so you were not responding to what they decided when they formed that agreement; you were responding to a direction by government, singular.

Mr Paine—I wasn't personally involved in this part of the seamless national economy, but I have had exposure over several months to other parts of it and my experience has been that the officials try very carefully to meet the deadlines in that agreement. Whether governments—and it is plural—make those deadlines is assessed by the COAG Reform Commission. They—let me put it tactfully—focus in fine detail on whether deadlines are met. So I would imagine that the officials here were very mindful about the timing.

Senator BUSHBY—But surely you are not saying that the officials made a decision in view of the tight deadlines to do away with the consultation process?

Mr Paine—No, I was not saying that.

Senator BUSHBY—It sounded a bit like that. I just wanted to clarify that.

Mr Paine—No, I was not; what I was saying was that officials, I expect, were very mindful of the final deadline, and our experiences with getting parliaments around the country to pass legislation—they all face a lot of priorities—

Senator BUSHBY—Wouldn't they have raised that when the agreement was being negotiated and they were putting in the time lines and including a consultation period between April and June? Have they learnt something since late last year that has enabled them to realise that maybe that is not realistic?

Mr Paine—Senator, you are probably much more experienced in having to take decisions that I am, but often with the benefit of hindsight things look a little differently than what they may have looked when the SNE—seamless national economy—national partnership was actually agreed.

Senator BUSHBY—If that is the case and you have reassessed it, surely with legislation that is as far-reaching, substantial and important as this, and as important as it is to get it right, there are other avenues of looking at it right up to and including extending the start of date. That would make more sense than excluding the consultation phase on the actual terms of the bill and how that will actually impact in society, how it will deliver the benefits that it is designed to deliver to consumers, how it will impact on business and the appropriate balance you are trying to strike there. Surely that is a key part and it would be one of the last bits that you would drop when you are looking at that.

Mr Paine—I agree with you there are compromises that often need to be made in practice, including between timing, but also the processes leading up to it. My colleague outlined that there has been some consultation in the sense of specific—

Senator BUSHBY—But more on principles level rather than the actual implementation, and the implementation is where most of the problems are arising with most of the submitters.

CHAIR—I am looking at the time and we do have a long list of specific issues.

Senator BUSHBY—I am satisfied that this has been explored. I do not think we are going to get any further.

CHAIR—If we could then move on to some of the areas that were raised about the bill. One is the definition of 'consumer' that I think was to raised most comprehensively in the Freehills submission: that the concept of 'consumer' would be confusing to consumers, particularly in the ordinarily used phrase and that that would exclude some transactions and some consumer protections. It was particularly raised in the case of small business that where they once had the $40,000 limit they will now not have the protections of consumers. I want to explore that issue.

Mr Writer—The amendment to the definition simply removes an aspect of it, which is to take away the $40,000 threshold which applied with respect to all goods. In that regard, the Commonwealth Consumer Affairs Advisory Council made some suggestions in its report, which was published in October last year. So the definition and now is that the definition of 'consumer' relates to goods which are purchased which are ordinarily used for personal household or domestic purposes.

The test relates to the goods rather than the person. It does not really matter who purchased them; it is whether the goods are ordinarily of a kind used for personal, household or domestic purposes. In that respect there is no difference to the current law. The only difference is that some goods which were of a value less than $40,000 might be taken out of the scope of this provision because they are not ordinarily used for

personal, household or domestic purposes. I am perhaps a little perplexed as to why that might cause confusion given that it is a fairly minor change from what is there now. It is really designed to remove a fairly arbitrary threshold and focus the provisions on the types of purchases that consumers typically make, which is of goods which are ordinarily used for personal, household or domestic purposes.

CHAIR—One of the examples that Freehills gave was that, if a person hires a cement mixer to construct a driveway at his or her home, under the new bill that person will not be regarded as a consumer unless the cement mixer can be categorised as goods of a kind ordinarily acquired for personal, domestic or household use or consumption.

Mr Writer—We could go through many examples and attempt to split hairs. The provision is drafted in general terms so that cases can be dealt with on a case-by-case basis and the actual situation can be dealt with. I cannot say whether a particular kind of cement mixer might be or might not be a good ordinarily of a kind et cetera, but the provision is designed to deal with consumer purchases of those sorts of goods.

Senator BUSHBY—You mentioned that it is on a case-by-case basis. What most of the submitters have argued—and that it includes both consumer groups and business groups—is that it is effectively narrowing because it cuts out some consumer protections that currently exist. The case of the cement mixer is one example where people who would normally be considered consumers currently would be covered if they buy a good which is not ordinarily used for personal purposes and they will not be covered now. If they buy a fax machine or something like that it is arguably something that would normally be used for business and therefore they do not have the consumer protections that are provided by the ACL. The flip side of it is that currently, if businesses—and not just small businesses; it goes right up to big businesses—buy something that is under $40,000, they have a right to a statutory warranty which they will lose if they are not buying a fridge or something like that to put in their staff room—if they are buying something that is not ordinarily used for personal purposes. That is, in an overall sense, a narrowing of what is available currently for goods under $40,000. So there are protections that currently exist that will not exist after this. That is where most of the criticism comes from, that there is a narrowing in certain circumstances of the protections that are provided. Similarly—and you used the words yourself—on a case-by-case basis there is less clarity in terms of what might be or will not be covered, because it creates a grey area that does not exist when you have a clear monetary limit.

Mr Paine—I would like to comment on that. It seems that the provision has moved to a more principled approach. In that sense, there may well be things that are not covered currently but will be covered. I do not find it all that surprising that people who are beneficially affected do not find their way to your committee. That is probably a fairly general experience. So you might well be getting a bit of an asymmetric response from people.

Senator BUSHBY—Just about every submitter, including the consumer law advocate submitters, as well as business and the Law Council, said the same thing: there are problems with the definition because it removes rights that currently exist.

Mr Paine—That point I was making is that people who gain rights tend to not lobby against the change. It tends to be—

CHAIR—Nevertheless, we have to deal with—

Senator BUSHBY—Consumer law advocates acknowledge where there is a gain as well.

Mr Paine—My colleague is looking for a typical point.

Senator BUSHBY—I guess the question is whether there scope to actually address this issue in a way that can continue to deliver the outcomes that the ACL is designed to deliver, but which can actually ensure that the protections that currently exist are not lost and that we do not end up with a lot of litigation or a lot of uncertainty as to what goods might be covered and what are not. There have been a number of practical suggestions made by a number of the submitters on this.

Mr Writer—We understand that, Senator. Obviously, we have endeavoured to, and believe that we have, drafted the legislation to meet the policy objectives that were agreed by COAG and developed by the ministerial council. We are obviously aware of all of the views that have been raised in submissions. To be quite frank, many of those views have been raised by us prior to this process. We will obviously pay close attention to what the committee recommends on those particular technical drafting issues.

Senator BUSHBY—I am happy on that issue.

CHAIR—Fine. Let us move on to the larger issues, generally, of unsolicited calls. This is where we received a large amount of submissions, both illustrating the existing problems with unsolicited calls and from people who represent those people making unsolicited calls who feel that the legislation goes too far. So we have heard both sides of the argument. Let's start with the recent one. The direct sellers came in this morning and said that that kind of party plan arrangement, common among Avon, Tuperware and a lot of other people, where you invite people into your home, would be regarded as an unsolicited call. Can we deal with that technical issue first of all? Would that be the case?

Mr Writer—The legislation is designed to deal essentially with transactions which take place outside of a retail environment. Traditionally this has been conceived of in terms of door-to-door sales, which has historically been a way in which direct sales have been made. That is obviously less common, and there are more sophisticated and different approaches taken to these issues. The fundamental policy issue that is being addressed, though, is that the concern is around the kind of vulnerability that exists because of a change in the situation that a consumer finds themselves in. We all know that when we go into a shop we are receptive to the retail experience and to potentially being sold something. When we are at home, or in a social situation—and a party plan is perhaps a good example of that, where there are personal relationships involved, and perhaps social obligations at play in addition to the retail context—a different approach to regulation may be required. For that reason this applies in relation to unsolicited sales context.

I should say, though, that there are existing regulations in every state and territory about this form of transaction. And what we have endeavoured to do in the 15 pages of the bill which deal with unsolicited selling is to harmonise those approaches, which are contained both in the fair trading acts and in some cases in stand-alone acts in the states and territories.

CHAIR—So you are saying that this bill does not go further than existing state and territory legislation.

Mr Writer—That is certainly not our intention in preparing this legislation.

CHAIR—What about that key issue, then, of supply? Under this current bill, as I understand it, not only is there a 10-day cooling off period—

Senator BUSHBY—Ten working days.

CHAIR—Ten working days; and you cannot supply within that time. I think this is one issue where those direct party plan people find it quite difficult—they cannot supply within that time, whereas if you went to a shop to buy something then you could.

Mr Writer—The issue of cooling-off periods is obviously important in this area. The committee has heard about the benefits of cooling-off periods. As I was saying before, we are talking about something that is not a conventional retail transaction and there are pressures which consumers may face in those transactions which suggest the need for a cooling-off period. For that reason, in situations where goods might be provided there is then an additional obligation in that you already have the goods. To go back to, for example, your friend who has hosted this party and say, 'Actually, I don't want them; I want you to take them back and deal with that inconvenience,' may be an issue. The point of a cooling-off period is to provide a genuine hiatus to enable a person to rethink the transaction in the light of day and to make a more reasoned assessment of whether or not they actually want to make that purchase. There are a very wide range of products which are sold here and the committee has heard about those, some of which are quite expensive and some of which have linked credit arrangements and can be quite expensive for people to deal with, particularly when they do not understand the full implications at the time at which the product is sold to them.

Senator EGGLESTON—The maths courses are a great example of that; they incur huge expense.

Senator BUSHBY—There are certainly great mischiefs like that that need to be addressed. But there is an extreme example with the inability to supply and the cooling-off period and I would be interested in your views as to whether this is actually the case. It was put to us that, if a customer is currently receiving a service with a fixed end date—maybe a telephone plan or something like that—their supplier rings them two days before it expires and asks whether they would like to sign up for a new one and the customer says, 'Yes, of course; I'm very happy with what I've had for the last two years, so I will sign up again,' technically the supplier would have to stop supply for eight or 10 days, depending on the overlap, after the phone call and signing up.

Mr Writer—That might be the case, but the supplier should really ring up 11 days before the termination.

Senator BUSHBY—Obviously they will have to now, but, if for whatever reason their processes do not allow them to do that or they have not caught up with the legislation if it is passed, it could actually cause great problems for consumers because they will miss out on the supply of a product. Alternatively, I suppose they could say, 'I can't say yes. I'm going to have to solicit a new one from somewhere else myself.'

Mr Writer—It will depend on the terms of individual contracts and I cannot make an assessment about what the effect would be.

Senator BUSHBY—But that is a potential outcome?

Mr Writer—It could potentially be an outcome, but it seems to be one that is fairly—

Senator BUSHBY—I was hoping you would tell me it was not and give me the reason.

Mr Writer—It seems to be one that is fairly easily dealt with in that the supplier can ring up at an earlier point so that this would not be an issue.

Mr Paine—Hopefully the bill will be passed well before the date it takes effect so suppliers can adjust their practices. Typically, particularly here, where we are trying to balance various interests which to some extent are competing, the decision will have to be taken at the end of the day by the parliaments of Australia. Businesses can and do change the way they work. The other point I would make, without loading a lot of onus on the regulators and administrators, is that they can take a pragmatic and practical view in some cases.

Senator BUSHBY—They can, but when we put in place legislation we have an obligation to the people of Australia to get it as good as we possibly can and to remove unintended consequences if we can.

Mr Paine—I agree.

Senator BUSHBY—That is what we are trying to do now. We cannot rely on regulators to fix mistakes that might be made at a legislative level.

Mr Writer—Of course.

Senator BUSHBY—The other thing, of course, is that in probably the vast majority of unsolicited transactions that people sign up to they are buying goods that they want—they sign up; they want to get them. A significant proportion of quite legitimate unsolicited but satisfactory purchases would involve consumers that will not be happy that they cannot get their goods or service for a 10-day period. Surely there could be some scope built in to allow people in those circumstances to make an informed decision to waive the 10-day period before they can receive supply.

Mr Writer—There could be, and there is some flexibility built into the legislation in terms of provision for exemptions from all or part of the regime in certain circumstances where there is clear justification for that to occur. Obviously we are endeavouring to deal with a fairly clear policy imperative, which is that this is an area that arouses a great deal of public attention.

Senator BUSHBY—Nobody argues that there are problems there that need to be addressed.

Mr Writer—Yes, and there is also a very real potential for abuse, given the nature of these sorts of transactions. We have tried to be mindful of that in preparing the legislation so as not to create loopholes which can be exploited by those who have incentives to do so and who try and take themselves out of the scope of this law.

Senator BUSHBY—Similarly, in addressing very real and clear mischief, we need to be careful that we do not impose unnecessarily onerous burdens on the consumers who it is designed to protect—

Mr Writer—Of course.

Senator BUSHBY—and similarly on businesses that have been going around doing their business in a very upright and proper way.

Mr Writer—That is correct, and for that reason we have gone down this path. On a related issue, in the financial services sector any unsolicited sales are prohibited; they are simply not permitted. This is a different way to approach the issue. There was certainly felt to be no justification for prohibiting these sorts of practices, because it was certainly a legitimate way in which to sell things to consumers and in some cases an important channel for consumers to access goods, particularly in rural and remote areas.

CHAIR—Could we move on to areas where people want legislation to go further. One of the issues seemed fairly compelling. The maths software, which was referred to earlier, seems to have caused a lot of problems. Sometimes people are approached via a form that they fill in at school, a survey, a form in a booth or an offer

of a demonstration and then find that it is actually quite a hard sell for this software. Is that kind of form filling or survey form counted in terms of soliciting sales calls, or is that still regarded as an unsolicited sales call?

Mr Writer—I do not think I can be quite as definitive as you perhaps might like me to be on that issue. There are probably two aspects to this. There are what purport to be consents, which are included in agreements for the provision of other services. That occurs where you might be asked to tick a box or where you acknowledge by agreeing to something that you have agreed to be approached. I suppose that I could note there that they are covered, firstly, by the new unfair contract terms law; but also there is certainly jurisprudence in a common-law context about the nature of informed consent and whether or not those sorts of things actually amount to consent. The provision has been drafted again, in general terms, in a way which is intended to catch the full range of possible factual scenarios that might be covered here. Obviously, the concern in relation to consumer protection issues is that, if we engage in a great deal of precision in drafting in some situations, that can create the potential for exceptions or loopholes to be exploited by particular traders.

CHAIR—If you then find, as a result of tightening up of unsolicited calls, that there is an explosion in this kind of approach, which may well happen, can you just run through how amendments to the bill, assuming it was made law now, might be made if you did want to tighten up in this area. How is that process going to happen?

Mr Writer—Under the Intergovernmental Agreement for the Australian Consumer Law, a process for amendment takes place. First a proposal is put to the Commonwealth minister by any jurisdiction that is party to the agreement. There is then a three-month consultation period to consider the change, and then a vote can be called. The voting process is that there must be agreement by the Commonwealth plus four other jurisdictions, three of which must be states. At that point we can go ahead and bring legislation before the parliament, and when that is passed by the parliament it will then apply automatically as a law of each of the states and territories.

Senator BUSHBY—On that same issue, many of the issues that have been raised as part of this consultation process are implementation issues as opposed to principle issues. If we as a committee made recommendations that something should be tweaked or changed, to what degree of specificity does the COAG agreement go? Does it allow us to make suggestions which then can be taken up by the federal government unilaterally?

Mr Writer—The committee is free to make what recommendations it wishes to.

Senator BUSHBY—Obviously we are free to do that, but how is the government bound by the agreement?

Mr Writer—If the Commonwealth accepts the committee's recommendations and wants to put forward a proposal, it can do so as well.

Senator BUSHBY—The wording of this bill, right down the last word, is part of the agreement—is that what you are saying?

Mr Writer—Effectively the text of the bill has been agreed by all jurisdictions.

Senator BUSHBY—Okay, that is fine.

Mr Writer—And, going forward, it will need to be agreed by all jurisdictions to maintain the consistency which is obviously a very important part of this reform.

Senator EGGLESTON—Is there in fact an agreement that this legislation as is between the states and the Commonwealth should be the final form of the legislation?

Mr Writer—No, there is no explicit agreement in the sense that ministers have signed a copy of this bill or something like that, but—

Senator EGGLESTON—That is exactly what I mean.

Mr Writer—It is by exception. The states and territories have indicated, certainly at officials level, that they agree to this. The text of the legislation will need to be taken through state decision-making processes, including in some cases—all cases, presumably—their cabinets and then their parliaments.

Senator BUSHBY—That has not happened yet?

Mr Writer—My understanding is that, in some cases, it is in the process of happening now.

Senator EGGLESTON—Are you saying that a draft of this exact legislation has been circulated and that is being approved or not approved by the states?

Mr Writer—The states have the text of the bill as it was introduced into the Commonwealth parliament. They obviously cannot finally agree to it until they have the final text of the bill as it has been passed by the Commonwealth parliament.

Senator EGGLESTON—In the beginning, it was effectively approved—that is what I am looking for.

Senator BUSHBY—So we are not yet at the point where you have to go through that full COAG process to change things. That is really what I am saying.

Mr Writer—The initial text effectively has to be agreed to by all jurisdictions because they all have to apply it and—

Senator BUSHBY—But that has not been finalised yet.

Mr Writer—No.

Senator BUSHBY—So if the government decides to make changes, whether on the basis of recommendations we make or otherwise, to the text of this bill, then that can still be dealt with as part of the initial process rather than an amendment?

Mr Writer—That is right, and we will need to go back to the states to seek their agreement to potential changes and see how we go.

Senator BUSHBY—But not the official process—

Mr Writer—No, that will kick in once this legislation commences.

Senator BUSHBY—Understood.

CHAIR—If we could now move on to the serious injury and safety areas, there has been some suggestion that the phrasing of the bill, talking about consumer goods associated with deaths, serious injury or illness of any person, does not properly account for long-term disease or problems. Would that be the case?

Mr Writer—I think it could deal with that type of situation, although I would probably note that we are talking about a situation where somebody becomes aware of something and then has to notify within two days. It is, I suppose, focused on those more immediate risks which arise from time to time because somebody is, unfortunately, injured as a consequence of a product design or operation, and action needs to be taken.

CHAIR—So would that be covered if, as has been suggested by Hasbro, you said that notification would be required if there were any risk rather than any incident?

Mr Writer—The obligation is that the supplier becomes aware that the goods—

CHAIR—So if you are aware of a risk rather than—

Mr Writer—They become aware if the consumer goods 'have been associated'. It is 'have been', so it is retrospective in that sense. The issue about a risk is that this is a positive obligation on people in the marketplace to report. There is a penalty for failing to do so and that trigger point needs to be fairly clear for them. Unfortunately, in most cases, the first time that anyone becomes aware that there is a product safety problem is because somebody has been injured. There are many goods out there that may be dangerous; we just do not know until a problem arises.

CHAIR—But suppose someone became aware, for example, that there was asbestos in a product.

Mr Writer—Asbestos has been associated with the death, serious injury or illness of people, so I would suspect that would lead to—

CHAIR—Okay, so it is interpreted in that respect. If there is a known injury as a result of a particular chemical or ingredient then that would just as well apply.

Senator BUSHBY—If you are saying it is that broad then every time you sell a motor vehicle you should be notifying somebody, 'Look, I am selling a motor vehicle, which has been associated with a serious injury or a death.' That is a ridiculous example but it is consistent with what you are saying.

Mr Writer—Not quite. The provision is drafted in broad terms and there is obviously a clear public policy imperative to do that. We are dealing with product safety where the need to intervene in markets is considerable in order to protect the public from harm. But in subsection 2 of the provision in section 131 of the Australian Consumer Law it talks about situations in which subsection 1 does not apply and outlines a number of things. There are four of those. One is that it is clear that the consumer goods supplied were not associated with the death, serious injury or illness. The next is that it is very unlikely that they were associated with the

death et cetera. Then there are two other ones. The supplier is required to notify in accordance with the law of the Commonwealth—

Senator BUSHBY—On that first one that you read, though, if you are saying that asbestos has been associated, but if you are selling a good which you know has asbestos in it but you know that they were not associated with the deaths that you were aware of through asbestos then you could claim that exclusion. I am being deliberately difficult here, but that is because people who are looking to either take advantage of these laws or use them to exclude their liability will also be difficult and they will be looking for ways around it. I think it is sufficiently unclear to exclude the obligation on people to make reporting in circumstances that clearly are not circumstances intended to be covered and to feel that they are obliged to do that because that exception, on the basis of what you said about the asbestos, could actually be said to apply to them. It would not give them the out, basically.

Mr Writer—Yes. The provision is drafted broadly in order to catch the full range of potential situations that might be a problem. The difficulty that any government faces and any regulator faces in this area is that a failure results in very serious consequences.

Senator BUSHBY—Absolutely. But there is more than one way to do this. As I understand it, Japan is the only other country in the world that has adopted an incident-based, hazard-based system, and even there it only applies to accidents that cause injury requiring 30 or more days to recover. And Canada I think is considering it. Apart from that, nowhere else in the world does it this way. But there are plenty of other jurisdictions in the world that are just as concerned about ensuring that products do not cause injury or death and they have other ways of dealing with it, such as the product hazard type of approach, which has the added advantage of highlighting potential problems before they actually manifest in serious injury or death.

Mr Writer—That may be the case. The Productivity Commission did a detailed research exercise into this area. I do appreciate that that was some time ago. They made a specific recommendation that we adopt this approach. We have implemented that approach.

Senator BUSHBY—I am normally a fan of the Productivity Commission, but on this one I find it hard to understand. I imagine that Senator Cameron, who is not normally such a fan of the Productivity Commission, may actually agree with them on this one.

Senator CAMERON—Spot on.

CHAIR—Any more on the safety issue?

Senator BUSHBY—I have some more questions on that. What is the benefit of requiring a business to report on products that they do not even supply, that is, competitors' products?

Mr Writer—The obligation is on the supplier.

Senator BUSHBY—There are frequent references in the regulation impact statement to suppliers reporting on their products but in actual terms of the bill it requires competitors of products to also report. The RIS constantly referred to 'their products' all the way through rather than 'theirs or their competitors'.

Mr Writer—The obligation set out in proposed section 131(1) of the law before the committee states:

(1) If:

(a) a person … in trade or commerce, supplies consumer goods of a particular kind; and

(b) the supplier—

that person—

becomes aware that consumer goods of that kind have been associated with the death or serious injury or illness of any person;

the supplier must, within 2 days of becoming so aware …

Senator BUSHBY—So you are saying that competitors are not required—

Mr Writer—The obligation is on the supplier of the goods.

Senator BUSHBY—Only on the supplier. So the interpretation, which some of the submitters have suggested, which actually could apply or require competitors of a similar good to report is not actually the case?

Mr Writer—That is not my reading of that provision.

Senator BUSHBY—That has come through in quite a bit of what we have received. If you could have a look at some of the submissions where they raise it and clarify that you are 100 per cent confident that it does not create that obligation—

Mr Writer—We can do that.

Senator EGGLESTON—The Motor Traders Association raised the issue of multiple reporting of risk. Do you have any thoughts on that?

Mr Writer—We have included in the provisions an exception, which is that the obligation does not apply if they are required to notify in accordance with the law of the Commonwealth, a state or territory or under regulations and also if there is a similar notification requirement in accordance with an industry code of practice. The industry code of practice would have to be specified in the regulations so that there is a positive consideration of that exemption rather than people just deciding to exempt themselves from the obligation. Consideration has certainly been given to situations where there are other obligations and, clearly, in the automotive industry there are other obligations. Currently, they are not quite the same as this obligation in relation to the industry code of practice. But there is certainly scope to try to remove the potential for that kind of double reporting that people are concerned about.

Senator EGGLESTON—It did seem to be quite a big concern. I think Hasbro also raised it. You could have the same problem reported multiple times and that seems to be an unnecessary duplication. I presume that some sort of bureaucracy would have to be set up to receive those complaints?

Mr Writer—That it is right and that is why we have included these exemptions.

Senator EGGLESTON—I take your point, but there was some concern that there was still scope for multiple reporting of the same incident or a potential for hazard.

CHAIR—As that is all on the safety issue, I will ask Senator Cameron if he has any questions.

Senator CAMERON—I have a number of questions. Freehills have made submissions saying that they have five major concerns with the bill. I think you have answered some of those concerns this morning, but the first point is that the bill is too complex and for lawyers to be arguing the bill is complex is quite interesting. You may want to take some of these questions on notice in terms of the Freehills' submission so that you can have a look at it. You may want to add something to the answers that you have already given. The first issue is that it is too complex. They also say that the reliance on criminal and quasi-criminal enforcement is greatly increased and that the enforcement does not seem to be proportionate to the seriousness of the conduct which engages the regime. You may want to comment on that. Thirdly, they refer to the different concepts of 'consumer'. They raise that issue again, which I think you have dealt with. They then raise not so much a technical/legal argument but more a political issue. You may not want to comment on this, but it is the issue of business to business, small business consumers and how they have been carved out. They go to this issue, again, of the mandatory reporting provisions. They say you should not remove 'associated with' and replace it with 'causation'. Can I just put these on notice, because I think you have traversed some of them. If there are any issues you want to raise in the context of the specific submission from Freehills I would be interested to hear any additional comments on those issues.

Mr Writer—We will certainly do that. I will just cover off on a couple of high-level points which might assist today. In terms of complexity, there are probably two points. One is that I find it curious that the argument of complexity is made when we are replacing provisions spread across 17 Commonwealth, state and territory acts and putting them into one piece of legislation which is set out, we would hope, in a fairly rational way. That is the first point.

They have made specific comments about the consumer guarantees provisions. The purpose there was to try and simplify those provisions and to make them clear in terms of what the rights were for consumers and what the remedies were and to put those in the same place so that consumers and businesses had a clear understanding of the standard of conduct that was required and, if there was a failure to adhere to that standard of conduct, the remedies were clearly expressed. There is nothing really in those provisions which is different from the existing law, but they are designed to be clearer and easier for people to understand in terms of those things.

On the issue about criminal enforcement, I might point out that at the moment really all enforcement is only criminal in this space, apart from the civil remedies like injunctions and damages that individual consumers can seek. In the reforms that the committee considered as part of the first bill, and which are reproduced in this piece of legislation for application in the states and territories, there are a range of other options which are

provided to enable there to be more proportionate enforcement responses to breaches of the law, whereas before in many cases the only option was to commence a criminal prosecution. I might leave it there, in terms of those general points.

Senator CAMERON—One of the other areas that has been raised by a number of witnesses is the issue of extended warranty. Professor Malbon, Dr Patterson and the Consumer Action Law Centre all argued that extended warranties were really not necessary and that statutory rights were not well known by consumers and that the extended warranty in some cases diminished statutory rights and in some case cases only mirrored statutory rights, so that people are paying for what their statutory rights are. How is that dealt with in this bill?

Mr Writer—There are a number of ways it is dealt with. Just on the point about extended warranties: obviously there are concerns about the use and prevalence of those in the market, particularly where they do not really add much to the existing statutory rights.

Senator CAMERON—Does Treasury have any idea about the amount of money that is going into extended warranties in the retail sector?

Mr Writer—I do not have a figure. There was quite extensive research done last year by the national Education and Information Taskforce of the Ministerial Council on Consumer Affairs about statutory warranties issues, including extended warranties. We can have a look at that and come back to you on that.

Senator CAMERON—Thank you.

Mr Writer—But there are certainly extended warranty products which can and do provide additional services to consumers, and we saw no reason for those kinds of legitimate products to be prohibited through this legislation. Clearly part of the purpose here is to make consumers much more aware of their rights through a clearer legislative framework supported by enforcement and education initiatives which are designed to do that.

In terms of trying to deal with some of the problems which exist in the market at present, we have introduced two provisions into the legislation which are to do that, in the false or misleading representations area. The first is that it is clear on the face of the legislation now that it is a contravention of the law to make false or misleading representations about the nature of conditions, warranties, guarantees et cetera.

Secondly, it is made clear on the face of the law, so that there is no misunderstanding about it, that it is a contravention to make false or misleading representations about a requirement to pay for things which are statutory rights. The implication there obviously is that there is evidence of situations where people are purchasing products which do nothing more than set out their statutory rights. That is designed to quite explicitly make it clear that that kind of conduct is not acceptable.

Senator EGGLESTON—I would like to raise an issue which the architects and engineers are concerned about which is liability for fitness for purpose. They sought a continued exemption from that. While they were prepared to accept responsibility for negligence, they said that fitness for purpose was a much more nebulous concept which was hard to be specific about and there could be a difference between a client's dream or ideal and what the architecture or engineer actually produced. I thought they were very genuine in their concern about this because they thought that game playing could occur in which clients would state at the end of the process that whatever the outcome of the building was, if it was a building, it did not match their fitness for purpose, and they therefore withheld final payment, which would disadvantage particularly individual architects and engineers and cause them financial hardship. Do you have any comments on that issue?

Mr Writer—Obviously this issue was traversed in some detail at the first hearing we were at. The purpose of the guarantee is to set out in fairly clear language on the face of the statute what the required standard of business conduct is, so that services provided are fit for the purpose that was disclosed or are clearly implied from the interaction between the two parties. In that sense, if it encourages businesses to make much clearer the basis on which they are providing their service or the basis on which they might provide advice, that can only be a good thing. I do not think we accept the proposition that it is somehow a more nebulous concept than the law of negligence for a consumer. Few consumers would really have an appreciation of what the law of negligence is, given that it is a common law concept which has been developed over the past 90-odd years by the courts and given that this obligation applies to other professions, to other trades and to other businesses in relation to the services they provide, some of which are fairly clearly analogous to the sorts of situations that architects and engineers find themselves in.

It is difficult to see how the argument can be sustained that the law of negligence somehow provides consumers with comprehensive consumer protection, which they are aware of in relation to architects and

engineers but not in the case for others, because they have to rely on this more nebulous statutory concept. The point of the legislation is to make rights clear for consumers so that they understand what those rights are, can be better informed about what they are and be clear about what remedies they have where there is a failure to meet those obligations. In terms of a consumer understanding their rights, I do not think the same could be said of the law of negligence without paying probably a considerable amount of money to a lawyer to explain that to them.

Senator EGGLESTON—With respect, the architects accepted liability for negligence. Medical negligence is medical negligence with an adverse outcome due to incompetence by actions by a doctor or failure to act within proper responsibility and the same applies to various other professionals. The point the lawyers and engineers were making was that in the eye of the client an outcome was not what they thought it would be, even though the architect or engineer acted in a fully competent way. So there is a difference there, I would have thought, which quite legitimately they drew to the attention of the committee because it is a little bit like a painting which, whether one likes it or not, is a subjective matter. That is the point they are making, I think.

Mr Writer—There is always that subjective issue. A portrait painter whom you commission to paint your portrait is subject to this obligation now, and that subjectivity applies there. To a large extent this kind of concern can be addressed through greater clarity about the nature of the services that are to be provided. They should be set out clearly in a contract between the two parties.

Senator BUSHBY—The other issue they raise, though, is that the interpretation of their design is often outside of their hands and is in the hands of third parties—specifically builders. They do not always micromanage projects; sometimes they do the design and then that is the end of it. When the builders build it, it could have subjective elements different from how they had envisaged it when they designed it an certainly different from what the client has expected. They may wear liability because, often, they have the deepest pockets and are the easiest people to go for. They are insured.

Mr Writer—Again, that can be addressed through contractual means regarding the scope of the advice that is provided. It is not really a matter that goes to the question of fitness for purpose but to the nature of advice, and professionals couch their advice on the basis of certain assumptions or within certain parameters all the time. Certainly that occurs routinely in the provision of legal advice and other sorts of professional advice.

Senator BUSHBY—They provide a lot of extra work for the legal industry.

Senator EGGLESTON—With respect, though, the engineers and architects would not have agreed with that point of view. They do accept liability for negligence. I can hear what you are saying: this issue should be written into a contract; and, if the contract is not fulfilled, that may be negligence. Nevertheless, I personally think the architects and engineers made quite a valid point. But I thank you for your answer.

Senator BUSHBY—For the public record—we discussed this at the private briefing—have extra funds been made available to the ACCC to assist them with their obligations under this?

Mr Writer—In last year's budget the ACCC received $24 million over a period of four years to implement the product safety reforms. Further budgetary allocations are subject to budgetary processes.

Senator BUSHBY—So that $24 million overlaps but is not specifically for their increased obligations under the ACL.

Mr Writer—No, it is for their obligations in relation to these reforms of product safety.

Senator BUSHBY—That is interesting. The ACCC did not put it quite that way when I asked them about it. They basically had their fingers crossed behind their backs, waiting for the budget to ensure that they had enough money to deliver it. I will move on from there.

CHAIR—So had Treasury.

Senator BUSHBY—No doubt! We have had a lot of submissions about the carve-out of telecommunications, energy and gas. Very few of them actually welcomed the carve-out. What is the thinking behind that?

Mr Writer—There is no carve-out in the bill. There is the potential for one made by regulations. The rationale is that those are services of a particular kind. They deal with large, interconnected networks. If you have a blackout, that potentially has large impacts across a wide range of situations. There are specific provisions in laws regulating energy, water or telecommunications networks which are designed to deal with the consequences of those kinds of failures. The exemption is really there to recognise that there may be a specific way of dealing with those sorts of problems in these kinds of network industries.

Senator BUSHBY—So it is more to do with the services side of it. Theoretically, regulations could be written under the provision as written, which relieves telecommunication companies from liability for hardware problems.

Mr Writer—The scope of the exemption is to be decided—if there is to be an exemption.

Senator BUSHBY—But, from your understanding, that is not the intention. It is to do with those issues that you just talked about—for example, unavoidable service interruption.

Mr Writer—That is the sort of situation that we have contemplated in providing for the potential for that kind of exemption, yes.

Senator BUSHBY—That at least explains where you are coming from on that. One of the things that I have always liked about this is the fact that it provides a lot of the remedies through lower cost state based dispute resolution—forums, small claims courts, the Victorian commission, or whatever the title is. However, that does not seem to have satisfied a lot of the submitters. They still seem to think that that will not provide the ease of access to the remedies that a lot of consumers would need and that there should be further thought given to actually providing some form of forum. Most of the suggestions were that it should be through a national framework that provided a low-cost avenue of accessing the remedies that are provided.

CHAIR—'Dispute resolution' was the term used, I think.

Senator BUSHBY—Yes. Basically, if you have a dispute between a consumer and a business over whether they will comply with what the consumer sees as the guarantee on something or any of the other aspects of the ACL, an easy way for them to have it acted upon. If you say, 'You need to replace this under the law as it currently stands,' and the business says, 'No. Rack off,' what do you do?

Mr Writer—Certainly the scope of this reform was to harmonise existing laws and create a single national consumer law. There are obviously issues around access to justice and dispute resolution mechanisms which are being addressed through other processes, including at the national level through a process that the Attorney-General is leading at present. We have designed this law to deal with the situation as it is now in the states and territories and at the Commonwealth level. It is intended, obviously within the constraints that are provided for by the rules about which forum you can access on which sort of dispute, that people should and can do that.

Senator BUSHBY—I am getting close to policy questions. Presumably it is possible that a low form of dispute resolution mechanism could be built to apply to this, if you were instructed to do so by government?

Mr Writer—Potentially.

Senator BUSHBY—You do not think that is the ideal way of addressing it?

Mr Writer—No, I am not making any judgment on whether or not—

Senator BUSHBY—No, but, in terms of delivering it from a mechanistic perspective, there are existing avenues at the state levels. Do you think that is the simplest way of ensuring that consumers can access the protections that are provided?

Mr Writer—There are existing mechanisms. They are there and people are familiar with them. At the Commonwealth level there is obviously constraint in terms of setting up the kinds of tribunals that exist at the state levels, because we have a clear distinction between judicial and administrative functions and the kinds of decisions that can be made by people who are not judges.

Senator CAMERON—The Consumer Action Law Centre in their submission raised the issue of lay-by agreements, which are very important to some families, especially around Christmas and those sorts of times. They say that the laws have been watered down when you compare them to laws that already exist in Victoria, New South Wales and the ACT. Is that correct?

Mr Writer—The situation at present is that there is regulation of lay-by sales agreements in only those three jurisdictions that you mentioned. In other jurisdictions there is no regulation of lay-by sales agreements. The provisions provide basically five high-level rules around what should be part of a lay-by sales transaction. It does not get into the business of prescribing what a lay-by sales agreement should look like. I would also note that, for most purposes, if not all, lay-by sales agreements would be standard form contracts and would therefore be covered by the unfair contract terms law. A view was reached that this is the most appropriate way to go, by agreement of all jurisdictions, including New South Wales, Victoria and the ACT, and there are acknowledged to be, in terms of the submissions that we have seen from a business perspective, difficulties

with those laws, particularly in terms of the kinds of levels of prescription that might be required with regard to these agreements when there is probably no need for that.

Senator CAMERON—You may want to take this on notice. Choice in their submission argued that sector-specific exemptions create economic distortions. We only have one minute to go and I know that Treasury would like to talk a bit longer than about 30 seconds on economic distortions, so I would like you to take that on notice and give me your view on Choice's argument about the economic distortions.

Mr Writer—We can do that.

CHAIR—I thank Treasury for answering our series of questions and thank you in advance for the responses on notice.

Committee adjourned at 1.00 pm