COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

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

TUESDAY, 27 APRIL 2010

CANBERRA

BY AUTHORITY OF THE SENATE

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

Tuesday, 27 April 2010

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

Substitute members: (As per most recent Senate Notice Paper)

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

Senators in attendance: (Insert, in alphabetical order, the names of senators provided by committee secretary)

Terms of reference for the inquiry:

To inquire into and report on:

WITNESSES

Committee met at 2.29 pm

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

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

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

[2.31 pm]

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

MAGENNIS, Mr Darren, Policy Analyst, Department of the Treasury

WINCKLER, Mr Simon, Policy Analyst, Consumer Policy Framework Unit, Infrastructure, Competition and Consumer Division, Department of the Treasury

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

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

Dr Kennedy—If it pleases the committee I would be happy to make an opening statement to outline the processes around the bill.

CHAIR—Yes, please go ahead.

Dr Kennedy—The Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 is the second bill to be introduced into the parliament to implement the Australian Consumer Law. The bill will complete the text of the Australian Consumer Law and is intended to deliver on the agreement by the Council of Australian Governments to create a single national consumer law. The reforms to create and implement the Australian Consumer Law arise from the recommendations made by the Productivity Commission in its 2008 review of Australia's consumer policy framework. The Australian Consumer Law will replace the substantive consumer protection, fair trading and enforcement provisions now set out in 17 Commonwealth, state and territory acts. It also replaces specific provisions scattered through a range of other state and territory acts. It will simplify and consolidate Commonwealth, state and territory generic consumer protection and fair trading laws.

The law is based on the existing consumer protection and fair trading provisions in the Trade Practices Act, but it has been drafted so as to rationalise the way in which provisions are organised to make provisions clearer and easier to understand and include additions and amendments—drawing on best practice in state and territory consumer protection laws—which have been developed and agreed by the Ministerial Council on Consumer Affairs and developed through a cooperative process by all jurisdictions.

The Trade Practices Amendment (Australian Consumer Law) Bill (No. 1) was passed by both houses of parliament on 17 March and received royal assent on 14 April. This act established the Australian Consumer Law as a schedule to the Trade Practices Act, introduces a new national unfair contract terms law, which is scheduled to commence on 1 July 2010 as a law of the Commonwealth, and provides for enhanced enforcement penalties and redress options for the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission. As you are well aware, this bill was the subject of an inquiry and report by this committee in 2009.

The second bill, which is being considered today, will complete the text of the Australian Consumer Law. The additions to the law introduced by this bill are based on decisions taken by the Ministerial Council on Consumer Affairs on 4 December 2009. This second bill does a range of things. Firstly, it completes the text of the Australian Consumer Law by introducing a range of general and specific consumer protections. These are based on the existing consumer protection and fair trading provisions in the Trade Practices Act and also include new or amended provisions drawing on the best practice in state and territory consumer protection laws. It also establishes a new national regime for consumer product safety, which draws on the extensive work of the Productivity Commission in this area, introduces a greater focus on national regulations and enforcement, with the lead role being taken by the ACCC, and establishes a national regime of statutory consumer guarantees that replaces the existing rules on statutory implied conditions and warranties, which are currently set out in the Trade Practices Act with various iterations in various state and territory laws.

The second thing the second bill does is it amends the Trade Practices Act to make changes designed to ensure that the Australian consumer law can be effectively enforced as a law of the Commonwealth. In some cases slightly different approaches must be adopted on a jurisdictional basis to give effect to the law, to account for the differing court and law enforcement systems in place around Australia. But, where possible, consistency has been maintained. Thirdly, it amends the Australian Securities and Investments Commission Act 2001 and the Corporations Act 2001 to align their provisions dealing with consumer protection issues in a financial services context with the provisions of the Australian consumer law as appropriate and as necessary.

The fourth thing this second bill does is it introduces new enforcement powers for mandatory industry codes of conduct prescribed under part IVB of the Trade Practices Act, including provision for public warning notices, non-party redress orders and a new audit power for the ACCC covering documents required to be provided and held under industry codes. Fifthly, it makes a range of consequential amendments to Commonwealth acts which result from the repeal or amendment of provisions in the Trade Practices Act and the introduction of the Australian consumer law. Lastly, it changes the name of the Trade Practices Act to the Competition and Consumer Act, making the content and purpose of the act clearer, and makes consequential changes to other Commonwealth acts to reflect this.

I would like to finish by reflecting on a couple of specific issues. The majority of the Australian consumer law simply picks up the existing law with minimal change. However, there are some more substantial changes, and I am going to briefly outline a few of those key changes. Some of the provisions of the Australian consumer law which draw on best practice in state or territory consumer protection laws will see the Commonwealth entering into areas of regulation which have until now been the province of the states and territories. These provisions were the subject of extensive consultation with the states and territories as well as the general public during 2009.

The Australian consumer law will include provisions regulating unsolicited selling, covering both face-to-face and telephone sales. These provisions stipulate express consumer rights and obligations and express supplier obligations about how consumers can be approached, the making of unsolicited selling agreements, disclosure requirements and postcontractual behaviour. However, these provisions do not override industry specific regulation in relation to unsolicited selling, such as those imposed by the Do Not Call Register Act. The Australian consumer law will also include provisions that set out basic rules for the making of lay-by sales agreements. The law will contain requirements for the formation of a lay-by agreement, cancellation rights for the consumer and the supplier and requirements on the imposition of a cancellation charge by the supplier.

The product safety provisions in the Australian consumer law implement a number of recommendations by the Productivity Commission's 2006 *Review of the Australian consumer product safety system*, including expanding the scope of product safety regulation to cover services related to the supply, installation or maintenance of consumer goods in all jurisdictions; allowing product safety standards, bans and recalls to be put in place where reasonable foreseeable use or misuse may render an otherwise safe product dangerous; allowing regulators to undertake product recalls directly where no supplier can be found; and requiring suppliers to report serious product incidents to regulators. Permanent product bans and mandatory safety standards will only be able to be made to apply nationally, but state and territory ministers can still issue interim bans and conduct recalls.

The statutory consumer guarantee provisions in the Australian consumer law replace conditions on warranties that were implied into contracts by current consumer protection and fair trading laws in the Commonwealth, states and territories. These provisions will be more clearly addressed and simplify the legal basis on which these important consumer rights rest, making them easier to understand, apply and enforce. The guarantees will apply uniformly across Australia. The Australian consumer law also sets out remedies that are available to consumers when goods or services fail to meet consumer guarantees, including refunds, repairs and replacements. Damages are also available against suppliers and manufacturers in certain circumstances.

To conclude, following the enactment of legislation in states and territories to apply the Australian Consumer Law in those jurisdictions, this bill will fulfil the agreement by COAG to implement a national consumer law. It represents a significant opportunity to rationalise, harmonise and simplify consumer rights and business obligations. The commencement of the Australian Consumer Law will allow, for the first time, all Australian consumers to enjoy the benefits of clear and consistent consumer rights wherever they may be and all Australian business, through simpler, clearer and nationally consistent laws, to reduce cost, increase efficiency, develop and innovate in the national market and better serve the interests of Australian consumers. I thank the committee for giving me the time to make that opening statement. It is a large bill with a lot of aspects to it, so I wanted to ensure that you are aware of the scope of all the aspects of the bill.

CHAIR—Thank you, Dr Kennedy. It is useful to get that overview. Clearly this bill is designed to assist consumers by letting them know more clearly what their rights are and having them apply across Australia. You also mentioned in that opening statement that there would be simplification for businesses. Obviously those businesses that work across state borders would find that. Have you done any study of the costs there may be to business and of the cost advantages there may be to business?

Dr Kennedy—I am aware of such studies. I do not have them to hand. Mr Writer, who I will ask to speak in a moment, may be aware of the numbers. You are right that a very large proportion of businesses do operate across state borders and an important purpose of this bill of the Australian Consumer Law is to have a nationally consistent approach. One of the things we have found is that the return to business is as important as the return to consumers in having well understood and nationally applied laws. In fact, from memory, when the Productivity Commission was reviewing its estimates of what harmonised consumer laws could do, it estimated that it could potentially lead to an increase in gross domestic product in the order of $1.5 billion to $4.5 billion, which is a direct result of the efficiency improvements that might result from clearer regulation across state boundaries. Simon, would you like to make any further comments from a business point of view?

Mr Writer—One thing the Productivity Commission did highlight was that around 50 per cent—I do not have the exact figure to hand—of transactions now take place across state and territory borders and that figure increases year on year as there is greater integration of our economy nationally. The Productivity Commission did examine in some detail the ways in which you could quantify the benefits to the Australian economy of these reforms. Dr Kennedy has outlined the amounts that they talked about in terms of an annual benefit resulting from this rationalisation and simplification of consumer laws and the consequent reductions in cost to business of complying with the nine different current regimes and folding those all down into one.

Senator PRATT—With such substantial changes aligning both Commonwealth and state consumer laws, can I ask you about the approach that has been taken in the work so far to align the bureaucracies that consumers access to secure their rights? I appreciate that the laws have not yet been passed, but in order for them to be ready I assume a great deal of work has been done in order to get that on track.

Mr Writer—You are right; there has been quite a bit of work done there. Obviously we are working to develop the laws and there has been quite a degree of cooperation through the Ministerial Council on Consumer Affairs. One of the recommendations made by the Productivity Commission was that the ministerial council take some steps to improve the way in which it made policy and coordinated its activities, particularly in relation to enforcement. To that end, last year on 2 July, COAG signed an intergovernmental agreement for the Australian Consumer Law, which will govern the way in which policy decisions are made for consumer laws going forward.

In step with that, the ministerial council has reformed the way in which it works. It has set up clearer decision making processes for policy and enforcement issues, and to support it it has streamlined the system by which decisions are made and set up four committees of senior officials to progress things. The first deals with policy; the second is a compliance and dispute resolution committee, which is effectively an enforcement coordination body; and the third is an education and information committee, which is about developing coordinated approaches for educating both consumers and businesses about the law. The last one is a consultative committee on product safety issues chaired by the ACCC because the ACCC will be taking the lead role in product safety enforcement.

Those bodies are working now to develop all of the things that will need to be ready when these laws commence in terms of both a coordinated enforcement approach, which is obviously critical to the success of these laws; the development of national guidance, in which significant steps have already been taken to prepare national guidance on unfair contract terms and there will be more national guidance on various other aspects of the laws to come; and the better coordination and development of greater cooperation between enforcement agencies to ensure that these laws can be enforced as effectively as they can be.

Senator PRATT—In the context of the consumers' experience as they seek to access their rights, will there be changes to which bureaucracy a consumer approaches? Seeing as they are uniform national laws, will it matter if someone approaches the ACCC or the state department of consumer protection? Will there be efficiencies with a consumer being able to go either way to access their rights or will they have to be cross-referred depending on the nature of the problem that they have?

Mr Writer—Obviously, these are things that are in the process of development in terms of concrete arrangements, but one of the intentions is certainly that consumers should not face any obstacles in ringing up an agency. That really should be the beginning and the end of it for a consumer, but I do not want to overcommit our enforcement colleagues.

Dr Kennedy—The ACCC, who will be appearing before you later, could talk a little bit more about that. As Simon was saying, an important intention of all the jurisdictions was to make sure that a lot of the on-the-ground work supporting consumers in states and territories could work quite effectively. There is no intention for there to be a loss of effort or that sort of thing in those areas. It is more a coming together of those efforts. I

will let the ACCC talk a little bit more about how they plan to coordinate on the enforcement front. Certainly the intention from Treasury's point of view is not to have a consumer call someone and then be referred off. The intention of the arrangement is that consumers can have points of access that they are familiar with at the state level but will also have the ACCC playing the lead regulator role.

Senator PRATT—For example, if a Western Australian consumer approaches their local department of consumer protection about a telephone contract that was taken out under Victorian law, will be they be able to pursue that issue through their state department?

Mr Writer—I think the intention is that they should be able to pursue is in the easiest way they can. As I said, though, this is all being developed. There is a memorandum of understanding which has been developed by all the regulators to coordinate the way in which they work together. That will deal with these sorts of questions. I am not sure that that has quite been finalised—I think they are yet to sign it—but it is designed to set out those basic rules which will govern the way they work together.

Dr Kennedy—The intention in that example, perhaps if there were an unfair contract term, would be that across all jurisdictions we would have full alignment of the application of the Commonwealth laws. Regarding the question of whether they should ring up someone in Victoria or WA, the reform is designed to address that issue. Everyone will be clear that they all face the same rules. They will, hopefully, be able to approach someone in WA who will deal with the matter regardless of the fact that it was in Victoria, New South Wales or wherever.

Senator PRATT—What thought has been given to the kinds of consumer laws that exist that are specific to other services? We had some discussion of this earlier—for example, energy, which can be quite highly regulated by the states. I think you contended that these laws are designed to be complementary, but there are a range of essential services where ongoing consumer access is important even if they are behind on their bill payments or they are in breach of their contract. I appreciate you might not have the details for how it is envisaged that this will work. Perhaps it will not have any relevance and we will have to revert to state laws under those circumstances. Can you comment at all on the intersection of those issues?

Mr Writer—The Productivity Commission recommended and COAG agreed that these would be generic laws that applied to all sectors of the economy. The only exception to that is in relation to financial services and products, and that is as a result of a constitutional issue and a referral of powers by the states and territories. But there is consistency there as well. In relation to the examples such as utilities that you cited before, the intention is that the Australian consumer law will be the base level of consumer protection for all Australian consumers for all goods and services. Those sorts of sector-specific laws are intended to augment the protections provided by the Australian consumer law and deal with specific issues which are not really covered by the Australian consumer law. The example of disconnection rights in relation to electricity is a good one because very specific rules are needed to deal with the specific consumer issues that exist there. The intention is that these be complementary. There are a number of processes ongoing at the moment to develop national laws there. There is a national energy customer framework in the process of finalisation at the moment. We have been having discussions with those agencies responsible for the development of those laws to ensure that that position of balance between the two things is maintained.

Senator PRATT—In a sense, we might—clearly this is not on the table yet, although you did mention the national framework being developed—be looking at a different category of consumer issues when you are looking at essential services that clearly are not part of the minimum standard provided for under these laws. But you are contending that in the future it is envisaged that these are the kinds of things that might nevertheless be looked at within these kinds of frameworks.

Mr Writer—That is right. There is something else I should mention as well: under the intergovernmental agreement, there is a commitment by the Commonwealth and the state and territory governments to go through sector-specific laws and get rid of any of those which duplicate or are inconsistent with the Australian consumer law. So the assessment is of whether additional sector-specific protection is necessary for consumers or replicates existing protections in sector-specific contexts.

Senator PRATT—For example, we have had experience doing that at a national level in telecommunications. Other utilities, however, have historically been dealt with at a state level. Would we contemplate more nationalised approaches to those in the future?

Mr Writer—There certainly is in relation to energy services; others I am not as familiar with. But that is the case. With other sorts of utilities and other sector-specific things, the states are under this obligation under

the intergovernmental agreement to go and look at those and to check their consistency. Certainly, constitutionally, in relation to the regulation of the affairs of corporations, the Australian consumer law will prevail to the extent of any inconsistency with state or territory laws.

Senator EGGLESTON—There is a submission from the architects association where they raise some issues. I understand section 61 will include architects and engineers as service providers, subject to the proposed statutory guarantee to consumers of fitness for purpose. The architects and engineers, under that provision, will have to guarantee that their products are fit for the purpose so designed, and this section, I understand, would apply to consumers who engage an architect for their house but not for those who will on-sell their home as developers. The architects and engineers say this will impose liability on the architects and engineers where consumers already have adequate protection in the form of negligence actions and misleading and deceptive conduct actions under the Trade Practices Act as currently operating. Would you like to make a comment on that?

Mr Writer—Yes, I can. It might help to just provide a little context about the exemption for architects and engineers in the first place. The fitness-for-purpose warranty was introduced in 1986 through a trade practices amendment bill. It is an implied warranty that services will be fit for the purpose that is either disclosed to the service provider by the consumer or is clearly implied as a result of their interactions with each other. So there has to be some definition to the services that are to be provided.

The only professions that are exempted from this warranty are architects and engineers. An amendment was introduced in the Senate at the time, sponsored by the Democrats, to do that, and the government accepted that—although it accepted it over an objection, which was that they were doing it in order to get the legislation through the Senate. The then Attorney-General, Lionel Bowen MP, made it quite clear that that was the government's position when it went back to the House.

The other thing to bear in mind is that the warranty was introduced in 1986. The sorts of impacts that those representing architects and engineers are claiming for the removal of this exemption in relation to those professions are not borne out by the experience in relation to every other profession which is covered by this warranty. So, for those reasons, when CCAAC, the Commonwealth Consumer Affairs Advisory Council, examined this it really saw no reason for retaining this exemption for those two professions only, when there are many other professions which have proceeded quite happily without the need for this exemption.

In terms of the effects claimed, the evidence in relation to other professions is that it has not created those sorts of liability problems. In terms of the options available to consumers, I suppose consumers certainly do have rights under tort law, in terms of negligence and in terms of other obligations under the Trade Practices Act, but I suppose the counter point to that is that, in relation to all other professional services, consumers are given these rights in relation to warranties now and there seems to be no rationale for excluding architects and engineers from that, going forward.

The other point that is probably worth making is that, as you have pointed out, these apply only to services provided to consumers as defined under the act. So we are talking about a fairly limited range of services that most architects and engineers would provide in terms of their general businesses.

Senator EGGLESTON—So the basic situation is that there was a Democrat amendment that exempted them, whereas other professions, which presumably include law, medicine et cetera, are covered?

Mr Writer—That is correct.

Senator EGGLESTON—What was the rationale for the Democrats seeking that exemption?

Dr Kennedy—I think it is outlined in the submission by the architects and engineers where they note in particular, from memory, the unique characteristics of the services provided by architects and engineers and how those services are provided as part of a broader bundle of services that might be provided around building a house or some other facility. That was my understanding of the thrust of the argument. As Mr Writer outlined, we are not arguing that engineers and architects do not provide services that are unique to themselves, but there are many professions that provide services in a similar sort of fashion and the existing law seems to have worked reasonably well in those cases. Now that the law is well understood, though it has obviously been changed since 1986, the need for the exemption seems much less than it was initially.

Senator EGGLESTON—Thank you. I have some other general questions that I would like to put on notice.

Dr Kennedy—We would be happy to do that.

Senator BUSHBY—Are you aware of any particular problem with the services provided either by architects or engineers which needs addressing?

Mr Writer—Not in particular.

Senator BUSHBY—It is more just that everybody else is covered so they should be too?

Mr Writer—That is right. In, say, the construction of a house you have a situation where the architect and the engineer are exempt from the warranty but the builder, plumber, tiler and everybody else are covered by it.

Senator BUSHBY—As Dr Kennedy mentioned, if they are building it for a developer the architect has no liability to the developer under this either because they would be doing it in business?

Mr Writer—Exactly.

Senator BUSHBY—Interesting. On the reversal of the onus of proof, and I know you answered some questions about that earlier, does this legislation extend that any further? Is there a similar aspect that extends it to new areas that were not already covered under the first tranche of legislation passed earlier this year?

Mr Writer—There are some that replicate existing reversals of the onus of proof in the Trade Practices Act as it stands now, and there are some new areas that reflect the fact that we are moving—

Senator BUSHBY—What are the new areas?

Mr Writer—Mr Winckler will outline what those reversals are.

Mr Winckler—There are seven provisions in this bill which are new reversals, either fully, in terms of a full legal burden, or partially, in terms of evidential burden. Two of those relate to the unfair contract terms, which has already been dealt with.

Senator BUSHBY—So those two have already passed?

Mr Winckler—Exactly.

Senator BUSHBY—So there are another five?

Mr Winckler—Yes. Of the remaining five, one relates to false or misleading representations about testimonials, and that as an evidential burden rather than a legal burden. Another relates to whether an unsolicited consumer agreement is in fact unsolicited, and in that case there is a full legal burden that a business would need to show that a consumer solicited them if that is the argument they want to put. The remaining three are related and they are compliance with mandatory safety standards as well as with product safety bans and permanent product safety bans and compliance with information standards. It is an offence for a person to supply a good that is in breach or to offer for supply a good that is in breach. Lastly, it is also an offence for a person to possess or have control of goods that would be in breach of the standard. However, it is a defence for that person to say that they only possessed or had control not for the purposes of supply, so that does work as a reversal of the onus.

Senator BUSHBY—For the record, would you explain information standards.

Mr Winckler—Information standards are a requirement that a certain product includes with it certain information or that a product not include certain information. At the moment there are a number of information standards at the Commonwealth level and at the state and territory level. They include things like tobacco labelling at the Commonwealth level. There is currently the standard that you have to have all those warning labels, so if a person was found to have a lot of cartons of cigarettes that do not have those warning labels and that person wanted to mount the argument 'I wasn't going to supply those in trade or commerce,' which of course would be an offence, it would be for that person to show that they did not have those cartons of cigarettes for the purposes of supplying them in trade or commerce. In a civil contravention the full reversal of the onus would be on that person. In a criminal contravention it would be an evidential burden only, rather than a full reversal.

Senator BUSHBY—That is fine. In the interests of time I will leave the onus of proof there. I note the benefits—you have discussed the productivity Commission's report into the benefits—of aligning the laws across the states. Could the government have chosen to have introduced a national consumer law which would have delivered many, if not all, of those savings across the states without actually making all the changes that were included as part of this package of legislation? You could have aligned, with the agreement of the states, consumer law without, for example, introducing the legislation around standard-form contracts. You could have aligned it on the basis of how the Trade Practices Act stood beforehand.

Dr Kennedy—There are two parts to that. We have done that alignment because all states will apply this law and we picked up what we all agreed across the jurisdictions. I have to say it has been a very cooperative and collegiate COAG process. The current chair of this ministerial council is Western Australia, who chaired the meeting where we worked through the second aspects of the second bill. This has been an example where all the jurisdictions have cooperated very effectively to harmonise. So we have done what you are rightly outlining is a good thing to do—that is, not only take the Trade Practices Act, but pick up the useful things that are being done in other states and apply them nationally.

The second thing that we thought was an important part of the reform was to make this an enduring reform. That goes to the fact that these laws can only be changed now—Simon will need to remind me in a moment what the voting arrangements are—through the intergovernmental agreement, because we have had attempts in the past to have consistency across—

Senator BUSHBY—There must be a lot of legislation which does not last very long—

Dr Kennedy—Yes, it has tended to come apart.

Senator BUSHBY—I understand that. I guess what I am saying is that you talked about the first part being harmonisation. Harmonisation was the first part, but there was also, was there not, a deliberate policy intention to raise the bar in terms of consumer protection? There are things that have been introduced as part of the consumer law reform that go a lot further than were necessarily required just to harmonise across the states.

Dr Kennedy—I would not put it as 'raising the bar'; it was to try and strike the right balance for business and—

Senator BUSHBY—That is policy consideration. That is what we are looking at today—what the impact of that might be—but harmonisation could have been achieved with a different set of provisions that provided differing balance between business and consumer.

Dr Kennedy—Yes. We could have made—

Senator BUSHBY—The benefits could still have been delivered but with a different balance.

Mr Writer—Possibly, but there is really nothing in the legislation that does not exist anywhere in Australia at the present. You raised the issue before of unfair contract terms. There is existing—

Senator BUSHBY—Victoria.

Mr Writer—Victorian legislation and there have been commitments, publicly, by other jurisdictions to introduce legislation along the Victoria lines—not necessarily the same; we do not know.

Senator BUSHBY—I understand, but it is a policy decision to do that—to actually pick that up. I am focusing on the issue of the benefits identified by the Productivity Commission through harmonisation. They did not require those policy considerations to be picked up, if agreement could be reached.

Mr Writer—The Productivity Commission did recommend that there be a national unfair contract terms law. Without going into any great detail, it recommended that we re-examine implied statutory conditions and warranties and that product safety laws also be reformed and that we look at best practice provisions in state and territory laws. So in its assessment of the benefits, which is not a precise number but an indication of the kinds of benefits that we can obtain, it has factored in the sorts of things which are included in this legislation. We really have not gone beyond the parameters that the Productivity Commission set in its report and we have explored those issues that it asked us to look at and the issues that it contemplated that we would look at as part of the reform process.

Senator BUSHBY—I am not saying that the government has gone beyond, but I am saying it has tried to separate out the potential cost savings to business by having harmonisation, which I think everyone agrees is a great thing, from the actual specific provisions which, from an architect's perspective and no doubt from the perspective of other sectors of business around the country, will be seen to still contain some issues. I think everybody would be keen to get hold of the benefits from harmonisation but not everybody is necessary 100 per cent as keen on all the specific provisions in terms of the—

Dr Kennedy—You are right, Senator, there is a judgment to be made on getting efficient regulation for business and consumers.

Senator BUSHBY—I am just flicking through the legislation, looking at offences, and they all appear to be mandatory. They are not maximum penalties; they seem to be—

Mr Writer—They are maximum penalties; they are not mandatory.

Senator BUSHBY—That is not noted in each provision—it is either somewhere else or in the Acts Interpretation Act.

Mr Writer—I think that is right. I can check that for you and take it on notice.

Senator BUSHBY—While we are on that, you mentioned the information standards. I am just looking at section 203, subclause (1), which says that if a person commits an offence in relation to information standards, basically the body corporate could be liable to up to $1.1 million and a person who is not a body corporate could be liable to up to $220,000 for breach of information standards requirements. On the previous page, page 202, if somebody is in breach of failing to report consumer goods associated with the death or serious injury or illness of any person the maximum penalty is only $16,650 if the person is a body corporate and $3,330 if a person is not a body corporate . Just looking at the two, if you breach information standards, you could be up for $1.1 million. If you fail to report something that could result in the death or serious injury or illness of a person, the maximum penalty is only $16½ thousand. I just wonder how you arrived at the level of penalties that you have decided upon.

Mr Writer—In determining the level of penalties we have had regard to the Attorney-General's guidelines on framing Commonwealth offences, civil penalties and enforcement powers. Those penalties have been determined according to the guidance provided there and the advice of the Attorney-General's department. In terms of those two examples, obviously it is a serious matter to fail to comply with an information standard. For example, if there is a failure to do that with regard to a cigarette packet, that could occur on many millions of packets of cigarettes and consumers would be denied that information. In relation to failure to report it is probably a more difficult issue.

Mr Winckler—Can I just say that, in terms of the precise level of penalties, as a general rule we have tried to reflect those maximums that currently exist in Commonwealth, state or territory legislation. That $1.1 million penalty is currently there in the Trade Practices Act for breaches of information standards. The mandatory reporting requirement is of course a new requirement that does not currently exist, but the maximum penalty that has been attached there aligns with the penalty that exists for failure to notify the regulator when you have undertaken a voluntary recall of goods. That notification requirement is currently there in the TPA. So that is where those numbers come from.

Senator BUSHBY—I understand your explanation of where the numbers come from but if you fail to report goods that are associated with the death or serious injury of a person it seems that the penalty is so much smaller than offences relating to information standards. We are talking about people's lives and serious injury. Once again I was looking at the juxtaposition of one side of the page and the other and it seems quite ludicrous just looking at it like that. Thank you.

CHAIR—I am sure Treasury will take any questions on notice. Thank you for coming in this afternoon and assisting us with this bill.

[3.15 pm]

BOXALL, Dr Peter, AO, Commissioner, Australian Securities and Investments Commission

KIRK, Mr Greg, Senior Executive Leader, Credit Taskforce/Deposit Takers and Insurers, Australian Securities and Investments Commission

McCARTHY, Ms Clare, Senior Policy and Education Officer, Australian Securities and Investments Commission

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

Dr Boxall—Thank you. I have a very short statement just to clarify things. ASIC would be the national regulator for financial products and services only under the bill. I understand that the ACCC would be the national regulator for other consumer products. It is proposed that there will be a memorandum of understanding between ASIC, the ACCC and the states and territories to establish protocols for coordination, handling complaints and information sharing once the Australian consumer law is in place.

We note that financial products and services are already regulated under the Corporations Act, the ASIC Act and will be under the new credit act. In the second Australian consumer bill, which is the subject of this committee, the scope of amendments for the ASIC Act and the application to financial products and services is very limited. Notably the consumer guarantee provisions and the unsolicited consumer agreement provisions do not apply to financial products and services.

CHAIR—Thank you. Will the changes envisaged in this bill make much difference to the amount of work that you do currently in the regulation of financial services from the consumer point of view?

Dr Boxall—We anticipate that they will not. It will be very much business as usual and these will be some additional tools in our enforcement kit.

Senator BUSHBY—What additional tools do you actually receive with it then?

Ms McCarthy—The additional tools predominantly for ASIC come in the first bill, the unfair contract terms provisions and the enhanced enforcement and consumer redress powers. There are very limited amendments in the second bill that affect ASIC.

Senator BUSHBY—Given that we are looking at the second bill, what amendments do affect ASIC in this bill?

Ms McCarthy—The amendments are set out in schedule 3 of the bill and they principally tidy up some interpretive provisions and deal with some of the unfair terms provisions in subdivision D of the ASIC Act. There are no substantive, significant changes; they are more by way of clarification and consistency.

Senator BUSHBY—You mentioned the unfair terms, does the legislation clarify the definition of 'unfair' or the way that the provisions operate?

Ms McCarthy—The unfair contract terms provisions were picked up in the ASIC Act in the first ACL bill and they are consistent.

Senator BUSHBY—So what do they clarify in respect of that bill?

Ms McCarthy—I should clarify, there is the unfair contract terms regime which was in the first bill and this second bill picks up just some of the unfair practices, bait advertising, pyramid selling in those provisions in subdivision D of the ASIC Act.

Senator BUSHBY—I note the definition of participating in pyramid selling reads:

> … to take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or promotes the scheme, or who otherwise takes part in the scheme).

I think that is clause 44(3)(b). That seems a very broad definition of 'participate' and could presumably expose to liability employees or agents or even potentially customers who are involved in it but without any real malice or understanding that they are involved in a pyramid scheme.

Ms McCarthy—I would have to take the question on the details of the pyramid selling provision on notice.

Senator BUSHBY—'To take part in the scheme in any capacity' and then it seems to be very broad in terms of those people who may be caught up and face some liability. It is clause 44(3)(b).

Ms McCarthy—It is not clause 44 of the ASIC act.

Senator BUSHBY—Sorry: schedule 1 division 3.

Ms McCarthy—It would be 20—

CHAIR—We are very happy for you to take that on notice.

Senator BUSHBY—Take it on notice; that is fine. Given that most of what your involvement is we have actually dealt with as part of the inquiry into the first scheme, I do not think I have any more questions.

Senator PRATT—I have a single line of questioning which relates to the consumer interface that you have. Purportedly, one of the directions that the Australian consumer law will see is a greater capacity for a one-stop shop for consumer interactions, but I would think in ASIC's case consumers will still becoming directly to ASIC when it comes to financial services and consumer complaints—is that correct?

Mr Kirk—That would be correct. Even before the Australian consumer law comes into effect there has long been an overlap in terms of ASIC having specific regulation of most of financial services plus the ASIC Act provisions in the fair trading acts that apply to financial services. That overlap will continue. There are two key things that are different in financial services. One is that because we license all the players in financial services—and soon will license the credit providers and the intermediaries in the credit space as well—and we have the specific regulation of them, we have a far broader range of tools, remedies and laws to administer than the states would. So that is one difference.

The second difference is that in financial services all licensees have to be a member of an external dispute resolution scheme. So to the extent that they are looking for just a remedy for themselves, most often the first port of call would be the external dispute resolution scheme. To the extent that that is unsuccessful or the issues raised are regulatory issues that a regulator should take on, because of our broader range and more specific range of powers and laws, normally the best place for them to come to would be ASIC. In terms of our arrangements with the states, the agreement is that we would generally be the primary regulator of those things.

Senator PRATT—So in terms of external dispute resolution as the first port of call, they could be state bodies facilitating that dispute resolution—is that what you are saying?

Mr Kirk—No. Under their existing financial services laws and under the credit laws as they are coming in, all licensed providers or credit and financial products and credit and financial services have to be members of an ASIC approved external dispute resolution scheme.

Senator PRATT—I recall that from the previous inquiry.

Mr Kirk—They are industry funded schemes but structured independently, approved by ASIC and generally operated on a national basis.

Senator PRATT—Do you think, though, that there should be some overall improvement in coordination of consumer capacity to access their rights under Australian consumer law as states and territories start to get better coordinated and better at talking to each other about these things?

Dr Boxall—With the memorandum of understanding that is envisaged between ASIC and, as I understand it, the ACCC and the states and territories, that is an opportunity to lay out the protocols for dealing with this. For example, in ASIC we have the client call centre, where people might call in and make complaints, and the operators will be scripted on how to forward those—whether to refer them to a state and territory body or whether to refer them internally in ASIC. That is an issue that we are very conscious of, and that is how we are planning to address it.

Senator PRATT—I know that this is not the bill that we have before us, but I am trying to dissect all the different elements. We have had some discussion on this committee about the regulation of credit and what states have historically done in nationalising that credit control and that those state authorities that are now coming together under the Australian consumer law have historically done some of that credit regulation that ASIC—and under other national credit laws—are now starting to be more active, thanks to the law reform that has been happening. So there is that sense a greater coordination of consumer rights now happening between the states and the committee. Nevertheless, it does seem to be a complex bureaucracy for consumers themselves to unpick. What would you say in terms of giving consumers confidence that there will be greater transparency in their capacity to access their rights under these new regimes?

Dr Boxall—As you quite rightly say, Senator, that is not the subject of this committee. But, as it turned out, we are working on credit in ASIC and we have had a series of roadshows to explain the new regime. We are also liaising with the states and territories on the transition of responsibilities. So, again, we are addressing

those issues. ASIC, as you probably know, has offices in the capital cities. We do not have offices in regional centres like some, but not all, states and territories do, but we are looking at various ways to deal with that. regional officers—for example, with 1300 numbers and things like that.

Senator PRATT—But that kind of program based on credit will have implications for how things like this consumer law inevitably are rolled out because it cuts across ASIC's presence across the country.

Dr Boxall—Except that, in the case of the consumer law, the ACCC are involved in that. They are, in a sense, the lead regulator for the Australian government. So it will be subject to whatever memorandum of understanding arises from the deliberations of the ACCC, ASIC and the states and territories. So there is an extra player.

Senator PRATT—In the mean time, when consumers have issues with financial services do they just approach ASIC directly?

Dr Boxall—Some do.

Senator PRATT—I am trying to get my head around this. One of the things that the government is trying to do is to drive a greater consumer understanding of their rights, and the kinds of memorandums of understanding with the states and the national reform will, I think, see us head in that direction. Nevertheless, it is still quite confusing for consumers in terms of where they go to access their rights as the bureaucracy continues to sort these things out.

Dr Boxall—I am not sure whether that is a question, Senator.

CHAIR—It is straying into policy, I think.

Senator PRATT—Your answer to my question, 'Yes, sometimes they will come to us,' is, I think, an illustration of this. The question really is: where do consumers go? Is there a single point of contact where they can then be confident that they will be referred to the right place? Is it ACCC? Is it ASIC? Where is it?

Mr Kirk—For financial products and services, the primary point of contact for consumers is, and should be, ASIC.

Senator PRATT—Thank you.

CHAIR—As there are no further questions, I thank ASIC for their appearance here this afternoon.

[3.38 pm]

COOPER, Mr Bruce, General Manager, Information, Research and Analysis, Australian Competition and Consumer Commission

GREGSON, Mr Scott, Group General Manager, Enforcement Operations, Australian Competition and Consumer Commission

RIDGWAY, Mr Nigel, Group General Manager, Compliance, Research, Outreach and Product Safety, Australian Competition and Consumer Commission

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

Mr Gregson—Yes, by way of introduction, perhaps to set the scene for our contribution this afternoon for the committee's consideration. As senators are aware, the ACCC, with ASIC, are the Commonwealth agencies responsible for enforcement of and compliance with the proposed laws. In this regard we are best placed to comment on the application of the law in practice and to leave certain aspects of the background as to the bill that you see before you in its current shape to the Treasury and the government.

This said, the ACCC clearly supports the Australian consumer law reform agenda. Greater consistency of laws, additional enforcement tools and remedies, and increased scope and enthusiasm for cooperation amongst agencies will deliver enhanced consumer protection for all Australians. This is obviously a good thing. At this point let me emphasise that one of the keys to maximising an increase in consumer protection is maintaining and enhancing cooperation between the jurisdictions and clear communication of the proposed changes in law to the public at large.

The Commonwealth, including through the ACCC and ASIC, are committed to working with the states and territories to ensure that we achieve these aspects of the implementation. From MOUs to joint or consistent guidance and training, from new liaison structures to enhanced information sharing—these are the mechanisms that will ensure we deliver that consistent approach. In this regard we expect senators will be interested in our activities with the states and territories and our proposals for communication and outreach. We would of course be pleased to detail what we are up to in those areas, bearing in mind that some of that work is a work in progress as the laws continue to progress through parliament. With this short introduction in mind, we look forward to answering questions you might have for the ACCC.

CHAIR—Thank you, Mr Gregson. I would be interested in hearing a bit more about how you are working with the other jurisdictions to try to improve consumer education. We have heard that in Australia both consumers and some businesses are not entirely aware of the current provisions, so now would obviously be a good time to improve that knowledge.

Mr Gregson—Certainly. Mr Ridgeway is the group general manager responsible for outreach activities, and I will let him deal with that.

Mr Ridgway—The ACCC has for some time been working with its state and territory counterparts and, to the extent that it is relevant to financial services, with ASIC to identify how and in what form we can best collectively raise awareness among Australian consumers but also Australian businesses of the new obligations and rights that flow from the development of the Australian Consumer Law. We are particularly looking at identifying organisations such as business and industry associations and consumer groups as well as financial counsellor groups and others who we would characterise as intermediaries to make sure they have a good working understanding of the new framework so that they can assist consumers as and when they need to. We are also looking, particularly with respect to the consumer guarantee reforms, to identify the best way that we can help consumers understand their rights when it comes to what avenues of redress they have when things go wrong with the products or services they buy.

CHAIR—For example, if someone goes into a discount shop and buys a product that does not work, and the discount shop says, 'No, we're a cheap shop; we don't do refunds but we'll swap something,' what can that person do next?

Mr Ridgway—We already have some information in our materials under the current regime. If a trader says outright 'no refunds' without any qualification, they are likely to be contravening the law now and it is likely they were contravening the law then. In the event that a consumer is faced with that, we have a couple of avenues. One is to take certain steps themselves to assure themselves that they are able to assert certain things and seek redress, and there are a set of steps that we provide that consumers can follow. Separately, we advise that, if they do not receive an outcome that satisfies them, either the ACCC or state and territory fair

trading agencies may be able to assist them further. And, in the event that they do not get satisfaction, they should come back to us.

CHAIR—Okay. When you say 'assist them further', would that be in the form of contacting the retailer and advising them of their responsibilities?

Mr Ridgway—As I said, there are two different avenues. One is, yes, to go back to the supplier and say: 'This is the product that I purchased. This is the issue that I've got that is of concern and what I'm seeking from you is some redress or some assistance.' That is one avenue, and there is some information we provide to assist them to take those steps. The other is that if they do not achieve success or satisfaction from that process then they can come back to the regulator, either the ACCC or a state or territory fair trading agency, to identify that they have taken those steps and they were unsuccessful and to seek such assistance as may be available.

Mr Gregson—Chair, perhaps a more direct response to your question is that, if we are provided with information from that consumer or, more generally, the large number of consumers who come to the ACCC because a trader is consistently misrepresenting warranty rights or obligations, yes, we both will act and have acted in the past in terms of the misrepresentations that might entail. But, as Mr Ridgway points out, the actual enforcement of a specific warranty remedy is in the area of direct consumer action.

CHAIR—Often traders operate in different names in different states. Will this bill give you more of an ability to track some of that behaviour if traders are operating poorly?

Mr Gregson—It will in the sense that there will be enhanced lines of communication between agencies. Practically speaking we still have that capacity now to have discussions with our co-regulators around the country, and we share information and track down who is behind a particular scheme. But one of the beauties of this reform process is that it is through having consistent laws encouraging greater cooperation and coordination between agencies. I am sure that will lead to better enforcement.

Mr Ridgway—Work is already under way between the ACCC and state and territory agencies to encourage and promote consistent characterisation of conduct in industry sectors and traders so that we can better identify and draw upon collective data bases of consumer complaint information so that we can get a better picture of emerging trends more quickly.

CHAIR—That will also assist you, will it not, to educate businesses and enable them to streamline their practices across Australia?

Mr Ridgway—Absolutely. As we can identify that data more quickly that point outs that there is a particular sector or a particular trader that appears to be coming up more frequently than others, so it enables us to move more quickly to bring that to their attention. That is some of the work that already happens around the country. Certain traders are identified as perhaps having more complaints in relation to, say, warranty issues than others, and it enables the ACCC and other regulators to bring that to the trader's attention and to seek some change to their systems so that these issues are less prevalent.

CHAIR—It is my experience that industries in general like to have people who are not operating properly and often gaining a financial advantage by that identified and dealt with fairly quickly. That is an advantage to everyone.

Senator EGGLESTON—The bill replaces parts of the Corporations Act 2001. Can you comment on the nature of the changes and the impact on ASIC's workload and powers as a result of these changes?

Mr Gregson—They are perhaps questions that ASIC might have been best able to assist you with. For our part, obviously the distinction between the general consumer protection provisions and those that apply to financial services remain. I am not sure I can comment much further on how ASIC will be employing those provisions other than to say that we continue to cooperate and assist them as they do us with both training and outreach.

Senator EGGLESTON—In your case, what programs are in place to educate businesses and consumers about their rights and responsibilities once the bill is in place and is law?

Mr Gregson—There are two elements to that. It is partly the outreach programs we have had established over many years and building on that. But, as you point out, there will clearly be a need for further education in relation to the new provisions. Mr Ridgeway can give you a few more details about our intentions there.

Mr Ridgway—One of the areas in which the ACCC has been working with its state and territory counterparts on the education side for business has been in developing guidance in relation to unfair contract terms and what is expected or required by the law there. Part of the work will involve development of some

specific guidance which covers the marketplace but, in addition to that, we are proposing to work with a number of the industry associations. An example might be some preliminary discussions that have happened today between the ACCC and the Master Builders Association, who are seeking some guidance on behalf of their industry sector to say, 'As the law is developing, this is what we are looking for traders to be thinking about.' There will be a number of areas in the marketplace that will be seeking some guidance and there will be a number of areas where we think it is particularly important to get that guidance to business.

Senator EGGLESTON—What about consumers? What are you doing to inform consumers of changes to the laws which give them extra protection in terms of standard form contracts?

Mr Ridgway—In terms of standard form contracts, we are particularly looking at getting some key information to those consumer organisations and other intermediaries, as I call them, such as financial counsellors who are likely to deal with consumers who will be seeking that kind of information, so that we can get a bit of expertise and knowledge about a range of individuals who consumers will go to naturally. In addition to that, we are developing some materials that will go on our website and some other key points for consumers to be aware of in relation to the unfair contract terms or consumer guarantees and the like.

Mr Gregson—Mr Ridgway has failed to mention one of our key communication channels with consumers. We have a consumer consultative committee that comes together with the ACCC involving representatives of a large number of consumer bodies. We find that an essential tool to not only communicate our message but also find out from those groups the issues that are impacting on them. It is a circular type process.

Senator EGGLESTON—Are you going to run a mass publicity campaign? Are you going to have television advertisements saying, 'You have greater protection under these new laws,' aimed at householders and ordinary citizens? Otherwise they may not know.

Mr Ridgway—The specifics of the material that we want to progress are not finalised at this stage, necessarily because we are working with the state and territory agencies, as well as ourselves, to have some consistency in the messaging, but also to reduce duplication or inconsistent approaches. Part of the process that is underway now will look at identifying the best format and the best way to get information to consumers. Often consumers can pick up a deal of information from media coverage and so forth. It may be that paid advertising is not necessarily the best avenue to go down, but that has not been determined at this stage.

Senator EGGLESTON—Do you get many direct consumer complaints? What percentage of the work that comes to you comes from Mr or Mrs Consumer in the suburbs about an issue?

Mr Gregson—A large percentage of matters coming to the ACCC's attention come through our information centre in either written or telephone form. The latest number is up to 120,000 contacts per year. Mr Cooper is responsible for, among other things, the running of our information centre and would know the percentage of consumer contact to the ACCC.

Mr Cooper—The number of telephone calls is 70 per cent of that, and then there are emails on top of that, which are generated largely as a result of consumers accessing our website and pursuing the line of inquiry in writing to us, and we respond to those.

Senator EGGLESTON—How do you respond to them—with a standard form email or do you have a standard set of words?

Mr Cooper—We use numerous templates, but the idea is that we attempt to provide information that will help consumers with their particular issues. There will be circumstances when we have to say, 'Thank you for the information. We will look at taking it further,' if we want to investigate it. If the matter is investigated we will usually inform the consumer after that.

Mr Gregson—We certainly do—without blowing our own trumpet too much—take a degree of pride in our information centre for having a person contact. There will be person-to-person contact. I have had the privilege of walking through the area on a daily basis listening to the conversations. Where we are not in a position to assist a party, we go to a great length to advise of the agency that might be best able to assist. That may be relevant to some of the other questions you come to about how we ensure we work with other agencies to find the best home for a complaint.

Senator EGGLESTON—So you respond individually. That is good to know. In the context of another inquiry in relation to ASIC we were told that they tend to send a standard form email and then nothing more is heard for a very long time. What is the time frame for your response?

Mr Gregson—Certainly with telephone calls it is immediate. Where it needs to be referred to an officer for information, that contact is ordinarily made within the week.

Mr Cooper—Our corporate plan says that we will respond to written communications within 28 days, but we normally respond well within that time. The more complicated issue is when we have to provide an interim response because further investigation is required, but we will always do that within 28 days as well. I do not have the figures with me, but we will respond to written communication within that time frame, I think, 98 per cent of the time. I will take that on notice, if you like.

Senator EGGLESTON—Thank you.

Senator BUSHBY—Thank you for assisting us with this today. Treasury indicated that you had received an extra $24 million in last year's budget to help fund these activities. Is that correct?

Mr Gregson—Senator, you might be referring to the reforms in relation to product safety.

Senator BUSHBY—At the briefing earlier today it was indicated that, due to the additional activities that you would be performing under this, there was an additional $24 million allocated to you in last year's budget.

Mr Gregson—It is certainly the case that we were allocated funds—I do not have the precise figures available—in relation to the new product safety functions the ACCC has undertaken over the last year in what will now be part of the ACL reforms. You will appreciate that I am anxious about budgetary issues, given that there is currently a budget process before government.

Senator BUSHBY—I am just talking about last year's budget.

Mr Gregson—Indeed. I think you will find that is related to our product safety functions.

Senator BUSHBY—So an additional $24 million was provided to you for product safety last year, not specifically for this, then. What additional resources will the ACCC need to utilise to actually deliver your responsibilities under the Consumer Law?

Mr Gregson—It is clearly the case that the proposed legislation in addition to that that recently received royal assent will provide new roles and functions for the ACCC, including the deployment of new powers and remedies. As we do with any changes to our roles and responsibilities or powers and functions, we make an assessment about how we are going to deliver that, whether we need to have further resources. We have that discussion with government through the budget process. We have had those discussions with government and I guess we will wait and see how we are further resourced to deal with that. Needless to say, however, we are prioritising ACL. We are confident that we will have sufficient resources to make sure that we deliver those reforms effectively, in combination with the states, territories and ASIC.

Senator BUSHBY—I guess I will have an opportunity to ask you guys a bit more about that during the budget estimates. I am interested in the fact that ASIC, over the last few years, has been loaded up with a lot of extra functions. At times there has been additional funding to match those functions and at other times there does not appear to have been. Given your statement that at this stage there has been no specific funding provided to ASIC to reflect your additional responsibilities under the Consumer Law in general—

Mr Gregson—The ACCC, Senator.

Senator BUSHBY—Sorry, the ACCC. Given that, it will be interesting to see what does happen in the budget. Have you had to put on new staff or do you anticipate putting on new staff if the second tranche of the ACL gets through?

Mr Gregson—We obviously put on additional staff where we have the funding to assist with that, but it is clearly the case that we are directing resources toward ACL. In particular, for new roles such as the unfair contracts terms we are putting in place a team that will assist us in our activities there.

Senator BUSHBY—So you have put a team together that focuses specifically on that, but to this point you have not received additional funding to actually fund that. You have done it internally via a reallocation of resources.

Mr Gregson—It is certainly the case that we are using the current resources available to us to make sure that we deal with the important implementation and preparation issues. Unfair contracts terms is one example. There is also the work that the staff under me, Mr Ridgway and Mr Cooper are doing and have been doing over the last 12 to 18 months in the lead-up to ACL. As you are aware, the budget process is relatively advanced and we will see whether that assists us going forward.

Senator BUSHBY—How big is the team that you have put together so far for dealing with ACL?

Mr Gregson—It is a loose team at this stage in relation to ACL.

Senator BUSHBY—Which would include the first tranche in unfair contracts?

Mr Gregson—It is loose in the sense that a staff member who may be responsible for other law reform or other outreach activities will also be working on the ACL reforms or outreach activities. It is a bit hard to give you precise figures. We have at least 10 staff involved from time to time in progressing these matters.

Senator BUSHBY—Is that in the reform process or in the actual administration of your responsibilities under the—

Mr Gregson—It is very much in the reform process in the sense that the new laws in relation to enforcement powers only came into force in mid April. Of course, we are waiting until 1 July in relation to the unfair contract terms. Of course, we are not involved in the pointy end of implementation.

Senator BUSHBY—No, but presumably you would be involved in setting up and planning for the pointy end and are the people who will actually have responsibility for dealing with that as opposed to the people who will be looking towards that reform process and what might happen when this hits parliament and so on.

Mr Gregson—I cannot give you a precise figure, but certainly we have at least one or two people who are spending a lot of their time setting up the team that is going to be looking at unfair contract terms. That complements the work that various staff have done over the last 12 to 18 months with both internal communications liaison training and preparation of templates guidance and consideration of how we might employ these techniques.

Senator BUSHBY—I would be very interested to see how that pans out: one, with the budget—what you actually get there and how that is dealt with—and, two, as the changes actually come on stream. Do you have any role in assisting business in ensuring in advance of the 1 July start date that their contracts are compliant?

Mr Gregson—We certainly do not have a clearance mechanism or a process where we would review contracts put to us. We certainly have a clear role in relation to the provision of information. The key plank in that is obviously the joint guidelines that the ACCC is preparing with both ASIC and the states and territories. That has been out for consultation with key stakeholders, including business. We believe that communication is well and truly on foot and will only enhance from here.

Mr Ridgway—Some of the feedback we got from business and industry associations in our consultation exercise on the draft unfair contract terms guidance has highlighted a number of issues that are clearly on the minds of their members. That has given us a bit of guidance as to some of the areas we need to have some discussion on and provide some information on to assist them to come to grips with the application of the unfair contract terms regime with their industry and their industry practices.

Senator BUSHBY—It is good to hear that. Will it be just with industry representatives or will you have fact sheets? If a business is concerned to ensure that their standard form of contract is compliant, can they head to your website and find some information that will assist them to make sure that when they draft them they are right?

Mr Ridgway—There will be some broad information that will be of use equally across the market for those who wish to. We have taken a bit of care to try to phrase that in plain English rather than legalese so traders can get to grips on a range of the key issues. Sector by sector they have different characteristics that will determine whether or not an industry association approach is the best way. How to best reach those who want that information will really depend on the sector profile.

Senator BUSHBY—Some traders will be actively involved in industry organisations and others will not have any activity. They will need to know the information.

Mr Ridgway—That is correct. We are quite alert to the variety.

Senator BUSHBY—Looking at the legislation that is before us, what about retrospectivity in respect of the guarantee and in terms of the country origin information? Using that latter one as an example: if you have a box of goods with labels on them but they are not compliant, how will that actually work?

Mr Gregson—My understanding of the amendments to the country of origin provisions relate to defences as opposed to additional prohibitions. That does somewhat reverse the issues in terms of retrospectivity. What was the second part of your question about?

Senator BUSHBY—The guarantees. If you have sold something before the date of effect then you are not subject to it, presumably.

Mr Gregson—We do not have those precise details. Obviously our staff have spent a fair bit of time going through the ins and outs. Can we take that one on notice and assist you with that?

Senator BUSHBY—I want to make sure that the transitional arrangements do not impose unfair burdens on businesses that carried goods or undertook activities in the knowledge of the law as it stood prior to the new law taking effect.

Mr Gregson—We will provide you information with respect to retrospectivity. In relation to the consumer guarantees, it is emphasised in the drafting of this bill that a big part of it is to clarify and modernise language. It certainly provides additional roles for the ACCC, but the heart of the guarantees is very similar to the warranties that businesses have been operating.

Senator BUSHBY—The Australian Institute of Architects is appearing after you. Architects and engineers are currently exempt, but that will not be the case if this legislation passes, so there may well be new obligations imposed on them. For engineers and architects, projects are often a lot longer. They may be well into it when it starts but still be active after the date of effect, so it would be important to establish what new obligations may arise for them in respect of projects that they are already undertaking.

Mr Cooper—My understanding is that, because the supply of goods is what the guarantees hang off, it is the date of supply that will determine what other obligations and rights the consumer and business have. So if the date of supply is after the proposed bill has commenced operation then it is the new guarantees that would operate.

Senator BUSHBY—It is easy enough to say when you got something if you are buying a toaster or something simple. But an architect, for example, may well design and oversee the construction and then have an ongoing role where they are continually supplying services related to the one project, so it may get grey—that is all I am saying—and it may need to be clarified.

Mr Gregson—Certainly. We will have a look at the transcript from today and see if we can assist further with those implementation issues.

Senator BUSHBY—Thank you.

Senator PRATT—How is it envisaged the interface will change for consumers? I appreciate that some of these things are likely still being worked out in the implementation phases. For example, if under a national consumer law someone approaches a state bureaucracy about an issue that normally would have fallen under the ACCC, will that consumer be able to pursue that complaint there or will they still need to be referred on to the ACCC?

Mr Gregson—It is probably worth quickly revisiting how consumers currently engage with agencies. There are fair trading laws in each of the states and territories and obviously at the Commonwealth level. There are also specific consumer protection laws in some of the states that are not apparent elsewhere. Today a consumer who wishes to raise an issue will equally have to make choices about who they call and there will be information provided by that agency, including at times a referral to a more appropriate agency. The beauty of our new regime is that we are dealing with one set of laws in an environment where there is enhanced cooperation and information sharing between agencies. So the choice a consumer has as to which agency they go to should not be reduced under this new regime. It will simply be that we are dealing with one set of common laws, with greater information sharing between the parties to allow us to work out who is best placed to assist a consumer or deal with a consumer issue. In some respects it is the same, but in other respects consumers will be much better placed.

Senator PRATT—Surely we should be ridding the system of inefficiencies rather than necessarily having two bureaucracies for consumers to access. I appreciate that will take time. Is it envisaged that, for example, the ACCC might have to have a stronger presence in the states or to work in closer partnership with state bureaucracies with shopfronts or whatever the future approach might be?

Mr Gregson—We are certainly looking at opportunities for sharing information. We are looking at opportunities to ensure the information we take from a consumer when they make complaints is the same type of information so that that can be shared and we can provide the same information in return for that complaint. It is also clear that we are striving towards better communication between the agencies to share the information, to allow us to work together on investigations and ultimately in enforcement activity. It is certainly the case that we would like to remove what consumers sometimes see as that doubling up of the bureaucracies.

Senator PRATT—Sometimes such doubling up means a consumer perceives that neither bureaucracy is taking their issue very seriously. They think someone else in another jurisdiction is handling it. The perception is that one agency has stepped back from helping them pursue their claim. How will consumers get clarity about who ultimately is going to help them exercise their rights?

Mr Gregson—One of the phrases we have been using internally to deal with the perception or reality you have referred to is to ensure that complaints 'don't fall through the cracks'. We will make sure that the information sharing between us, ASIC and the state and territory agencies is enhanced to ensure that that does not happen. We will continue to do that and continue to try and communicate to businesses and consumers about the types of matters the ACCC is more interested in, vis-a-vis the states and territories in terms of the allocation of matters.

Senator PRATT—How will the consumer know which camp they are in when they approach an agency about an issue that might more properly belong with the ACCC? Will a referrals process still be relied upon in those circumstances or would the state agency pass that issue on to the ACCC?

Mr Gregson—Contrasting what we currently do versus what we might do under the new regime, we currently receive complaints from consumers that we ultimately decide, either a specific complaint or a series of complaints, reveal an issue that may be referred to another agency. It may be referred to ASIC or it may be referred to a state and territory agency and vice versa. That will continue just with enhanced information available to us and enhanced cooperation, and hopefully in a way which demonstrates to consumers a confidence that enforcement agencies around the country take it seriously and are interested in getting real remedies for consumers.

Mr Cooper—There will be situations where a complaint is made directly to the ACCC, and reasonably so from the consumer's point of view, but that matter is already being investigated by one of the state agencies. In that circumstance, we want to make sure that we can pass the complaint that was made to us, in as transparent a way as we can, to the agency already looking into a similar matter or investigating a particular trader.

Mr Gregson—While at times it may sound desirable to have black and white lines about which matters will be handled by each agency, I suggest it is not in the consumer's interest to have such black and white lines. There will be matters of common interest between agencies and I think the best outcome for consumers is to allow that information to the agencies, have an environment where it is shared and discussed, and we collectively work out the best way to get consumer redress.

Senator PRATT—Yes, and in that context I would expect that greater information sharing. Would it be the case that because different states do things a little bit differently that the ACCC will be in a better position to learn about how different states do things, and at times the states will probably share those approaches with yourselves and other states?

Mr Gregson—Very much. It happens to a large extent now. We have forums in which we share investigation and enforcement and compliance techniques with our colleagues in the states and the territories and ASIC. We find that an invaluable way of looking at the pros and cons of different styles. Increased cooperation, coordination and discussions can only lead to better outcomes there.

Senator PRATT—That is going to be interesting, given that those different approaches will now be taking place under a single law. Do you think that will present any particular challenges?

Mr Gregson—On a net effect, it will present greater opportunities. With the same laws, we will all be talking on the same page about what we are enforcing and investigating. Of course, there will be greater discipline on all agencies to make sure we are talking to each other about how we are either interpreting or enforcing those laws, and that is a big part of what Mr Ridgway's team is doing in terms of MOUs and liaison protocols.

Mr Ridgway—Interestingly, one of the things we have identified on the education and awareness raising side is that there are some expectations in one part of the country for a particular format where community consultation and discussions are held, whereas in another part of the country that format does not work quite as well because the expectations are different and consumers are looking for a different format to have their information brought to them in. So, while we have identified that we can learn from each other, there are different ways of doing things and we are also finding that there are some discrete preferences from different consumers around the country. So we are not trying to duplicate what others do, but to best tailor the way we do our work to, for want of a better term, the expectation and the practices of that particular part of the country.

Senator PRATT—That is an interesting observation. Lastly, if we are trying to get some national consistency here, do you think that the states universally have sufficiently resourced their consumer protection agencies to create and fulfil a nationally consistent capacity to uphold consumer rights, or are some states going to have to lift their game in order to meet the standards set by others?

Mr Gregson—I suggest that that will not be a call for the ACCC to make and comment on, save to say that different states employ different structures and different ways of delivering their consumer protection. We have certainly found strong colleagues in our states and territories in complementing or taking the lead on work that we have been involved in with them. We have certainly been impressed with our interactions with the states and territories on numerous fronts in consumer protection and hope that that continues, perhaps with enhanced vigour under the new regime.

CHAIR—There being no more questions, I thank the ACCC for coming in this afternoon and for your assistance.

[4.18 pm]

BARTON, Mr Richard Bruce, General Counsel and Company Secretary, Australian Institute of Architects

PARKEN, Mr David John, Chief Executive Officer, Australian Institute of Architects

TOWNSEND, Ms Catherine, Member, Australian Institute of Architects

CHAIR—I welcome representatives from the Australian Institute of Architects. Do you have an opening statement you would like to make, Mr Parken?

Mr Parken—Yes, I do. Thank you for the opportunity to come and present today. I have with me my colleagues Richard Barton, who is the General Counsel of the Australian Institute of Architects, and Catherine Townsend, who is a member of the Australian Institute of Architects, a practising architect and a former president of the ACT chapter of the Australian Institute of Architects. The institute has over 9,000 members. We advance our members' professional standards and contemporary practice, we advocate for sustainable design, and our members undertake both commercial and residential work. This includes work undertaken for consumers which is primarily residential housing work, both new housing and alterations and additions.

For the committee's background, we surveyed our principals of practices, ranging from small practitioners through to larger firms. We received over 1,001 responses in two days to a national survey, which is about a 36 per cent rate, which is extraordinary. That means our members are concerned about the proposed changes. The findings have also informed our submission. We have made a formal submission. Thank you for the opportunity to speak to you on a bit more detail.

Overall, we support the bill. We certainly support a fair deal for consumers. Our concerns are particularly with section 61, which removes the current exemption for architects and engineers from the fitness for purpose, which has stood for 24 years. We believe that there are some unintended consequences out of these changes which we would like to draw to your attention. We also believe that there is not a proven market failure out there.

I will touch on a few issues. We obviously have quite a few in our submission but, in the introductory statements, I will touch on a few. It will be informed with a bit of information from our survey. We believe that one of the unintended consequences of this is the possibility that our members will be less innovative. Architects are generally often trying new things. The product that comes out of their services, particularly when they are dealing with a consumer, is design for housing. Often it includes some experimental activity. In fact, 64 per cent of our members surveyed said they would avoid innovation if this were imposed, because we are going from a warranty to a guarantee. We believe that brings an increased level of liability for our members—in fact, a higher threshold; a no-fault liability—and they would be liable for both their services and the product. It is unlike the manufacturing process, where you have Q&A and laboratory testing—cars are tested with crash dummies and the whole bit—and then you make 100,000 and you have a fairly high level of confidence in the manufactured items. Housing is virtually about creating prototypes. Each one is unique to place and unique to the consumer's brief.

One of the issues with that is the requirement to cover the implied requirements of the consumer for a period of six years. That means that post the project being built—and projects are quite complicated to get through our planning system, but I will not be diverted onto the difficulties of getting through the nation's planning system in the 560 individual councils—we also find that a lot of things change along the way. To have to meet a consumer's implied requests when they are not stated or written has some difficulty. Again, most of our members said that they would have to do additional work in terms of clarifying the brief and stating very clearly to the consumer what the risks are in going forward with the project. This would add additional time and cost to the process, which unfortunately would have to be passed on to the consumer.

We also have concerns about insurance. Believe it or not, we have had a problem with getting insurance after the HIH collapse. At the moment, this guarantee is not covered by insurance. Ninety-six per cent said that they would be concerned if premiums were to rise. Again, if those costs rise, they would have to be passed on to consumers. So we are concerned about the impact on small business. Ninety per cent of our members work in practices of 20 or fewer people. A lot of them—probably about half—work in practices of five or fewer, and we have a number of sole practitioners who basically focus on the housing side of the market. Our members' survey back up their concerns. Eighty-seven per cent said exposure of this new liability was of concern; 81 per cent said that they would be concerned even if they could insure for the liability; and 95 per cent said they

would be very concerned if insurance were not available. These are quite major issues for our profession. Anyway, we are happy to be here today to answer questions and we look forward to it.

CHAIR—Thank you, Mr Parken. Your submission also talks about the operation of New Zealand consumer law and due note that, in over 15 years, there has been very limited use in general by New Zealand consumers of the New Zealand Consumer Guarantees Act. But you then say—in my summation—that there is a cultural difference between Australia and New Zealand. It seems to me there are a lot of similarities between Australia and New Zealand and that there does not seem to be a lot that you need to worry about if there has not been much action under the New Zealand law.

Mr Parken—Basically we would say that New Zealand is not a society which is high on litigation, particularly from the consumer. We believe that the circumstances there are different. In fact, we believe the New Zealand government is concerned that consumers are not active enough in all sorts of areas. So we do not think that the New Zealand situation is world's best practice. I will ask my a colleague to comment as well.

Mr Barton—Senator, you are probably aware that New Zealand does not have a personal injury litigation culture, that you cannot sue for personal injury because of the universal insurance scheme. Although we cannot be certain exactly what the differences are and exactly what the reason is, it does seem very surprising that, given that there is no exemption in New Zealand, there is very little activity on that basis. We can only surmise that there is a different culture in New Zealand and that to compare the two is like comparing apples and oranges. We do not see that New Zealand is a reason to change what has been established in Australian law for quite some time, particularly as we believe that the avenues for redress by consumers are perfectly adequate as they are now in terms of architecture and engineering.

CHAIR—You are asking for an exemption for those two professions, yet other professionals are covered under the existing law. Do you see any evidence in case law or action against other professions which are relevant to you? Is there any indication that it might cause a big hike in insurance policies or a lot of litigation?

Mr Barton—It is very difficult to say. When you talk to insurers, they are very averse to saying one way or the other whether they will cover with insurance this kind of liability. We know that when this was introduced in 1986 the insurance was available to other professions but the insurance line for architects and engineers is extremely complex and very marginal. David could probably enlighten you further on that. It is a very marginal insurance line. The willingness of insurers to be in that market at any one time in the economic cycle is very tenuous. Certainly the attitude of insurers to any kind of assumed liability where it is voluntarily assumed, such as agreeing to a fitness for purpose warranty or guarantee in a contract of engagement, is a blanket no. That is very clearly brought home to us by the advice we received from our subsidiary—who is an insurance broker. Basically insurers who operate in professional liability for architects and engineers will not entertain a fitness for purpose warranty or guarantee. We have every reason to think that, if this were to become a statutory requirement, the cost of insurance for our members would rise very substantially or the availability of insurance would reduce dramatically.

CHAIR—So you maintain that you have got such a difference from other professions that there is nothing to be learned from their current experience of the law?

Mr Barton—Yes, basically that is right.

Senator EGGLESTON—I am quite interested in what you have been saying. You referred to the no-fault liability injury system in New Zealand, which is the workers comp system. There is no fault—there is simply a payment made if you lose a finger, an eye or a leg. You are talking about warranties and fitness for purpose. Could you explain the difference between that concept and negligence, which is in fact the basis of, say, insurance claims against doctors, lawyers and other people? How does fitness for purpose differ from negligence? What are we talking about in terms of architects and engineers here? It is not quite clear.

Mr Barton—Negligence is basically liability under the common law. The starting point for negligence is a failure to exercise due care and skill. There is a standard of due care and skill, and if the professional falls below that then prima facie they are guilty of negligence, you might say. The difference between that and no-fault liability is that, under a guarantee, it does not matter how much due care and skill you apply. In fact, if you apply exemplary care and skill but something has failed to be achieved, or you fail to achieve what the consumer has asked you to do no matter how hard you try, then you are still liable. In negligence, you would be liable only if you fail to achieve the standard that the law has set. Then there are a number of other things like contributory negligence and the state of knowledge at the time. But, primarily, a guarantee basically means: 'you fail; you suffer'.

Senator EGGLESTON—So we are not talking about a house that falls down after it has been built because it has been improperly built, which would be negligent, one presumes; we are talking about not achieving a concept, perhaps, of what the purchaser wanted.

Mr Barton—Not meeting their implied expectation, which is the difficult thing. Perhaps Catherine could talk about this. An example might be: 'I wanted my living area to be light and airy and comfortable and not to rely on air conditioning,' and then when it is finished the consumer comes back and says, 'I had to install an air conditioner because I got a bit cold,' or 'I was a bit too hot and you didn't meet my request.' The architect may have said, 'This is going to be difficult to achieve.' They might have counselled them on it and the consumer says, 'Proceed anyway,' but afterwards there is an argument because, 'You should have known better because you're the professional.'

Ms Townsend—As David has said, many of the concepts we deal with in architecture are subjective assessments—temperature and comfort, obviously. What I perceive as light and airy might be different from what you perceive as light and airy. It is common during construction that one's clients will comment about how the space differs in actuality from how they imagined it to be. It is either smaller or larger, or higher or lower.

As well as you can illustrate something in drawings or models, whether physical models or a computer model, those models are facsimiles of the real thing and, until it is illustrated at one-to-one in real life, most people really struggle with how to interpret what is shown on a page, especially when it comes to concepts that most normal consumers do not have a vocabulary or language for. They find it difficult to articulate to us exactly what they are looking for and how to give parameters for what they are looking for. With those implied expectations we try to anticipate their requirements, we try to elicit information, we try as many mechanisms as we can. But unless we can get the client to articulate in some way their expectations, we are relying on our abilities to pull as much information out of the client first so that we can satisfy those expectations.

Senator EGGLESTON—Do architects and engineers as a profession have professional indemnity insurance for negligence?

Mr Parken—Yes.

Mr Barton—Yes. It is in fact compulsory for architects in virtually every state and territory.

Senator EGGLESTON—You mentioned that often the 'idea' that you are trying to create is just discussed but not written into a contract. Is that—

Mr Parken—No, we did not say that. There is generally—

Senator EGGLESTON—Requests implied not written I mean.

Mr Parken—Sorry. There generally is a written contract of a client-architect agreement and there are many, many drawings, there are discussions, there are meetings, there are planning submissions—

Mr Barton—Briefs.

Mr Parken—there are briefs, but what we are highlighting there is that the way that the act is drafted you are giving a guarantee for the consumer's requirements, both stated and implied, and it is the implied bit which is very worrying. Some sharp behaviour might result in the consumer saying: 'I'm really disappointed in this. You didn't meet my expectation. I'm not going to pay your final fee bill.' Under the legislation, the payment for services is on the table as some sort of restitution. We certainly find in the commercial sector, in the B2B area, that clients who do undertake sharp practices often try that on with professionals, try not to pay the last bit because they are not happy: 'We don't want to litigate but we're going to hold that out.' To move that into the consumer area around their implied expectations, we think, is an unintended consequence.

Senator EGGLESTON—Is it possible to deal with that issue by writing out an agreement about what you design being consistent with the purchaser's concept, or is that too hard to do?

Mr Barton—It is not too hard when the requirement is expressed clearly and stated, but the problem is anticipating what may be implied and what may be considered to have been implied up to six years after the person has moved into the house.

Senator EGGLESTON—That is the sort of issue that I was really driving at, writing everything down, but obviously you cannot quite do it.

Mr Barton—You cannot do it.

Senator EGGLESTON—I understand now. Thank you.

Senator BUSHBY—I think most of what I wanted to ask has been covered. Essentially what you are saying is that, for want of a better way of putting it, there is an artistic input in the service you provide, so it is difficult to pin down what is essentially a subjective expectation that clients of your members may have when they engage an architect. I think Ms Townsend put it well in saying that you can give them diagrams and write down in detailed words exactly what you are trying to deliver and what your understanding is of what they are after, and they can say, 'That looks fine; it seems exactly what I want,' but when they actually walk into the one-to-one they say: 'Hang on a second. This isn't what I thought I was going to get.' That is your concern primarily, as I understand it.

Mr Barton—Exactly.

Senator BUSHBY—And you are saying you are different because of that aspect.

Mr Parken—We are saying that our product is not a manufactured product that is at a consistent standard like a widget; therefore it cannot be tested.

Senator BUSHBY—Unlike the example of a car, which can be thoroughly tested and should be able to meet certain standards by the time it is sold.

Mr Parken—The other thing is that normally the biggest investment that a person makes in their life is their own house, not only financially but also emotionally. If you have a house designed by an architect, it is likely to be a bespoke house that reflects your personality and the requirements of your family now and into the future. Then you have to overlay on that the challenge of sustainability and all that comes with that—climate change, reducing water usage and being more efficient with energy—and of trying to experiment, sometimes totally with the support of the client. The idea of something not quite meeting their expectations is a higher standard being applied that is going to open our members up to a new area of litigation.

Senator BUSHBY—Even if your reading of the draft legislation overstates that risk to you, insurers may well look at it and make their own assessment on that basis. Regardless of the likelihood that your members' clients will actually start taking actions under this, the underwriters will need to write premiums which reflect that possibility, which will then involve increased cost. If your members design projects for consumers which actually have any real flaws—which, say, do not meet Australian standards or do not take proper account of engineering reports which have been provided—then consumers would have a course of action in those circumstances. There is no doubt that, if a mistake is made where they designed something incorrectly which actually has real consequences, there is a remedy available to consumers at that point.

Mr Barton—Under current law, yes.

Senator BUSHBY—So what we are talking about here is something else—that is, the implied fit for purpose. If it is not fit for purpose because it has cracks in it because you did not put the right footing in, then there is a clear remedy. What concerns you is that more subjective element, where people have an emotional or romantic attachment to an idea of what they are going to get and then get something that is not quite the same as that idea, despite your member's best efforts to actually tell them what they were getting.

Mr Parken—Yes. We have over 30 years of experience with our insurance-broking firm of seeing the claims against architects, and we have put a lot of effort into trying to educate the profession on how to improve standards. The institute is there to advocate for higher standards and better education amongst the profession, dealing with the failures that result and learning from them as a risk management strategy. At the end of the day, it is really important that they can find insurance. There was a period there when we were quite concerned and the premiums went up but also the insurance coverage went away. It was quite a big risk to the profession. Obviously other industries did suffer insurance leaving the market through the HIH collapse. These are serious matters, and an additional charge on our members will have to be passed through to consumers. But it is not just that charge; it is then having to explain things more carefully, particularly talking about what can go wrong and trying to mitigate one's risks, although you cannot contract out of that, and, again, there is additional time and cost in that. Seventy-seven per cent said that they expect the cost of providing these services to increase, 41 per cent said fees are likely to rise over five per cent and, of those, 23 per cent said fees may rise more than 10 per cent.

Senator BUSHBY—Playing the devil's advocate in this respect, explaining better to clients probably is not a bad thing.

Mr Parken—Sure.

Senator BUSHBY—Going to a greater extent to ensure that they understand will probably lead to an improvement in the outcomes that your members get with their clients, I would have thought. It may come at a cost for the clients, but that will not necessarily be a negative thing in terms of the overall outcome. It is probably one of the things that the legislation is endeavouring to actually deliver.

Mr Barton—I do not think there would be any objection to a move that would increase the standard of our service if it did not come with a much greater risk to our members too. I think that is what we are concerned about. If we could say confidently that all we had to do was explain better and the risk would disappear, we would not be here today, I suspect. The fact that even that is not going to get us out of trouble is the real worry.

Senator BUSHBY—I asked Treasury whether there was a mischief that needed to be addressed in respect of architects and engineers that they were aware of, and the answer was no. It was not so much that they were including these two professions because there was a clear problem that was not being addressed by the current legislative framework; it was more that you were accepted and there did not appear to be any good reason why. It is a funny way that legislation or the approach of legislation seems to work. Because law is not in place that actually affects you in this respect, you are seen to be an exception rather than the other way around, where they actually cover areas that need to be covered. I think that is probably a better way of looking at it. You actually go off and fix what needs to be fixed and you do not touch anything else—and, if they are not touched, they are not an exception; they are just the status quo.

Clearly, the answers that you have provided to some of these questions suggest that there are times when there are clients of your members who, when they do see the one-to-one aspect of it, think, 'This isn't exactly what I thought I was getting.' Is that a problem that needs to be addressed? Is giving those consumers a right of redress a reasonable thing? I am just putting this to you to give you the right to answer that question.

Ms Townsend—Generally they are comments about the difference in their expectation and it is not generally a deal breaker. They are observations. I think the greater danger comes with the subjective assessment of comfort. I think that is a potentially major issue—that is, what is a thermally comfortable environment for me is going to be different for you. That somebody could have the opportunity six years after the completion of their house to pursue their perceived now lack of comfort, I would find to be very difficult.

Mr Parken—I might answer this in another way as well. There is a lot of change that is managed through the process of building a house. We have a standard contract that we have developed specifically for housing with the Master Builders. We have probably sold over 40,000 copies of that contract. We have never been in court once—our members, our clients or the builders. That is because the risk is allocated clearly. Changes are dealt with very clearly within that contract. If there is an unforeseen situation where you go to a site and you dig up the ground and you find rock, there is a way of dealing with that. Similarly, if a client changes their mind, there is a way of dealing with that in an orderly way. There is a very clear risk allocation and it is managed well, and we believe we have got a very good history and track record of delivering those outcomes very efficiently.

Senator BUSHBY—And introducing this factor may upset that balance?

Mr Parken—That is what we believe.

Mr Barton—I would simply add that the legislation at the moment entitles the consumer to a refund of the professional fees, and that seems to be extraordinarily tough on an architect such as Ms Townsend who may have worked for months at a time with any one consumer. It is not quite the same, but the example was raised by one of my colleagues the other day that if you get a bad haircut you ask for your money back. It is a completely different proposition to have a major part of your income stream on the ropes because someone is not happy.

Senator BUSHBY—I am not sure, and maybe the Treasury people can answer it when they appear before us again later this week, but, presumably, using Ms Townsend's example, if somebody is not happy with the thermal qualities of the house, theoretically the professional fees the architect may lose might include the fees for the whole project when the only aspect that is proven as not fit for purpose is the thermal properties of the place.

Mr Barton—That is right.

Senator PRATT—It appears that the profession thinks that it is in a fairly unique position and, as has been highlighted, with the length of service that might be provided and the size of the contract in some instances that might be the case. But there are certainly many other professions with which you would have in common

that issue of subjectivity in what is perceived from the consumer's point of view to be implied. Have you had any discussions with other professions about those issues?

Mr Barton—I have had a discussion with the legal profession. The interesting comment was that they had not seen a claim mounted under the warranty of fitness for purpose and that usually consumers pursue negligence claims.

Mr Parken—Again, what we would say there is that their main delivery to the client is the service; there is not so much a product at the end of it, whereas in our endeavours, particularly when we are dealing directly with consumers, there is very much a product at the end of it. It is a complicated product and it is tailored to the consumer's brief, and it is quite challenging to get it 100 per cent right. The idea that it is 100 per cent right in every aspect of every detail is probably naive.

Senator PRATT—I would expect that those who have put these laws together have given at least some thought to the kinds of issues that you raise. What response have you had thus far?

Mr Barton—We have met with Minister Emerson's advisers and we have been told what their position is. The response has been, I think I could fairly say, based on uniformity and simplicity.

Senator PRATT—Surely there are a great many other professions where that subjectivity comes into play. There should not really be a clear reason why you should be taken out as a whole from such consumer contracts.

Mr Barton—I think there is a uniqueness about designing a building. A building is an extremely complex thing.

Senator PRATT—So is cosmetic surgery, and the implied outcomes that a consumer might expect might be fairly subjective. There are a range of different professions that would certainly fall into that category.

Mr Barton—I could not disagree with you on that one, Senator, but there is another aspect of uniqueness; that is the significance of the fee for one service, which is a very daunting prospect for a small practitioner.

Senator PRATT—Have you contemplated how you would examine advising practitioners in relation to how they work with clients? For example, if you are looking at thermal issues, would you give advice that those kinds of issues be expressed in contracts so that there is not an implied guarantee—that they indicate in the contract that, whilst they aspire to attain a certain outcome, these things are subjective, and that the issues be talked through with the client? Surely that should be enough to protect you from these circumstances.

Mr Barton—One would like to think so but we do not read the legislation as giving you that option.

Mr Parken—We believe we cannot achieve certainty no matter how much risk management you bring to the table. We believe our members would be less innovative, less wanting to take on any risk, but there is still no way of being absolutely certain, and we think that is a negative outcome, not just for the profession but for the community. If we are not going to test or try things new, we are going to stifle innovation, which was, I thought, one of the government's key priorities, particularly when we look at the challenges facing the built environment and the building sector from both climate change through to abatement of carbon but also the adaptation challenge of dealing with higher temperatures, more frequent storms, more frequent flooding and higher wind velocities. There is a lot to do. We are coming from the point of view of wanting to see people stay in the profession and to build the capacity of the profession, and potentially this could have a negative effect.

Senator PRATT—The law as I see it written—and you have quoted it in your submission—is that consumers are going to be given the protections where they might reasonably be expected to have achieved the result that the consumer asked for. It honestly does appear to me that when you put it to that reasonableness test—and consumer agencies all over the country often think about what is reasonable—the kind of thermal variation you are talking about would not meet a reasonable expectation when you are looking at the practitioner having discussed those issues thoroughly with their client. Yet I remain to be convinced by your argument, given that these laws are only supposed to be reasonable in their application.

CHAIR—That is the end of our session. Thank you for coming in and speaking to your submission this afternoon.

Committee adjourned at 4.58 pm