
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## ECONOMICS LEGISLATION COMMITTEE

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

THURSDAY, 29 APRIL 2010

MELBOURNE

BY AUTHORITY OF THE SENATE

THIS TRANSCRIPT HAS BEEN PREPARED BY AN EXTERNAL PROVIDER

**INTERNET**

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

The internet address is:

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

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

**SENATE ECONOMICS**

**LEGISLATION COMMITTEE**

**Thursday, 29 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

**BAXT, Professor Robert, Partner, Freehills ..... 37**

**CARTER, Professor John William, Consultant, Freehills ..... 37**

**CRICHTON, Ms Jennifer, General Counsel, Telstra Consumer, Telstra Corporation Ltd ..... 14**

**CRUMMY, Mr Paul James, General Manager, Aegis Direct ..... 23**

**FAULKS, Mr Joshua, Head of External Affairs, Salmat Ltd ..... 23**

**GRIGGS, Mr Lynden, Private capacity ..... 10**

**LOWE, Ms Catriona, Co-Chief Executive Officer, Consumer Action Law Centre ..... 44**

**MALBON, Professor Justin, Private capacity ..... 32**

**O'REILLY, Mr Cameron Myles, Executive Director, Energy Retailers Association of Australia ..... 2**

**PATERSON, Dr Jeannie, Private capacity ..... 32**

**PECKHAM, Mr Alan, Partner, Freehills ..... 37**

**RICH, Ms Nicole, Director, Policy and Campaigns, Consumer Action Law Centre ..... 44**

**ROHAN, Ms Melinda, Director, Corporate and Regulatory Affairs, Australian Direct Marketing Association ..... 23**

**SHAW, Mr James, Director, Government Relations, Telstra Corporation Ltd ..... 14**

**SMITH, Mr Gary, Head of Strategic Solutions, Salmat Ltd ..... 23**

**TAN, Mr Gingkai, Director, Direct Sales, CPM Australia ..... 23**

**WRIGHT, Mr Steve, Executive Director, Franchise Council of Australia ..... 51**

**YOUNGER, Mrs Rochelle Amanda, Legal Counsel, Sensis Pty Ltd ..... 14**

**Committee met at 8.36 am**

**CHAIR (Senator Hurley)**—I declare open this third 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 and 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 upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer a witness may request that the answer be given in camera.

[8.40 am]

**O'REILLY, Mr Cameron Myles, Executive Director, Energy Retailers Association of Australia**

**CHAIR**—I welcome Mr O'Reilly. Would you like to make an opening statement?

**Mr O'Reilly**—I would. I have given you a bit of a hand-out. It is really just a guide as to who we are. We represent the retailers of electricity and gas in Australia which provide electricity and gas services to pretty much 98 per cent plus of Australian consumers.

The industry is really a product of earlier competition policy reforms which provided full retail contestability for consumers, mostly on the east coast, so people have a choice of which company provides their electricity and gas as a result of those reforms. My members vary in size from anywhere between AGL and Origin, the top 20 publicly listed companies, to new-entrant retailers that have as few as 100,000 to 120,000 customers. Competition was introduced into this industry and the consumers have benefited from that choice; the industry size and variety reflects the impacts of those reforms.

In broad terms energy retailing is essentially an industry that involves buying wholesale energy, taking out the variations that occur in the national electricity market for consumers through hedging, transporting the electricity to consumers and then packaging it up in various products to the end consumer. In some cases they have regulated tariffs and in others they are unregulated market contracts. In the diagram you will see on slide two what tends to make up the price of retail energy price to the consumer.

From our point of view, in terms of the Australian consumer law it has always been our view that generic legislation, generic regulation, for a lot of areas of consumer protection is preferable to industry specific regulation. However we are heavily regulated by a range of state retail marketing codes which govern a whole area of ranges of practices in this industry, including things such as marketing practices, disconnection and reconnection rules and so on. There has been a process underway, going back as far as 2005-06, to rationalise the state non-price retail regulation through the creation of a thing called the National Energy Customer Framework.

That process has been going on for five or six years and we are still no closer to finalising it. We have simply made the point in our submission that we want to make sure that the Australian consumer law process also works alongside the National Energy Customer Framework with the ultimate objective of seeing that the preferable approach of generic regulation covers as much as possible but the National Energy Customer Framework covers the industry specific regulation and that the final result is that we end up with a regulatory framework that is national, to reflect the national nature of my membership. We accept that it should provide comprehensive protection. It should keep industry specific regulation to a minimum but give priority to generic regulation through the Australian consumer law but at the end of the day it should ensure that we have comprehensive consumer protection within an efficient framework for my members who, as I have said, can be quite small companies that carry quite a significant regulatory burden.

The one specific area that we addressed in our submission in some detail was the issue of door-to-door sales. I want to make a few points there. Needless to say I do recognise that for some consumers, door-to-door sales is not the most popular tactic or approach. However, in this market here in Victoria we have 14 active retailers competing for customers. We actually have the highest levels of customer switching and competition in the world. This was documented by an international benchmarking study. Various analyses have shown that in relation to our product this is what is called a low-involvement decision. In other words, for a lot of us it is simply a case of: if the electricity and gas works and I have paid my bill then I will simply pay little attention to it because to date, although we know it is changing, it has been a fairly small percentage of consumer spending.

The reason that door-to-door is therefore important in terms of offering that choice is that for a lot of consumers if a better deal is provided to them and the switching process is quite convenient—as it is by signing a contract at the door—they will often access better deals and lower prices. This was documented in a review of the Victorian market by the Australian Energy Markets Commission. Our practices in relation to door-to-door selling have always been regulated by the retail marketing codes. A lot of areas will now be covered by the Australian consumer law, which provides pretty much most of the protections that we always had through the state retail marketing codes, although it does impact on the hours of door-to-door sales.

We as industry are conscious of trying to make sure that the practices are as professional and ethical as possible and observe the letter of the law in relation to door-to-door. But as an important medium for new-

entrant retailers to compete in markets, the more you restrict it the more you take away the principle means by which consumers switch electricity and gas providers. Obviously that switching tends to benefit often the new-entrant retailers at the expense of existing retailers that already have the largest market share.

I would emphasise the importance of door-to-door to our industry. As I have said we accept that most of the practices outlined in Australian consumer law are what we have been observing to date. But one final comment I would make about Australian consumer law is that in terms of the hours outlined for door-to-door sales there is one thing to keep in mind when you are, say, restricting it to 9 am to 6 pm and banning it on Sundays—which we do not have a problem with—but some flexibility in the application of that might be appropriate. I do not know about you but a lot of people are not home by 6 pm and a lot of people are gone by 9 am and if you overly restrict it are you denying a lot of people access to the cheaper energy deals that are provided by door-to-door and most particularly are you denying it to people who are actually in workforce who may benefit from some of those savings. I would just point out that issue.

On occasions there has been a view that there have been too many door-to-door sales to what are perceived as vulnerable customers and to be frank—and we are always mindful as I said of the practice being as ethical as possible—often those vulnerable customers are more likely to be home. It is not a question of there having been any great profiling in this industry, it is that door-to-door has been the most effective way to build market share and to get new customers. People who get door-knocked are often the people at home. There are a lot of people in the workforce and I know not many senators would be home before 6 pm and you are pretty much gone by 9 am, so being so prescriptive about the hours could impact on the nature of this industry and could impact on the level of competition.

As I said, it is an important medium for this industry and we know that the Australian consumer laws respect that it is an important part of some industries, but we would just point out the potential downside of such restrictions of hours.

**CHAIR**—You mentioned that there is an ombudsman in each of the states. Will that ombudsman continue once your framework has developed?

**Mr O'Reilly**—That is right. The National Energy Customer Framework does envisage always the retention of the Energy and Water Ombudsman scheme. There was some discussion on whether that should be a national scheme. I think at this moment it is probably being left with the status quo. We do not have any issue with that. We often have representatives on the boards of ombudsman's schemes. They have been either statutory schemes or industry-run schemes. They provide an important outlet for consumers but the point I would make is that a lot of the issues that have come to us from our industry have been the sort of issues to do with billing rather than particular sales practices. If you look at the table I provided on the second last slide it shows that the highest level percentage of marketing complaints as a percentage of total complaints to the Energy and Water Ombudsman is 7.4 per cent. It is less than 10 per cent in all jurisdictions but more importantly if you look at the number of customers who have actually switched their provider in all of the states and the level of marketing complaints it is all less than one per cent of the level of switching transactions that are occurring.

I am mindful of the fact that people do have to be fairly motivated to go to an ombudsman. It is not to say that that reflects all complaints or dissatisfied customers, but there is a very, very high number of fairly satisfied people through the switching process. As I have said, in this industry they will mostly switch providers because of door-to-door and they will mostly switch providers of electricity and gas for lower prices. It is hard to distinguish the product. Occasionally some people may switch for a green product offering but generally they will switch for a lower price.

**CHAIR**—If a customer complains to the current-date consumer authority are they referred automatically to the ombudsman?

**Mr O'Reilly**—There are various ways but sometimes people may go to Consumer Affairs but I would assume that they would point out to them that there is an Energy and Water Ombudsman. The ombudsman's general practice is to try to get the company to resolve the issue first. In most cases that is how things are addressed but people can escalate up to the next level. As I said, we in no way are questioning the role of the Energy and Water Ombudsman, we are simply saying that if you look at it in terms of issues such as sales practices to consumers the complaints arising to ombudsmen as a percentage of the large number of transactions that are occurring are pretty low. We would like to get that down to zero but we cannot monitor every door-to-door sales activity that does occur. We can never 100 per cent guarantee the quality of sales practice but we are doing our best.

**CHAIR**—In terms of aligning all the regulations, if this law is passed it will become a national body. I presume that they will also refer to the ombudsman if they get complaints unless there is some serious issue.

**Mr O'Reilly**—Even with the move, say, of the industry specific regulation of retail energy to the federal sphere for what is called the National Energy Customer Framework which will be overseen by the Australian energy regulator, separate to that the Australian consumer law, which is not really talking about the Energy and Water Ombudsman as such, envisages that within the National Energy Customer Framework even with federal regulation of industry specific nature of retail regulation that there will be Energy and Water Ombudsman schemes still available to the consumer.

**CHAIR**—Perhaps I am wrong here but in terms of 6 pm I understand that will be able to be regulated separately by each of the states.

**Mr O'Reilly**—That is my understanding. I think there are areas of discretion. Perhaps there would be situations where for instance there may be a door-knocking occur at 5.30 pm and the person at home may say, 'I am actually not the account signatory.' Of course we are supposed to deal with the person who holds the account because if you are not the account holder you cannot transfer supplier. They may say, 'Can you come back when my husband—or wife—is home at 7.30 pm.' If that can be allowed I think that is important to the dynamic of competition and door-to-door in our industry. We hope there is some discretion in the application of that while recognising the intent is to ensure that door-to-door is not a hassle to people and is occurring at very inconvenient times, or times that are very unwelcome on the part of the vast majority of the community.

**CHAIR**—I will check on that but my understanding is if that were the case that that would be a solicited call and that would then be permitted under the regulations.

**Senator EGGLESTON**—I notice you say here that national coverage includes WA but in your chart of people changing suppliers there are no figures for Western Australia. Does that mean Western Australians do not change suppliers very often or that the number of suppliers is limited?

**Mr O'Reilly**—I have to say that most of our activity is focused on the national electricity market but in fact the major gas retailer is Alinta; it is Synergy in the south-west corner for electricity and Horizon are what we call associated members of ours. For various reasons including the fact that, as you know, Western Australia is going through some significant electricity price rises now because there was a price freeze for nigh on a decade and that meant that even if there were the intent to provide competition at the moment no-one could really enter the market because they would not be able to offer a better deal because I suppose we would say that pricing in Western Australia—which is still acknowledged by the Office of Energy in Western Australia—is not at cost reflective levels, so if you are new-entrant retailer you cannot enter a market if the price is at non-cost reflective levels because you cannot offer a better deal. So the dynamic of competition is not apparent in Western Australia now.

It is our understanding that Western Australia has the option to join the National Energy Customer Framework, so some aspects of non-price retail regulation could be relevant, but I believe that Western Australia may be considering but have not guaranteed that they will be party to the National Energy Customer Framework. But it has to be said that to date Western Australian consumers have not enjoyed the benefits of retail electricity and gas competition.

**Senator EGGLESTON**—You referred to the national electricity market which is actually the eastern states and should be described as such in my presence.

**Mr O'Reilly**—That is right. I will note that.

**Senator EGGLESTON**—The western electricity market runs on gas, largely. The other thing is this business of door knocking. I would have thought you would get a better outcome from television advertising and radio advertising. I do not like people coming and knocking on my door at any time. They are usually Seventh Day Adventists or other Christian groups. I am not particularly interested in door-to-door sales. Given that there is a cultural antagonism towards door-to-door salesmen and often, as the chair pointed out, the purchaser actually is not the person talked to, I am surprised that you claim that it is a useful means of selling. I would have thought television showing price advantages and so on would be far more effective.

**Mr O'Reilly**—I would say to you that this is based on detailed discussions with my members and analysis of how they acquired their customers. The general reason is that to date electricity and gas have been a relatively low percentage of people's average income expenditure. That may be changing over time and people may become more conscious of their purchasing decisions in electricity and gas. But generally speaking we know that it works and so often people decide from looking at their bill—or maybe not even looking at the

bill, they may do a direct debit—that they tend to be fairly inactive when it comes to their electricity and gas decisions.

But generally speaking their behaviour is also driven by: we would like to get the lowest cost deal, the cheapest deal. But because of the perceived hassle of taking action themselves like ringing call centres or approaching the companies and taking the proactive steps of changing supplier, that is the thing that often deters them. But when it is made easy for them by door-to-door they will often embrace those deals and then the process as long as it is followed to the letter of the law—and keep in mind a lot of those people who do door-knock your house are not governed by the level of regulation and laws that our door-to-door salesmen are—if it is made easy for them then they will embrace those deals.

This is not simply an observation on our part. The Australian Energy Markets Commission for instance reviewed the market here in Victoria, the most competitive in the world and certainly the most competitive in Australia in terms of customer switching as my graphs show, and they used the term 'energy purchasing, the low-involvement decision'. People are passive. If nothing is done the default option prevails. But if a better deal is offered to them and it is made easy for them to switch, they do. And the easiest way to help them switch is through door-to-door sales. That is why that has been the chosen means.

A lot of my members would prefer it if that were not the case. Door-to-door is quite a high-cost channel. It also has potential pitfalls with complaints. Often consumers do not like it but it is how they build market share. It is also how you build brand awareness when you do not have the big budgets to do advertising. I have found for instance here in Victoria around 20 to 25 per cent of the market is held by what I can term new-entrant retailers, companies who really did not exist four or five years ago. Of their market share I ascertained that an average of 55 per cent of their customers were acquired by door-to-door and in one case 80 per cent. Ironically the 80 per cent is with the company that is the most recent entrant to the market.

The newer you are to the market the lower your brand recognition and sometimes the smaller the company you are. How do you build consumer awareness? How do you get customers? Door-to-door is the most important means because if people do not know who you are they are not necessarily going to approach you or be attracted to any advertising or direct mail.

In essence, it is the passive nature of consumers when it comes to retail electricity and gas because we make it easy. It is pretty easy to get your electricity and gas connected. If you pay your bill it will stay connected; you do not have to do much. But generally speaking people like the cheaper deals and if it is made easy for them to access those deals they tend to embrace them. That is not to say that there is not some downside to door-to-door but this is the observation made by the Australian Energy Markets Commission and it has been the practice of the industry based upon the reactions of consumers. As I said, I bet you they would wish that there was more customer switching online and more customers ringing them up directly which would be a lower cost sales option for them, but practice has shown this is the way consumers are and therefore the way the industry responds. If door-to-door is the most effective means to get consumers that is the one that they will pursue.

**Senator EGGLESTON**—Is part of your rationale for door-to-door selling rather than through radio or television to conceal the deal that you are offering so that you are not tipping off your competitors that you are offering various sorts of discounts or lower prices?

**Mr O'Reilly**—There is some transparency here where there is no regulated tariff. The Essential Services Commission of Victoria still transparently monitors prices and default options to customers have to be listed on the ESCV website. Then in other states there are regulated tariffs so there is that transparency there. Obviously it is a highly competitive market here with 14 providers and you do not always want your competitors to know what you are offering. In some cases once you ascertain the history of the customer or their profile then you may offer them a better deal that is not particularly advertised as such. You do want that competitive dynamic of a whole range of different product offers whilst still ensuring that the industry is transparently monitored, as we are, in terms of at least the default offers here that would prevail in Victoria. If you walk into a house you are guaranteed supply by the existing retailer and if you do nothing you will get the supply of what is termed a default offer and you can see what that default offer is on the regulated website.

**Senator BUSHBY**—Is it your contention that the reason why door-to-door selling is a better option is that you can provide an ease of access and an ease of change that you cannot by alerting them to the possibility of a deal in other ways where you are not actually having that one-on-one relationship to be able to provide the deal?

**Mr O'Reilly**—Yes.

**Senator BUSHBY**—I can understand that argument—

**Mr O'Reilly**—Just because a contract is signed—obviously there are cooling off periods as there are under Australian consumer law but the whole process of activating a switch can be done immediately—

**Senator BUSHBY**—Whereas if you see something advertised on TV that looks enticing you still have to take that step yourself to chase it up and maybe sit on a call waiting to get through, pressing or dialling this or that? I can see that argument.

**Mr O'Reilly**—That is right. At the moment electricity bills in Australia are obviously a higher percentage of income for lower income people. Therefore if electricity bills go up it has a regressive nature and that is why you need transparent government concessions, utility concessions and so forth for pensioners and so on. But for some people the level of savings that they will get—which may be five or 10 per cent which might be $100—they might think, 'Oh, it is not worth the hassle.' It is worth the hassle if it is easy. I think that behaviour will become more pronounced. As we all know, longer term, electricity prices are going up.

**Senator BUSHBY**—I guess that is why experience within the industry has lead to that is where you have put your marketing efforts because that is where you are going to get the better return?

**Mr O'Reilly**—That is right.

**Senator BUSHBY**—Which then does raise questions of some of the practices that have been involved in door-to-door sales.

**Mr O'Reilly**—That is right.

**Senator BUSHBY**—We have had some evidence in the last couple of days about some of the tactics that are employed by door-to-door salesmen selling maths software for kids which as I see it is not so much about the software but more about selling the credit that goes with funding the software which is at hugely exorbitant prices. And there are also some of the tactics that are involved in actually hooking vulnerable parents who are concerned about their children's education into signing up to something that they really do not fully understand. The consumer law promises to provide an avenue of relief in those situations.

You were making the point that you had some discussions about the ombudsman and how things are there but if a door-to-door salesman for an energy retailer knocked on the door and made statements saying, 'We can offer you a better deal', and it turned out that it was not a better deal, firstly, how long is the cooling off period and, secondly, what options would that person have if they have been mislead in terms of tactics employed by the door-to-door salesman which lead to them believing something was the case and they were going to be substantially better off and they were not?

**Mr O'Reilly**—In most cases a 10-day cooling off period has been the case under the Australian consumer law.

**Senator BUSHBY**—But they do not discover the reality of it until they start getting bills down the track?

**Mr O'Reilly**—That is true. That is still false and misleading conduct which is outlawed by state retail marketing codes. But if they ascertained that it had been a deal signed under false and misleading representations there are various actions they could take. Most people are not going to go to the hassle of trade practices actions and things like that but they still have—

**Senator BUSHBY**—If they find out their bill instead of being $100 cheaper is $50 more expensive—

**Mr O'Reilly**—That is right, but they still have access to an ombudsman and they will not be charged for approaching an ombudsman.

**Senator BUSHBY**—What can the ombudsman do?

**Mr O'Reilly**—The ombudsman can then—

**Senator BUSHBY**—Render the contract void?

**Mr O'Reilly**—They can approach the company and ask that it explain the situation and in consultation with the provider it is my understanding that they could say that this was signed on a false premise. The company in that situation would probably recognise that this had been a customer acquired under false pretences and would probably take actions themselves to address that situation. In some cases my members who use door-to-door will use staff that they directly employ but in most cases there are direct selling organisations that they

contract with. We in turn—because those companies are representing my member brands—will take up the issue with the door-to-door selling company and say that this particular agent has created this situation.

We are always mindful of the fact that the people doing the door-to-door at the end of the day have to wear identification and are seen to be representing my member companies and therefore any mis-selling or bad behaviour ultimately reflects on us and ends up being a complaint to the ombudsman, which will cost us; it will not cost the consumer anything.

As you say there are a lot of people who use door-to-door. In our industry they are already regulated and the consumers have more recourse for mis-selling or inappropriate conduct than they do have in most industries because they got an Energy and Water Ombudsman. Australian consumer law is not presenting a radical, new change for us and we therefore support it because we think a lot of these things are better handled by generic regulation. But I would say that we have more rules where consumers have more recourse than most other industries and at the end of the day we are offering an essential service and mostly, through the door-to-door channel, we are offering that essential service at a cheaper rate. I would say that we are very keen to distinguish door-to-door in our industry from a lot of other industries.

**Senator BUSHBY**—You mentioned how you prefer a generic approach to these things. My general approach has always been that I actually prefer industry-specific and that is because I think that the challenges, practices and the tactics that might be employed in various industries are all very different and the risk to consumers in different industries are different and by overlaying a generic obligation on everybody it might sometimes actually unfairly penalise some industries that are doing the right thing in order to capture other industries where the practices are not so good. That is a general thing. I do not always subscribe to the theory. Sometimes it is appropriate to have generic—

**Mr O'Reilly**—Can I make it clear that it is our common position because obviously there is a range of compliance issues. More particularly if I have member companies reducing their compliance burden matters when some of my member companies—

**Senator BUSHBY**—But there is a difference between generic legislation and industry specific legislation as opposed to common legislation within an industry. You could still have a nationwide approach to energy retail with industry specific legislation where it is consistent.

**Mr O'Reilly**—We still want the national legislation. We certainly do not want the Australian consumer law to delay the National Energy Customer Framework. We accept that for our industry being an essential service there will always need to be some industry specific regulation, but it should be controlled. We recognise that in some areas it is duplicating generic regulation and in that case generic regulation should prevail. But certainly looking at things like disconnections and things unique to our industry, of course you need industry specific regulation. We have all come to accept that there are things such as hardship plans for consumers having trouble paying their bills that will be covered within industry specific regulation. We accept that that is a practice in the industry that is important because we want our consumers to be in a position to pay our bills and in some cases we want to help those that are having temporary payment difficulties.

We are profit-making companies. We cannot be held responsible for social disadvantage. In the long term that is where we need government help with things like utilities concessions. But if there are specific circumstances around why people might be having trouble paying their bills for particular short-term reasons or events that were beyond their control, then it is very reasonable to expect our industry to help them through these payment difficulties with hardship plans and payment plans. We accept that as an industry specific regulation as well.

**Senator BUSHBY**—In respect to the generic regulation, is the main advantage that you see in that the consistency of legislation? Is that why you are fan of that? Why is it that you prefer generic over industry specific regulation in that sense?

**Mr O'Reilly**—A lot of what we have to explain to consumers, for instance, is that one of the market contracts that we sometimes have to offer a customer is that thick and that can sometimes scare them off. We have to explain to them every bit of regulation or protection that they have. We would prefer to say that their rights in a lot of these areas are covered by general privacy or fair trading laws under the Trade Practices Act and then minimise the amount of stuff that we have to explain about the industry specific protection they have. Therefore we have all these protections from generic regulation and these other protections through the National Energy Customer Framework eventually for industry specific issues such as disconnections, payment plans, hardship plans and all those sorts of things. There is a benefit obviously to us in having some generic

regulation when we set up our compliance systems and so on and then there is some benefit to us in rationalising the various segments of regulation in cost terms.

**CHAIR**—Senator Bushby, we need to move on.

**Senator BUSHBY**—The advantage in that sense is avoiding overlap which you could do by carving out industry specific legislation for you and not having other areas of advice?

**Mr O'Reilly**—We want the National Energy Customer Framework to go ahead. We want it to rationalise some of the state-specific ones under a national scheme. We do accept that there is a very important role for industry specific regulation but if the industry specific regulation is going to duplicate generic regulation then the generic should prevail.

**Senator CAMERON**—I am having a problem getting access to Legal Aid Queensland who have an appendix to their submission. I did not bring it all with me and I cannot get it at the moment. I might ask you to take on notice some questions in relation to specific issues that Legal Aid Queensland have raised on door-to-door selling and just get your comments on that. I am sorry I do not have the detail to ask you now but I will forward you those questions.

You said on a number of occasions how competitive the energy market is in Australia and how it is one of the most competitive in the world—

**Mr O'Reilly**—Particularly Victoria.

**Senator CAMERON**—I am just wondering how that comparison works. Is it due to the low base rate of power coming to the retailers for on-selling to the consumer? Is that one of the key components?

**Mr O'Reilly**—Let us be clear. In terms of customer switching this is the metric we do because it is the benchmark that can be applied across the world. So it is the number of customers in a market and first of all the number of markets that have chosen to make all consumers contestable is a limited number around the world, generally in developed countries. Australia has probably led the world in introducing full retail competition in retail electricity. The UK, parts of Europe and the United States have done it. The metric that they have is that the number of customers in that market and the number of customers who have switched each year their provider which gives you the percentage of customer switching or churn.

I think why Australians may have shown a great inclination to do that is not because our prices are high by a world standard but, say, here in Victoria I think it is that we have established a market structure where the barriers to entry into the market are fairly low. If you can get wholesale electricity and you can transport it and you have reasonable standards then you can acquire customers. Through privatisations and for various reasons a lot of the incumbent or existing electricity providers are fairly new to consumers. They have come about through privatisation and the brand loyalty is not particularly there. Then all of our analysis of consumer behaviour indicates that people are price driven and a lot of new entrants to markets like Victoria have been able to offer a price inducement to customers to switch to them. Therefore I think that is why we have fairly high levels of switching.

**Senator CAMERON**—Does churn automatically mean consumer benefit?

**Mr O'Reilly**—Some of the consumer groups have said to me that is not a perfect indication of whether consumers are benefiting. It is one indication. But if you therefore look at the presumption—and surveys of consumer attitudes have shown this—that the major motivation in electricity and gas is one that works, that is a pretty important consideration, but all else failing you cannot distinguish electricity or gas. There is a certain category of customers who buy for green power. That is about eight or nine per cent of the market. The rest are driven largely by price. If 30 per cent of the market here in Victoria is switching provider the general presumption must be that in most cases they are switching for price reasons and a lot of those people do not go and complain to the ombudsman or someone to indicate that they are unhappy. The percentage of complaints as a percentage of the overall transactions occurring is very low. That is not to say it is perfect, but it is a pretty good barometer I think of consumers being aware of the choice, being prepared to exercise it and also the fact that people are aware if they shop around they can probably get a better deal.

I think going forward, regardless of what we say at the retail end of things because of aspects like eventually whether there is a carbon price, or certainly because there is going to be a lot of investment in networks because of a renewable energy target, or because of growth in peak demand which leads to a lot of network investment—and peak demand is largely driven by air conditioners—energy prices are going up—

**Senator CAMERON**—You have said that several times. I do not need—

**Mr O'Reilly**—I think it is a good thing to have an energised consumer shopping around for the best deal.

**Senator CAMERON**—I want to come back to this issue of the consumer. As to the churning, how much of it is driven by door-to-door sales?

**Mr O'Reilly**—As I said I asked four of what I consider to be my new-entrant members to give me their market share, which is very confidential, just for the purposes of illustrative presentations like this and then to indicate to me what percentage of their customers they had acquired by door-to-door. Overall in Victoria the retailers are getting up to 20 to 25 per cent of market share in this market and on average, of those new-entrant retailers, 55 per cent of their customer base had come through door-to-door but it was higher the newer the company was. The most recent entrants to the market had a higher dependence on door-to-door. With no brand recognition or history it is therefore a more important channel to say, 'Hey, we are a new company in town; we can offer you this deal.' And that is how they got their customer base.

**Senator CAMERON**—On the issue of door-to-door selling you say a consumer can probably get a lower price; there is no guarantee that they sign-off and they get a lower price; is there?

**Mr O'Reilly**—No. In some cases that is not the motivation but it is the major motivation. In some cases they might have rung a call centre not being happy and say, 'I am really angry with the way my after-sales service has been; I am really angry about the way I have been treated by this call centre; I am going to leave you.' This is a low-margin, volume business and one of the great dynamics of a competitive market is you want as many customers as possible, so losing customers does hurt.

**Senator CAMERON**—I might put some questions on notice. I am running out of time. Your detailed responses have cut me back on question time.

**Mr O'Reilly**—It was not a tactic.

**Senator CAMERON**—No?

**Mr O'Reilly**—It was not a filibuster.

**Senator CAMERON**—Did you not watch Frost and Nixon?

**Mr O'Reilly**—Yes, I did.

**Senator CAMERON**—I am sure you did. A customer comparing the new door-to-door retailer that they have signed up to is very difficult. It is very difficult to make a comparison as to whether you are actually making a gain because you could have signed up off the back of your last bill and your last bill could be a winter bill where you used a lot of power to heat your home. Your next bill that comes in could be your spring bill so it will necessarily be a lot less. Is there a process where to provide true competition you could get a true comparison on a kilowatt per hour, or whatever it is, between your last bill and this bill without having to go through a very complex procedure as a consumer? Because you are arguing that this is about true competition. You are arguing that it is about providing information. My view is that sort of information requires symmetry to be dealt with. How do we deal with that?

**Mr O'Reilly**—I think the regulators do try to provide comparative sites. It is one of the recommendations in New South Wales. There is such a comparative site available in the Essential Service Commission of Victoria. Out in the market there are intermediaries developing like Go Switch which are sort of brokers that people can go to to say—

**Senator CAMERON**—I hope they are not like the health industry where these people are simply agents for the existing players. Is that how Go Switch works?

**Mr O'Reilly**—No. But at the end of the day Go Switch would hear what claims they are making about various offers made by my members would be policed by my members to make sure they are not making any claims that are not true. But switching sides is very common in the UK. I accept that. Then as I said in the contracts there are 10-day cooling-off periods so if people decide that it was not the right decision they can still get out of it. But the regulators are mindful of this issue and the call centres of the member companies have their switching sites. But at the end of the day people often do go back and look through the history of their bills and know their own household practices. They might know when bills go up and down. Yes, there are a lot of people who are just completely unaware but there are actually a lot of others who do have reasonable information about their own behaviour and know what appliances they have got in their house and how big their bills are. I suspect that is going to be growing over time.

**CHAIR**—Thank you for participating this morning.

[9.26 am]

**GRIGGS, Mr Lynden, Private capacity**

*Evidence was taken via teleconference—*

**CHAIR**—Welcome. I am sorry about the confusion with the timing this morning. I am afraid it has left us a little short of time. Do you have an opening statement you would like to make?

**Mr Griggs**—I do have some minor comments I would like to make just picking the eyes out of my submission as well some brief additional points that I would like to make.

The first thing I would like to say is that I welcome the harmonisation that we are seeing in the No. 1 act and the No. 2 bill and the amendments we are making to consumer guarantees, product defects and the remedial smorgasbord now being offered to the ACCC. I think they are to be applauded and welcomed.

In terms of my first comment on my submission about the general prohibition against unfairness, what we are seeing in the common law is a development of a good faith criterion. We see common law and statutory based unconscionability and it is all directed towards promoting ethical business conduct. One of the things that I think we could actually do to bring all those ideas under one umbrella is to simply change what is now 52 from 'misleading or deceptive' to 'misleading or unfair'. While the obvious concern about that is that the term 'unfair' is too broad I do think it would be available to use that common law development on good faith and unconscionability to actually bring some parameters around that. Whilst I realise that it is not part of the bill I do understand there are going to be some further changes to unconscionability looked at down the track and perhaps in the context of that it may be something to consider.

The second point I would make is that the consumer guarantees are an important change. Obviously though the major issue for consumers is really access to justice, so it is imperative that we have a consumer guarantee regime that is easily accessible and easily understood by both suppliers and consumers. I would really emphasise there the importance of the minister under section 66 of the proposed bill in terms of display notices, the education focus on the regulator in terms of informing consumers about their rights under that as well as the suppliers. I realise that the major/minor distinction that we see in the bill is a compromise if you like towards rejecting lemon laws. Consumers will not want to access the legal system to resolve their dispute over a failed TV or whatever the item may be, so we really do need to have some guidelines in terms of our understanding what 'major' and 'minor' are.

As to the 'sale by auction' requirement, I applaud that change. I just intuitively felt that the way it was worded was not easy to find for me. I wonder if the drafts people could have a look at that and instead of defining perhaps 'sale by auction' define just 'auction'. When I looked at the proposed legislation and looked at that phrasing I then went to look at how 'auction' was defined and could not find it and then found it was 'sale by auction'. That is just a minor point. But I just found what was meant there intuitively difficult to find.

As to the comment that I made about extended warranties, the explanatory memorandum suggests that the Consumer Affairs Advisory Committee indicated that the proposed consumer guarantees would allow informed decisions by consumers. I think the explanatory memorandum has some licence there with what the consumer affairs committee actually said. I indicated that the evidence may be that extended warranties may not be justified because of the statutory guarantees but that further review is required. I think that is something we need to keep in mind if this bill does come into being as to whether the major/minor distinction and the consumer guarantees have actually worked and whether down the track we should be looking at cooling-off periods, more mandatory use of display notices and perhaps the consumer acknowledging their awareness of statutory rights and perhaps the disclosure benefits that the sales person is receiving being made known to the consumer.

In terms of the additional points that I did not have time to put into the original submission, I have some minor points to make. With the definition of 'consumer' in section 3 of the bill, I am sure that the intent was not to narrow that definition but it could have that effect. By removing the financial threshold there is the possibility that someone may purchase an item which would not ordinarily be acquired for personal, domestic or household use. Perhaps an example could be someone suffering from emphysema who has to get oxygen cylinders of some sort, or for medical equipment that may be supplied normally through the hospital system which would not ordinarily be acquired for personal, domestic or household use.

The simplest answer may be to remove the word 'ordinarily'. The way the cases have interpreted personal, domestic, household use has generally been an urban-centric approach. I think country purchasers, even though they may be personal or domestic in a country sense, because they are not ordinarily acquired by people in a metropolitan or suburban area they have been ruled outside the consumer protection guarantees. I do think that definition of 'consumer' needs to be looked at. As I said, a suggestion is perhaps just to remove the word 'ordinarily'.

Section 131 subsection (1) of the bill talks about a duty to report when reasonably aware of circumstances existing of death, serious injury or illness. I wonder whether consideration should be given to making that 'should be aware' or 'ought to be aware', a more objective standard rather than how it presently reads, which is a fairly subjective standard.

I forgot to note the section number but as to the definition of 'harassment and coercion' I would suggest that perhaps the committee look at the examples in the Victorian Fair Trading Act; I think it is section 21 subsection (2) of that act. It actually gives some examples of 'harassment and coercion'. I think some examples within the legislation would have a good educative effect.

The final point I make refers to section 224 and the monetary penalties. I have no major issue with that. I just think that penalty units allow some protection against inflation down the track. They are the only points I have to make, but I am happy to answer any questions the committee has.

**CHAIR**—In terms of the point you make as to the major and minor repairs, do you think that is working reasonably well on a state level at the moment?

**Mr Griggs**—I think that certainly from a Tasmanian perspective we do not have much issue in relation to that. I am happy to concede, if you like, that we go forward with this major/minor distinction but make sure that the regulator is monitoring this and we are not having any confusion 12 months, two years down the track and to ensure that the suppliers of products are not using that distinction to force consumers to accept a lesser remedy than they would otherwise be entitled to. I think the issue there is a question of—monitoring that over the next couple of years and making sure that you review that down the track.

**CHAIR**—Thank you. Senator Eggleston.

**Senator EGGLESTON**—I will defer to Senator Bushby.

**CHAIR**—Senator Bushby.

**Senator BUSHBY**—I note in your submission you mentioned that the proposed legislation does little to improve access to alternative dispute resolution options. The evidence that we have had from Treasury officials indicates that most of the remedies will be available through the Australian consumer law, many of which currently reside in the Trades Practices Act and are really only available through the Federal Court. All of the remedies will now be available through whatever dispute resolution each of the states provides. I asked Treasury: 'Could you take an unconscionable conduct action in a small claims court, subject to monetary limits of the court?' The answer was, yes. Do you see that the remedies the ACL will have will provide greater access to low cost dispute resolution mechanisms?

**Mr Griggs**—It will certainly assist. The question will be: will the consumer be able to access those low cost dispute resolution mechanisms without obtaining the assistance of a legal professional? I am not sure of the current monetary limits on the small claims divisions in each of the jurisdictions. I know it differs from state to state. There is no question that the availability of that will assist. As I noted in my submission, I like the Civil and Administrative Tribunal set-up in Victoria. We do not have anything similar to that in Tasmania. A person would need to access the magistrates division civil section. I do not know whether there would be too many consumers who would be comfortable about accessing that without a legal professional.

It is a matter of encouraging, explaining and putting in place the processes within those small claims tribunals that say to the consumer that you can access this without the assistance of a legal professional and it is not something that will be tied down in legal requirements or the rules of evidence. It is a question of empowering the consumer to be able to access that. There is no doubt that these proposed changes will assist greatly. If we had a national tribunal system of some sort, even if it were attached or connected somehow with the Federal Magistrates Court, that would go a long way to allowing the empowerment of the consumer to act on their own behalf.

**Senator BUSHBY**—Presumably here in Victoria if you are seeking to access a remedy available under Australian consumer law—once this is all in place—you could go to the Victorian Civil and Administrative

Tribunal to seek that remedy. From my understanding, and from what the officials mentioned when we asked them questions, there are currently discussions going on at an official level around the country about how the remedies might be delivered in each of the states. Theoretically they are looking at the issues of how this might be offered to people on a more low cost basis to ensure that they can access it in simple cases without the assistance of legal professionals, and in other cases with the assistance of legal professionals but in a more low cost way than currently exists. It may be in the Magistrates Court in Tasmania, local courts, county courts or whatever it might be, rather than the Federal Court, which is a much more expensive option.

**Mr Griggs**—That is good to hear.

**Senator BUSHBY**—I was going to ask you whether you see any unintended consequences or drafting issues, but you have already raised a few of those. The Law Council, in its submission, raised a few issues as well, which you will have the opportunity to read. They see some practical problems that may impact. For example, in New Zealand they have a consumer guarantee system, which has been adopted in a similar way to what we are looking at, but there are some changes. The differences there, for example, are that this bill requires goods to be reasonably fit for any purpose disclosed to the supplier or to any person by whom prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made or to the manufacturer. This differs from New Zealand, which requires the goods to be fit for a disclosed purpose only if that purpose is disclosed to the supplier. It creates the possibility that the suppliers may be held to have failed to have fulfilled the guarantee as to fitness for purpose where the supplier is not aware of the disclosed purpose that the bill deemed should have been communicated by the consumer. There are issues like that. Do you understand that issue? Was I clear in what I was saying there?

**Mr Griggs**—Yes, I do.

**Senator BUSHBY**—There are issues like that where there may be consequences that could be unintended. It is a deliberate difference from what is in New Zealand, but it might place obligations on suppliers in circumstances where they had no knowledge of what the intended purpose was.

**Mr Griggs**—Yes. I read the Law Council's submission. I could see the arguments that they made. Certainly the experience from New Zealand has been positive in terms of how they have looked at and interpreted their consumer guarantees. I can see the point being made by the Law Council. The only issue would be, even though the supplier may be arguing that they were not aware of the purpose for which the item was to be used, whether they would normally have been aware or whether it would have been in their contemplation. I think it is a drafting issue as much as anything.

**Senator BUSHBY**—That is something that I had not read before I spoke to Treasury. I will ask them again, when we see them tomorrow, the extent to which it is a drafting issue or a policy issue. There are issues raised by the Law Council that do have some credence, so I am interested in your views on that. I was also wondering whether there were any definitional terms that have been introduced as part of the Australian consumer law that, in your opinion, will need to have case law interpretation to clarify what they mean and the extent to which those remedies that flow from that will actually deliver the desired outcomes? Is there anything that you think will present issues that will require judicial interpretation?

**Mr Griggs**—None that come immediately to mind other than what I have spoken about so far with sale by auction and the definition of 'consumer'. As we all know, the courts are still going to have their turn, if you like, at defining these terms and interpreting them in a manner that they see fit for the purpose of the legislation and the intent behind the legislation. But, no, not beyond what I have already addressed.

**Senator BUSHBY**—Thank you.

**CHAIR**—Senator Pratt.

**Senator PRATT**—You mentioned the removal of the word 'ordinarily' from the definition of 'consumer'. This is not the first time that specific problem has been raised with us in terms of the definition of a 'consumer'. I wanted to ask your opinion about the arguments against such an amendment, which might include that it introduces a level of complexity for businesses that are not used to dealing with consumers.

**Mr Griggs**—I will start with my problem with the personal/household/domestic criterion. The way that it has been interpreted is that the courts have adopted a view that seems to have been met by those of us who live in metropolitan or suburban areas, in the sense that they have taken, in some respects, an objective view of what the majority of people would consider to be an ordinary domestic transaction. Even though it may be subjectively personal or domestic for you or me, for the majority of people it is outside the definition of 'consumer'. A traditional example that I teach is the person who lives on a small acreage that might have some

free-range chooks and buys an incubation machine, and it is not that authorities suggest that would not be for domestic or personal use, yet for the personal or small acreage that is not running a business it could be in that category. The danger is that when you remove the financial threshold you are then going to have the small business trader who buys their computer for that business perhaps being excluded from the protections when at the moment they would not be. The argument that suppliers could put up would be that they are not able to determine whether this is a business purchase or consumer purchase, which to me does not really stack up.

I have thought about that in the past. The question may be whether we actually go in a totally different direction and make all transactions consumer transactions but then allow business the opportunity to contract out of the guarantees. The person may well say, 'If you're a business purchaser I can provide this at a lower cost to you if you are willing to contract out of the guarantees or the consumer protections being offered.' From my direction, I would be looking to bring more transactions into the frame rather than less. Off the top of my head, I am struggling to come up with the arguments that business could put forward to actually have a tighter or narrower definition of 'consumer'. I appreciate that probably has not answered your question, but at the moment it is the best I can do.

**Senator PRATT**—It is difficult being able to dispute your own argument. I do agree.

**CHAIR**—Thank you for participating with us this morning. I now ask Telstra and Sensis to come to the table.

[9.50 am]

**CRICHTON, Ms Jennifer, General Counsel, Telstra Consumer, Telstra Corporation Ltd**

**SHAW, Mr James, Director, Government Relations, Telstra Corporation Ltd**

**YOUNGER, Mrs Rochelle Amanda, Legal Counsel, Sensis Pty Ltd**

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

**Mr Shaw**—Yes. I would like to thank you for the opportunity to talk today to the Telstra and Sensis submission. Mrs Younger is from Sensis, which is a fully owned subsidiary of Telstra and which put in a separate submission to the inquiry, but it is a submission that is endorsed by Telstra. Ms Crichton from our consumer area will deal with elements of our submission.

I would like to lead off with a few short comments to indicate that, firstly, Telstra supports the uniform consumer law proposals. As a company that operates in all states and territories we think that having a harmonised set of consumer laws is a good thing. In our submission we indicated a few areas where we think some elements of the law could be tidied up in terms of making it more practical and more easy to implement, and therefore providing greater certainty for consumers, business and the regulator in the way that the law might work. We are happy to talk to those elements of our submission shortly.

Before I pass to Ms Crichton to give an overview of those matters, I would like to draw to the committee's attention an article in the *Australian Financial Review* yesterday that quoted from the Telstra submission and could be interpreted as suggesting that Telstra did not support the Australian consumer law. I think we have been a victim of selective quoting in that article and I would like to make it plain that we support the policy direction that has been taken with this legislation. I would ask Ms Crichton to address some of our specific concerns around the law as it is drafted at the moment.

**Ms Crichton**—Thank you for allowing us to be heard on this. We agree with the principles of the unsolicited consumer agreement provisions, and our submission mainly relates to the practicalities in implementation. We believe the laws can be basically finetuned so that consumers are still protected, but that it also provides more certainty for business and is not overly complex. For example, we believe that the cooling-off period of 10 business days is unduly complex as it actually requires staff and customers to take into account things like public holidays and even bank holidays in the different states in applying the period so that they can make the calculation. Given that often the call centre staff might be in a different state from that of the customer in question, there has to be a debate about it and a working through of the bank holidays and public holidays, which makes it unnecessarily complex. We would submit that 10 days is much easier for both the consumers and staff to apply, and it still gives the consumers a lot of time to make an informed decision. Most of the states and territories today offer 10 days cooling off and it seems to operate very well.

In relation to the prohibition on the supply of goods or services during the cooling-off period, we suspect that quite a few consumers will not appreciate the new law. For example, once a consumer has made a decision to sign up for, say, a back-to-base alarm service, they will actually be quite unhappy with having to wait two weeks or even more if it is a holiday period to get that service. We would suggest that consumers be given the right to make that decision as to whether they use the goods and services during the cooling-off period and, if they decide to use them, there would need to be some form of reasonable payment in relation to what they have used. These rights could be set out very clearly in the documentation that they receive so that there is a very informed decision.

In relation to the liability for dealers, we obviously take compliance by our dealers extremely seriously and we have very robust processes to ensure that they comply with the law, but occasionally a dealer will act in direct contravention of our instructions and we do not always find out about it right away. We can take action such as terminating that dealer, if it is a really serious issue. Under the bill we are liable even if we have done absolutely everything reasonably possible to prevent this occurring. We submit that there should be a defence available to suppliers under civil penalty provisions in the same way there is for criminal penalty provisions. Obviously, if the supplier does not do anything once they find out about what the dealer is up to or if they do not take any remedial action once they become aware of the misconduct, then they cannot rely on those defences.

In relation to the permitted hours for face-to-face or door-knocking sales, we would submit they should be 9 am to 8 pm on weekdays rather than 9 am to 6 pm. We recognise that not everyone appreciates door-knocking

calls, but the bottom line is that some people do and some people find it a convenient way to have someone sit down in their house to tell them about a service and take up that service. The reality is that most working people will not be home by 6 pm and so they will not have the opportunity for the face-to-face sales. We note that jurisdictions other than Queensland have been working on the basis of 9 am to 8 pm on weekdays, and we are not aware of any public concern around this. We also submit that the current exemptions that apply in New South Wales, Victoria and the ACT have worked very successfully and should be carried across to the national laws.

Finally, we have made some smaller points around practicalities, termination notices and the like, which I will not go into. I will just briefly touch on the consumer guarantees. Our key submission is that this represents a major change to the law compared to the statutory warranties. We would like to see consultation with industry about the issues so that when the ACCC provides guidance it can answer all of the practical questions. That would need to happen before the laws come into effect, because it is quite a big change compared with where the law is today. We also believe that the drafting of the provisions around the termination of what are called 'collected goods and services' is broad, which could have unintended and quite serious consequences. For example, if someone has purchased a laptop and they also arrange internet access, but subsequently there is an issue with the laptop and they reject it, then arguably with the way it is drafted at the moment the internet service is also automatically terminated on the basis that it is connected, and yet the ISP may not be aware of the rejection of the laptop and therefore the internet access, which becomes quite problematic. We would submit that the connection should be limited to the things that the one supplier supplied where they are bundled in a package deal. For example, in the EM it talked about mobile handsets bundled with a calling plan, which would be a package. You could see that would all be terminated at once as one supplier supplied it.

In relation to refunds, we agree that the consumer should not have to pay for something that has stopped working due to a manufacturing fault, which makes sense. The open question is really around what gets refunded when this occurs. For example, a mobile handset stops working after 10 months due to a manufacturing fault and so it is obviously appropriate to refund the cost of the handset, but I do not think it is appropriate to refund the call charges for the calls for the last 10 months while the phone was working. That may be more of a drafting issue as to the breadth.

That captures Telstra's main submissions and I will now hand over to Mrs Younger, who can talk through the Sensis submission.

**Mrs Younger**—Thank you for inviting Sensis to discuss its submission with you. Our submission focuses specifically on the prohibition in relation to unsolicited directory entries and advertisements. While Sensis supports the overall objective of the prohibition, which is to provide a uniform national approach to protecting consumers against those scam organisations that charge for unauthorised directory entries or advertisements, we are concerned that the current drafting of the bill could have unintended consequences and unnecessarily increase the compliance burden and administration for legitimate large publishers and their customers.

In summary, the main submissions for Sensis are in relation to the removal of certain existing exemptions under the current trade practices and state based regime and a suggestion that perhaps certain key concepts in the prohibition could be clarified and modernised to reflect current industry practice and reduce unnecessary delays with paperwork and administration for publishers.

I would like to talk briefly to those two points now and then if you have any further questions I would be happy to talk to those. Our primary concern, which goes to the heart of the business, is that the proposed bill does not replicate all of the current exemptions under the Trade Practices Act and the corresponding state based acts, particularly in New South Wales and Victoria. In particular, the bill has omitted the exemptions for directories produced by or on behalf of the Australian Telecommunications Commission, which is Telstra's corporate predecessor, currently exempt under section 64(10) of the Trade Practices Act and the equivalent New South Wales provision. Also, the exemption for publications by large proprietary or listed companies and their subsidiaries, which are currently exempt from the unsolicited advertisement requirements in Victoria and New South Wales.

It is not clear from my reading of the explanatory memorandum or regulation impact statement why these omissions were removed and whether it was a conscious policy decision, but it is relevant to note that the regulation impact statement recognises the need to mitigate increased compliance costs of this prohibition and, to that end, has recommended that the exemption for publications that carry out a large number of advertisements, including newspapers, be retained in the bill. Unfortunately, that exemption relates only to publications with an audited circulation of 10,000 or more copies per week, which arguably would not cover

legitimate publications that have annual circulations in the many millions, such as the White Pages and Yellow Pages directories, and also other legitimate online publications that may not be able to have an audited weekly circulation figure.

The removal of these omissions will have significant consequences for Sensis and other large publishers and, in our view, will unnecessarily increase the costs of compliance, particularly given the risk of exposure to a strict liability criminal offence for these provisions. It could also add to the administration and compliance costs of small businesses and unnecessarily delay their advertising in those publications. It is important to note that it will not increase the protection for consumers by actually tackling the illegitimate small operators that the legislation is trying to target. On that front, Sensis admits that those longstanding exemptions should be retained in the ACL and, to that end, I just wanted to point out that we are not asking for any exemptions or concessions over and above those that currently exist. It is just simply reflecting current industry practice and what has been in place for a long period.

Our other submission relates to the authorisation requirements. In Sensis's view the proposed authorisation requirements could be clarified and improved, and this is a good opportunity to perhaps look at those in 2010 with regard to current industry practice. To take a step back, the prohibition sets out certain requirements that must be met to demonstrate that a person has authorised the placement of an entry or advertisement, and these steps require that a document authorising the entry of the advertisement be signed by the person and that a copy of that document be provided to the person before the right to payment is asserted. While that might sound simple, it could create serious logistical difficulties, particularly when the document is not in writing. For example, there is quite a broad definition of 'document' in the bill, which contemplates electronic recordings or voice recordings as satisfying the requirement for a document, but it quite difficult to provide a copy of the voice recording to the customer before the right to payment is asserted. In turn, that could prevent publishers from moving to more efficient processes and technologies for finalising advertisers' requirements and could disrupt and prolong the process for customers.

Sensis has over 600,000 customers. Most of them are small businesses. Many of them deal with Sensis many times throughout the year every year to discuss, confirm and update their advertising requirements, and in our experience they have very limited time to finalise their requirements. What we are hoping to achieve is that the legislation recognises legitimate industry practice and does not require publishers to comply with lengthy written protracted processes. We would like to thank the committee for the opportunity to make the submission. We submit that the requirements that the documents be signed and given to customers be clarified to expressly contemplate other forms of effective authorisation.

**CHAIR**—Thank you. In terms of Telstra's submission, I think it is fair to say that a lot of consumer complaints that members of parliament hear about relate to mobile phone contracts. To me, in a sense, this is about Telstra and other telecommunications companies, but Telstra by no means stands out. With respect to the contracts and the 10-business day time frame, we hear of quite unscrupulous people who might take advantage of that. If you have a weekend and a long weekend, for example, then that might be five days out of your 10-day cooling-off period, so you have only five days to evaluate it, which might not be sufficient for most consumers.

**Ms Crichton**—Ultimately there has to be a decision on what is the appropriate time. We would submit that the 10 days has been working well in the jurisdictions where it applies, which is most jurisdictions, and I would submit that it does give consumers a reasonable amount of time to make a decision.

**Mr Shaw**—We also see the benefit of the 10 days as being one for consumer information and education. It is the simplicity of saying to consumers, 'You have 10 days,' and the ability to get the message across, be it for mobile phone or any other product—

**CHAIR**—I think it is fairly well understood what 10 business days is, though. It is not a difficult message.

**Mr Shaw**—It is if the 10 business days as understood by the call centre operator in Perth does not take account of the fact that there is Melbourne Cup Day or some other holiday falling in Victoria. The understanding of the two parties may not always align, and so the ability to have a common understanding of what the period is, in our view, is one reason to consider 10 days.

**Senator BUSHBY**—In some cases you have to refer to state based acts interpretation acts to work out what a business day is, when you have holidays on Easter Tuesday in some states and bank holidays but not public holidays.

**CHAIR**—Still I do think a list of public holidays would be relatively easy compared to some of the problems that can be caused by people accepting a contract that does not suit them. Moving on to consumer guarantees, you were saying that this is quite a change and you would like to be consulted with respect to new terms. I am sure the ACCC will develop guidelines that probably will be subject to some consultation, but our understanding is that most of the act is based on current state practices. Is there anywhere this is not the case where you would have particular difficulty?

**Ms Crichton**—I think the change from 'merchantable quality' to 'acceptable quality', which you were discussing before; the New Zealand Court of Appeal has taken a different approach and does see them as being different concepts. I think acceptable quality might be a slightly lower threshold. The concepts around major failure, compared with the statutory warranties today that do not draw that distinction between what is minor and certain remedies apply versus what is major, and certain ramifications for both the consumer and the supplier. I think this will be quite difficult for retailers and the like to get their heads around for the different products, and it will also be quite hard for consumers to get their heads around.

I sat in on the Choice submission yesterday and there was talk about point of sale material to make sure consumers are aware of their legal rights. I do think campaigns by regulators to make consumers aware of their legal rights can be extremely successful. I think the Do Not Call Register is a real example of that. One of the reasons that it is successful is it is simple to explain. I think once it gets more complex to explain, even if it is a point of sale poster, it is still going to be very complex, probably quite lengthy and possibly will not be easily read by consumers. Ultimately I think if we have good guidance before the laws comes into effect, it will enable us to be able to explain to our staff, and in some cases we will need to explain to consumers, what the law now holds. It is not that simple at the moment.

**CHAIR**—It is really only those couple of issues that will be difficult, the major versus minor, and what was the other one?

**Ms Crichton**—The acceptable quality, major failure and also the reasonable time. There is an issue where certain ramifications are triggered with the supplier if things are not done within a reasonable time. What is a reasonable time? It would be extremely useful to have some practical guidance, but with consultation, so that the right questions are answered before the laws come into effect.

**CHAIR**—The last issue that I have is with the bundling. The example that you mentioned was the laptop and an internet contract. We heard in Queensland where bundling, particularly with finance packages, causes problems. But also, if you buy a laptop and it is some time before that laptop is repaired or replaced, you might be paying for an internet contract that you do not use.

**Ms Crichton**—That is difficult, but if that be the case how do you manage that so that the internet provider knows what is going on?

**CHAIR**—If you are selling something in a bundle—

**Ms Crichton**—If Telstra were selling the package, we would accept that as a bundled package and, therefore, the package is connected in the sense that the act intended. The issue that we have is where the customer has independently gone to Dell to get their laptop and Telstra knows nothing about that; we have supplied the internet service and then there is a problem with the Dell laptop, and that is rejected. The consumer is dealing with Dell. The way it is currently drafted the internet access is still connected even though there is no interaction with Telstra.

**CHAIR**—Have you had discussions on that? It seems totally unreasonable if you have different contracts and different suppliers that they would be—

**Ms Crichton**—We definitely agree, but we do not think the drafting quite reflects that at the moment. It seems the intention in the EM is that it is the same supplier and where it is a package from that supplier, but the actual drafting today does not reflect that. It is finetuning.

**CHAIR**—We will check that. I would like to discuss with Mrs Younger the exemptions that Sensis is asking for. Why would it be a problem for you to have the consumer benefits of this act included in your contracts with them?

**Mrs Younger**—The vast majority of Sensis's customers are small business customers, and so we are not dealing with individual consumers for the vast majority of the charged directory advertisements. From Sensis's perspective, it is still subject to the prohibition in relation to charging for unsolicited services, and that specific prohibition for unsolicited directory advertisements is quite prescriptive in terms of the steps that need to be

taken. It is targeting those smaller operators that do not have the compliance programs in place and their long-established history with their customers. In order to comply with those prescriptive steps that would need to be demonstrated—

**CHAIR**—Are you talking about the authorisation requirements?

**Mrs Younger**—Yes, specifically requiring that a copy of the authorisation document, not a copy of the advertisement, be signed and a copy be given to the customer prior to any right to charges being asserted. The vast majority of Sensis's business customers conduct their contracts over the telephone. With over 600,000 customers there is no ability to visit each of them face to face and spend the hours that would need to be spent with each customer to finalise that.

**CHAIR**—It would not have to be face-to-face, would it?

**Mrs Younger**—Again, it comes down to the steps that are required to demonstrate authorisation. They are quite prescriptive.

**CHAIR**—Prescriptive in requiring a written authorisation?

**Mrs Younger**—A certain order of steps.

**CHAIR**—What order of steps?

**Mrs Younger**—The prohibition requires that a document be signed by the person authorising the entry or advertisement. That document is defined broadly so that it could include an electronic or voice authorisation.

**CHAIR**—Which is pretty quick and easy.

**Mrs Younger**—Absolutely. It then requires that a copy of that document be provided to advertisers before any right to charges or payment is asserted. That is really where the difficulty may lie, particularly in relation to voice signature requirements. I suppose if you are expanding the application of the prohibition to not just Yellow Pages where you are dealing with small business advertisers but White Pages where you potentially may have residential customers who are looking to remove their information from directories, it will add to the administrative burden on both the publisher and the customers and may delay the processing of those requirements.

**CHAIR**—I would have thought that, if you have residential customers that want their name removed, you would make sure that it is not someone else; that might require some sort of written authorisation.

**Mrs Younger**—The concern is not with the authorisation. Sensis does not charge customers for unauthorised entries or advertisements. It has clear policies in place to ensure that each of its customers authorises its advertisements or entries. It is the potential for this to delay the processing of those requirements and potentially add in additional steps to that process, which might not be welcomed by small business or individuals.

**CHAIR**—Thank you. Senator Eggleston.

**Senator EGGLESTON**—Telstra's submission makes several references to making this new arrangement consistent with existing regimes. Would you like to run through where you think it should be consistent and why the changes should be made?

**Ms Crichton**—The key consistencies that we are looking for are in terms of the 10 business days, which we talked about, and carrying across the exemptions that currently exist in Victoria, New South Wales and the ACT. They are the key areas where we are looking for consistency.

**Senator EGGLESTON**—You state that the 10-business day time frame relating to the termination period should be changed to 10 days.

**Ms Crichton**—That is right.

**Senator EGGLESTON**—If that is the case it would presumably include Saturday and Sunday?

**Ms Crichton**—It does, but it is a clear defined period where there is really no argument; it is what it is. The government might decide that it ends up being 15 days, but it is a clear time line.

**Senator EGGLESTON**—Probably 12 business days is a more reasonable approach to a business agreement.

**Ms Crichton**—Our approach to the submission in general is that we are looking at how to make this work practically when you are having to communicate it to 10,000-odd frontline staff and make it simple for the

staff as well as the consumers. With telemarketing you have call centre staff who are usually not located in the same place as the customer. It takes out that added complexity.

**Mr Shaw**—On page 6 of our submission it draws on some examples of three different days leading to three different termination periods as a consequence of an application of business days versus calendar days.

**Ms Crichton**—Easter and Christmas are other examples. I think it is the clarity that is the most important thing.

**Senator PRATT**—Maybe we should amend it to 15 days. We should just lengthen it in general so that it is guaranteed.

**Senator EGGLESTON**—That is an option.

**CHAIR**—It is an option.

**Ms Crichton**—It is an option, but I think it is an important to point out that under the current state based rules it is overwhelmingly 10 days.

**Senator BUSHBY**—Do any of them have business days?

**Mr Shaw**—New South Wales has five business days. The other states and territories just have 10 days.

**Senator PRATT**—What about 14 days, and clarity about it being two weeks? That is something that we can debate later as a committee.

**Senator EGGLESTON**—There is also the question of informing a person of termination rights. Your paragraph states:

Given consumers will have a number of ways they can communicate termination it would be practical or useful to a consumer to have a supplier read all of the cancellation options … rather it would be sufficient for consumers making an unsolicited consumer agreement to be advised during the call of their rights of termination and provide them with the detail of how long they may do so or how they may do so in the termination notice.

I gather that is a conversation, but why not provide a form or something like that?

**Ms Crichton**—What we are suggesting there is that it is quite prescriptive in terms of a telemarketing call. The call centre staff have to go through all the ways in which the customer can contact them to cool off. What we are suggesting is that, as part of call centre communications, customers or consumers get a lot of information and it can be overwhelming. That will be included in the documentation that is sent to them. Rather than having it read out to them on the call, they will receive it as part of their package around cooling off. Obviously the cooling-off period does not start until they receive the document in any event, so it is really relatively small in the greater scheme of things, but a very practical point around requesting that, rather than being prescriptive about what a consultant says on the phone, the customer will get that information in any event in a written form. We would submit that would be the more appropriate way so that they have time to read it and refer back to it if they decide to cool off.

**Senator EGGLESTON**—I agree with that. The other thing you talk about is the usual hours for door-to-door salesmen calling—up till 8 pm. As I said to an earlier witness, I am never pleased to have people knocking on my door selling things, especially as the evening moves on. I personally would say that I agree with the provision of it being 6 pm rather than later. I think many people would agree with that, in disagreement with you.

**Ms Crichton**—Yes. Door knocking is one of those questions where people have very strong views, but the bottom line is that some people find it convenient. We welcome in the new laws the strengthening of the obligations on suppliers and so on to leave premises if people do not want the call, and so there is a lot of protection if you are not interested to end the conversation and the supplier will leave.

**Senator EGGLESTON**—I am personally very averse to the whole concept of door-to-door selling. As I said to an earlier witness, why not advertise on television or radio so that people make a choice about seeking to take up the options you are offering? Often the person at home may not be the key person, may be overwhelmed by the patter of the salesman and sign off on things which perhaps they would not if they just saw an advertisement in a newspaper or watched it on television and thought that might be something they were interested in. How important is door-to-door salesmanship to your organisations, both of which are very big and successful companies with large customer bases?

**Mr Shaw**—There is clearly a business case for it, to the extent that we are engaged in those sorts of activities, which means that some of our customers value that service, take it up, and it is a channel by which

we can deliver products and services. As you just mentioned, there seem to be some polarised views around this. I think the important point is that if the consumer does not want someone trying to sell them a product then they can indicate that and the salesperson should immediately leave the premises. There are other people who are time poor perhaps and hence the ability to have someone come to their place and offer this service is something they value. We do achieve sales as a consequence of that.

**Senator EGGLESTON**—Is it a significantly important means of expanding your business and gaining additional customers for a company like Telstra, which is so big and well established?

**Mr Shaw**—We like to think that we can offer our products and services through all the channels. Customers favour some over others. It is a channel by which we can interact with our customers or potential customers and we see it as part of our business that we will continue to pursue.

**Senator EGGLESTON**—What percentage of your new business is derived from door-to-door salesmanship?

**Mr Shaw**—We would have to take that question on notice.

**Senator EGGLESTON**—I would be very grateful if you could. Thank you.

**CHAIR**—Senator Cameron.

**Senator CAMERON**—I would like to go to the issue of the 10 working days and the complexity that you say is involved in this approach. Why is this a bigger problem for Telstra than the problem that a customer has in trying to work their way through some of the packages that you promote and the complexity in the packages? Is this not a much simpler thing for a business rather than a consumer in terms of complexity of some of the packages and then being able to compare your packages with your competitors?

**Mr Shaw**—There is no doubt there is a lot of complexity around the products and services that our sector offers, and I think that is a consequence of the way that technology is changing and the way that service providers and others can think of new ways to deliver services with new applications and the like. We would agree that the telecommunications sector has a lot to offer consumers, but with that myriad of products and services there is a degree of complexity in working out what is the ideal product for you and your circumstances. To compare that with the 10-day issue, the 10-day issue is about doing business for us, but is also for the consumer.

**Senator CAMERON**—I am not making a comparison. I am simply saying that complexity seems to be the nature of your industry. The packages you put together are extremely complex and extremely difficult for consumers to make a comparison. You are not the only one. Your competitors do the same thing. The whole nature of consumer capacity to compare is compounded by the different packages, and so it is almost impossible to make a direct apples with apples comparison. You can work all of that through in terms of your profitability, and yet you cannot handle 10 working days? That just seems to me to be a bit disingenuous.

**Mr Shaw**—If the decision is 10 working days then we will work our way through it. There is no issue. The point that we made was that on the consumer side the complexity between 10 clear days and 10 business days is not always there, so in terms of informing our consumers, if we can make it easier at any step in the whole process, then we would like to do that.

**Senator CAMERON**—I would have thought your priorities would be somewhere else than 10 working days to make it easier for consumers.

**Mr Shaw**—I accept the points you make. We endeavour to make these things as simple as possible. The problem is that with the competitiveness of the market there are so many niche products and other things being put out there that, if we do not match those sorts of products in the market, we find that our competitors will be in there taking that portion of the market. It is not a straightforward situation of trying to invent as many different products as possible, because that has implications for us in terms of our billing systems, provisioning systems and the like. It reflects the extent of competition in the market in many ways.

**Senator CAMERON**—I am happy that you said you could handle it if that becomes the situation. Legal Aid Queensland has put in a submission. The appendix to that submission gives an example of a 48-year-old man who is living with his parents, who are in their 70s. He has an intellectual disability. One of his parents is extremely ill. There has been continual telemarketing to the intellectually disabled person, and he signs up with a number of different phone companies. Some of the bills are $1,000. Can I ask you on notice to have a look at that submission from Legal Aid Queensland and advise how this can be resolved and whether the legislation might help with this?

**Mr Shaw**—Certainly.

**Senator CAMERON**—It is very disconcerting when people are saying that people with intellectual disabilities have $1,000 phone bills.

**Ms Crichton**—Off the top of my head, customers can opt out of telemarketing or where it is appropriate we will opt them out so that they just do not get those calls in the first place.

**Senator CAMERON**—I think it was eventually resolved, but at huge stress to the parents, in their late 70s, who were trying to deal with this. I would like you to have a look at that. Another issue I would like to ask you about is your general comments on unsolicited consumer agreements. You state that the supply of goods and services should be determined by the purpose of the goods or service they acquire.

**Ms Crichton**—That is right.

**Senator CAMERON**—What happens in the case of someone who predominantly purchases goods for home use but periodically uses it for business use?

**Mrs Younger**—Ultimately you would look at the main purpose for which they are using something.

**Senator CAMERON**—Do you think so?

**Mrs Younger**—That is how you would approach it.

**Senator CAMERON**—Is that the firm position that you are putting to us?

**Ms Crichton**—For Telstra it is relatively easy in that if you are buying something for consumer use then you will sign up to a consumer plan, and if you are buying it for business use you sign up to a business plan and provide an ABN. That becomes very simple for us, because the customer has indicated how they are going to use it. That is not something that we need to confront on a daily basis.

**Senator CAMERON**—Do you sell hardware?

**Ms Crichton**—We sell handsets outright, but the vast majority of the things that we sell are bundled with the plan, and the plans are structured to the consumer requirements.

**Senator CAMERON**—What if someone buys an expensive handset predominantly for home use, but does use the handset for business use?

**Ms Crichton**—You would have to have a conversation with them. The bottom line is that we would treat them very similarly in terms of how we look after what is a fault with the goods. Whether they are using it for consumer or business use, it is a matter of customer satisfaction.

**Senator CAMERON**—In your submission you talk about how the act may clash with your consumer service guarantee. Is that not easily resolved?

**Ms Crichton**—The key problem is in terms of the prohibition of supplying during the cooling off period. We have the timeframe where we basically need to supply usually within two working business days. If we do not, then a customer will be paid compensation on a per day calculation. After five days it jumps higher. The maximum amount under the CSG is $25,000, so there are significant potential penalties. It is a practicality, which is a further reason we say that the customer should have the option to be able to receive supply during the cooling off period.

**Senator CAMERON**—I would like to go to the unfair practices submission that you made in relation to section 47(5), where you say that you should be able to retract a price by means that are reasonably effective.

**Ms Crichton**—Yes.

**Senator CAMERON**—What is your definition of 'reasonably effective'? You have argued in other submissions that there has to be clarity and definitiveness in relation to definitions. What is your definition of this?

**Ms Crichton**—Where we are coming from with that is that it is very prescriptive at the moment as to how you notify when a catalogue has the wrong price. It talks about newspapers of the same circulation and similar circulation of audience. Just because someone saw the catalogue they will not necessarily see the notice in the newspaper. We think 'reasonably effective' in that scenario could actually be in the store, when the customer comes in and says, 'I've got the catalogue. It has this price.' We will be able to have a notice up there that says, 'There was a mistake in the January catalogue which quoted $100, but was meant to be $1,000.' How we would see it is that the people who are interested are likely to see it.

**Senator CAMERON**—What if you live in regional Australia in a remote area? For example, your local press runs this ad and you say, 'I'll be in the major regional centre in two weeks time.' It is a 250 kilometre drive there. 'I'll get there. The offer is open for a month.' Two weeks later you front up thinking you are getting a $100 package and it is $1,000. You say, 'Oh, it's in the store. It is there.' 'Sorry!' Is that good customer service?

**Ms Crichton**—You can never guarantee that everyone who saw the catalogue is going to see the retraction however you end up doing it. I understand what you are saying in that sort of scenario, and probably as a customer service matter once the customer explains that we would most likely honour the price. They have just driven 200 kilometres or however long it is.

**Senator CAMERON**—Just do not tell Senator Joyce that.

**Ms Crichton**—As a customer service matter, you want people to buy your products.

**Senator CAMERON**—I am glad you put that on the public record.

**CHAIR**—Senator Bushby.

**Senator BUSHBY**—On the door-to-door matter, obviously it works otherwise you would not be doing it. There is obviously a market for it. The issue there is to ensure that those people who are signing up are doing so in an informed manner, that they know what they are getting and completely understand the obligations that they are signing up for. I guess that your argument would be that allowing people to knock on your door between 6 o'clock and 8 o'clock is not going to impact customers' ability to ensure that they are actually informed. It is really a privacy issue rather than an issue of whether their consumer rights are being protected; that that should be dealt with in other ways other than the time that people knock on their door.

**Mr Shaw**—That is correct. It is also an issue of availability.

**Senator BUSHBY**—I understand that from the perspective of the business probably more people will actually answer the door between 6 and 8 pm, but in terms of protecting the consumers, as I understand it, there are no real issues of consumer protection between 6 and 8 o'clock. There may be privacy issues with people having dinner and not wanting to be interrupted and so on, but in terms of consumer protection you could apply all the protections that apply in here just as well between 6 and 8 o'clock as you can between 9 and 6?

**Mr Shaw**—That is correct.

**Senator BUSHBY**—I am not convinced on the connected services issue, either. I think one of the intentions of that aspect of the proposal is to specifically catch things that have been thrown in that are not necessarily part of a recognised package like you are talking about. I will use an example that I am aware of as applied to small businesses and telecommunications, as opposed to consumers, which highlights the connection. That is where small businesses were being sold cheaper telecommunication services and having free electronic goods thrown in as part of it. They were not really free, they were actually being paid for out of part of the contract over time. Some of these small telecommunications companies then fell over and were no longer able to deliver the telecommunication services, but the obligations to pay for the free goods, which were being subsidised by the costs that they were paying, continued. I think that part of the Australian consumer law is designed to attack that type of practice in a consumer setting rather than the situation where you go to Telstra and buy a mobile phone that comes with a packaged contract for services. If it was implemented in the way that you are suggesting, it would possibly mean that we do not catch some of those rogue elements that are doing that sort of thing. I would be interested—not necessarily today—in your thoughts on how your legitimate interests could be protected, but the Australian consumer law could still address that type of activity?

**CHAIR**—Can I ask you to take that on notice?

**Mr Shaw**—Yes.

**CHAIR**—We are running quite short of time. Thank you for coming in this morning and for your assistance.

**Proceedings suspended from 10.42 am to 10.50 am**

**CRUMMY, Mr Paul James, General Manager, Aegis Direct**

**FAULKS, Mr Joshua, Head of External Affairs, Salmat Ltd**

**SMITH, Mr Gary, Head of Strategic Solutions, Salmat Ltd**

**TAN, Mr Gingkai, Director, Direct Sales, CPM Australia**

**ROHAN, Ms Melinda, Director, Corporate and Regulatory Affairs, Australian Direct Marketing Association**

**CHAIR**—Welcome. Mr Faulks, do you have an opening statement?

**Mr Faulks**—I thank the committee for the opportunity to appear today. I would like to make some brief opening remarks on behalf of Salmat, Aegis Direct and CPM in relation to field sales, and my colleague Ms Rohan will offer some further comments about telemarketing which we endorse and support.

Salmat, Aegis Direct and CPM have come together for the first time to articulate a unified industry position in support of field sales. As leaders in the field sales industry we take our obligations under the law and to consumers very seriously. We have extensive procedures and training processes in place to ensure that we conduct field sales of a high standard and we stand by our reputation as the most responsible professional field sales operators in the industry.

The extraordinarily low amount of complaints we receive about field sales points to an industry best practice model that is working and is working well. In fact, the Australia economy and consumers obtain an enormous benefit from field sales. Our three organisations alone engage over 1,700 sales agents, make over $1.1 million net sales through new market offers that directly benefit consumers and generate in excess of $1.3 billion in annual sales turnover for the clients we represent and the consumer benefits should not be understated.

The reason the sales channel is so successful is that it provides consumers with choice and competition right to their doorstep. It allows consumers to vote with their wallets and easily change energy providers or telecommunication providers if they can get a better deal. Unfortunately from our perspective many of the negative reports and comments about field sales stem from organisations who do not take their fundamental responsibilities to the Australia consumer seriously. These organisations do not have the same commitment to the level of investment in recruitment, training and compliance practices and do not represent the reputable operators in the industry. The entire industry's commercial viability should not be tarnished by such unscrupulous operators.

Salmat, Aegis Direct and CPM strongly support the principle of a nationally consistent Australian consumer law. The success of this process will depend on the ability of states and territories to quickly repeal, amend or modify any legislation that replicates, alters or is inconsistent with Australian consumer law.

We are concerned that some elements of the bill will unnecessarily harm the field sales industry for little benefit to the consumer. It is all about getting the balance right between protecting the consumer and appropriate regulation of the industry. Our view is that achieving this balance does not necessarily entail the wholesale adoption of the most severe consumer protection provisions that currently exist in various jurisdictions. As outlined in our submission we have four specific concerns with the unsolicited consumer agreements part of this bill.

The first relates to the proposed reduction in permitted calling times. We know that every jurisdiction bar Queensland currently permits field sales up to 8 pm on a weekday. These hours accommodate the requirements of busy families where both parents work and would not make it home before 6 pm. As I indicated earlier, the benefit of field sales in terms of choice and competition is clear. Busy working families should at least be given the opportunity to agree to hear from a sales representative if they want to or indeed to say no if they are not interested. There is no doubt that this change to consumer law in Australia will have a significant impact on the viability of this sales channel and in our opinion will achieve little additional benefit to consumers.

A second specific concern relates to consent and is directly linked to permitted calling times. Consumers should be able to give voluntary consent to a sales representative to come back at a more convenient time. If the permitted calling hours are further reduced the ability to give voluntary consent to call at another time becomes even more crucial. We are concerned that the bill in its current form removes the consumer's right to consent to a sales representative face to face. It seems ridiculous that if a consumer says, 'I am interested but can you come back later?', that the sales representative will have to reply, 'I am sorry, but you cannot give me

that consent face to face. I will have to go away and call you at another time.' The unintended consequence of this provision is that the consumer is inconvenienced by having to receive another call and the sales representatives and the industry are subjected to a further unnecessary compliance cost. We would argue strongly that section 73(2) should be deleted and replaced with a provision that permits the consumer to give consent face to face during the permitted calling hours.

Our third concern relates to disclosure. We strongly support clear and transparent disclosure about identity and purpose of the visit at the beginning of any sales presentation. However, we do not support the requirement set out in section 74(b) of the bill where the sales representative must advise that they are obliged to leave the premises on request before starting to negotiate. The overwhelming advice we have received from people with extensive experience in door-to-door sales is that this requirement will have a significant effect on field sales.

The success of this sales channel depends on the ability of the sales representative to build rapport with the consumer in the first moments and minutes of a sales presentation. The requirement set out in section 74(b) will make that very difficult. Furthermore, the bill already contains strong and effective deterrents for sales agents to ensure they leave the premises when requested. We recommend that this provision be deleted, or at the very least amended to say 'as soon as practical' rather than 'before starting the negotiation'.

Finally, our last concern with the bill relates to the ability to supply goods and services during the termination period. Section 86 of the bill is relevant for many goods and services but may have the unintended consequence of inconveniencing some consumers. A good example of this is a consumer who chooses to purchase a newspaper subscription but may not want to wait two weeks for it to appear in their letterbox. We recommend that section 86 of the bill be amended to enable a consumer to consent to receive goods and services within the 10 business days cooling-off period whilst maintaining the consumer protections of the cooling-off period.

**Ms Rohan**—We were formed in 1966 and during our 44 years of operation we have been involved with the formulation of legislation covering direct marketing. We have over 500 members evenly spread between the user and supply side, including major financial institutions, telecommunications providers, energy providers and entertainment providers. Our remit is to help companies achieve better marketing results through the end-licence use of direct marketing.

ADMA has for many years taken the view that the 17 different state and territory fair trading laws should be replaced by a single consumer law and we strongly believe that this will deliver positive outcomes for both consumers and business. We welcome the decision to ensure that the obligations that are already specified under Do Not Call Register legislation not be duplicated in the Australian consumer law as they are in many regards under the current state fair trading regimes.

Our support for the bill in total, however, is contingent on the single consumer law not unnecessarily burdening business and we do not believe that the bill has yet struck, in some parts, the right balance between the needs of consumers and business.

As Mr Faulks mentioned, we are going to limit our comments more to unsolicited selling over the phone, which is specifically within our remit. The specific areas that I want to highlight today are in relation to a number of provisions that we believe would be impractical to implement. The first one is the requirement to provide an agreement document to a consumer within five business days when Australia Post can only guarantee a minimum four business days for delivering mail. We believe that the practicalities of taking on the task to process and get out into the mail an agreement document within one day with no failure ever would be too onerous on business and is actually not technically practical and reasonable for most businesses.

In addition, the prohibition of supply for 10 business days which goes well beyond the current 10 days, which is the most stringent in state and territory legislation, does not appear to take into consideration the impact that this would have on continuous services. For example, if a provider even of an essential service were to make an unsolicited call to extend a contract or to renew or provide a new service it would seem under the legislation at the moment that they would have to discontinue providing that service for that time frame. That seems probably not to be an intended consequence of the legislation and would be something that should be looked at.

The prohibition of supply for 10 business days also adds a degree of complexity which the committee has already heard about earlier today. But I think it is important to note that the cost of the additional complexity on business will ultimately be borne by consumers. Consumers also need to contend with complexity in terms

of determining what their rights are and following those up. In terms of the use of business days, it needs to be considered from both sides: firstly the cost to business which is ultimately passed onto consumers but then also for consumers when trying to work out what their rights are as to when those days finish et cetera.

We are also concerned about section 82(6) which specifies that there is no requirement in relation to the form or content of the notice provided under section 82(1), which is the termination notice. We believe the legislation should require that a consumer provide at least sufficient information that would reasonably enable an organisation to identify their sale and to process the termination request. If organisations do not have that information then they may not be able to action that termination request properly and that will lead to consumer detriment because they will have difficulty in actually getting out of that contract, and confusion will almost definitely arise if that provision stays as it is.

There are two other areas that we want to raise. The first one is the inability of a supplier to use as a defence the fact that they took reasonable precautions and exercised due diligence to avoid a contravention of section 77 of the act, whereas in fact it is an allowable defence under section 208 of the act which carries criminal penalties. I refer to the Do Not Call Register which has in its provisions the fact that if a supplier has taken reasonable precautions and exercised due diligence that should at least be a defence.

Our submission goes through a number of other inconsistencies but we will refer to the apparent inconsistencies without going through it in detail in relation to sections 83, 85 and 88 where it is not clear whether or not there is liability in relation to a supply of a service where it has been terminated, but I will not go through that in a great amount of detail.

As a closing remark, we encourage the committee to consider that the vast majority of unsolicited selling transactions are conducted successfully in Australia and that we should not look to overregulate a system where there could indeed be a significant detriment to the majority of consumers and businesses to respond to what is perhaps a minority of cases and problems.

**CHAIR**—In relation to the continuing service, are you saying that if someone has a contract and a sales person comes around to check on renewal or an ongoing service then that would be counted as an unsolicited call in your view?

**Ms Rohan**—It is not specified otherwise in the legislation. If you were recontracting on a service, say, ringing up in relation to a service—I will use a phone plan because at two years duration that seems to be a good example—then theoretically you would be prohibited from supplying that service for that time frame; then there is no distinction at all between whether or not that service is already in supply. This could be a major issue for people. Essential services would be clear, but also if people have children and pay TV they may understand the disruption to a household that may occur if you are not allowed to have your subscription television for 18 days. I know my house would be disrupted if that were the case.

**CHAIR**—People with children would understand that.

**Senator EGGLESTON**—There seems to be a lot of comment made in several submissions about the 6 pm deadline on door knocking, and Telstra, for example, feels it should be extended to 8 pm. It is a really difficult issue because obviously there is the issue of the privacy of the individual. Is there some way if you wish to come back at a later time to make some sort of agreement with potential clients by an earlier call, or something such as that?

**Mr Smith**—The issue about calling time I think is a very pertinent point. It is about finding the period of time when a customer and a sales agent find it convenient to do business. The issue that we as an industry body or industry players have found is the physical availability of the prospective consumer or customer to be physically home prior to 6 pm limits the size of the market potential. At least with 8 o'clock you have the decision makers available. Whether you are selling energy, telco or subscription television, in a lot of cases the decision making is actually done by the couple and not by one party because there is always the deferral to the other partner before a sale is actually made. So the ability to be able to get access to the key decision makers is enhanced by a later cut-off time rather than an earlier cut-off time. Then the option of saying, 'Well, it is actually not convenient for us to reach an outcome at this point in time', because of family matters, et cetera, the opportunity to reschedule a time that is more convenient is of course very much part of the modus operandi. We would certainly want to see the ability for a prospective customer to seek that sort of flexibility to absolutely be maintained in whatever legislation is ultimately tabled.

**Senator EGGLESTON**—But your submission says that under this legislation it is not possible to have an agreement to come back later without calling back—

**Mr Smith**—What is being proposed would actually incur another step of compliance and therefore another imposed cost because if you are there and then with your prospective customer and the customer is willing to seek a later time and to arrange it there and then, to say, 'No, we cannot do that; I will have to refer that to another party'—whether it is myself making a call, but not on the door or to an organisation that then phones in to make another time—seems to be contrary and counterintuitive to what we are trying to achieve, which is to allow the customer to exercise their ultimate discretion as to when it suits them to have a sales presentation made to them.

**Mr Crummy**—Often the bills are in the partner's name as well, so the prospective customer on the door will like the idea of the offer but they will often invite you back on the basis that the partner is the account holder and the decision maker as per that contract.

**Senator EGGLESTON**—Would you like to see some relaxation of the rules regarding the right to come back rather than stick with what is in this legislation? What percentage of people do you think would want people to come back? What is your experience?

**Mr Smith**—The fact that we as three significant representatives of the field sales industry make that $1.1 million sales on behalf of the customers that we serve per annum would suggest that whether it is done up to 8 o'clock or after 8 o'clock, in our case the majority of sales are done during the permitted calling hours and percentage-wise it is only on those occasions—I might defer to my colleague—

**Mr Smith**—Eighty per cent are done at the point of sale. Twenty per cent are appointments that would be made later.

**Senator EGGLESTON**—In other words, the 80 per cent that you are talking about you are dealing with, say, the wife rather than the partner?

**Mr Smith**—Up until 8 pm the chances are we are dealing with both, or the person—if I may use the term loosely—who is authorised to be able to make that transaction. If they are the account holder then that would be done still within those permitted hours up to 8 pm.

**Senator EGGLESTON**—How much business do you do during daylight, shall we say from 9 am until 5 pm?

**Mr Smith**—We do not. In fact, this is an industry that sort of mobilises itself in the field from typically 4 pm through to 8 pm.

**Senator EGGLESTON**—In other words from 4 pm until 8 pm is your activity level?

**Mr Smith**—Yes.

**Senator EGGLESTON**—Are you saying that this proposal cuts out 50 per cent of your operating time?

**Mr Smith**—Yes, it effectively would.

**Mr Crummy**—I would probably go further to say that the primary window is probably about 5 pm to 7 pm. That is where we see the majority of our activity.

**Senator EGGLESTON**—Okay. Nobody has given that evidence to us before.

**Mr Tan**—One of the challenges for us as an operator in the industry is that we are essentially a volume based business so, as Mr Smith alluded to, the fact that we can have a greater contact rate when people are home after 6 pm certainly provides us with greater cost effectiveness that enables us to offer greater value to our clients. If we were to lose that opportunity to engage with consumers between 6 pm and 8 pm what that might do is actually inflate our costs so that we would have to pass that higher cost on to our clients. We fear that may increase the cost offered to the consumer which therefore may become uncompetitive by nature. It is one of the concerns that we share in addition to the cost of the offer itself.

**Mr Smith**—It is by nature a high-cost channel for the companies that we serve but it is an effective channel. It is known as a push channel as opposed to a pull channel. If you think about any of the organisations that we typically serve, they do above-the-line advertising; they do below-the-line advertising, be that television, direct marketing et cetera. The fact that we can make 1.1 million sales collectively means that consumers have not responded to any of the other forms of communication but when you actually present the products and services and the features and benefits of those products and services on the door-step where you can show them and take the time to go through a sales brochure to demonstrate value and therefore consumer benefit is actually a very powerful sales method, but it is one where the offer and acceptance principle applies because the customer has expressed an interest, has had it demonstrated where value is

represented and that leads then to a consumer decision. It is a very important part of the economic cycle and the money supply that works between a customer and an ultimate manufacturer or organisation that we actually serve.

**CHAIR**—I understand one of the objections to post 6 pm is that it is dark and there are security concerns and a lot of people feel quite threatened by having someone on the door. How do you respond to that?

**Mr Smith**—That comes back to something that the three parties before you today have very strong views on as to the rules and procedures. It all comes down to the training and the identification of the sales agent on the door at that time with a very clearly displayed badge of identification. Part of our whole recruit, train and manage process is making sure that in that very first moment where there is that engagement of the customer and sales agent that they immediately establish the purpose of the visit and that they build rapport so that they immediately address that issue of the unsolicited nature of the actual call. That is one of the principal reasons why the three organisations here today have been so successful for so long is that we spend a lot of time making sure that agents understand exactly how they should present and always stand in an area where there is as much light as possible, whether it is a porch light, or whatever, and are clearly uniformed with clear badge identification.

**Mr Crummy**—We do encourage our clients to provide high visibility wear so they are quite identifiable at night. It is something quite vibrant; sales wear is very important from a consumer point of view.

**Senator PRATT**—Clearly you have put yourself forward as good practitioners in this space, but there are a lot of bad practices out there. I want to know, in contemplating the kinds of issues that you are raising, that we are not in fact letting back in the elements of the industry that we really do want to see these laws address. How do you think we should go about that?

**Mr Smith**—This inquiry has actually caused the industry to come together as one because up until now we have not had our own representation and, as a reflection of history, it is something that we probably should have done. As a result of that the three parties before you today have actually come up with what we believe is a best practice industry standards document. I am very happy to table a document with you today. I will make the point that it is in final draft stages so it is not something we would expect to find its way into legislation necessarily but it will give you an indication that we are prepared to be managed, too, and be seen by third parties as being able to be audited against these best practice standards which would become the benchmark for any operator coming into the market to abide by. By reference, if they do not meet those minimum standard expectations then they should not have industry accreditation. That is a significant step forward and it is something that we feel very strongly about because we have been doing this for the last 15 years, as is the case with my colleagues. This is a very viable industry. It provides a consumer benefit and it serves the customers upon which we operate. There is $1.3 billion worth of industry economic benefit that is there to protect and grow, so we believe it is our responsibility to offer that type of accreditation standard.

**Senator PRATT**—That does not prevent someone who is not accredited and who is unscrupulous from knocking on the door of a vulnerable person at 7.30 at night under your proposal and saying, 'If you do not want to talk to me now, let us make another time.' There are some pretty vulnerable consumers out there being sold products that probably the consumer felt pressured to buy that they would prefer in hindsight not to have.

**Mr Smith**—I understand the point you are making.

**Senator PRATT**—There is not an easy answer for us or for you. In part I think it comes down to the nature of the contract that you are asking people to sign and whether it is—

**Mr Smith**—And the companies that we represent.

**Senator PRATT**—And whether or not they did legitimately want it, which is a different question to the rules of when you can and cannot—

**Mr Crummy**—In talking about that process, the 1.1 million sales that Mr Smith mentioned represent our three organisations that are all supported by a telephone process called 'sales verification'. In those cases, 100 per cent of the time we call record the customer's explicitly informed consent to enter into a contract with the organisation that we represent. We see that as a minimum standard whereas there are other organisations that probably do not see that as being important. It is probably the fact that it is cost prohibitive that causes them not to adopt that process.

I think in looking at the document that Mr Smith talked about that has been drafted that it is our responsibility to not only bind together as a group but also to educate some of the clients that are engaging

what we would call not only second-tier organisations but third-tier organisations. That is a difficult process for us to go down that path, but we see it as a joint responsibility from a client point of view as well as from a sales or business point of view.

**Mr Smith**—The verification process is actually an independent process, so it is not the actual sales agent that is involved in that process. That is another check and balance to make sure that (a) the consumer knows what they are actually buying, that they know their obligations, that they know the terms and conditions and because it is a voice-recorded call that we have that on record and we maintain that record for a length of time, which is just further evidence that we take this whole customer interaction through the sales process very seriously as reputable tier-one providers in an industry that we see as being a very fundamental part of the channel mix on behalf of our customers.

**Mr Crummy**—Speaking on behalf of Aegis Direct, the verification services that are provided for our business are not provided by our business, they are provided by an independent third party. That independent third party makes sure that all the key elements of the contract are covered. I mentioned explicitly informed consent. I guess the hot buttons are whether a customer knows they are entering into a contract, so that is very clearly stated; whether they understand the cooling-off period of 10 days, and the fact that they are changing retailers. There are many organisations out there misrepresenting the fact that they are representing a retailer and there are often allegations that you would have seen yourselves: the government is calling. We are very clear. The questioning in that verification has to be very clear so that the customer will stay on the phone and whilst they have been ticking a box and understanding each of the elements of it they know exactly what they are entering into.

**Senator BUSHBY**—You mentioned you were supportive of the concept of a national, harmonised law but you do not want to see a replication of laws which are essentially a continuation of state laws. As I understand the advice that we have received from Treasury basically the idea of the consumer law is to pick up what is going on in the other states and put it all into action in a national sense and that where you have similar laws they will actually be repealed. I do not think you are going to have any issues in that respect but I would be interested to know if you do.

On the issue of consent to come back, I suspect that the inclusion of that in this legislation has been done deliberately to protect against the situation where you might have a vulnerable person who has somebody knock on their door and they use the excuse, 'I am too busy now'; they are just not strong enough or assertive enough to say, 'Look, I am not interested; go away.' One of the tactics which has been used on me over the phone—and presumably it would be the same with door to door—is that they say, 'When can I come back?' And they pressure you and push you. I suspect that this is designed to remove that avenue of pressure on somebody who really is not interested. If we adopt your suggestion, how could we deal with that to ensure that people who really just want them to go away but do not have that assertive personality or ability to tell them to go away can actually be protected from people who pressure them so that they make an appointment to come back later?

**Mr Faulks**—All our businesses have various systems and processes to make sure our sales agents are performing and acting in a way that we believe is reputable. If a sales agent returns to a property without invitation—

**Senator BUSHBY**—No, I am not saying that but you might have somebody who gets a knock on the door and they say, 'No, I am too busy; I am having dinner,' and the agent says: 'When can I come back? What about in an hour's time? Would it be better then?' I have experienced it myself. You answer the phone and say, 'It is a bad time,' and the response is: 'When can I ring back—what about in an hour's time?'

**Senator PRATT**—They would rather have said no but they did not.

**Senator BUSHBY**—Yes, that is right. They might just be being polite. In the end those people may well say, 'Okay, come back in an hour's time when dinner is finished,' even though they do not really want you to. You have been talking about people who say, 'I would love to but I cannot do it now.' With these people they might just not want you to come back but I suspect this is in there deliberately to protect people in that circumstance.

**Mr Smith**—I understand the question. I think it is a case of looking at the industry statistics to help decide whether that is the norm or whether that is probably in the extreme category. We, as three representatives of the industry, currently have a complaints ratio to sales made of 0.4 per cent in the worst case scenario. It is 0.4 per cent of those 1.1 million sales made which have ended in a complaint where either there was a concern

from a consumer that it was not what it was alleged to be, et cetera. But we have an ombudsman complaint escalation process. That is in fact 0.002 per cent so we are talking about a very small number of extremes.

**Senator BUSHBY**—I am not trying to advocate strongly against this and I do not have an accurate reflection of people who feel strongly and go off and complain. I am sure there are also people who in the heat of the moment sign up to things that they had not necessarily been thinking, 'Gee, I need some of that.' Then they think, 'Oh, well, I have signed up now; I have signed a contract,' and they just leave it and pay it.

**Mr Smith**—And do not exercise their 10-day cooling-off option.

**Senator BUSHBY**—That is right. In some cases they might not have to start paying until afterwards so they do not really seriously think about it until after the 10 days are up. I suspect that there are people like that and they would not be complaining and they may well be the same people who said, 'No, I am too busy,' and somebody came back an hour later because they were not assertive enough to say no and then they say, 'That sounds reasonable; okay, I will sign.' I am not alleging that you represent people who do things that are unethical but your sales people would be trained in psychology and in how to achieve the sale and have tactics that they would employ. In that sense I am interested to know how do we actually ensure that people who end up signing up to these things that you are selling do so in a fully informed way and are fully aware of their rights and obligations when they do it as well as ensuring that they are actually getting something that they really wanted?

**Mr Smith**—The remuneration model that applies in the direct sales space does not encourage a sales agent to continually prospect an opportunity that really is not showing promising signs because time is the key ingredient here. It is in their interests to actually move to the next available house as their primary interest. So to continually hassle somebody to try to get that next commitment, yes, it may happen but in terms of priority or prime interest, no, it fades away fairly quickly.

**Senator BUSHBY**—The same thing happens if you are door knocking for election, too.

**Senator CAMERON**—I do not want you to answer this now because I have not got a lot of time but I would like you to take it on notice. I have heard a bit about how important the industry is, how valuable the industry is in terms of the economy and how beneficial the industry is to consumers. I have heard nothing about your sales agents other than it is not in their interest to hang around so I assume they are on some payment by result approach. Can you provide details about your how your sales agents are paid and their terms and conditions?

You also say that you should not be penalised by these bad companies that are out there doing the wrong things; am I right in saying that? The standard should not be set by the lowest common denominator, basically?

**Mr Smith**—That is correct.

**Mr Crummy**—We would say it was all about balance. Rather than saying that it is the lowest common denominator, it is the balance because of course you need to capture some of those unscrupulous operators.

**Senator CAMERON**—Unscrupulous operators are not the big players in the industry?

**Mr Smith**—Absolutely.

**Senator CAMERON**—They are absolutely not?

**Mr Smith**—You have the three largest, most recognised and highest credentialed parties in front of you today.

**Senator CAMERON**—You mentioned Telstra in your submission. What is the relationship of any of you with Telstra?

**Mr Smith**—We are their direct sales majority provider Australia-wide.

**Senator CAMERON**—Telstra are one of these reputable big businesses with no problems?

**Mr Smith**—They are a reputable organisation that places significant governance and compliance responsibilities that are reflected in our training, recruitment and management practices.

**Senator CAMERON**—Tell me about People Telecom and the ACCC?

**Mr Smith**—People Telecom?

**Senator CAMERON**—Yes, and the ACCC, a subsidiary of Telstra.

**Mr Smith**—I declare little knowledge. We do not represent them.

**Senator CAMERON**—But you said that they were one of the reputable companies. I am afraid I did not list Telstra because I have just come across it. The ACCC have just now put out a public statement to say that People Telecom had used telemarketers and door-to-door sales agents to promote its telecommunications services, mobile phones, fixed phones and data services. There have been complaints to the ACCC that these People Telecom agents were claiming they were agents working on behalf of the customer's current telecommunications carrier, misrepresenting the position, and that the customer was required to change their carrier to People Telecom and that changing to People Telecom would not compromise any current contractual or billing arrangements with their current carrier and this was not the case. People Telecom is a subsidiary of your member. The ACCC have dealt with this matter and there are binding agreements with People Telecom as to how to deal with this.

You just told me that Telstra is a reputable company and that these things do not happen, that it is these outriders that are out there causing the problems, but that is not the case. That is not the case. If you want to get any inquiries I can tell you ring the ACCC and talk to Brent Rebecca. That is the contact for this if you do not know about. You have come here and told us everything is okay when it is not. How do we deal with this? What value can we put on your evidence that everything is really good when one of the companies that you represent has only just this week been subjected to the ACCC directions?

**Mr Smith**—That is absolutely news to me. I have no knowledge of who People Telecom are but I will certainly make inquiries for our own education point of view but—

**Senator CAMERON**—I think it should be more than for your education.

**Mr Smith**—We do not have that relationship.

**Ms Rohan**—I would like to take the question on notice but my understanding, not having researched this, is that People Telecom is a carriage service provider perhaps of Telstra but they are not a wholly owned subsidiary of Telstra. My understanding is that carriage service providers can contract for services from carriers but they are not related organisations. In relation to the requirements and obligations which apply in terms of telephone sales, the Do Not Call Register legislation already requires that any organisation's representatives properly identifies who is making the call. I believe, as you have said, that the ACCC has raised issues in terms of Do Not Call Register as well as other pieces of legislation—

**Senator CAMERON**—When was this? Over what time?

**Ms Rohan**—I think the point is that you are asserting that People Telecom is a subsidiary of Telstra, which I do not believe is the case. They are a wholly unrelated company but they are a carriage service provider of one of the major carriers. I could be wrong but that is my understanding having worked in telecommunications for a number of years.

**Senator CAMERON**—They are not one of your clients?

**Ms Rohan**—No.

**Senator CAMERON**—Even if they are not a wholly owned subsidiary they are acting to promote Telstra's business, you are saying—

**Mr Smith**—They are a carriage provider.

**Ms Rohan**—From what you have said—I have not seen their release—I think the problem has been that they have been alleging that they are working on behalf of the carrier when they are not.

**Senator CAMERON**—That is not what I am saying. They were alleging that they were acting on behalf of a competitor company to Telstra and they were saying, 'You can simply come over to Telstra and there is no obligation; everything will be okay.' They were misrepresenting the position and, regardless of the fine detail of whether they are a subsidiary or who owns them, the ACCC have actually had to deal with this. It is a telemarketing company. It is a door-to-door company that on behalf of probably the biggest corporation in the country is out there misleading consumers. So it is not outriders, it is not just that there are some problems. There are some systemic problems in your industry and there have to be laws in every state to deal with them. If it was all okay there would not be laws in each state, would there?

**Mr Smith**—The first point I would like to make is that it is not systemic through the whole thing. We do not represent People Telecom. We represent a lot of the other things to do with Telstra and those sales are conducted up to the high standards as indicated in the document provided to you.

The second point I would like to make is in relation to the Australian consumer law that includes the requirement that you have to disclose the purpose, your identity and which corporation you are referring to. There are always going to be unscrupulous operators in this industry. I think that is a fact. All that we and the legislators can try to do is hold everyone to the highest possible standards and if they breach those standards then of course bring the full force of the law to them such as with the ACCC. But the Australian consumer law already deals with the provisions to disclose that kind of information, the purpose for which you are there and the identity of the corporation you work for. If someone chooses to be misleading in that respect then the legislation already deals with that.

**CHAIR**—If you could provide some answer on notice once you have seen the press release that would be good. If you want to do a supplementary submission that is up to you. I would like to thank you for coming in this morning.

[11.38 am]

**MALBON, Professor Justin, Private capacity**

**PATERSON, Dr Jeannie, Private capacity**

**CHAIR**—Welcome. Do you have opening statements you would like to make?

**Prof. Malbon**—I want to congratulate the government on making reforms to this area which are quite substantial. In fact I am struggling to get through the massive detail that is in these bills. I certainly will not be attempting to be comprehensive at all. By way of emphasising how important this is, the consumer part of the economy is probably the main driver. I think the significance of properly regulating this area is well illustrated by the existing global financial crisis. Even though there is a lot of focus on it at the moment where there was a packaging of collateral debt obligations and how the big major financial organisations behaved in relation to that, at the absolute base point of all this were some very, very poor consumer practices: the door-to-door selling that was going on and selling people products where they knew that they had no hope of repaying the debt. Not that this bill is dealing with that topic but it just goes to show at the heart of all this huge international financial crisis is the fact that the regulators, the government and industry were engaging in extremely poor consumer practices. We see that it is critical that Australia maintains a very high standard in terms of consumer protection. It is not just a question of fairness, it is a question of good economics.

Firstly, I just want to make a couple of comments about the unconscionability provision. I want to make a suggestion about special disability.

Secondly, turning to the question of guarantees, I want to make a suggestion which really is not something that would go in the bill but the committee might want to make a recommendation on, and that is that we should consider, in relation to the question of guarantees, greater accessibility for consumers to make complaints and consider the idea of an industry funded dispute resolution scheme that is truly independent so the consumers can get easy redress where they are being sold a dud product or a product that has lots of problems. Because they tend to be relatively low income purchasers dispute resolution is one of the major problems in this area.

Thirdly, I would like to make some comments about the section 65 carve-out for telecommunications. I do not want to say anything about gas and electricity because I also happen to be on the board of the Queensland Competition Authority, which is the ultimate regulator in Queensland in terms of electricity and gas in the retail market.

Finally, I want to propose that the legislation specifically provides for a parliamentary three-year review because there is such a mass of new changes we do not know how this is actually going to play out in the marketplace itself. Perhaps the legislation should specifically require for a review which will look at specified questions such as: is this making any difference on the ground? Dr Patterson will be talking about unfair terms.

**Dr Patterson**—I would like to make a comment about unfair contract terms and the need for a requirement for transparency in contractual documents and I have a comment in relation to extended guarantees.

**Prof. Malbon**—Just as a matter of curiosity, have you had submissions about the definition of 'consumer' in section 3(1)(b)? I am puzzled about that.

**CHAIR**—I am sorry, there is a real issue of time. We need to move on quickly.

**Prof. Malbon**—As you are aware, in terms of unconscionability the bill pretty much follows the Trade Practices Act and section 20 talks about unconscionability being the meaning of the unwritten law from time to time which picks up the fact that, as we know in terms of the unwritten law, a first step is you have to establish that you suffer from a special disability before you could then get any further. So you have to establish first up a special disability such as language, age, drunkenness over three days or being smitten in love that is then taken advantage of before you can get anywhere. When the term appears in sections 21and 22, 'A person cannot engage in trade or commerce in connection with the supply... engage in conduct in all the circumstances unconscionable', it seems to trigger back to the unwritten law's understanding of unconscionability. Despite the fact that section 20(2) says that this section does not apply to conduct that is prohibited by sections 21 and 22, I think there is still doubt as to whether or not that first requirement of sections 21 and 22 establishing special disability is still required. I think if an amendment were made to sections 21 and 22 to say that there may be unconscionability even if a consumer or business consumer does

not suffer a special disability. If that provision were put in there I think that would clarify the operation of sections 21 and 22. That would overcome a huge area of uncertainty which the courts seem to be tip-toeing toward. But that would certainly clarify the position.

Turning to the question of guarantees, this committee has looked at this issue before and it has made recommendations and it has identified that one of the major problem areas is the fact that once they are knocked back consumers do not have an easy redress. If they do not take their product; they say it is defective they then say, 'Well, that is too bad. It is fine. Go away.' The consumer often leaves it at that. Easy redress to some remedy is not readily available. We propose along the lines of what is available now with the financial ombudsman's service and other industry funded dispute settlement schemes, or resolution schemes. We suggest that perhaps this committee recommend that either it be set out in the legislation or that an independent dispute resolution scheme be established.

Turning to the section 65 carve-out—this is in relation to the guarantees—that provides that this division does not apply if the supply is of the kind mentioned in the regulations or is the supply of gas, electricity or telecommunications service. We see a huge range of disputes and problems of consumers is in the telecommunications area. We see no reason why there needs to be a carve-out in relation to that area. Although there are other contracts and provisions dealing with telecommunications, we do not see any reason why this base standard set out in the legislation should not apply to them. 'Unfair terms' applies to them along with a whole range of others. There does not seem to be any special reason for a carve-out in this area. At the very least we would say that the carve-out should be limited to the subdivision dealing with services. That is to say that if someone is on a telecommunications plan which sells both the phone and the service there can be some doubt as to whether or not the phone is caught by that. Therefore we would say that if there is to be a carve-out at all, it should only apply in relation to the subdivision dealing with services, which is subdivision (b), rather than the whole division.

Finally, as I mentioned before, there should be provision for a review specifying the sorts of matters that should be reviewed by parliament in three to five years time.

**Dr Patterson**—My comments relate first of all to the unfair terms provisions which I think are a great development in Australian law and provide a great deal of protection to consumers against terms that are unbalanced and unfair. I notice however that there is no general requirement in the proposed Australian consumer law legislation that contracts be transparent in any way; that is only a subsidiary requirement that is relevant in assessing whether a contract term is unfair.

A fundamental principle of consumer protection policy is that consumers should be able to have access to their contracts, they should be able to read those contract and they should be able to understand those contracts. That is the absolute baseline point for consumers to be able to make decisions about whether or not to enter into contracts and also to enforce their rights at a later stage should a dispute develop.

Given the importance of consumers being able to know their contractual rights, I think it would be a great addition to this legislation if there were an independent requirement that all contract terms be transparent, not just contractual documents that are specified in this legislation. Consumers need that requirement as a first point for enforcing and protecting their own rights. Such a provision already exists in Victoria and appears to cause no great harm to business and industry, and I think that the costs involved in all businesses across Australia in making their contracts transparent would not be significant and there would be a great gain to consumers. That gain to consumers would come in consumers themselves being able to take steps to resolve contractual disputes, so I think the gains would be significant.

If you go down to VCAAT, which is the Victorian Civil Administration Appeal Tribunal, where individuals themselves can bring consumer complaints there is actually quite a lot of action there with consumers coming before the tribunal and asserting their rights, but they cannot do that if they cannot find or read or understand their contract terms. I think that should be included in the legislation.

A second point I would like to make about the unfair contract terms provisions is that it is a great pity that those provisions have not been applied to business-to-business contracts. In the initial draft of the legislation the unfair contract terms law was going to apply to business-to-business contracts and that provision was taken out; the legislation was narrowed to apply only to consumer contracts. As you would be aware there is great concern at the moment in the industry, in particular industries, about the mistreatment of small businesses, particularly in the franchising industry and the leasing industry. A great deal of protection would be provided to those small businesses by having the unfair contract terms provisions apply to them.

If unfair contract terms applied to business-to-business contracts it is not going to apply to all business-to-business contracts, it is only going to apply to standard form business contracts. Standard form business contracts are only found in certain relationships, typically large business, small business relationships. If Optus and Telstra are contracting with each other it is not done on a standard form contract and would not be affected by this legislation. The type of relationship that is affected is the franchise relationship.

If this unfair contract law was extended to business-to-business contracts a lot of pressure would be taken off the unconscionability provisions because at the moment it is a great deal of pressure to extend and expand section 22, what used to be 51(a)(c), which is the business unconscionability section. That section is being asked to do a lot of work to protect small businesses in a way that is quite awkward and which courts are resisting. They are resisting because unconscionable conduct in traditional legal terms simply does not apply to problems with the terms of the contract. One easy solution to that tension in relation to unconscionable conduct would be to expand the scope of the unfair terms provisions as was initially proposed.

My last point is in relation to extended guarantees. Whilst the legislation clarifies the implied guarantees in contracts it does not do anything about extended guarantees. As you would be aware, particularly in relation to white goods, consumers often at the end of a purchase are offered the opportunity to purchase what is called an extended guarantee so they pay some money in return for a supposed guarantee that is represented usually as extending the time in which they will be able to seek repairs of those goods without any dispute with the supplier.

Often that extended guarantee gives consumers no greater protection than would currently exist under the Trade Practices Act. Consumers are not aware of their rights under the Trade Practices Act. Suppliers in fact are not aware of their obligations under the Trade Practices Act. When this issue is discussed with suppliers they go, 'No, no, we have given an extended guarantee; that is better than the Trade Practices Act.' Actually the Trade Practices Act provisions are often better than the extended guarantee provisions. Consumers are not aware of that, so often they are making a decision to purchase this extended guarantee to obtain a warranty in relation to the functioning of their goods that is quite unnecessary. I think there should be an obligation that if a retailer or supplier is selling a consumer an extended guarantee the consumer should be given information about their statutory rights. The fact that there may be a sign somewhere saying: you as the consumer have certain statutory rights in relation to the repair of the product is not enough. Where that information needs to be is on the same piece of paper as the extended guarantee so that the consumer and the retailer are confronted with the question of what the relationship is between these two sets of provisions. That is what I would like to see.

**Senator EGGLESTON**—As you say, standard form contracts are not common in business, except between large and small businesses?

**Dr Patterson**—Franchise contracts are often standard form contracts.

**Senator EGGLESTON**—What percentage of business would that apply to, do you think?

**Dr Patterson**—I do not have a view about the percentage of business but it would not apply to a large number of business-to-business contracts simply because they are not done on a standard form basis. Any large transactions are usually specifically tailored to the nature of the business dealing. But to the extent of being concerned about franchise contracts and retail leases, those are the two main examples of standard form contracts in business-to-business environments.

**Senator EGGLESTON**—The issue of extended warranties is one that has been raised with us already. It is obviously an important issue and consumers are often misled into thinking that they are getting a benefit when in fact they are not.

**Dr Patterson**—They are misled and yet it is not necessarily misleading or unfair conduct and moreover, because the consumer never knows, there is never any complaint about being misled.

**Prof. Malbon**—One of my students who works for a large retailer mentioned the other day that the mark-up on those extended warranties is huge. There is some other third party that organises these things and they pay—she came up with a figure like $20—and they will on-sell it to the consumer for $80-plus. It is a lucrative area. They are under pressure to sell them because they often make a bigger mark-up out of the extended warranty than the goods themselves.

**Dr Patterson**—What is interesting is that retailers themselves often do not understand the relationship between what are currently the Trade Practices Act's implied term provisions and the extended warranty, because I myself have had numerous debates about the fact that if there is a Trade Practices Act implied

warranty actually what the extended warranty says does not matter and retailers often use the extended warranty as a way of capping claims. They say, 'Oh, you are out of time with the extended warranty so you cannot make any more claims,' which is actually not correct.

**Senator EGGLESTON**—The consumers have no idea that that is the case.

**Dr Patterson**—That is correct, so they need the information right there in front of them.

**Senator PRATT**—We have had some discussion about greater accessibility for complaints and dispute resolution. You indicated that industry funded programs would be a good way to go. What do you think dispute resolution should look like across the country in this kind of brave new world?

**Prof. Malbon**—They certainly should not look like the TIO, the Telecommunications Industry Ombudsman scheme, which I think has governance issues. I think if you have an industry scheme you have to make sure that the ombudsman is not subject to any pressure from industry and can act completely independently. I think the governance operations and the way those schemes operate—I must also confess that I am on the financial ombudsman's service—

**Dr Patterson**—It is generally the view that the Financial Services Ombudsman system works very well and it is a very good example of—

**Senator PRATT**—Is that because there is a greater diversity of the kinds of services in it and that some ombudsmen kind of get captured by—

**Prof. Malbon**—Yes, there is a real risk of capture. The financial ombudsman sort of collected together a number of schemes but the scheme that I was involved in previously before it got fixed was the financial industry ombudsman. That deals with financial planners and so on. Eventually a complaint can get up to a panel. There is usually a retired former judge or some such person as the chair and then there is an industry representative and a consumer representative. We had no pressure whatsoever from industry. We are insulated so that we can make decisions quite independently without pressure, so I think that is a critical component.

**Senator PRATT**—Part of the problem surely is that there are too many bodies for consumers to go to and that even the referring organisations really do not know who to refer people to.

**Prof. Malbon**—That was the idea behind combining the financial industry four schemes into one, to overcome that problem. I think if it is known that there is a scheme to go to; if you have something wrong with your phone and your complaint is not dealt with—

**Senator PRATT**—A franchise ombudsman—

**Prof. Malbon**—There is a whole range of things under this. I think there is a huge expectation on the ACCC to solve the world's problems. They just have such a massive workload, they have to prioritise. These kinds of things are not going to be in the priority basket because they are such small transactions overall, but collectively they form a huge proportion of the problem. I think a report that was done for the ministerial committee said something of the order of $4.3 billion over a two-year period is the kind of economic loss to the economy because of the guarantees issue alone.

**Senator BUSHBY**—You mentioned that you would like to see no general requirement for transparency in a fair contract. What do you mean by 'transparency'? Do you mean it has to be in plain English language?

**Dr Patterson**—I am talking about the consumer must have access to the contract and the terms in those contracts must be expressed in plain English, they must be clear and there must be clear presentation. This is a really important requirement in paper contracts but also for online contracts because when you are contracting online there are a lot of providers where it is quite difficult to find the contract terms.

**Senator BUSHBY**—There is a little box you tick to say that you have read and agreed to the terms in the contract—

**Dr Patterson**—That is right, but you may have to do four clicks to actually find the terms and then it is a PDF and it is this big. There is a requirement of transparency in the act already, it is just that it applies to assessing whether terms are fair.

**Senator BUSHBY**—The reason why I ask is that we have seen attempts to do it before with consumer credit legislation where you have to go to your lawyer and get them to file a notice, but none of it really necessarily seems to work. Whatever you put in place, people do end up going through the motions. How do you actually really ensure that people understand it?

**Dr Patterson**—I do not think you can really ensure people understand it but I think you need to provide a baseline so people can at least have the opportunity of understanding it.

**Senator BUSHBY**—I think that is reasonable.

**Dr Patterson**—The other thing is I think we tend to focus on contract formation. People need to have the terms when the contract is formed. Of course, the counter argument is that people do not care about the contract terms; they just care about the product. Clarity and transparency are also important in dispute resolution so that people can start to think about what their dispute is and how that can be resolved.

**Senator BUSHBY**—While we are on the subject of unfair contracts, I actually have some problems with some of the aspects of the unfair contract legislation but to the extent that we have it and it applies I think there certainly are small businesses who are probably more vulnerable in a consumer sense than many well informed consumers. There certainly needs to be the protection and the protection is not there for them at the moment. I do not disagree with you at all on that. I agree with that. In terms of the extended guarantees, we actually had evidence from Choice yesterday and they went into this to some extent. Their view is that provided people know of the protections that they have they have no real problems with the extended guarantees being there, provided people understand that they might not need it because they have already got it.

**Dr Patterson**—But how do you make sure that they know that they have got—

**Senator BUSHBY**—They did have some commonsense suggestions as to how to do that as well. In terms of the carve-out of section 65, what examples of services provided by telecommunications and energy and gas could default or fall foul of the guarantee provisions? Would it be blackout type situations?

**Prof. Malbon**—Yes, greenouts and blackouts, also very poor lines. Apparently, at least in the case of Telstra, they are moving from copper to—

**Senator BUSHBY**—Optic fibre.

**Prof. Malbon**—Yes, so the question is: are they going to spend a lot of money looking after copper? So there are quite a lot of complaints about static lines, just very poor phones and services not working very well at all. It can be brownouts and cut-outs of service and just very poor reception in terms of copper lines.

**Senator BUSHBY**—Do you have any understanding why they have carved those areas out?

**Prof. Malbon**—There is a claim that there is other legislation that will be dealing with this, but we say that this form is just a very simple baseline that should apply to all industries. If you want to have legislation that goes further than that, that is fine. If you want industry specific regulation on top of this, that is fine. But there seems to be no reason why you should have a carved-out baseline.

**Senator CAMERON**—Dr Patterson, in your submission you go to the issue of extended warranties. We have had extended warranty debates every day of the hearing so far. You say that in many cases extended guarantees give consumers no greater level of protection. I have to admit I do not know when that line is crossed. Could you take on notice and may be give us a more detailed analysis of why consumers are paying $60, $70, $80 or $100 for extended warranties when they are not needed and what we could do to save consumers that expense in the context of the legislation that we are looking at?

**Dr Patterson**—I could.

**CHAIR**—Thank you very much. I am really sorry to have rushed you.

[12.05 pm]

**BAXT, Professor Robert, Partner, Freehills**

**CARTER, Professor John William, Consultant, Freehills**

**PECKHAM, Mr Alan, Partner, Freehills**

*Evidence from Professor Carter was taken via teleconference—*

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

**Prof. Baxt**—I will start and then I can take a back seat because my role has been to help Professor Carter and Mr Peckham and a fantastic team of people at Freehills to put together a submission which I believe is very comprehensive and very important.

Whilst there has been plenty of expectation that this legislation was coming, we seem to have a different pattern as to the way in which the government has moved in relation to the unfair contract legislation of the first bill, if I can call it that. There has not been enough time for this legislation to be exposed, to be considered and to be adequately assessed, and I think we are all going to pay a very big penalty for that. I think the community is going to suffer. The costs are going to be significant and I think the legislation is going to have to be amended.

In our submission—and Professor Carter and Mr Peckham will speak in much more detail to that—we will certainly elaborate on some of the difficulties. We do not see the desperate need to rush this legislation through. I think rushing legislation through is one of the great mistakes we make in this country and not giving enough time for it to be considered.

**Senator CAMERON**—We would like to get some legislation through, you know.

**Prof. Baxt**—That is true. I know there has been debate about other legislation. I heard on the news this morning about the possible double dissolution, but I do not want to get into that. I want to make sure that the legislation that we work with is good legislation. The idea of the legislation is fine. We agree in principle with so much of it but we do believe—especially when the regulators are going to have these huge new powers which came into effect on 23 April, or whenever it is, in relation to penalties and so on and so forth when royal assent was given to bill No. 1—that really some greater care and time needs to be given to that.

That is particularly relevant because the regulators have significant powers in what we regard as legislation that reverses the onus of proof, creates a burden on the defendant and in many cases that is going to be the small person, the consumer or the small business, the person other than the big companies, who are going to face scenarios where both commissions may act. That is our preliminary comment. We believe that this can lead to significant accidental non-compliance which will be costly and time consuming to rectify. We would urge the government to slow down the process so that this legislation when it is put into effect can work more effectively. I now hand over to one of my colleagues to take up the next preliminary comment.

**Mr Peckham**—We had the benefit of hearing Dr Patterson talking beforehand. She made the point that in her view it would not be burdensome on industry and would not be difficult to amend contracts. I think it might have been said in the context of discussion in relation to transparency.

Our concern, drawing on the point that Professor Baxt was making, is that really while there is a genuine and clear need for a national regime and to in some way augment the fair trading and consumer protection provisions of the Trade Practices Act in the manner that is described in the explanatory memoranda, we are quite concerned that the extent of the changes that have been made on the way through will actually have a far more substantial effect than may have been the intent, certainly than may have been the impression created by the explanatory memoranda that were considered by parliament when the bill was initially passed.

I guess coming out of that, certainly with clients of the nature of which we would generally deal, to make a concerted effort in order to comply with this legislation it will actually take quite a lot of time and effort to go through and identify the relevant documentation that has to be amended and to review and amend it and basically to have a whole lot of our clients deal with their preprinted documentation. If you think about the time frame that might be necessary to simply go out and retrieve the already preprinted documents and replace them with new documents, there is a cost and time involved in that whole process. It may not be a particularly complicated exercise to amend the documentation but I think we should not lose sight of the time and cost involved in actually doing that. In the covering letter that Professor Baxt submitted along with our submission

on the bill itself we suggested that it was similar to the process that was adopted in the context of the anti-money-laundering regime. Some period of no enforcement at least after the legislation is passed to enable industry to get its house in order, so to speak, might actually be an appropriate way of dealing with this if, to take the senator's point, you are desperate to get some legislation through.

**Senator CAMERON**—I did not say that. Don't verbal me.

**Mr Peckham**—I did not quite paraphrase you properly. Certainly in the anti-money-laundering context that was quite effective as a way of not only enabling the regulator AUSTRAC to get up to speed with its new responsibilities but also to enable industry at the time to actually manage their affairs and make good efforts to comply with the regime in going forward.

**Prof. Baxt**—Could I just make one other point that is the point about the unfairness that this imposes on our regulators. When legislation is enacted such as last year with the cartel legislation there was an immediate expectation that the commission would the very next day start prosecuting people criminally. It is very unfair to expect regulators to be able to suddenly find cases to bring to court and the same thing is happening in relation to this legislation. There will be pressure on the commission to do something. Why aren't you doing something? We have had this legislation in force now for a month; why haven't you already started issuing infringement notices, et cetera? I think that is such a difficult concept for people out there to understand how difficult it is for the regulators to get on top of this legislation to understand it and train the people, get the resources and apply it. We really do need to be patient and we need to have a sensible approach to what is overall very useful and important legislation.

**Mr Peckham**—That is an important point that I would like to make as well. From Freehills' perspective we are not sitting here saying that consumer protection legislation is bad; far from it. We are strongly supportive of the efforts that are involved in this whole process and to ensure that there is actually adequate and appropriate consumer protection legislation in place. Our concern is that the way some of these changes are flowing through we end up with some inconsistencies and anomalies which ultimately will make it even more difficult for our clients to actually with certainty comply and as a consequence create a genuine outcome of proper consumer protection. I might hand over to Professor Carter if that is okay, as that probably leads quite nicely into one of our first key points that we wanted to discuss, which is the definition of 'consumer' and the different approaches to 'consumer' within the different provisions of the legislation.

**Prof. Carter**—My disappointment with the bill is threefold. From the perspective of the consumer I think it is far too complicated for ordinary consumers to understand. I think the hope that we had of moving past the implied terms into a piece of legislation which the ordinary consumer could understand has not happened. It will be difficult for lawyers to understand the consumer guarantee provisions and, on that basis, it will be impossible for ordinary consumers to understand them. Consumers will therefore have to rely, as they do at the moment, on translations through the ACCC and so on issuing guidelines. I think we said in our submission that that is not an ideal result and I do not think it was a necessary result.

The second concern is this variation of 'consumer' within the Trade Practices Act which in itself is confusing for a consumer. A consumer might well think that consumer goods are goods supplied to a consumer, but they are not. A consumer might well think that a consumer contract is a contact to which the consumer guarantees apply, but it is not. There is a definition of 'consumer' which is not followed through in the act. We have various categories of consumer, but worst of all we end up with a definition of 'consumer' which is both too broad and too narrow. It is too broad because lots of corporations consumers are under the regime; it is on the whole sufficient for the goods or services to be of a kind ordinarily acquired and so on. It is too narrow because it means that if someone acquires goods that are not ordinarily acquired for a genuine personal use—and I think I have given the example of a person who hires a cement mixer for a weekend in order to put a path in at their house—it just seems anomalous that that person who does get the benefit of the unfair terms regime, if the supply is made under a standard form contract, does not get the benefit of the consumer guarantees and in fact would have to know the general law of contract, or go away and buy one of my books, in order to find out what their rights are. It just does not seem to match up.

If might beg your indulgence just for a moment longer, the position of a small business supplying to a large corporation is that it must treat the large corporation as if it were a consumer such as people like you and I who buy goods for our own personal use. It can be a large corporation or a small corporation. Any corporation that acquires goods of a kind without being for resupply or that acquires services of that kind is treated as a consumer and has all the rights as an ordinary consumer. Consumer protection there seems to be a misnomer and the end result is to devalue the consumer protection regime because there is, in fact, no special regime for

Australian consumers. All there is is a concept of 'consumer' that serves to protect large corporations as much as individuals.

Our principal submission in relation to all of that, as you will have read, is a very simple one, and that is to adopt the unfair contract terms definition, which focuses on the actual use of goods or services and to rely on that for the consumer guarantees, which would then, in fact, remove nearly all of those anomalies.

**CHAIR**—Thank you. I am sure you did not mean this, but the submissions you have made give the impression that there is widespread noncompliance with what would be the conditions under this bill; that everyone would have to go out and change their documentation and proceedings. That is not my understanding. My understanding is that most firms, in the ordinary way that they are proceeding now, would comply with the current legislation, and partly because, with some exceptions that have been noted, this is an amalgamation of existing state consumer law. One of the aims of the current legislation that we have heard is that this national legislation will make consumer guarantees and laws much clearer to consumers; surveys suggest that consumers do not currently understand consumer law. This is an attempt to simplify consumer law. We will have a system, maybe not initially, that is easier to understand, but the education and the bringing together of the consumer legislation will. On this committee we have heard a great deal, for example, about unfair contract terms and, as we understand it, there is a lot of confusion about what the unfair contract terms are.

**Prof. Carter**—I would not comment on the latter, but there are two points in relation to the consumer guarantees. They are markedly different. There is no clarification through the means of producing the bill because at the same time as trying to adopt a consolidated version and adopt the best practice for the materials, there have been very substantial changes. They are outlined in the submission, so I will not take you through those. There is widespread noncompliance at the moment. If you or I were to go into any department store and pick up a box of ordinary consumer software we would find on the back or inside that box contract terms which were criminal offences under the Trade Practices Act. I could direct you to 10, 12 or 15 websites in the course of a day where terms are included that are contrary to the Trade Practices Act. People do not understand the current position. It will get worse because the legislation is considerably more complex than the current legislation. That is 25 years of experience in teaching contract and writing on contract. I am not looking after anybody else's interests except for my own as a personal consumer, but I can say to you without fear of contradiction that the regime is more complex than we have at the moment.

**CHAIR**—We have had a lot of evidence that would contradict that. We have had a lot of evidence from people that want to take this legislation much further.

**Mr Peckham**—Many of the points that are made in the submission are aimed at trying to make some of these consumer guarantee provisions clearer. From our perspective, it is important both for consumers and for industry to know with certainty what the different rights and obligations are for the legislation. The concern is that, given that there is debate, as you mentioned in relation to unfair terms, there will be debate in relation to consumer guarantee provisions as to what they actually mean.

I am sorry to come back to this, but there was a suggestion earlier about transparency. Senator Bushby had to ask twice effectively what transparency actually means. It is very difficult in a context like this if you are a large corporate organisation with thousands of document to deal with. How do you interpret transparency with some certainty and know what changes you need to make to your contracts to make sure that you comply? Just to pick up on your point about the possible implication from our submission that there is widespread noncompliance, that certainly was not the intention of the submission. For the clients that we deal with, they are the ones that generally take their compliance obligations very seriously. They are the ones who are out there trying to do the best they possibly can to make sure they comply with how they understand or what they understand the law to be. They are not the people that you are worried about here. You are worried about the examples that Professor Carter just gave of the people who are already pretty much ignoring the law because they do not understand it and because they cannot afford the services of firms such as Freehills, Mallesons or Blakes. Those people out there are the ones that are actually breaching the legislation and would have difficulty complying with the amended legislation. As a consequence, the purpose of the legislation to protect consumers may not actually be achieved.

The point we are truly trying to make is that if we can have a definition of consumer that is concise and consistent across the different provisions of the legislation, if we can have provisions and descriptions of the consumer guarantees that are capable of being understood by the layperson or your average person in the

street, it will make it easier for everybody and hopefully produce the outcome that you are seeking to achieve with these reforms.

**Prof. Baxt**—I would like to add a couple of points in relation to the process which I think the government should follow in dealing with this. With the unfair contract legislation we had the initial version of it with business-to-business included. That was subject to a great deal of discussion and debate. The exposure period was excellent. As a result of all of the input that the government received, variations to the legislation were reached. Not everyone is going to agree with the final version of the legislation and I fully appreciate that, but at least that opportunity for debate, discussion and for the issues to be fully explored meant that you did get, I believe, a better piece of legislation in terms of being able to be enforced by the regulator. We are not having this process here. What we are doing is rushing this through for no apparent clear reason to me. Why is this so important that it has to be introduced and become effective on 1 January 2011? I do not see what is so urgent. With a bit more time we will get it better and working more effectively. That is what I do not understand.

I am not suggesting that the views of Freehills necessarily will finally sway and it may well be that most of our points are not taken up, but at least the opportunity will be given to everyone to have their chance to say, 'These are our arguments. These are the suggestions we're making. Think about them and see if we can get a better deal.' Professor Carter's description of the definition of 'consumer' is a classic. I think we are going to pay very dearly for that, because we are going to get courts coming down with different interpretations. Remember this is new legislation. The courts will be dealing with it for the first time. As with all legislation, there will be a lot of interpretations. They will disagree with each other. It is going to be years before we get clarity. As a result, there will be an attempt by the next government, whichever it is, to say, 'We'd better amend this legislation', and then we go on a rollercoaster of amending legislation for the sake of amending it. I do not think Australia can afford that kind of approach to law making.

**CHAIR**—Senator Eggleston.

**Senator EGGLESTON**—There is European law on unfair terms in consumer contracts, and there is British law. How much reference has been made to those sorts of laws, to established jurisprudence, and whether it has better definitions that we could perhaps have had attention to?

**Prof. Carter**—The legislation that I am most familiar with in England is the consumer protection under the Unfair Contract Terms Act, which does not apply to business consumers except where business consumers deal with another entity on that entity's standard form of business. They do not get the protection of the unfair terms regime, and indeed they do not get the protection of our unfair terms regime, but small business does get a modicum of protection from the statutory implied terms.

In relation to the scope of the definition in European law, it is for unfair terms very similar to our own. The only major difference between the European law and Australian law, and that seems to be a significant improvement on our law, is that the descriptions in the examples of what are unfair terms enable business to draft their contracts in a way in which they can ensure will not contravene the concept. Our examples of unfair terms are very open-ended and it is very difficult to draft terms that comply with the examples, not that complying with the examples is crucial. However, the examples are as a matter of fact the way in which business will work through them. In terms of comparison, I think we are fine from the definition of 'consumer' in the unfair terms context and I think that is really well accepted worldwide. The problem that I think we have with unfair terms is more in the lack of assistance through the examples and, of course, lack of assistance to the supplier and also a lack of assistance to consumers, because they do not have the clear guidance either. We want clear guidance for everyone right through this legislation if we can get it.

**Senator EGGLESTON**—Are there other comparisons, though, with Canada, England or the United States laws that might have been of assistance?

**Prof. Carter**—Europe has been much more of a leader in consumer protection than the United States. The United States operates at a state level it is really impossible to find a clear norm of consumer protection there. In my experience the consumer protection concepts will not apply to corporations. Corporations are regulated by the uniform commercial code. Corporations are entitled to exclude the implied term of merchantable quality so long as it has, in capital letters in the contract, that the implied term of merchantable quality is excluded. That is for commercial contracts. Consumer contracts vary from state to state. For example, I notice that Iowa has unconscionable conduct provisions very similar to ours. I think your predecessors have debated the concept of 'consumer' many times and have found it very difficult to arrive at a concept of consumer. The critical point that we are trying to make is not so much that there are other definitions out there that are better, but that we do have a good working definition in the unfair terms regime and it would be so much easier for

everyone if that were also the definition of consumer for the purposes of the consumer guarantees. I hope that answers the question.

**Senator EGGLESTON**—It will.

**Prof. Baxt**—I would like to add a further comment in relation to our laws and the US laws. I do not know so much about Europe. We are very much a black letter law regime. The language of the statute, as it is drafted, is going to be very critical in the way in which the court interprets it. In the United States there is far more prevalence in adopting a policy approach to the way in which legislation is interpreted. I think the way in which our legislation is drafted creates opportunities for confusion, difficulty and delay to occur in the way in which the legislation will be implemented. Therefore, what Professor Carter was saying is absolutely central. It would seem strange that in the new Australian Competition and Consumer Act, which is going to be the new name of the legislation, you will have one set of definitions in one part for a consumer and a different set in another part for no apparent reason.

**CHAIR**—Senator Pratt.

**Senator PRATT**—I want to pursue the question of the definition of a 'consumer' and ask you whether, in you opinion, the current definition might leave quite vulnerable consumers without protection. For example, if you were a person with a disability acquiring services or goods that would not normally be ordinary—basically we are all about facilitating you living an ordinary life—would the services that they require be inside or outside this definition?

**Mr Peckham**—They could quite possibly be outside, if it is not of a kind ordinarily acquired for personal, domestic or outdoor purposes. That is quite a bizarre outcome in the circumstances. Another example, perhaps not quite so poignant, is that you could have a small business operation supplying goods or services of a kind ordinarily supplied for personal, domestic or household purposes to an ASX100 company. That company gets the protection of the legislation and the small business supplier does not. It seems quite a bizarre outcome.

**Senator PRATT**—Thank you.

**CHAIR**—Senator Bushby.

**Senator BUSHBY**—I note your comments on timing and agree that something like this, which is such a fundamental change, really does need time for people to look at it. I understand that it is the intention of the government to try to get it through by the end of June as that may be the last sitting for the year, so I guess there is probably a reason for that. In terms of the complexity, Professor Carter mentioned that this is far more complex than the existing situation, but part of the reason for that is probably because they are seeking to harmonise cross-jurisdictions and pick up bits from COAG that would be desirable to be part of a national regime. And so essentially they have cobbled together an overall scheme that has the agreement of the states as well as the federal government, and in that sense it is probably more complicated because you are picking up things that are not currently in the federal scheme. Were you talking specifically about it being more complex than it currently is at a federal level or were you taking into account the cross-jurisdictional complexities?

**Prof. Carter**—I was taking into account the cross-jurisdictional complexity. The sale of goods legislation will be easier to understand than the new legislation. One reason for that is the automatic right of termination that consumers currently enjoy under the Trade Practices Act will be replaced by a consideration of degrees of responsibility. Is it a major failure to comply or is it a minor failure to comply? If there is a minor failure to comply then generally the consumer will be required to give the supplier the opportunity to repair the goods. If the supplier does not repair the goods then the consumer gets a right of termination. It has to go through that process and, of course, explaining all of that, which is very different from how the implied terms operated, necessarily takes more time and adds to complexity. I can cut through the complexity and say that in that respect the real problem is not that it is complex. It is just that it is not yes or no, do I have a right to reject?

**Senator BUSHBY**—Do you think that the changes that are being made will deliver better outcomes and that the complexities were required to deliver the outcomes, or could the equivalent outcomes in terms of consumer protection be delivered through more simple means or legislation presented more simply to both business and consumers?

**Prof. Carter**—I have absolutely no doubt at all that it would be possible to draft the legislation from the perspective of the consumer and to use language that consumers understand. In my view, the principal right a consumer wants to have is to terminate a contract and get their money back or in some cases to have goods repaired. Actions for damages, compensation and so on are not of concern to the everyday consumer. I am not saying that those rights should be excluded, just that they do not need to be dealt with in the consumer regime.

Towards the end of this discussion and in the submission I put forward the idea that you could have a clause drafted that would not be much more complex than saying, 'You'—that is, the consumer—'may reject goods, return them and get a refund if the goods are defective. Goods are defective if …' In one clause you could do what the current legislation and also the draft legislation takes several pages to explain in technical language, whereas you could express it in language that the consumer can understand.

**Senator BUSHBY**—That sounds like a very commonsense suggestion. We can certainly look at that, but whether the government will take it up is another matter.

**Prof. Carter**—As you can see, I am passionate about this. It is something where I was hoping Australia would lead the way, that we would be the country that produced a genuine consumer protection regime that consumers could actually understand and that retailers could understand, so that we would not have this result that I am sure everyone in the room has experienced, where you buy something that does not work properly, you take it back to the retailer and the retailer says, 'I'll send it to the manufacturer.' You say, 'I want my money back,' and they say, 'No, I am sorry, we can't do that.' They are obliged under the legislation to do that, but it is drafted in lawyers language that they do not understand. My fear is that we will be in exactly the same position under the new regime, whereas if you could say, 'You know that you have supplied defective goods. You know that under the Competition and Consumer Act you must accept the return of those goods.'

**Senator BUSHBY**—I guess there are two overall issues, and that is where the balance is that you strike between consumers and business. What you are talking about is how that is actually delivered—

**Prof. Carter**—Yes, that is exactly right.

**Senator BUSHBY**—under this arrangement, if it is not actually going to deliver the best outcomes for consumers, primarily because of the complexity and that there are things that could be done that would improve that and make it better?

**Prof. Carter**—Yes. Rights that are unknown do not exist.

**Prof. Baxt**—What makes it even worse for the consumer is that regrettably the regulators are just not interested in pursuing these matters.

**Senator BUSHBY**—Thank you.

**CHAIR**—Senator Cameron.

**Senator CAMERON**—The issue of the definition of 'consumer' is one that has been longstanding and complex. Is that correct? Has it ever been defined clearly?

**Prof. Carter**—I would express it as there are various approaches to it, according to whether you wish to capture some business users within the concept of consumer.

**Senator CAMERON**—In terms of some of the arguments that have been put forward by Freehills, are some of these issues dealt with as other legislation is dealt with after it has been through parliament, and that is through case law, prosecutions and ACCC regulation or education? Is this a process that would take place?

**Mr Peckham**—Yes, it would naturally take place over time, which is very similar to the way in which Facebook developed. The problem for that is that it leaves both consumers and business with a great period of uncertainty, which then increases the cost of compliance and increases circumstances where consumers do not get the protection that they deserve, because it is being dealt with on a case-by-case basis and effectively retrospectively. We would be waiting for a decision to come down ultimately from the High Court and then everyone would go away and fix up their practices to be consistent with the decision from the High Court. It is not a proactive way of managing the objectives that you are trying to achieve. It is the way that we have always done it, but that does not necessarily make it the right way to move forward.

**Senator CAMERON**—You said that is the way we have always done it. In terms of the case law, the courts are established to make interpretations or to define the law.

**Mr Peckham**—To interpret and apply the law.

**Senator CAMERON**—Yes, to interpret and apply the law. That is no different from any legislation. This legislation does not provide a more complex or a different set of challenges for the law that many other aspects of legislation do; it needs interpretation.

**Mr Peckham**—Yes. There are plenty of examples of legislation that have been put forward by the current government and prior governments. They have been incredibly complicated and have resulted in a significant amount of interpretation and expense in terms of the provision of regulatory guidance.

We can talk about chapter 7 of the Corporations Act, the financial services reforms. In my personal view they were pushed through by the former government far too quickly and resulted in a situation where we had the law saying, 'This is black,' and two years later the regulations came out saying, 'Actually that is white.' It is a ludicrous outcome for everybody. It is not good, effective law making.

If I were sitting on your side of the table, my desire for our community, our consumers, our business and our electorate would be to make sure that the legislation that I was passing was as certain and as definite as possible and therefore achieved the objectives that I was actually setting out to achieve. The concerns that we are raising here are particularly around that definition of consumer. It does create inconsistencies. It does result in anomalies of the sort that we have described in our submission and in this hearing today. Ultimately we are not convinced that it achieves the objectives that you are trying to achieve.

**Prof. Baxt**—There is another classic example which is linked to this area. I cannot remember which government it was that first introduced the unconscionable conduct provisions of the act, but we have had so many inquiries and so many attempts to change that legislation over a very short period it is quite extraordinary and it still is not working.

**Senator CAMERON**—Is that not the nature of legislation that there are issues of uncertainty and that those issues have to be dealt with through the court processes, the black-letter law?

**Mr Peckham**—It depends, because in many ways if you can achieve that certainty through the parliamentary process then we would not need to go through the exercise of having the ACCC, in this case, issue guidelines which are then debated, discussed and negotiated and are then reflected or not. We then have prosecution. Far be it for me to say that because I would do myself out of a job.

**Senator CAMERON**—You would not need the Federal Court, the High Court or judges. If we could get everything—

**CHAIR**—I do not think you need to answer that. We really are out of time so I would like to thank you for coming along. The committee will take a break and then resume with the Consumer Action Law Centre.

**Proceedings suspended from 12.46 pm to 1.23 pm**

**LOWE, Ms Catriona, Co-Chief Executive Officer, Consumer Action Law Centre**

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

**CHAIR**—The committee will resume and welcome the Consumer Action Law Centre representatives. Do you have an opening statement that you would like to make?

**Ms Lowe**—We will make a brief opening statement and then welcome questions from the committee. Obviously the committee will have had the benefit of reading our submission. We have not covered the gamut of issues raised by the bill, but we would certainly like to touch on a few that we see as particularly important elements, and potential reforms to the bill.

As we mentioned, we are concerned by the removal of the specific iterations of what might breach the more general principle regarding debt collection, in particular, harassment and coercion in the collection of debts. We run a legal practice and our lawyers advise us that those particular iterations of conduct that breach the more general provision have been enormously helpful in attacking debt collection conduct, which is obviously an area where the rights between the collector and the consumer are very finely balanced, and the articulation of where those breaches can occur and what sorts of conduct might breach that quite broad principle have been very useful in a practical sense.

We also have concerns around the treatment of unsolicited agreements; that is, selling in the home. We have done some research in the last 12 months that suggest that consumers may be more vulnerable to in-home selling in circumstances where they have, in fact, invited the trader into their home in some fashion, whether that is by providing their details in a competition or agreeing to a demonstration of a maths software product, which is certainly one of the more common scenarios that we encounter. Our preferred position would be that there is broad coverage around this area, but we recognise, given the state of development of the law, that it might be difficult to really wind it back, so we would urge the committee to look at adopting a broad definition of what constitutes 'unsolicited'. We think there is a very workable definition that exists in what will be the regulations to the National Consumer Credit Protection Act. It adopts a definition that effectively looks at the primary purpose for which the consumer has sought the contact, and if it is not to be sold something then it is considered to be an unsolicited sale. We think that would certainly be useful in attacking a number of the real problems we see at our centre.

There are some more detailed provisions that have been in the Victorian Fair Trading Act that are also useful to give consumers a psychological break to enable them to say no to the salesperson or to ask them to leave if that is what they would like them to do, and certainly written permission to stay in the home for more than an hour has been useful for some consumers to actually give them the break, but then it is also useful to our legal practice if that permission is not sought. It provides a basis on which the agreement can be reopened.

We encourage the committee to look at the more detailed provisions around lay-by sales in the bill. We are particularly concerned that low-income consumers have access to an alternative to credit in making their purchases, and obviously they will only do that if it is safe for them to use the lay-by system. We think there are some small practical things that could be done that would make that a much more viable proposition for consumers.

Obviously we are very interested in the consumer guarantee provisions. We welcome the introduction of the guarantee. However, we are very concerned by the exemptions from those guarantees. We note that the Commonwealth Consumer Affairs Advisory Committee recommended against exclusions, and we do not see them as justified. We have some specific things to say about what may or may not be covered in industry specific regimes in that regard. We will leave it there and welcome any questions.

**CHAIR**—With respect to the door-to-door type of selling, we have had submissions from people who say that the number of complaints that they get in that area is very small and that we have to be careful not to legislate for a very small proportion of their industry. Do you have any evidence on that matter?

**Ms Lowe**—We certainly do. I am sure it would be well known to the committee that the general view is that the actual complaints that are made represent a slice of the actual consumer complaints that may exist out there. Consumer Affairs Victoria did a piece of work on consumer detriment, in examining how much detriment occurs in the marketplace, and one of the findings that they made was that approximately four per cent of revealed consumer detriment is reported to Consumer Affairs, a smaller percentage is reported to other parties, and 26 per cent do not make any complaint at all.

**Ms Rich**—Even to family or friends.

**Ms Lowe**—That is right; so not even a formal complaint. They might not articulate out loud that they have suffered that detriment. Looking at the numbers of complaints that go to an ombudsman scheme, whilst we would say it is indicative of trends and issues of concern to consumers, it would be very unwise to assume that those complaints represent the totality of complaints that are caused by this sort of conduct.

**CHAIR**—What is your view of having the regulator, the ACCC, being the initial point of contact or whether we need another system?

**Ms Lowe**—The ACCC will clearly play an enormously important role in this framework, but at the end of the day they are not a complaints handling organisation. They will take consumer complaints for the purposes of building a picture of conduct in the marketplace that might, and hopefully will, support their enforcement work in this area, but they are not a body unlike existing state and territory fair trading offices, which will take on a portion of those complaints and resolve them for consumers, separate perhaps entirely to any enforcement action that they may take. That is simply not a role that the ACCC has. It is not a failing on their part that they do not do it; it is just not their job.

**CHAIR**—In view of that, do you see the continuance of the existing ability to go to the small claims court, for example, as satisfying that part of handling of customer complaints?

**Ms Lowe**—There is a range of mechanisms. Are we talking specifically about the selling aspect or more generally?

**CHAIR**—No, more generally.

**Ms Lowe**—There are aspects of the law that are not necessarily amenable, if you like, to one-off consumer resolutions, even through VCAT that can be a pretty onerous experience for consumers. We are great supporters of the existence of those tribunals, but of course they do not exist across all of the states and territories. Victoria and New South Wales have one, but a number of other jurisdictions do not have them, which would mean that consumers in those jurisdictions would need to go to the Magistrates Court, potentially, and face legal costs if they were unsuccessful, which is obviously a very rational off put to consumers taking that sort of action. In our experience, that means that in the absence of really strong enforcement action by regulators the cost-benefit analysis for traders around 'Will I or won't I comply?' is a pretty obvious equation, in the sense that if they know that consumers are not, in the main, going to pursue breaches or detriment that has occurred then the incentive on the trader to comply with the law is obviously reduced.

**CHAIR**—On that point, we have been told that surveys show that Australian consumers do not know what their rights are so naturally they are not going to complain, whereas in New Zealand consumers have a much higher awareness of their rights. Do you think this bill will tend towards—providing we get the right education—a better and clearer understanding for consumers and suppliers of their rights and responsibilities?

**Ms Lowe**—Certainly. To take the consumer guarantees as an example, we think that the provisions there will hopefully go some way to making those rights better understood by both parties because there is certainly an issue around consumer and trader awareness of rights. Obviously putting these things into law will not achieve that. There will need to be promotion and education campaigns for consumers around their rights if that is to occur.

The other critical element of that—and this is not guaranteed by the bill—is that there is regulatory enforcement and compliance work around those rights. Whilst awareness is part of the issue, consumer confidence that they will be able to assert those rights is the other part of the picture, and clearly action by regulators, whether it be compliance or enforcement work, has an enormously important role to play in traders understanding what the rules are, having a strong incentive to comply, and therefore the consumers having the ability to assert those rights in a retail context without having to run off to the tribunal or the Magistrates Court over a $60 faulty toaster, which we would argue many consumers would rationally choose not to do. Of course, if you are selling hundreds and thousands of faulty toasters at $60 a pop then you are doing all right out of that process.

**Ms Rich**—I know that Consumer Affairs Victoria did another report specifically on the guarantee issues, on warranties in Victoria, in relation to common warranty complaint goods like electrical goods and whitegoods, and that informed the Commonwealth Consumer Affairs Advisory Council's work. One of the findings of that report was that, yes, there is large-scale lack of awareness on the part of both consumers and traders about their rights, and we certainly agree that one consistent and clearer law will help to address that. Also

importantly, the report made it very clear that even where traders were fully aware of their obligations, they still did not comply. The reason for that is essentially because there is very little chance of enforcement, because it relies on consumers taking action, and for all of the reasons that Ms Lowe has explained that is unlikely, particularly in guarantee disputes, which are small value disputes. Even where a consumer is persistent enough to go back, complain and potentially take legal action, it is much cheaper just to settle those cases than it would be to actually change your systems to be compliant more generally. That is why, in our submission, when we talk about the guarantees part of the law, yes, we are absolutely supportive of what the law is doing, but it is certainly not the end of the road in terms of fixing up this area of the law. We wanted to make that clear as well.

**CHAIR**—In your experience, what is the major area for consumer complaints? Is it door-to-door sales, whitegoods or telecommunications?

**Ms Lowe**—They are all up there. In terms of complaints that come to our centre, we receive thousands of complaints from Victorian consumers each year, so it gives us a sense without it being entirely comprehensive. The door-to-door selling of maths software has been one of the highest causes of complaint, and that is why we undertook the research that we did around the consumer psychology of why consumers would purchase something for $6,000 after having a salesperson in their home for hours and hours. There is some interesting and complex psychology around all of this. Yes, the door-to-door selling provisions are crucial from that perspective.

It may interest the committee to know that one of the little actions that we have taken over the last few years is to produce what we call a 'Do Not Knock' sticker, which is something you can stick on your door and ask the salespeople not to knock and come in. They are effective, which is wonderful, and they are incredibly popular. Whilst consumers may not pick up the phone and complain, there is clearly consumer concern about door knocking more generally. We have certainly seen cause for real concern around door knocking in energy and also telecommunications. Maths software is the top of the pops, but we get consistent complaints in those arenas as well. As to telecommunications, I think the sorts of complaint stats that the Telecommunication Industry Ombudsmen has been seeing over the last couple of years are very concerning and are indicative of a pretty unfortunate attitude to customer service. We know from our regulatory colleagues that warranties and refunds are always in the top 10 sources of complaints and they are often in the top three. Debt collection would be our other very common source of complaint.

**CHAIR**—Thank you. Senator Eggleston.

**Senator EGGLESTON**—That is very interesting. This morning Telstra made a major point of saying how important door-to-door selling was, which I was rather surprised about, considering the size of that company. One would have thought that they would attract business through other means rather than knocking on doors. We heard yesterday about the sale of maths programs. Do you feel that the provisions in this proposed legislation are going to adequately address the sorts of issues you have raised?

**Ms Lowe**—We see that much hinges on the way that 'unsolicited' is defined. Certainly unsolicited in the context of an energy or telecommunications person turning up on your doorstep would fit within pretty much any standard definition of unsolicited. Beyond that, with the maths software for example, commonly what a consumer will have done is entered a competition or there might have been a stand at their local shopping centre where they have been asked, 'Have you got school aged kids? Would you be interested in a demonstration of some maths software?' so they have given their personal details. The company then contacts them and they make an appointment to come and see the consumer. Unless a definition of 'unsolicited' focuses on the primary purpose that the consumer gave the details in the first place, they are likely to be outside the scope of that definition by virtue of the fact that the trader has made an appointment ahead of time. The research that we have done strongly suggests that consumers are, in fact, more vulnerable, not less, in circumstances where they have invited the trader into their home.

**Senator BUSHBY**—Is that because they are likely to be less assertive in telling them to go away?

**Ms Lowe**—That is exactly right. One of the findings of the report is that it is about a psychological desire to be consistent. By having the salesperson come into their home they have sent a message to their neighbours and people in their street that this is someone that they trust enough to invite into their home. Thereafter, there is this human desire to behave consistently with that message. Marketing has been on to this for a very long time. Consumer policy is only beginning to catch up with the power of this. You will have seen, for example, in some of the submissions from the door-to-door sellers where they talk about the importance of establishing

a rapport and all of those sorts of things. It is creating that connection which makes it hard for the consumer to say, 'No. I don't want it. Please leave.'

**Senator EGGLESTON**—One of the other issues that has been raised is 12 days or 12 business days. Do you have a view about that?

**Ms Lowe**—The business days cooling off?

**Senator EGGLESTON**—Yes, the cooling-off period.

**Ms Lowe**—We probably have a couple of views about it. One will sound initially unrelated, but we will come back around to how it relates. Again, we have spent a bit of time looking at how behavioural economics and consumer behaviour impacts on some of these things and for that reason we recommended an opt-in process for consumers where they have indicated an interest in purchasing a product in the home selling situation. We think that the ideal approach in that situation, rather than there necessarily being a cooling-off period per se, is to require the consumer to take a further proactive step to contact the trader and say, 'Yes. I confirm that I want this product.' That could be something that they are required to do, say, within 48 hours of the salesperson being on their premises. The psychology around a cooling-off period is that it requires the consumer to admit that they have made a mistake and to take those extra steps to say, 'No. I don't want the product,' and then go through the process of cancelling. Whereas with the opt-in process, if the consumer genuinely wants the goods, it is a very small thing for them to pick up the phone and say, 'Yes. I confirm I'd like that new energy contract,' or 'Yes, I confirm I would like that maths software,' and then away you go, contract formed. It also provides the capacity for the consumer just to not make the call if they do not want the goods, though they may have agreed at the time for all of the sorts of reasons that are outlined in our report. We would see that as the best approach to this issue. But if the bill cannot be amended to introduce that sort of approach, we would certainly be in favour of a cooling off period that gives consumers an adequate time to consider the implications of their decision and to exercise their rights.

**Ms Rich**—There needs to be a little bit of distance from the act of agreeing in order to psychologically be able to admit that they have made a mistake and act in a way that would contradict their previous actions. They do need a little time to get over that psychological hurdle.

I would probably say, in terms of some of the specifics of the actual provisions, I have read Telstra's submission and there are one or two things that they say that I would probably not necessarily disagree with, like the fact that there is an issue that you cannot provide services in that termination or cooling-off period, particularly ongoing services such as electricity, gas and telecommunications, where consumers would probably expect that it would start straightaway. I think we disagree with quite a lot of the other specific things that they are making. One broader point about that is that because there has not been an exposure draft consultation process with the bill there has been no opportunity for Telstra or stakeholders like us to engage in the real details of the provisions. That is a real shame, which means that you, as senators, are going to have to grapple with all of those little details that you would not normally want to.

In terms of some of the things that Telstra said, for example, regarding cooling-off rights and so on, we would not necessarily agree with some of their points about things like not having to tell the consumer at the beginning about the way that they might be able to exercise their termination rights. Clearly the sorts of submissions that were saying that was problematic were purely because of the psychological aspects, their attempt to build rapport and so on. The provision is intended to deal with providing a psychological break by giving the consumer that information up front about how they might exercise terminations. It is really important that that stays in there.

We could talk about the details, but we would probably disagree with a lot of what Telstra has said. One thing that one of our colleague's submissions has talked about was the concept of informed consent. We did not talk about that in our submission, but we would certainly agree that that is a concept that is missing. None of the industry submissions talk about the fact that under these provisions they are not required to ensure that a consumer understands what they are signing before they sign. There is lots of talk about entering into agreements and signing—you have to sign if you want the agreement to be amended—but at no point in the legislation is there any obligation on the seller to ensure that the consent is informed. That concept is not without precedent. It exists at the moment in the energy sector in Victoria, for example. You cannot sign someone up without informed consent. Unfortunately, that is a provision that is constantly breached, but at least it enables consumers to have a remedy when it does happen. Of course, the sorts of cases where you see that as being a problem are with elderly pensioners that are signed up and who do not understand what they are signing up to; newly arrived migrants, particularly those from non-English-speaking backgrounds, and so on.

We see really terrible cases where they clearly did not understand what they were signing up to—children translating for their parents and so on. One thing that we would probably agree is not in there but could be in there is a concept of the fact that before the agreement is made the consent needs to be informed and needs to be obtained by a supplier.

**Senator EGGLESTON**—That is interesting. That sort of discussion never occurred, because there was not an exposure draft and discussion there.

**Ms Rich**—That is correct.

**Senator EGGLESTON**—How long would that process normally take?

**Ms Rich**—Under the COAG agreements there was meant to be April to June exposure draft consultation process, and instead this bill was drafted and introduced into the parliament in March. It probably would have taken three months.

**Senator EGGLESTON**—That process did not occur in this case.

**Ms Rich**—No.

**Senator EGGLESTON**—You have not had input or an opportunity to point out these sorts of problems?

**Ms Lowe**—No. I think we had two weeks.

**Ms Rich**—We had less than two weeks to look at the regulation impact statement, which did not include the detailed drafting. Quite a lot of these issues were not talked about in the regulation impact statement, because a regulation impact statement does not go into that level of detail.

**Senator EGGLESTON**—What sorts of consultations occurred around this legislation with stakeholders like yourselves?

**Ms Lowe**—Other than at the broadest of conceptual discussions, the less than two weeks that we had on the RIS and this process. It was not ideal.

**CHAIR**—Senator Bushby.

**Senator BUSHBY**—I raised with one of the earlier witnesses that there are two overarching aspects of this. One is the balance that you strike between the consumer and business, which is really a matter for parliament, but obviously the evidence of witnesses like yourselves feeds into that process. The second aspect is, once that balance is struck, how you implement it to ensure that the outcome is actually delivered to reflect the balance that you seek to strike.

Some of the submissions that we have had today and yesterday have raised issues in the legislation and how it is delivering the balance that it is seeking to strike. They have some academics, the Law Council, legal firms and also consumer groups like Choice. One of the main things they have raised is the definition of 'consumer' and how possibly under this it is being narrowed in some respects compared with how it currently stands. Do you have a view on that and how it could be improved?

**Ms Lowe**—We have some views about that. One of the points that we make in our submission is that the lack of consultation has not provided the space to have discussions around those sorts of issues. Clearly, when there are changes being made to the definition that has existed under the Trade Practices Act, for example, there are implications that flow from making those sorts of changes that need to be carefully thought through. We very much agree with the concerns that have been raised around that issue. However, we do not agree with some of the solutions that have been put forward.

**Senator BUSHBY**—There has been a range of solutions. The simplest one this morning was just the removal of the one word, 'ordinarily'; to remove 'ordinarily' and just leave it as 'used for consumer good.' That seems a reasonably neat option.

**Ms Lowe**—That is one worth reflecting on. That is part of the issue. It is difficult for us sitting here with you right now to say yeah or nay as to whether we think that would work, without having an opportunity to reflect on the implications of that. We have had some time to reflect on some of the other sorts of suggestions that have been made. We note, for example, that Freehills makes a number of suggestions, including picking up the definition of 'consumer' as it is used in the context of unfair contract terms.

**Senator BUSHBY**—Which seems also to be a reasonable suggestion?

**Ms Lowe**—We could say a number of things about that. Firstly, in our view, it would be a further narrowing. Secondly, what Freehills does not say about that definition is that it comes linked to a reverse onus

of proof in terms of the standard form contracts issue and certainly the purpose of the contract. We know from our work in the credit space, for example, that one reason we would strongly oppose a definition that simply focused on the use rather than a concept of 'ordinarily used' is because it begs for avoidance behaviour. What we would start to see happen in consumer contracts generally, as we have seen in a number of consumer credit contracts, is a little box that says, 'Tick. I am using this product for business purposes.' All of a sudden the consumer has excluded themselves from the range of protections that is available under the act.

**Senator BUSHBY**—I raised that issue with Dr Patterson. She was talking about the need for transparency and I asked her what that meant. In my own experience, when you put something in like that then people go through the motions. They find a way to actually do it. The way I see it is trying to get informed consent from people so that they know exactly what their rights are and what the obligations will be that they are actually signing up to, sort of gets avoided anyway. How do you really get that informed consent? People should have the right to offer things to people, but people should only be signing them up if they know what they are signing up to. If they do know, and they make an informed decision, then they should be bound by it. You need to make sure that they are informed when they make that decision and how do we guarantee that?

**Ms Lowe**—That is clearly a very important element. We would add to that, though—and this is particularly pointy in the credit space—if someone is in need of credit they are perhaps prepared to turn a blind eye to things that they know not to be true, such as saying that this is for business purposes when it is not. It has been very clear from the cases that we have seen that consumers do not understand the implications of ticking that box. They might know that this is not a loan for business purposes, but what they do not know is what flows for them in terms of remedies, access to hardship provisions, access to a whole range of consumer protections, simply because they have ticked that box. They are then left in a position of proving all the way back.

**Senator BUSHBY**—That does not constitute informed consent in my mind, if they do not understand when they do that.

**Ms Lowe**—Yes.

**Senator BUSHBY**—Informed consent is the key. I am hearing your evidence that whether you can knock on the door at 6 o'clock or 8 o'clock is at the edges really, if people do not understand what they are signing. If they sign at 6 o'clock or 8 o'clock it does not really matter if they do not understand what they are signing.

**Ms Lowe**—That is right. We are often talking about complex products. An energy contract is a complex instrument to work out whether it is going to be beneficial to you. That is a hard exercise for consumers to do and it is very important that they understand.

**CHAIR**—We are getting short of time.

**Senator BUSHBY**—You mentioned that, if traders believe that they can get away with it, then that provides an additional incentive for them to try to get away with it. Do you think that is the attitude of most traders? It sounded like you meant traders in general, or do you think that it is more the smaller, less scrupulous end of the spectrum that would undertake that sort of activity?

**Ms Lowe**—There are definitely traders that make more effort than others to comply. There is simply no question about that. Many of them have very sophisticated compliance systems. But that said, where an issue of compliance appears to them to be far down the priority chain of the relevant regulators, where it is difficult for consumers to assert, when they have a range of compliance obligations, the ones that are going to be very strictly adhered to and monitored are the ones that they see there being a real and present risk that if they breach them there is going to be broader consequences.

**Senator BUSHBY**—Do we deal with that by equipping our regulators to more aggressively go after them, to enforce where they are deliberately breaching things?

**Ms Lowe**—I think there are different responses depending on whether it is deliberate or inadvertent. Yes, it is clearly a very important part of this picture that our regulators are empowered and resourced to send the signals to the marketplace.

**Senator BUSHBY**—The best way is to empower consumers to know what their rights are so that they can chase it, too.

**Ms Lowe**—Yes. I agree it is a flipside, because the two things are very strongly related.

**CHAIR**—Senator Pratt.

**Senator PRATT**—Is all door knocking for sales inherently bad? Is there any legitimacy to the complaints that companies with good practices are going to be precluded from undertaking legitimate business by the laws before us?

**Ms Rich**—In a lot of ways the door-to-door or unsolicited selling provisions and other provisions are just based on harmonising the existing laws. While not all jurisdictions might have that same level of protection, it is not like these laws do not exist already in Australia. For things like unsolicited selling they already exist in quite detailed form in Victoria, New South Wales and Queensland, and so these laws would already cover the majority of consumers. I think it is a little bit disingenuous sometimes for traders to be arguing that this will be a whole new regime that they are not used to complying with, which will shut down business overnight, because in Victoria and New South Wales unsolicited selling continues unabated. I do not think that is a realistic outcome, but we certainly believe that there needs to be some regulation around unsolicited selling. That regulation has been put in place at the state level for many years because of experience with what happens if it is not regulated.

**Senator PRATT**—Clearly you have just stated that the proposals are largely a harmonisation. In that sense they do not necessarily go a long way to protecting consumers from those that are going to be unscrupulous in the way that they might, for example, be in selling maths software. If you are prepared to engage in those kinds of tactics, where there is a will there is a way, and to some extent the cooling off periods and the unfairness of the contract or the suitability of the contract, aside from the selling technique, is important.

**Ms Lowe**—We agree that is true, but the selling techniques are incredibly important to the outcome. As Ms Rich has pointed out, the reasons that these provisions exist is because of longstanding recognition that it is a very different thing to have someone in your house selling to you rather than walking out into the world and voluntarily going into a shop that you can just as easily walk out of again. As we have touched on in our presentation, the psychology of how this is done is, firstly, very sophisticated and, secondly, really effective. Marketers have been on to the fine gradations of this for a long time and, in our view, consumer policy has been less aware of those things. It is a question of how to attack what really happens to the consumer. These provisions seek to harmonise a range of approaches around the country. We would urge that the provisions that have proven to be effective perhaps not in stopping the conduct but at least in providing consumers with a remedy, such as those in Victoria, are a really important part of this package, because some of them have definitely been more effective than others at getting consumers out of situations.

**Senator PRATT**—In the context of the provision of, say, maths software, would elements within other legislation on consumer credit help fix some of these situations? As a whole with this consumer law and things like the consumer credits law will we get the balance right?

**Ms Lowe**—We have been very involved in the processes around the credit law amendments. We are similarly very supportive of the introduction of the national regime in that space and also very supportive of the responsible lending obligations. It is a little more difficult at this stage to see how those responsible lending obligations will play in this sort of situation. One can see how it might work in a home loan situation or a larger lending situation. It is going to be more complex, because in that space it is only going to be irresponsible if it either does not meet consumers' purposes or it puts them in substantial hardship to repay it. What does 'substantial hardship' mean when you are talking about a $6,000 maths software contract as distinct from a home loan contract? We think it is a bit early to tell whether it will be attackable through that channel. As we have said, it really is the techniques that are used to sell these products, in many ways, that is the problem. It is this law that is the home for addressing those selling techniques and for providing those effective breaks for consumers to be able to say, no, when very often in our experience very often they want to.

**Ms Rich**—With respect to the credit laws, the credit product in things like maths software is the secondary aspect of it. The first aspect is that you are buying the product, and then the harm comes because you are paying so much and you are borrowing to pay for it. You need to be able to get at the initial conduct, which is the selling conduct. Once you have established that there is a problem with that, the credit law bring in the credit product as a linked product to that sale. You need the general consumer laws around not being able to engage in misleading and deceptive conduct, not harassing and coercing, and so on, because otherwise there is no problem with the sale and therefore no problem with the credit, if that makes sense.

**CHAIR**—Thank you for coming in this afternoon.

[2.04 pm]

**WRIGHT, Mr Steve, Executive Director, Franchise Council of Australia**

**CHAIR**—Welcome, Mr Wright. Would you like to make an opening statement?

**Mr Wright**—Yes, thank you. The Franchise Council of Australia presumes, not having done any serious investigation of this, that the franchising sector was not the main target that this legislation was drafted for.

**CHAIR**—No, indeed. You will be the target later down the track.

**Mr Wright**—That is underway as we speak.

**CHAIR**—Yes.

**Mr Wright**—We have had a couple of Senate inquiries in the last 12 months on various aspects relating to franchise regulations. I am breaking from what I was going to say, but it is a segue so I will continue, that is a case in point. There is a lot of franchising regulation, which has been continuously worked on, and to the extent that we support that, we are also very conscious of the potential for other new legislative initiatives to overlap. As you know in dealing with the implications of legislation, both intended and unintended, you can run into some troubles.

That takes me back to what I wanted to say at the start, which is that we are supportive of the thrust of this legislation, without doubt. We definitely agree with the harmonisation approach, a national approach, rather than having state-by-state legislature. That suits us as a national operating sector. We would also support the concepts on consumer protection and reducing regulatory complexity. But, in our contention, there is the risk that without a couple of either carve-outs or specific amendments this legislation will have the actual effect in franchising of creating greater complexity and causing the potential for some confusion about what should apply in what circumstances and so on.

Our key submission made some time ago now was that there should be an exemption for the use of standard form contracts to allow standard form contracts to apply in franchisor-franchisee relationships. That is the main contention. These are business-to-business arrangements and should therefore be regarded differently from business-to-consumer, which is the intent of most of the content of these bills.

At this point I will pause because it was my understanding that that very issue was being addressed in the amendments to this bill and, to the extent that I hope that is right, it may be that I am unnecessarily using the committee's time if that has already been addressed.

**CHAIR**—That is my understanding. I am just looking to the secretariat. Business-to-business contracts are excluded. In fact, there is a bit of debate about it, but it is an ordinary consumer type good.

**Mr Wright**—If I can perhaps continue just with a little more about the whys and how we think it could be constructive to keep the franchising, for now let us call it, exemption in mind, if there is further amendment to this bill in the Senate, we have an agreement that is the central contract between franchisors and franchisees. It is in every franchising arrangement. There are 70,000 franchisees in Australia, about 1,200 franchisors and about 600,000 employees. All of those contracts are b2b contracts and they have extensive regulatory controls on them that are all about protecting franchisees. I think if this bill were ever to touch on a b2b relationship it would probably be at the very micro business end, where you might come into the question of the definition of 'consumer'. We think that to catch the entirety of the sector would potentially cause enormous upheaval in almost every one of those contracts. That would, of course, have serious flow-on effects. It would create a great deal of extra work that would be highly unlikely to be productive in any way.

Those contracts that currently exist are all about protection of the franchisee. They are about disclosure. They are intended to minimise any unfairness, if you like, or the potential for any unfairness to come into the contract. However, the arrangements do not stop there. They also go to having a safety net, that is, a mandatory dispute resolution process. Unlike many take it or leave it business-to-consumer contracts, we already have protections built in. There is also a safety net after the fact in franchising should there be any dispute arising, and those mechanisms work. They are widely regarded, in fact internationally regarded, as being very much at the best practice end of the spectrum. As a result, we have a very low incidence of dispute in franchising compared with international comparisons. We are at the most successful implementation of the franchising business model in Australia than anywhere else in the world, including the United States, if you take into account the actual market size. We have a situation where there is not a problem that needs to be

addressed by this bill and on the contrary, without that carve-out, if you like, there could be some serious problems created.

**Senator EGGLESTON**—Did you say there is not a problem to be addressed by this bill?

**Mr Wright**—Yes, exactly. If it were introduced and caught franchising, it would create problems. There would be disincentives to investment, increases in legal argument and I am sure unintended opportunity for opportunistic attempts to break contracts where one party or the other wants to try to do so for their own commercial purposes, which could be either party, franchisor or franchisee. I would think that the opportunity would be equally open. Again, that is the reason we think the franchising element should be excised from the application of this bill. There were a couple of other comments that I wanted to make just to close off, and that is about the substantial economic contribution that franchising makes. I guess I have already touched on that.

**CHAIR**—Since we are not really doing franchising that is probably unnecessary. Unless anyone has any questions on the consumer aspect of this bill, we will thank you for coming along and note your views on this.

**Mr Wright**—Could I ask a question about process?

**CHAIR**—Certainly.

**Mr Wright**—What will occur from here? Can you tell me whether or not, as submitters, we will be kept informed on the progress of the bill?

**CHAIR**—The records of these proceedings will appear on the website of the committee and we are due to report on this bill by 21 May. That committee report will be up on the website as well.

**Senator EGGLESTON**—Did you put a submission in?

**Mr Wright**—Yes, we did. I noticed it was not in the pack that was circulated.

**CHAIR**—I am wondering if you might have put it into the franchising inquiry.

**Mr Wright**—No. We sent it in. I can resend it to you.

**CHAIR**—We will chase that up. You could resend it.

**Senator PRATT**—Make sure you are sending it to the right place.

**Mr Wright**—Standing Committee of Officials of Consumer Affairs, March 2009.

**Senator EGGLESTON**—Does it say economics committee?

**Mr Wright**—Maybe this is where the mailing has failed. I did not do this personally; I was overseas at the time.

**Senator EGGLESTON**—Where did it go to?

**Mr Wright**—Standing Committee of Officials of Consumer Affairs. I do not know what that is.

**CHAIR**—That is certainly not us.

**Senator EGGLESTON**—Perhaps you could send it to the economics committee.

**Mr Wright**—The Senate Economics Committee is in fact a standing committee, but it is not called that. I will check to see that it is forwarded to you. I am pleased to sense that you do not regard anything I am saying as being utterly surprising or taking you into a place that you were not expecting to be. In that sense, sending you this submission will not turn up any new matters, but I will certainly make sure it gets to you.

**CHAIR**—Thank you.

**Committee adjourned at 2.15 pm**