COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Personal Property Securities Bill 2008

THURSDAY, 22 JANUARY 2009

SYDNEY

CONDITIONS OF DISTRIBUTION

This is an uncorrected proof of evidence taken before the committee. It is made available under the condition that it is recognised as such.

BY AUTHORITY OF THE SENATE

[PROOF COPY]

THIS TRANSCRIPT HAS BEEN PREPARED BY AN EXTERNAL PROVIDER
TO EXPEDITE DELIVERY, THIS TRANSCRIPT HAS NOT BEEN SUBEDITED

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://parlinfoweb.aph.gov.au

SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 22 January 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Participating members: Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin and Trood

Terms of reference for the inquiry:

To inquire into and report on:

Personal Property Securities Bill 2008

WITNESSES

EAST, Mr David, Partner, DLA Phillips Fox **41**

FALUDI, Mr Peter, Special Counsel, DLA Phillips Fox **41**

FLANNERY, Ms Angela Marie, Partner, Clayton Utz **20**

GILBERT, Mr Ian Bruce, Director, Retail Regulatory Policy, Australian Bankers Association Inc. **53**

GOUMENIS, Ms Sonia, Partner, Clayton Utz **20**

LEE, Ms Karen Wan Ching, Senior Associate, Clayton Utz **20**

LOVE, Mr David Maurice, Director, Policy, Australian Financial Markets Association **2**

MICHAEL, Dr Katina, Board Member, Australian Privacy Foundation **33**

WAPPETT, Mr Craig, Partner, Piper Alderman **11**

Committee met at 9.07 am

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs on our inquiry into the Personal Property Securities Bill 2008. By letter dated 11 November 2008, the Attorney-General requested that this committee inquire into and report on the exposure draft bill, and the inquiry was referred to the committee by the Senate on 12 November 2008 for report by 23 February 2009. This bill seeks to establish a single national law governing security interests in personal property. Broadly, the bill proposes to address the creation and extinguishment of security interests in personal property and to set out rules for determining priority among competing interests in personal property. The bill also seeks to establish a single national online register of personal property securities. The committee has received 31 submissions for this inquiry. All of those submissions have been authorised for publication and are available on the committee's website.

I remind witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. 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, the witness may then request that that answer be given in camera.

[9.09 am]

LOVE, Mr David Maurice, Director, Policy, Australian Financial Markets Association

CHAIR—Welcome. We have your submission from the association. For our purposes, it is numbered 23. Before I invite you to make an opening statement, do you have any amendments or changes you want to make to that submission?

Mr Love—No, I do not.

CHAIR—If you would like to make a short opening statement, please do so and then we will proceed to questions.

Mr Love—Thank you very much; I would like to make a statement. Thank you to the committee for the opportunity to present the views of the Australian Financial Markets Association on the Personal Property Securities Bill 2008. AFMA represents the interests of participants in Australia's wholesale banking financial markets. Our members include banks, stockbrokers, treasury corporations, fund managers, traders and specialised products and industry service providers. Their business places them at the centre of the equities market, brokering transactions, arranging underwriting capital raisings, structuring products, trading and investing. We consider this to be a very significant piece of legislation—in fact, one of the most significant law reforms that are occurring under the current government.

Our submission addresses the bill's broad policy objectives and commercial implications for industry and recommends how law reform in this area can best be handled. It does not attempt a detailed technical critique of the substantive law reform in the bill, which in our view is best left to expert legal opinion.

AFMA has had the benefit of discussing the jurisprudential implications with representatives of law firms expert in the area of Australia's securities law in the course of recent months. AFMA concurs with the detailed legal analysis being provided separately to the committee by several groups of law firms, by the specialist legal advisers, and shares their concerns about the law reform process surrounding the bill.

The bill represents an important initiative and opportunity for the nation that is worth getting right. The bill has two main policy objectives: (1) it establishes a national system for the registration of personal property securities and (2) it radically changes the established Australian law on securities by attempting a codification based on a modified foreign law or models. As a subordinate policy objective, the government is also consulting on implementing an international convention on private international law for securities which could be implemented through the legislation.

The central point made in our submission is that establishment of a national register for personal property securities is a welcome initiative that is supported by AFMA. This first policy objective needs to be distinguished from the second objective, which is a wholesale reform of the substantive law on securities in Australia. There are still serious flaws in the reform of substantive law on securities as proposed in the bill which require substantial effort and time to put right. AFMA believes that the bill's reforms to securities law are insufficiently developed at present and do not harmonise effectively with existing Australian law. This will result in significant legal uncertainty being created, and this uncertainty is likely to take a number of years of litigation to settle, in order to establish new case law. It is anticipated that the bill will increase regulatory uncertainty and consequently create more commercial risk at a time when credit providers are dealing with a difficult and fragile market environment.

As part of the draft legislation package, the government has been consulting on implementing international private law rules of the Hague convention on securities under Australian law, through the bill. It is desirable that Australia sign the convention as a first step in a domestic implementation of the rules.

In summary, AFMA recommends that, firstly, the bill should implement a national system for the registration of personal property securities in accordance with the decision of the Council of Australian Governments' intergovernmental agreement. Secondly, the broad reform of the substantive law on securities should be separated from this current bill package. The broad reform to securities and related law requires considerably more work and time to get right, hence it should be dealt with through separate legislation. Thirdly, we recommend that Australia sign the Hague convention on securities and implement its principles as part of the reforms to Australian law on securities. That is the end of my opening statement. I am now open to questions.

CHAIR—I will start by getting you to clarify things for us. Your position essentially is that the proposals in the bill should be split, that the register should be created in the first instance and that the substantial law reform on PPS should be almost secondary legislation. Is that correct?

Mr Love—That is it in substance. From the point of view AFMA it is not critical that the bill be split. We are proposing that the government can maintain its commitment made through the COAG process, which is a commitment to deliver a national registration system. We consider this to be very important. It will take time and effort, and money has already been allocated by the government to this process. So we consider there should be no reason why putting in the legislative framework to allow for that mechanical part of the registration system to be put in place should not go ahead, because putting that machinery in place is basically a technical framework part of the legislation. However, the real debate, and issues of concern that have been raised and I believe will be raised before the committee during the course of these hearings, relates to the other part of what this legislation proposes—that is, the wholesale reform of the law of securities.

In its scale this is one of the most significant substantive reforms to Australian law in many years. In my previous roles in government over many years I have been involved in working on financial services reform, and I was also involved in putting in place the anti-money-laundering legislation. In its scale I would consider this to be a far more complex and difficult technical and legal drafting task that the drafters of this legislation are attempting. There are numerous complex issues flowing there and there are unresolved consequences that are really not understood or have not been worked through.

CHAIR—I will go to some of those consequences in a minute. I am not sure how you do one without the other: I am not sure how you set up a national register and put rules around how it operates if you do not have substantive change or a substantive piece of legislation that underpins how the players in the market have to operate in accessing that register.

Mr Love—In a sense I am suggesting that the machinery part of the legislation go through in order to allow the government to meet its objectives of having the machinery of the register put in place. But I am concerned here that the machinery parts—as I said, from a technical point of view this is fairly straightforward from the Commonwealth's point of view. One of the difficulties with this legislation is that it will depend on a referral of powers from the states. So, unlike a lot of the legislation that comes before the Senate, the parliament will not have the ability to amend and get the details of this legislation right at a later stage, or it will be a very complex, slow and laborious process. Once it is settled and frozen, this piece of legislation will be passed by the various state parliaments as part of the process of referring their powers, and at that point it will be very difficult if operational problems come to light at a later stage, which we believe is very likely given the complexity and the ambitions of this legislation.

CHAIR—Yes, but isn't there a point at which you have to draw a line in the sand and say, 'Well, this has been going on for three or four years now. We put a draft out last May, and in August it was revised.' There was an acknowledgement yesterday that there are still quite a number of areas that need to be redefined, but there is a view that that can happen in the next couple of months.

Mr Love—This legislation package has really only been in a reasonably settled form since the early part of this year. The issue has been discussed for many years. I first began working on this issue in 1994. I remember working with SCAG on the issue back then. But as to the actual technical parts of the bill, the way it has been presented and those sorts of matters, industry has not really been able to look the detail, and for this bill it really is very much the old expression, 'The devil is in the detail.' It is a cliché but it is very true of this particular piece legislation.

CHAIR—Your submission talks about serious flaws and concerns, but you do not actually specify what they are. Can you give me some examples, or do you have a database of what those concerns are? I notice that in your submission you say a few times, 'the flawed state of the bill' or 'the bill has got serious flaws' or you 'do not believe it is realistic for the government to implement this bill because there are problems with it'. But nowhere in your submission do you actually identify one of those problems. Can you give us an idea? Do you have a spreadsheet of what the concerns are?

Mr Love—What we are saying in our submission is that we agree with the views that are going to be presented to you by the group of four law firms that are putting in a submission under the name of Freehills. We are concurring, basically, with that detailed submission and the detailed issues that are covered in that submission. There are a lot of technical issues here. This is very much a bill where the legal experts are very concerned about lot of the details. There are issues about definitions of 'investment entitlements', for example, and what those particular meanings are. They are matters where there has been discussion through the

consultation process. We consider that this bill can be made to work given time and effort. We have no doubt about that. But there is doubt that it can be got right within that time. A range of issues are raised in the law firm submission that came through under the hand of Freehills.

CHAIR—Today we have Clayton Utz and DLA Phillips Fox. We have numerous law firms. None of their submissions actually ask for a delay in the legislation. No law firms have asked for that. They have simply highlighted about a dozen or so areas they think need attention. I am wondering whether you can be a bit more precise about this. You are saying to us that you support the comments in the Freehills submission. Have you had a chance to look at any of the other submissions? Can you give us an idea about other concerns you have with the legislation?

Mr Love—The thrust of what I am trying to raise with the committee is that our submission is very much about the process that has been engaged in and the ability to work through the issues and concerns here. What we are saying is that the views of the law firms are indicating to our members—and this is what our members are concerned about—that there seems to be a high level of legal uncertainty. The advice that has been coming through the legal views on this piece of legislation is that the bill is creating an environment of legal uncertainty rather than increasing certainty. It is around those matters that we have concerns. We consider that it will be possible to clarify and settle these matters given a lot more work and discussion within working groups with the Attorney-General's people. We are not, and I am not, in the position to go through and make technical critiques of the bill at a working level. That is why our submission does not go to those particular points. It is more about the general environment of legal uncertainty that would be created by the bill being passed in anything close to its present form.

CHAIR—All right.

Senator BARNETT—How would you characterise the current arrangements in Australia for recognising legal rights and entitlements in this area of law, PPS?

Mr Love—I would characterise them as inefficient at the moment. I think this is why there is very broad industry consensus and support for the idea and the goals of the legislation and support for the decision that was made by COAG in order to create a national system. We and other industry players would consider that there is a significant level of inefficiency in having separate registers and separate law arrangements.

Senator BARNETT—So the position is that you believe there is a need for reform but the extent of the reform is where you differ from the current bill and the current proposal before us. You support a national register. You support reform. You support signing the Hague convention and implementing it in Australian law. But you do not support—or do you?—the reforms set out in this bill, over a longer period of time, subject to appropriate consultation and amendment.

Mr Love—We do support the scope and ambition of the bill. Our concern is with the process and trying to get the bill right. The message that I am trying to convey to the committee is that this is a very important piece of legislation. Its goals are certainly supported by AFMA's members. It is considered that, if got right, it would improve efficiency in the Australian economy. The scope of the bill is a reasonable one in the sense of what it is trying to do, which is to rationalise and codify the law on securities in Australia. As I said, though, we want to see a process which will allow the substantive law to be got right first time out, rather than relying on subsequent reforms.

Senator BARNETT—Of course, and that is an important objective. You have criticised the process. I understand that you have referred to a number of submissions from law firms. We have not got into the detail in your submission—as noted by the chair—in terms of terms of the criticisms of the legislation, but you have got criticisms of the process. So let us just focus on the process for the moment. What are your criticisms of the process? How should it be improved?

Mr Love—As is mentioned in our submission—and as I was explaining to Madam Chair—to us it is not actually critical that the bill be split into two parts. To us it is a matter of whether or not you would look at slowing the process. Whether or not you split it into two parts is more of a political decision about whether or not the government's goal of implementing the COAG decision is of critical importance.

Senator BARNETT—Let me just come in there. Have you taken advice from your member law firms or others to see whether it can be split into two and whether you can actually have a national register and then defer the rest of the bill for further comment? Have you got advice on that?

Mr Love—No, not from law firms. It would create complexity trying to do that exercise. That would create a further level of difficulty for the drafters at the moment, I would have thought.

Senator BARNETT—You have recommended it?

Mr Love—Yes, as a matter of process, as a matter of approaching the issues. As I was suggesting, it is more about dealing with the political decision that has been made by the government.

Senator BARNETT—But can it be done?

Mr Love—I believe you could sit down and separate the mechanical framework parts, the machinery of the register, from the rest of it. The first part of the bill deals with the machinery of the register—that is, establishing the register and having those components put into place. It is about having that up and ready. There is a whole administrative process underlying the need to—

Senator BARNETT—Up and ready or up and operating?

Mr Love—No. You would want to get your reform process, the law regarding securities, up and in place by the time you had the register operating. The register is supposed to be operating in 2010. You need a legislative framework to allow for the bureaucratic machinery, the administrative machinery, to be put in place to allow that to occur and for the necessary authority to start the process of transferring registers from the states.

Senator BARNETT—But my understanding of your argument is that you cannot have the machinery operating effectively because it will increase uncertainty, legal confusion and ambiguity. My understanding of your submission or thesis is that that is not possible at this stage because of the way the bill is drafted and the way we are heading. Using your argument, you cannot have the register up and operating without simultaneously having the machinery operating effectively. That would lead to confusion and uncertainty.

Mr Love—I agree that in here you do need the substantive law reformed in order to get the register working when it is up and running. The argument was about whether you just have the machinery part, the framework, to allow the work to continue to get the register in place, while having the discussion about—

Senator BARNETT—If we go down that track and you get the national register heading in the right direction and you can get it up there ready to go by 2010, how do we get the machinery part of it right, in terms of the law, so that we do not create uncertainty and confusion as to legal terms and who has got priority over what assets and so on? How do we do that efficiently and fairly and in an appropriate manner? What is your recommendation to this Senate committee and the parliament as to how that is achieved?

Mr Love—That there is separate—well, that there is legislation; whether or not it be in the same legislation that is slowed down, as a total package, or in separate legislation, that the substantive law reform is passed and in place by the time that the actual register machinery is in place. It is necessary that the law be reformed to make the national register work efficiently, to provide the law and the rules that people will look to in order to guide them when they are looking to the register. Yes, that needs to be in place by the time the register is up and running. That needs to coincide.

Senator BARNETT—You say you support COAG—correct?

Mr Love—Yes.

Senator BARNETT—And you support the signing of the Hague convention, and you support the principles behind the bill and the objectives of the bill, but you do not currently support the bill—or you do not support the bill in its current form?

Mr Love—No. The bill needs more time, to get the definition issues discussed and settled and to answer a whole range of questions that are going to be raised. At the moment, people are still debating a range of definitional issues and whether or not the definitions are right. Then, once that part of it is done, people will come back and industry will come back and try to work out what the consequences will be of the way that those definitions are going to work and they will have a discussion about that.

Senator BARNETT—Do you wish to recommend to this committee a process for achieving the reforms in the appropriate way?

Mr Love—The process we are supporting is that more time be given to the Attorney-General's Department. I think it would need at least the rest of this year to have discussions through its working group on the substance of the law in relation to this piece of legislation, to give the drafters enough time to try to get it as right as possible. On the present timetable, it is expected that it is going to get fixed perhaps next month and then would start to be sent to state parliaments.

Senator BARNETT—In your submission you have not expressed any view on privacy matters. Do you have views on issues of privacy on legislation such as this?

Mr Love—No. Our members have not raised concerns in relation to those matters.

Senator BARNETT—In terms of the substantive law reform, you have indicated that it is a very substantial law reform initiative. You referred to the financial services reform as an example—which was, I think everyone would agree, hugely significant in its reform nature—but have indicated your view that this is more substantial than that. Would you characterise it as one of the most substantial law reform pieces of legislation in the last decade, or how far would you go?

Mr Love—Certainly from a legal point of view and in the impact it will have on Australian jurisprudence, I think it is the most substantive law reform package. As I cited, with both the financial services reforms and the anti-money-laundering legislation, which were both complex packages, a lot of that was about administrative issues and about how people were to be regulated and the complexities and changed rules. But this is not only changing administrative arrangements in relation to how personal property securities are dealt with; this is going to affect how rights are dealt with under law because it is really taking a foreign law model—it is importing new concepts and quite a range of different concepts to the ones that presently prevail into Australian law. The law in securities has been developed over 150 or 200 years—I remember from my days at law school that this was a very daunting part of doing legal studies. I think its impact on the way contracts and other things are done and how people's rights interrelate is very substantive and would be one of the most significant reforms in a legal jurisprudential sense in the last decade.

Senator BARNETT—So, in summary, you are saying that your reading of it at the moment—with regulatory uncertainty leading to commercial risks increasing and in a climate of global financial insecurity—is that this is not the time to proceed. That is really the message you are sending to us.

Mr Love—Yes, that is the message. One of the key objectives of this legislation is to improve legal certainty and improve efficiency. The message we are getting back from the legal commentators who are expert in the field is that at the moment this bill is going to create a high level of legal uncertainty in its present form. Legal uncertainty basically means cost to business, and that is what is causing concern to our members.

CHAIR—The Attorney-General's Department has informed us that it got Access Economics to do a report on the impact of this legislation. Have you seen that?

Mr Love—Yes, it was in 2006 or something.

CHAIR—So that would be perhaps somewhat out of date given the current situation?

Mr Love—No, the Access Economics report is an economic analysis where they are relying on the view that the reforms will achieve their stated objective, which would be to clarify the law and improve the level of legal certainty. We believe that that is possible—that, given time and effort and a lot more work, it can achieve that goal. We are not arguing that that goal cannot be achieved down the track. The concern is that at present the bill still needs a lot of consultative work in order to create an environment of greater legal certainty. In a sense, we believe that the Access Economics analysis is right, but, like all the analyses, it is based on the assumption that the stated goals are going to be achieved by the bill first time around when it gets passed.

Senator TROOD—When your submission talks about 'radical change' in this area of law, does it mean radical in the sense that it is transporting a lot of the regulation of these arrangements from states and territories to the Commonwealth jurisdiction? Or does it mean that it is changing the law in relation to this area quite significantly in ways that you do not necessarily disapprove of but you want to be right if it is necessary to do? Or is it meant in both those senses?

Mr Love—It is the latter on which the emphasis falls. Yes, there is substantive change in the administrative arrangements, but it is the substantive law reform that is happening here. This is a piece of legislation which has its basis on models that were developed and evolved from those in Canada. It draws on US commercial experience and picks up on the so-called Saskatchewan legislation that was put in place, as well as looking to the legislation that New Zealand implemented, which also drew on Saskatchewan-Canadian experience.

That law came out of a different legal experience and different jurisprudential development process to Australian law. Australian law has developed on its own in this area. The Tasmanian law lien legislation and those things going back to the 19th century, for example, are quite peculiar examples of Australian legislation arrangements in this area. In many senses our legislation and the common-law precedent which has underpinned the development of the law in securities in Australia have been much more dependent on and are the child of English law and what has happened in England. Certainly we have noted that there was hesitation in the UK to embark upon a similar level of wholesale change to their law there.

There is debate amongst the lawyers, as I said, about whether or not this is the best course of action. We accept that the ALRC came to the view that the Canadian model should be looked to and picked up on. That is a reasonable call. But you cannot just pick up that piece of legislation. I think Professor Duggan, for example, has argued that the Canadian-Saskatchewan legislation is fairly comprehensible and should be picked up and basically applied here. I think that is very difficult in the Australian context because it does require a lot of modification if you are going to go down that way. It is interesting to look at some of the definitions. The drafters here have decided, for example, to develop their own definitions around words like 'debentures'. They have not relied on the Corporations Act's definitions and looked to those matters.

This piece of legislation also has been developed in isolation really from the corresponding reforms that are going to occur in relation to the uniform Consumer Credit Code being brought over from the state to the Commonwealth jurisdiction. There is a close interrelationship there which has not really been debated yet or really understood, because that work is still very much through the Department of the Treasury and is still very much in the formative stage and subject to consultation there. But, when you look at it, these two pieces of legislation down the track—because a lot of what this legislation deals with relates to issues that will impact on retail consumer credit issues as well as more commercial and wholesale markets—will have a range of interactions which have not even been contemplated in the consultations up to this stage.

Senator TROOD—When you make such widespread reform in an area, there is a disposition, I suppose—and perhaps it is a correct one—that there should be some rationalisation of peculiarities in the law which may have a 19th century origin but are questionably appropriate in the 21st century. This legislation, as I understand it, would rationalise some of those things and bring them up to date in ways which state and territory governments have not contemplated doing. Is it your position that that is a desirable course of action or is it your position that the peculiarities that exist in relation to many of these areas of law in the states and territories should be taken into the legislation? In other words, rather than try and develop some generic ideas, some of the specifics and peculiarities that apply in some territories—I do not know it well enough to give you an idea, but reference was made to particular securities that might apply over livestock and things in Victoria or elsewhere—be transported into the Commonwealth legislation, in your view? Should we try and accommodate these very specific interests that are reflected in this legislation already or should we accept that some of those are out of date and this is an opportunity to modernise the law and here is a good piece of legislation with which to do that?

Mr Love—As a vehicle the objective is that the law should be modernised and rationalised. The efficiency dividends that we were discussing in relation to what Access Economics did its modelling on are sort of premised on there being this level of rationalisation. It is being done by looking to a foreign law model where they went through. I am suggesting that, in bringing that into Australia there necessarily has to be a considerable level of tailoring to the local conditions. I do not think that means looking to the peculiarities of old state law in regard to livestock liens and those types of matters. That area can certainly be worked through and rationalised. It is not an area on which my membership has any views, as you would expect. So the legislation should be reforming. We strongly support the goals—and I think there is a large degree of consensus about where we want to get to—but it still needs a lot more work in order to get there.

Senator TROOD—The Attorney-General's Department told us that they have given close attention to the legislation in other jurisdictions but they also told us that they have adjusted the legislation to reflect Australian circumstances, the Australian legal environment and the peculiarities that have existed historically and otherwise in Australia. Their argument is that they have indeed adopted the approach that you are advocating. Are you saying that they have not gone far enough?

Mr Love—They are down the road on that process. Again I am looking to the experience that previous governments have had in major processes like financial services reform. It is very difficult when you are changing so much in big wholesale reforms to work out what all the unintended consequences are. That is why it is a bit hard to at this stage talk about all the outcomes that might come to industry. We are really guessing at the moment. We should look at the way that has been dealt with previously, for example, with financial services reform and with the anti-money-laundering legislation, which I am familiar with. The government had to come through with financial services reform and have a lot of remedial legislation in order to fix it up. You can say that that can apply in this example as well.

My concern though is that this legislation depends upon referral of powers from the states and the state parliaments have to basically agree to this legislation package and pass this legislation package in order to give it effect and for the Commonwealth to be able to implement it. That process of having to get all the states on

board and agree through their parliaments will freeze this legislation and it will become extremely difficult unless there is some agreement to do the remedial fix ups which I am sure will come out as a result of unintended consequences.

Senator TROOD—I acknowledge that, but it is a generic problem in relation to this kind of reform, isn't it? At any stage when the Commonwealth assumes powers from the states and territories it ends up in that situation. This committee and other committees of the Senate certainly have been told on more than one occasion that the legislation cannot be changed because this is what the states have agreed to. It is a complicated political process to then change it. It seems to me that the Attorney-General's Department has tried to address that question by putting out an exposure draft of the bill asking for public comment on the bill, being willing—at least at this stage rhetorically—to amend it in light of the report that the Senate might give and then returning the bill to the states and territories and saying, 'This is what we are proposing to use as legislation,' rather than having this arrangement precede as normal, which is that the states and territories say, 'We will give the Commonwealth legislative power according to some heads of goals and drafting principles.'

In the second circumstances, when the Commonwealth can only work on principles, there is a huge danger that when the principles are in the ultimate legislation the states will say, 'That's just not what we want to do.' But then to change it is very difficult. It seems to me that the Attorney-General's Department, as the chair said, has over a long period of time tried to address that particular concern you have had. It is difficult to know how you can settle this problem in light of the procedural difficulty of the states and territories referring powers to the Commonwealth. If you have a solution to this problem then let us hear it. But I do not see one.

Mr Love—We know how much effort and work the people in the Attorney-General's Department are putting into this. The way it has been mapped out is not wrong, but it is a matter of how much time has been given to them through the process, I suppose, of the government's decision about when it wants things done in this matter—and I think that is putting an artificial constraint on them. Again, everyone wants to see this reform go through as soon as possible. But my point is that they need more time, and I think it would take at least the rest of this year to have the necessary consultation on the substantive law reform. I know that they have released exposure drafts, but this is an iterative process—it goes backwards and forwards—and the industry is looking to work collaboratively with them. There is no criticism of the processes or the effort they are putting into it, but it is a huge task. That is what I am trying to communicate. It is not a simple bill, and it is a very complex task to get it right.

Senator TROOD—I think we get the message. Has your association been actively involved in the consultation process?

Mr Love—Yes.

Senator TROOD—So the tenor of this evidence has been the tenor of the views that you have expressed through the consultation process all along?

Mr Love—Yes.

Senator TROOD—Would you regard yourselves as having been listened to in that respect—

Mr Love—Yes.

Senator TROOD—or has your voice not been as you would have liked?

Mr Love—No. The Attorney-General's Department has been responsive to the extent that they can be. But, as I said, when the new draft comes out, everyone will start re-analysing and re-debating the variations that have been made, and new concerns get raised amongst the parties. This has tended to be a debate amongst the legal advisers and the expert legal opinion that we have been following. That is why, in this testimony, I have not tried to engage in technical measures such as saying that if you change this provision then you have to change that provision.

Senator TROOD—On that point, you have been at pains to avoid making specific criticisms of the bill because you are making some general observations about it—and that is fine. When you make remarks about legal uncertainty and the dangers that you see in this process, can I take it that you are relying upon the general criticisms that are raised by some of the other evidence? You alluded to the Allens submission, for example—the Stephen Jaques submission. Does it also apply to the submissions made to the committee by Clayton Utz and others?

Mr Love—Yes.

Senator TROOD—When you say there are serious concerns about the impact of this on the law, you are relying on those submissions.

Mr Love—Yes, that is right.

Senator TROOD—Some of those submissions—not necessarily all of them—recommend to us courses of action which might address the concerns they raise. I think I am right in saying that the Clayton submission, for example, raises some doubts about particular sections. It says, 'We can get around these problems by doing this.' From your perspective, is that a satisfactory course? If the issues raised by these very submissions can be addressed in a way which satisfies those who have raised them, would your association be happy with those processes, or do you have wider concerns that need attention?

Mr Love—There are a range of technical issues, and, yes, those matters should be—

Senator TROOD—Some of the submissions suggest: 'Here are the technical issues, but we think you can get around them by doing this.'

Mr Love—Yes, and those can be worked through and accommodated in the drafting process. What we see, though, is that you would then need to have another exposure draft, to see what those changes are and to look at them again in the context of how they relate to one another. That is why I am going back and saying that I do not think that there is a fixed set of matters which you can just tick off. I think that those matters that have been identified need to be picked up and put into another exposure draft and then there should be further consultation. As I said, I see this as an iterative process. There would probably be at least another couple of exposure drafts where there would need to be consultation.

Senator TROOD—An alternative course which is open is that the Attorney takes the evidence of the committee, takes the recommendations which the committee might make, amends the exposure draft and then puts it in the parliament as an amended draft. Then it goes through the usual processes, which might mean it coming back to this committee or another committee of the Senate or of the parliament, where there would be an opportunity to determine whether or not those changes have in fact achieved the objective which is intended. Would that be a course of action that would satisfy your members?

Mr Love—I think that is quite a practical suggestion in the circumstances as a way forward, yes.

Senator TROOD—I want to ask you a question about the Hague convention, with which you are generally in sympathy. Do you know as yet whether the convention has entered into force?

Mr Love—No. It was settled in 2006. Two countries so far—the United States and Switzerland—are the main signatories to it. The convention has not been ratified yet. As you know, under international law there is a signing process with a number of countries. There was some debate amongst EU members, particularly France, due to commercial reasons, which has delayed their signing of the convention so far.

The feature about the Hague convention here is that this piece of legislation, given its content, its nature and where it is going, is seen as an appropriate vehicle for putting those reforms into Australian law. From AFMA's point of view it is very desirable that the Hague convention does get implemented into Australian law. We do not see that it is necessarily dependent upon this piece of legislation. This is just a convenient piece of legislation for it. But as a first step in the process it would be desirable for the government to make a decision to sign the convention. So with this legislation the government is demonstrating its agreement with the convention by engaging in consultations suggesting that it was going to get implemented through here, but the government has not actually signed the convention as yet.

Senator TROOD—It needs to sign it and ratify it, doesn't it? I was not sure whether or not we had signed it. Not only do we have to sign the convention; it then has to go through the processes of the parliament.

Mr Love—Yes.

Senator TROOD—And then be ratified by the Commonwealth.

Mr Love—Yes. My understanding of treaty law is that the way it works is that the government indicates its policy agreement to an international treaty through signing the document. That does not automatically mean that the government has to implement it domestically. What happens once it has signed it and the treaty gets ratified generally is that then the government is under an obligation to implement it domestically through some form of legislation.

Senator TROOD—What you are saying is slightly different from my understanding of international practice, which is that individual states ratify treaties and they come into force when there are a sufficient

number of ratifications, as agreed in the treaty itself. I do not know what that is in this particular case. But we can clarify that without any difficulty. Do I take it that you have consistently advocated the ratification of the treaty by the Australian government in your submissions on the bill?

Mr Love—Yes. AFMA supports putting the treaty into effect.

Senator TROOD—Do you have any reservations? Are there any aspect of the treaty that would cause you concern?

Mr Love—No. I think the main thing to understand about the treaty is that it actually does not change substantive law with regard to people's rights. It is merely a conflicts of law regime where it is just pointing to which jurisdiction's laws are going to govern a particular dispute. It is seen generally, certainly by our members—and we have a large number of the international banks and others—that it is very desirable to have one set of principles governing the settlement of disputes around the world.

Senator TROOD—There have been general observations in some of the evidence about the conflict of laws provisions—or the absence of conflict of laws provisions. Do you have any particular views on that?

Mr Love—The bill is doing two things there. It is dealing with substantive domestic conflicts of laws issues—basically trying to work out between the various states and the Commonwealth where things are going. No, we are not making a submission on those. The issue about the Hague convention is a separable legal issue.

Senator TROOD—I was moving on to another issue there.

Senator BARNETT—On the conflict of laws issues, a number of the law firms that you referred to express concerns about omissions in the bill regarding conflict of laws and that there is an inadequate legislative framework to address the conflict of laws. You referred to those law firms in your submission.

Mr Love—Yes, but my point is that the desirability of having conflicts of law rules is a substantive law issue regarding the operation and the efficiency of securities law in Australia and having that regime working. Again, I am not putting particular views on what conflict rules should or should not be in place. It would seem to be desirable that the legislation, along with other matters, deals with those matters given the substance of what it should be doing, but I was just trying to distinguish that from the debate about the Hague convention and those sorts of matters.

Senator TROOD—Yes, they are separate things; I understand that.

CHAIR—Mr Love, thank you very much for your time today. We appreciate your attendance.

Mr Love—Thank you very much for the opportunity to present our views.

[10.04 am]

WAPPETT, Mr Craig, Partner, Piper Alderman

Evidence was taken via teleconference—

CHAIR—Welcome to our hearing this morning. Before I invite you to comment, do you need to make any changes to your submission?

Mr Wappett—I would like to make a brief statement in addition to the submission, but I do not wish to make any changes to it.

CHAIR—We certainly welcome your comments and a statement about your submission. When you have finished, we have quite a number of questions that we would like to ask you. I invite you to begin.

Mr Wappett—Thank you for giving me the time to appear before you this morning. I would like to start by briefly outlining my credentials and experience in this area of the law. I have been practising in the field of banking and finance law since 1987 across a broad range of work areas including corporate, project, property finance, equipment finance, insolvency and also consumer credit. I have spent some 17 years as a lawyer and then as a partner with Mallesons Stephen Jacques, initially in Sydney and then in Brisbane. I also worked some 15 years ago for a large Canadian law firm—Blake, Cassels and Graydon, based in Toronto.

Throughout my working experience I have always practised in and around the areas of banking and finance law and insolvency. I am currently a partner with Piper Alderman and am based in their Brisbane office. I am still primarily practising in the area of financial services law and I have been with that firm for the last three years. Through my experience working in Canada and also working with a number of clients in New Zealand, I have had firsthand experience with both Canadian PPSA legislation and also the New Zealand equivalent legislation. I have been a member of the Law Council's financial services law committee since the early 1990s, and it was through my involvement in that committee that I first became interested in the area of personal property securities law reform, most particularly when the Australian Law Reform Commission released its early interim report in the early 1990s. Similar reports were released by both Queensland and Victorian law reform bodies at that time. I have been working in the field of banking and finance and have had a direct personal interest in PPS reform since the early nineties.

I am a co-author of *Securities Over Personal Property*, which was published by Butterworths in 1999. I have also contributed to a number of other books in relation to Australian finance law, have written numerous articles and attended a number of conferences where I have given papers on topics relating to securities law. I have also been a member of the Attorney-General's consultative committee on the reforms since 2006. All of that information is to give the background to my exposure to this area of the law and to the issues that are encountered by practitioners in working with the current law. I would like to add a few comments in relation to the reform proposals as represented in the bill and in light of some of the other submissions which I am aware have been received by your committee.

The first point I would like to make is that there have been suggestions, not just in response to requests for submissions by your committee but over the last three years that this reform process has been underway, that it is possible to achieve the reform that is necessary merely by establishing a national register, without actually changing the substantive law that underpins personal property securities in Australia throughout the nine jurisdictions. I think that is an extreme simplification of what is involved here. It certainly would be possible to establish a national register and not amend the underpinning substantive law, but I do not think that that would really result in any substantial harmonisation of a lot of the problem areas that we currently have with the law. One of the issues that we have at the moment is that the current laws that we have deal with specific types of security in relation to particular types of property or in relation to particular entities giving security over those types of property. But there is an absence of a consistent conceptual framework across the whole area of law. Many of the existing laws and, indeed, the common law distinguish between different forms of security. They distinguish between priority outcomes. They distinguish between extinguishment of existing security interest when property is transferred. There are a host of areas where the laws are substantially different—both the statutory law and the common law as well as equitable principles that are relevant to them.

I think one of the objectives for law reform needs to be much more conceptual consistency across the whole range of security interests. A good example of how constructing a national register without changing the substantive law would itself prove problematic is in the area of motor vehicle securities. At the moment, all of the states and territories have motor vehicle securities and chattel securities legislation that allows you to

register a security interest as broadly defined, which could include both charge and mortgage type interests and also leases and hire-purchase or consignment type interests, on a state based register. Both state and territory laws are, in very broad terms, based on similar principles to the proposed PPS legislation—that is, they take a more functional approach to security and they deal not only with priority issues as between different security interests but also with extinguishment issues. They do not deal with those issues to the same extent that the proposed PPS legislation would, nor do they cover the whole range of property interests, because that legislation is essentially limited to motor vehicles, boats and outboard motors and some limited categories of agricultural equipment in some states. But the point is that we already have some legislation, and very significant legislation when you look at the number of security interests that are taken in motor vehicles throughout Australia each year, which takes a broad functional approach to security interests and deals with a range of issues which, for some other types of interest, such as company charges or bill of sale, are left only to the common law or equity to resolve. So, to say that you can construct a national register without changing all of the substantive law that goes to support the various types of security interest that we have at the moment is, I think, a gross oversimplification of the challenge that is faced in reforming this area of law.

That was the first point. The second point I would like to make is that, although this proposed bill is quite different in its drafting style and, indeed, in some of the policy substance, it is, in general terms, based on similar legislation that exists throughout all of the common law provinces in Canada and also in New Zealand. The implementation of those reforms in those jurisdictions has generally been acknowledged, both by academic experts and also by practitioners in those jurisdictions, to have been very successful. I believe that some of the comments that have been made about the proposed reforms here do not give appropriate regard to the fact that implementation of similar reforms in jurisdictions which have a very similar legal heritage to our own has not resulted in some of the dire consequences that some people are predicting.

In relation to that point, I think it is fair to acknowledge that the proposed PPS reforms do involve a significant shift in people's thinking. Lawyers, in particular, who have been brought up with many of the common-law and equitable principles that underpin our existing law, have considerable difficulty making the conceptual shift in thinking that is involved in adopting the PPS-style reforms. But I have been through that process myself and I know a number of other practitioners, in Canada and New Zealand, who have been through that process and, whilst it does involve some initial difficulties and some conceptual rethinking, my own experience and certainly the experience of the vast majority of practitioners that I have spoken to in those other jurisdictions over the years suggests that you would be hard-pressed to find too many experienced practitioners who would prefer to revert to the pre-PPS reform situation in jurisdictions which have already adopted a similar reform process.

They were the only comments that I would like to make at this time.

CHAIR—Thank you. That was very informative and very useful. Our previous witness, from the Australian Financial Markets Association, was in fact advocating just that—that the register should go ahead. Basically he was saying that the bill should be split and that the register should be put in place and there should be further consultation about the substantive reforms and the substantive nature of the legislation as a secondary thought. You have a view that we cannot or should not do that?

Mr Wappett—Yes. That line of thinking has been put forward over the last three years that this process has been underway. Mind you, it has been put forward in fairly simplistic terms and, to date, I have not seen anyone actually suggest any substance around that thinking that you can reform the register without reforming the substantive law that underpins it. It may be possible—in fact I am sure it would be possible—to establish a national law which made very little change to the existing substantive law, but it raises more questions than it solves. I think it would actually create more confusion and uncertainty than the proponents of that view realise.

The reason I say that is that, again to take the example of motor vehicle securities, we already have legislation in all of the states and territories that takes a substantially functional approach to security interests in motor vehicles. If we create a national register, presumably their thinking is that the national register would largely only deal with charge and mortgage-type security interests, so it would not deal with leases or hire purchase agreements or retention of title. If that is the case, does that mean that you would have essentially a register that only deals with charges and mortgages and we would continue to run a parallel system for motor vehicle securities?

I cannot imagine the equipment finance industry wanting to back away from what they currently can do under the REVS legislation. That has proved to be popular legislation in its own right. It does allow lessors

and owners of equipment under hire purchase agreements—and in some cases consignors of equipment—to register their interest, whereas they would not be able to do that if the register dealt solely with mortgage or charge-type security interests. That is probably one of the biggest difficulties—you could end up with a register that is primarily focused on mortgage and charge-type interests, but you would then have to make an exception for motor vehicles if you wanted to continue to allow lessors and owners of hire purchased motor vehicles—trucks et cetera—to continue to be able to register their interest.

It also raises the issue of what happens if property subject to one of those security interests is transferred. The REVS legislation has extinguishment rules in it. They are fairly basic extinguishment rules compared with what is proposed in the PPS Bill; nevertheless, there are clear extinguishment rules in the REVS legislation. There are no extinguishment rules under the Corporations Act for company charges; it is entirely left up to the common law. So the Corporations Act company charges provisions only deal with priority as between registered chargees. They do not deal with priority as against other interests that would not be registrable as charges. They do not deal with purchase money security interest issues, although there have now been a number of cases in Australia and overseas—including in England, where they have similar company charges legislation—where the courts have recognised purchase money security interest even though the Corporations Act says absolute nothing about them.

So there are a whole host of issues which I think would be problematic. Yes, you would end up with a national register, and the process of registration would presumably be a lot more straightforward—presumably it would be an electronic register. So there would be some efficiency gains through having a national register. But, unless you bring some consistency, in terms of both where you can find the legislation and the concepts that underpin the legislation, to the substantive law behind the register, I think you would be very much glossing over the problems and difficulties that arise in this area.

CHAIR—All right. Thanks for that. You say the conflict-of-law rules are deficient, but in the exposure draft we have got there is an appendix A with a conflict-of-law model. If you can just help me here: does that mean that this appendix A does not become part of the substantive bill? Are you suggesting that this model, or these clauses, should become part of the substantive bill?

Mr Wappett—Yes. My comment was that the omission of conflict provisions was a deficiency in the bill because the proposed model that is in the appendix is not actually part of the bill at the moment. I did go on to say that I thought the proposed provisions in the appendix would be an appropriate option in terms of dealing with the conflict-of-law issue.

CHAIR—So where in the bill would you put it? Would you take the clauses in this appendix and mould them into sections of the bill?

Mr Wappett—I believe that it would be a separate part of the bill dealing with conflict-of-law issues.

CHAIR—Okay.

Mr Wappett—You would essentially drop those provisions into a new part of the bill.

CHAIR—You were actually part of the Attorney-General's working group. Do you know why they have now been omitted? If they were in an earlier draft in May of last year, why are they now not in this draft that we as a committee have got?

Mr Wappett—Yes, there were provisions in the earlier draft of the bill that came out in May last year. They received quite a bit of criticism, including criticism from me. I thought that they were overly complex and difficult to follow, and there are quite a few submissions along the same lines. The department then took the provisions out of the next draft of the bill but suggested alternative provisions in the form of the appendix.

CHAIR—Okay.

Mr Wappett—So my view on the new, alternative provisions that are in the appendix is that they are a very significant improvement on what was proposed in the earlier draft, and I think they would be an appropriate set of terms to include.

CHAIR—Thanks for clarifying that, because my underlying question was whether this appendix A was simply what was in the May 2008 draft and they have just been hiked out, but they have been hiked out and changed.

Mr Wappett—They have been taken out and very substantially changed.

CHAIR—I think your submission is very helpful in providing us with those five sections of the bill where you have outlined the issues and outlined resolutions to those issues. That is most useful. Do you believe that the bill is close to being finalised? We have the Senate committee looking at the draft exposure, and people like yourself have highlighted to us that there are still a few glitches to be ironed out—in most cases anywhere between five and 15 issues, depending on the submission. But if they were actually looked at and attended to by the A-G's Department do you think the bill is fairly close to being finalised and ready for presentation, or do you believe there should be further consultation for another year or so?

Mr Wappett—I think it is close to being finalised. There has been some really useful feedback through the whole consultation process from a number of industry stakeholders and professional firms. I have not been through all of the submissions that your committee has received so far. In particular, I have not yet had a chance to read the full submission that came in from the four large law firms. I have read the executive summary of that but I will certainly be going through the detailed comments. Many of the substantive issues that have been raised to date have been appropriately reflected by the department in the revised bill. Certainly, of the submissions to your committee that I have had a chance to go through, I think there are very few issues coming out of those further submissions. You mentioned a minute ago that they were perhaps in the range of 10 to 15; I think that is probably about right. Unless a great deal more issues come out of any other submissions that I am yet to read, I would think that the bill is getting quite close.

As a general comment on the bill, it is quite long and it is quite daunting and complex. The key principles underpinning the bill are quite straightforward and once people become familiar with them I think they will find that a lot of the perceived complexity in the bill disappears. The bill is certainly substantially longer than some Canadian or New Zealand counterparts. Even though the substantive approach and the context of the bill are substantially the same, the actual drafting is a much longer style. I know some submissions have commented on that and various people have views about whether that is a good thing or not. I appreciate that obviously the Office of Parliamentary Council has a particular way of drafting and that is reflected across the board in Australian legislation. I was not proposing to really get into commenting on the drafting style per se. But in terms of the substantive issues, my view is that they have been narrowed significantly and I would be surprised if there are more than 15 or 20 issues outstanding at the moment.

CHAIR—Thank you.

Senator BARNETT—Thank you for your submission. Likewise, I found it very informative and the specific recommendations you have made are appreciated. I want to go firstly to your views on the objectives of increasing certainty and consistency, and decreasing complexity and cost. Do you think they can be achieved once the 10 to 15 amendments are sorted out?

Mr Wappett—Definitely. The experience with this legislation overseas—and I have firsthand experience of working with it—is that it does allow businesses to significantly streamline the way that they operate in terms of entering into transactions and the way they go about registering them. There is complexity in this law but from the point of view of day-to-day business—in terms of you take security and then you register it and you gain certain protections from that process—those processes are very much streamlined and the bill facilitates that occurring. There is a great deal of complexity in some areas of the bill and from a lawyer's perspective that can be quite daunting. But I do not believe that the complexity in the bill actually results in any more complexity than what exists under the current law; in fact, quite the contrary. Although it is still complex it brings all of the relevant law into one place. This is essentially the codification of a huge number of statutes, common law and equity that currently applies to taking security interests. At the moment you have to refer to a vast array of statutes, common law and equity to actually make sense of where you stand. The beauty of this bill is that despite its complexity it brings it all into one place. So, although some of the provisions are not necessarily easy to understand they can all be found and the answers to the vast majority of questions can, in my view, be found much more easily than they can be under the current law.

Senator BARNETT—Based on your experience in this country and in Toronto in Canada, how significant is this reform package? We had one witness this morning describing it as the most significant legislative reform in the last decade. How significant is it?

Mr Wappett—It is a very significant commercial law reform. It is different from some of the other reforms that the financial sector has seen in the last 10 or 15 years, which have been more regulatory focused—for example, consumer credit legislation and the FSR legislation. This is more focusing on fundamental property and security rights and is intended to facilitate the transacting of business relating to those rights. It is more facilitative of business rather than regulatory of business in its focus.

Senator BARNETT—That leads me to another question. Your criticisms are based on your life experience, presumably acting for and on behalf of various businesses, corporations and financial institutions. What about the issue of privacy and the consumer? We have received submissions from the Privacy Commissioner, the Victorian Privacy Commissioner and the Australian Privacy Foundation, but not many from a consumer perspective. Have you considered it from a consumer perspective and would you like to share any comments or views that you have? Do you think we have the balance right? As legislators, yes we want to decrease complexity and cost, and increase certainty and consistency, but we want to make sure that it is fair. What is your response to that?

Mr Wappett—This is one of the more difficult issues. Whenever you create a national electronic database on which information about people's financial affairs may be available it is going to be very sensitive from a privacy perspective. I believe the department has done a good job in trying to balance those privacy concerns against the objective of achieving a national securities regime which is workable, efficient and less complex from a commercial point of view. All of those things will, hopefully, mean that if business can be conducted more efficiently it should result in minimising overheads that go to the cost of providing credit.

Certainly, the disclosure of individual details needs to be taken into consideration as part of the whole package. As I see it, it is proposed that where the registration of a security interest relates to property or collateral that may be identified by way of its serial number then the individual debtor's details will not be searchable on the register. That is one area in which the government has taken steps to ensure that there is an appropriate balance between interests of privacy and commercial expediency.

Senator BARNETT—On that point: the Australian Privacy Foundation has recommended a full and public private impact assessment be undertaken. They say in their concluding remarks 'as recommended by the Privacy Commissioner for privacy significant projects'. They are quite castigating when they say:

The whole issue of who can get access to the register, for what purpose, and what information about individuals might be returned in response to a search ...

They are pretty strong statements. I am asking you whether you think we have got the balance right, or is that out of your purview based on your experience and your background acting for and on behalf of entities other than consumers?

Mr Wappett—My experience is not primarily acting for consumers. I have been involved in a lot of consumer credit work over the years but it has been primarily acting for lenders and credit providers. Certainly, privacy compliance has always been a critical issue for them. But I think it is inevitable that, when you are constructing any type of register of security interests, there will be concerns about adequate protections of people's privacy. This is a notice based register; it does not involve the lodgement of actual documents on the register. I think that is a significant step forward. Many existing registers actually involve the lodgement of entire documents on public registers. The fact that it is notice based is positive. The fact that personal details will not be required to be registered where there is another means of linking a security interest to particular collateral, so that people can search to see whether there is a security interest—

Senator BARNETT—What about the situation where that is not possible and the person's name and date of birth are required on the national register?

Mr Wappett—You can have a debate about whether the date of birth is necessary, although you do need some means of identifying people with common names from each other, hence the use of the date of birth. With a register where you cannot search by way of particularly distinct collateral, such as a motor vehicle, you do need some means of searching to see whether there is a security interest over that collateral. The grantor's name is the obvious way of doing that. To be honest, I am not sure that there is any other way of doing it other than to say that if it is a consumer interest and it is not over serial numbered property or collateral then it is simply not registrable—you could exclude it from the register altogether. That would be one option.

Senator BARNETT—We will have further discussions about that with different witnesses over the duration of this inquiry. I want to go back to this conflict of laws issue. In your submission you noted that it is omitted but in the earlier exposure draft there was reference to it, which you said was unclear and complex. I need a little clarity in terms of your views of the appendix A conflict of laws model and whether that should be included. I did not quite gather your views on the conflict of laws approach that should be included in the bill. Can you please clarify that for the committee?

Mr Wappett—My view is that the proposed provisions in appendix A should be included in the bill.

Senator BARNETT—Right. At the moment they are in appendix A to this exposure draft. Why is that so? Does that, therefore, mean that that is not included in the bill?

Mr Wappett—My understanding is that that is not officially part of the bill at the moment but the commentary that accompanied the bill raised the issue of whether it would be appropriate to include appendix A in the bill.

Senator BARNETT—If it were, are you satisfied with the content of appendix A?

Mr Wappett—Yes.

Senator BARNETT—I want to go now to this concern you have regarding proposed section 235 'Rights and duties to be exercised honestly and in a commercially reasonable manner'. This came up yesterday in discussion with the department. Your view is that that is unnecessary and would create perhaps less certainty, less consistency, increased complexity and increased costs rather than the opposite; is that right? I have read your submission and seen the reference to the Trade Practices Act and the equitable principles—that is, unconscionability—providing adequate protection. Is there anything else you would like to say about that to support your argument that those words should be removed?

Mr Wappett—There are similar tests under the Trade Practices Act but also under the ASIC legislation and to some extent under state and territory fair-trading legislation. The main issue around the inclusion of proposed section 235 is that it seems to be another layer of test requiring people to act in a reasonable way, in good faith and not unconscionably. There are already a number of statutory laws as well as equitable principles that deal with that point. I do not think this is an issue that is peculiar to personal property securities; it is an issue that affects the plethora of contractual relations between businesses and their customers. There are already a number of statutes that deal with the issue.

Senator BARNETT—There are a number of statutes that deal with the issue but, for example, the Trade Practices Act deals only with corporations and does not deal with individuals of course. What we are dealing with here is personal property securities which will cover businesses and individuals. I do not know what is in the minds of those in the Attorney-General's Department but I assume they are trying to cover the field. What is your response to that?

Mr Wappett—Almost in every case where a security interest is taken it will be taken by a corporation, so it will be the corporation that has the responsibility to act in a commercially reasonable manner. That is why we are saying that a number of other statutes, including the Trade Practices Act but also the ASIC legislation that deals with financial services, cover that issue adequately. Imposing a similar but slightly differently worded requirement in the PPS legislation seems to me to be unnecessary in light of that.

Senator BARNETT—What about a situation where it is not covered—where it is individuals or it is not covered by the Trade Practices Act? Would you agree that there are gaps? If there are gaps, how do you take that into account?

Mr Wappett—You are quite right. It is possible that a non-corporate entity may be taking a security interest. It may be a transaction entered into between two individuals, or between an unincorporated business and a customer, and they may take security. In that situation, section 235 would cover that gap. In theory, there is a gap there. I suspect that it would not be a particularly large gap—because most businesses, for GST and other reasons, are incorporated—but it is possible.

Senator BARNETT—You made reference to the 'nine jurisdictions'. We have six states and two territories. Which is the ninth jurisdiction you are referring to?

Mr Wappett—The Commonwealth.

Senator TROOD—Is the model set forth in appendix A, of which you approve, broadly consistent with the general principles of 'conflicts of laws' that apply in Australia, or does this depart from that in some significant way?

Mr Wappett—It is broadly consistent. It is also consistent with international trends and models for conflict of law resolutions set down in various trial rules.

Senator TROOD—Was the absence of that consistency a concern you had with the previous model, or was it just that it was far too detailed and complex?

Mr Wappett—It was more about the level of detail. It seemed to be overly engineered—for want of a better description.

Senator TROOD—Have the issues you have raised in your submission come to light since the exposure draft appeared, or are these matters about which you have been pressing for some time and have not been able to get any comfort from the Attorney-General's Department?

Mr Wappett—Most of these issues have come to light out of the last draft of the bill. I have raised a number of issues with the department throughout the consultation process, some of which have been addressed and some of which have not. But I appreciate that I am merely one of a number of people who have been making submissions in this whole process.

Senator TROOD—Is the 235 question one that you have been pressing for a while, or is that a new issue?

Mr Wappett—That is an issue which I have raised previously.

Senator TROOD—That is an issue that others have raised, and the department seems to be reluctant to accept the suggestions that have been made in this area. Is that a fair summation of this situation?

Mr Wappett—Yes, I think it is.

Senator TROOD—In relation to the registration problems and these issues of privacy which have been mentioned, do the models in other jurisdictions have electronic registers?

Mr Wappett—They do. New Zealand is wholly electronic, and most of the registers in Canada are now wholly electronic.

Senator TROOD—You have had experience with the Canadian situation. Were you practising there when the Canadian law was introduced or had been applied?

Mr Wappett—Yes, I was.

Senator TROOD—How do the Canadians get around this privacy problem in relation to individuals in particular—the fact that an entity does not have an identifying number, like an ABN or something of that kind, which could be used? How do they get around that problem?

Mr Wappett—The debtor or grantor's name and address details or date of birth details appear on the register. The rules and regulations for registration vary between the provinces but, essentially, if you are not dealing with serial-numbered collateral then the debtor name is the key criterion for registration and searching.

Senator TROOD—Is that true in New Zealand as well?

Mr Wappett—Yes, it is.

Senator TROOD—Then I take it that it is not easy to conceive, is it, of a way around that particular solution to that particular problem?

Mr Wappett—I do not believe it is. There are certainly some things that can be done to minimise the issue, but I do not think you can eliminate it altogether.

Senator TROOD—You say you have looked at the large law firms' submission, or at least their executive summary, and they put forward a proposal with regard to what they call a 'cut-back model', which would allow the reforms to go forward but leave out significant areas which they see as essentially complicating the law, affecting existing rights and introducing a level of uncertainty which is undesirable. Have you had an opportunity to turn your mind to the virtues of that proposal?

Mr Wappett—As I mentioned before, of this latest submission from these four large law firms I have only read the executive summary, at this point, because I only received a copy of it a couple of days ago, though I certainly will go through the rest of it. I have seen some earlier submissions that they had made through the consultation process and, to date, other than making a general comment that they believed a national registry could be created but without the substantive changes to the law, they have not, so far, provided specifics about exactly how that would be done or how the substantive issues, that vary greatly under the current law, would be rationalised into one regime.

Senator TROOD—They seem to be reluctant to do that. They seem to have a very conservative approach to the reform and suggest that the ambitious nature of this proposal is likely to increase uncertainty. It is going to change the common law in ways which are undesirable and from, I think, the committee's perspective, and certainly from mine, they argue that it is going to significantly affect the rights of parties. So there is a range of consequences with which they are concerned, and they trace these out in their submission. Are you persuaded that those consequences are likely to follow or not? If they are, then are you happy that the legislation is actually going to address them in ways which are satisfactory?

Mr Wappett—I think, a combination of the above. Those four firms have raised some very good issues throughout the consultation process and, by and large, I think the department has addressed those where they have been issues of genuine substance. There does seem to be a bit of a philosophical objection to the whole PPS model of reform, which comes through their submission, and I think that that sort of philosophical objection needs to be set to one side and that we need to focus on the substantive issues that are raised. My perception is that the department has focused on most, although perhaps not all, of the substantial issues that have been raised and has attempted to address them. As I said, I am yet to go through the last submission that they have put in and there may well be further issues in there which do need to be addressed.

Harking back to what I said earlier, I think the proposition that you can simply reform the registers by creating one national register and leave the substantive law as we currently know it untouched is a gross oversimplification of what would be required to create a national and effective register. That is simply because the current registers, the substantive law that underpins those registers and the various types of interests that are required to be registered on them are so vastly different. I do not know how you can just create a national register without also introducing a substantial degree of reform to the substantive law. It may be that you can do that and you do not need to change the substantive law as much as is proposed in the PPS bill. But to date I have not seen a detailed alternative proposal—just a very simple statement that that would be possible.

Senator TROOD—Yes.

Mr Wappett—My own view is that it would be possible but I do not think it would be an easy job and I think it would involve much more change to the substantive law than its proponents think.

Senator TROOD—As I read the firm's proposal—and this is on my first reading, anyway—they seem willing to accept some substantive changes in the law in some areas but not changes quite as comprehensive as this bill proposes. For example, they say it ought to remove references to 'chattel paper'. Do you have a particular view, just offhand, on whether that is a desirable change?

Mr Wappett—I guess I have two comments on that. One is this. Although the drafting is quite different, the concepts of the bill are very closely based on the concepts in the New Zealand and Canadian legislation. That legislation has proved to work and work well, so I think a lot of the criticisms of the bill in terms of the dire consequences that might flow from it need to be seen in light of the practical experience that has occurred in those jurisdictions. Both countries had legal arrangements very similar to our own before they introduced these reforms. The second point I would make on that is that, yes, I think the bill could be redrafted to exclude 'chattel paper'. There are a number of things in the bill that could be excluded and the bill would still be a workable bill and it would still be a worthwhile reform. Yes, I agree with all of that. The question is: do we want to depart substantially from a model which has proved to work in other jurisdictions that have a comparable legal heritage to our own?

Senator TROOD—I do not want to get preoccupied with the notion of chattel paper, but what would be the virtue of excluding that from the bill?

Mr Wappett—In my view, I do not think it would be the way to go. From speaking to a number of people in the finance industry, I think there are some distinct advantages—including the chattel paper concept—in the bill. There may, for example, be some reasonable argument that to perfect a security interest in chattel paper you may not need to take physical possession of it or you may not need to have control of it in the way that the bill currently contemplates. I think the proposed bill provisions will work and will work effectively, and they are closely modelled on the provisions that exist overseas. But, having said that, it is not a part of the bill that is indispensable in terms of whether or not the reform process goes forward.

Senator TROOD—I have just one last question. To what extent do you think this bill takes account of the peculiarities of the Australian legal and commercial environment? There has been some suggestion in some of the evidence—in both written and oral form—that rather too much of this bill has been based on external jurisdictions and not enough of it reflects the unique circumstances that apply in Australian jurisprudence.

Mr Wappett—I think the bill has been modified in a number of respects in response to submissions about the way in which business is conducted in practice. I think ultimately this bill has to work for businesses in practice, so it has to be practical. I think a number of alterations have been made in that regard.

In terms of whether or not it works with Australian jurisprudence, I think that criticism is coming from quarters that really do not want to see a departure from the way things have been done in the past. The PPS approach is a substantial conceptual shift in the way in which people transact security interests. In going down this reform path, we are no different to New Zealand or Canada, both of which had jurisprudence and legal

arrangements before their PPS reforms which were very, very similar to what we have now. Those jurisdictions have implemented similar reforms successfully and they have, by all accounts—and certainly from my own experience—been very successful in allowing business to be transacted more efficiently and in allowing people to understand exactly what their rights are in respect of any particular transaction more clearly than may have been the case under old law.

I think the issue about saying the reform needs to reflect existing jurisprudence is in fact turning the argument on its head. You are actually trying to reform the existing jurisprudence, not preserve it. With purchase money security interests, for example, it is very unclear under Australian law at the moment what the status of a purchase money security interest is. This law will clarify that. This law will also include very clear rules for the extinguishment of security interests when secured property or collateral is transferred from one entity to another. That is not at all clear under the existing law and it varies depending on what type of property you are dealing with.

So there are a whole range of areas where you do not want to preserve the existing jurisprudence because that is just preserving uncertainty and obscurity.

Senator TROOD—Thank you very much. That has been very helpful to the committee.

CHAIR—Mr Wappett, thanks very much. That concludes our questions of you today. Can I just say on behalf of the committee: thank you for your submission and the time that you have made available to us today. It is most appreciated.

Mr Wappett—Thank you for the opportunity to speak with you.

Proceedings suspended from 11.02 am to 11.23 am

FLANNERY, Ms Angela Marie, Partner, Clayton Utz

GOUMENIS, Ms Sonia, Partner, Clayton Utz

LEE, Ms Karen Wan Ching, Senior Associate, Clayton Utz

CHAIR—We have the submission from Clayton Utz and, for our purposes, we have numbered it 27. Before I ask you to make an opening statement, are there any changes or amendments you need to make to that submission?

Ms Flannery—No.

CHAIR—If you would like to provide us with an opening statement or a commentary on your submission we would welcome that, and then we will ask you some questions. Over to you, Ms Flannery.

Ms Flannery—Thank you. As an initial point, I want to say thank you very much for the opportunity to make this presentation and be present today. The legislation, if passed, will have an enormous impact on our day-to-day practise of the law. We have really enjoyed this opportunity to have an impact on the terms of the legislation. Another initial point that we want to make is that it is probably not that apparent from our submission but we do support the PPS legislation and its implementation. We think that it is important that it goes beyond simply putting in place a new registration system for personal property security law in Australia. We do not think that that can be done in isolation, and we think it is a great initiative to try and simplify and clarify the law that applies in this area.

What we have tried to do with our submission is to identify a few key areas where we think that, with some fairly simple changes—other than in the case of the introduction of a conflict of law regime—a couple of things that are problematic in the bill can be rectified and clarified. I will look at those particular issues. The first point that we had was the definition of accounts and how accounts are treated. The concept of accounts in the bill refers to any obligation to make a payment. If you look at the equivalent in the New Zealand legislation, it does have a very similar meaning but it is actually referred to as an account receivable in the New Zealand legislation. The feedback we have had from our colleagues in New Zealand is that 'account receivable' is given a much narrower meaning by practitioners than the drafting of the definition would suggest. What we have put forward in our submission is that we should be moving back more towards the UCC article 9 definition of that term, which we think is really how the legislation is interpreted in New Zealand and certainly the way it should be interpreted in Australia as well.

We have also made a submission on how transfers of accounts are dealt with. We think that, if the accounts definition is narrowed in the way that we have suggested, the legislation should recognise that you can have control of an account where, under the general law at the moment, you would have taken a legal transfer of that count. Where you go off and notify the debtor, that should be sufficient to give you priority even if you do not actually register. That would be putting accounts in the definition of controllable property for that purpose.

The second point that we have raised, which we were pleased to see in a few of the other submissions that were posted on the website, is to remove section 235(1)(b), which, in the next couple of days, I am sure you will hear quite a lot about. We think that the overriding aim of the legislation is clearly to provide for clarity and introducing that new test just does not do that. In New Zealand their equivalent is drafted in a similar manner to a previous legislative regime that they had, but we do not have an equivalent here. Also, we have all of the consumer code protections for that type of conduct. We question why we would have that extension of something that is so uncertain into a commercial area where people have much more equal bargaining rights.

The third key point that we had in our submission was how unperfected security interests are dealt with on insolvency. With the functional approach that has been taken in the legislation, particularly with leases where the lessor—who is actually, at law, considered to be the owner of the property—has the risk of losing title if they do not register their PPS lease prior to the insolvency of the lessee, we think that that provides a windfall gain to unsecured creditors of the insolvent lessee.

So you will have a lessee who has not paid full value for the lease property basically taking that leased property and having it available for distribution to all of its unsecured creditors. We do appreciate that there need to be incentives to register a lease. If there were a competing security interest in the leased property that was properly perfected, we think that title should be lost in those circumstances. But if, on the insolvency of the lessee, there is no competing security interest that has been perfected, we think that there should be a recognition that the person who at law has legal title is allowed to retain that title.

The fourth key point that we raised was the need to include a governing law/conflicts of law regime. We think it would be an opportunity missed if that important element of personal property securities law were not dealt with. We actually think it is a shame that those sections were omitted from this version of the exposure draft, because quite a few submissions did not really focus on those sections that were suggested by the Attorney-General's Department in their commentary on the bill. I certainly think that a regime should go in that provides a bit more certainty in that area.

They are our four key points. We do have a few other minor points which we can talk about if you have any issues about those. I would like to pass over to Sonia for her to say a few words in the context of securitisation, which is an area in which she is expert, and the implications of the bill for that area.

CHAIR—Great. Thank you.

Ms Goumenis—As Angela has mentioned, my primary area of practice is securitisation, and that is really the focus with which I have looked at the legislation. I was also involved in assisting the Australian Securitisation Forum in drafting their submission on the new PPS regime. My view is consistent with Angela's in that the regime is largely step forward and, from a securitisation perspective, I think the bill should facilitate rather than complicate securitisation. That said, as you can see from the submission that the Australian Securitisation Forum put forward and from our submission, there are some aspects around the edges that I think do need to be refined. One of them Angela has already mentioned: the issues in connection with transfer accounts and certain transferees taking priority where they have registered as opposed to having given notice. Angela has already covered that and it is covered in the Clayton Utz submission.

Another couple of aspects I want to touch on are section 125 and the provisions in that particular section which permit the account debtor and the transferor making amendments to the contract and the circumstances in which those will bind the transferee. From a securitisation perspective, those provisions might be problematic and would certainly cause some concern to investors and rating agencies involved in looking at transactions. I understand that there are conditions within those provisions. One of those conditions is the test that the amendments be commercially reasonable, and you are obviously going to hear submissions in relation to that term and what its meaning might be. One of the other conditions is the honesty test. I understand that there are potential workarounds in terms of being able to negotiate restrictions in the documents governing the transfer which would then, hopefully, cause a breach of that honesty test. But I think the regime is a little bit complicated and, from a securitisation perspective, we would prefer not to see those provisions in there.

Finally, I thought I would touch on chattel papers. I understand the policy objectives, I guess, behind the new provisions and the regime, and I think it will remain to be seen if the provisions in fact do create the market that they are intended to. Having looked at the provisions and how they would cut across our transactions, there are some aspects of concern around the edges, in particular, section 118 and the fact that a subsequent transferee who has taken possession of the chattel paper might actually defeat the interest of a securitisation vehicle that first took the transfer. In securitisation it is often the case that the vehicle does not take possession of the chattel paper. In fact, it is continued to be held by the transferee as custodian for the vehicle because it will continue to service the receivables. So there are some aspects around the operation of those provisions that do need to be tinkered with, and they are raised in the Securitisation Forum's submission.

CHAIR—I want to go to two of your key issues, and I am sure my colleagues will pick up the other couple. I want to cross-reference your submission with the exposure draft bill in front of me. In relation to proposed section 35, your definition of the word 'account' is much narrower than the definition in the bill. The bill actually says that 'account' means 'a monetary obligation'. You are saying that that is too broad?

Ms Flannery—Yes. For example, it would pick up liquidated damages clauses in contracts that are not accounts receivable.

CHAIR—Under the PPS?

Ms Flannery—Correct.

CHAIR—So you are suggesting that subclauses (1), (2), (3) and (4) of proposed section 35 be replaced with your paragraphs (a), (b), (c) and (d)?

Ms Flannery—Correct.

Senator TROOD—Ms Flannery, in relation to proposed section 35 you say:

… arguably "account" could cover …

Is that an argument based on common law, statute, jurisprudence? Why do you argue that point?

Ms Flannery—Possibly that is just being overly lawyerly—

Senator BARNETT—You are a lawyer.

Ms Flannery—It could well be the case that a court would read it down, as I suspect they would do in New Zealand, which has the same definition but calls it an account receivable. It says 'an account receivable' means 'a monetary obligation'. You need to look at the plain meaning of those words. A liquidated damages clause which says you will pay $X per day if you do not finish your building works by that time, for example, is a monetary obligation that falls within that definition.

Senator TROOD—Your proposition then is based on—and I hesitate to use this word in these circumstances—a common-sense interpretation of what that clause might mean in a contract or an agreement.

Ms Flannery—Correct.

CHAIR—That leads me to where I was going to go. It has been put to us that this legislation is not only more comprehensive and modern but simple. I am not a lawyer so when I read your definition as opposed to the definition in the draft bill it is really clear to me that an account does not include, for example, a negotiable instrument, an investment instrument or a chattel paper. But your words are:

… that is not evidenced by a negotiable instrument, an investment instrument …

To me it is saying the same thing but the draft exposure is simpler. Couldn't you use the current meaning in section 35 and simply put in a subclause (5) that says, 'But this meaning does not include liquidated assets, for example'—or the examples you have used?

Ms Flannery—Yes.

CHAIR—Would that be another way of doing it?

Ms Flannery—Yes. Another way of doing it would be to change 'account' to mean an account receivable but excluding those four categories, an account receivable at general law. That is what it is really trying to pick up.

CHAIR—So you could say that in this bill 'account' means a monetary obligation that is receivable under general law.

Ms Flannery—Yes, which is an account receivable under general law. Where possible we try to use wording from other legislation that is in existence, and that matches the UCC article 9 wording to a large extent.

Ms Flannery—The wording we picked up—what we tried to do where possible was use other, existing legislation and that just matches the UCCC section 9 wording, to a large extent.

CHAIR—On page 5 of your submission, under the same 'Key issue 1', you suggest the definition of 'controllable property'. Do we perhaps need to go through that in the same way? Because someone else has pointed out to us—in fact, it was the previous witness in their submission, although we did not talk about it in questioning—that there are really two definitions of 'control' in the bill, but they are not particularly highlighted as such. Mr Wappett said to us—if you look at their submission—that they do not have a problem with the two definitions of 'control', and they agree with the two definitions of 'control'; it is just that they need to be signalled or highlighted in a better way. Is that your view as well?

Ms Flannery—For me that would be in the category of 'nice to have but not really necessary', because I think it is quite clear in the bill that there are two different concepts and one goes to how you protect your security interests and the other is relevant to the concept of circulating assets. So I think it is clear enough. It is unfortunate that they are both referred to as 'control', but it is pretty clear.

CHAIR—So what you are advocating here is that the definition of 'controllable property' ought to be expanded—not that there are two definitions of 'control' but one of them—

Ms Flannery—Needs to be broader, yes, and pick up the concept of 'account'. The act goes part of the way there, because, although it is not referred to in our submission, if you look at section 125(7), it already says that if the account debtor is given the appropriate form of notice by a transferee of the account then effectively they have to pay that transferee. But in that section it does not deal with a situation where there are two transferees, one who has actually given notice to the account debtor to pay that transferee and someone else who has got a transfer as well, whether it is fraudulent or in error et cetera—what the position is when the first transferee gets the money as against that second transferee, who has registered their security interest on the PPS register that has not notified the account debtor. All we are trying to do is—

Senator TROOD—Does that question arise under existing law?

Ms Flannery—No, because under existing law if you give the account debtor notice then the position is that you take a legal transfer of that debt so you are the owner of that debt. So if someone else came along and tried to take a transfer of that debt from the transferor, that original transferor has nothing to transfer.

Senator TROOD—So you are saying this creates uncertainty in relation to what is a settled proposition in the existing law?

Ms Flannery—Yes. It would create certainty on that, yes.

Senator TROOD—But this would create uncertainty?

Ms Flannery—As currently drafted, yes.

Senator TROOD—Whereas with what we have now, the law is settled and clear on this matter.

Ms Flannery—Yes.

Senator TROOD—Is that in New South Wales or across the Commonwealth?

Ms Flannery—That is generally across Australia.

Senator TROOD—Okay.

CHAIR—Ms Flannery, I am going to leave your 'Key issue 2', because I have a feeling my colleagues might want to pick that up, and go to your 'Key issue 3', about the treatment of security interests in insolvency. You are suggesting that sections 233 and 234 should be amended.

Ms Flannery—Correct.

CHAIR—Can you just take us through that?

Ms Flannery—In section 233, it is a fairly simple regime as to what securities are invalid on the insolvency of the creditor—we will just call them the creditor. But there are a number of carve-outs from that regime. For example, there will be a carve-out in the case of 'a security interest provided for by a transfer of an account that does not secure payment or performance of an obligation'. So, if you actually transfer the account but it is not for security—it is an actual, full transfer—then, even if you have not registered, on insolvency that will be enforceable. I think part of Sonia's submission with the Australian Securitisation Forum was that that should be extended to refer to account or chattel paper—that there is no reason why account and chattel papers should be treated differently in that context.

We also wanted to see another exclusion in that section. If the lessor of a PPS lease, not just of the type referred to in subparagraph (c), had not registered and there was no competing security interest in relation to the leased property, they would retain title and be able to take what they own at general law out of the pool of assets that are available to unsecured creditors. That gives those unsecured creditors a windfall gain. Section 234 will give the lessors the right to claim in the insolvency basically for the value of their goods, but obviously if everyone is recovering 5c in the dollar then they are not getting to get the full value of their goods back.

CHAIR—So we need to look at your suggestions with a view to amending those sections?

Ms Flannery—Yes. It is a concept that is already in there. The drafters have already recognised that there are certain circumstances where, even if you have not perfected your security at the time of the insolvency of the creditor, you should still be protected. That is just one circumstance.

Senator BARNETT—That is under section 234, is it?

Ms Flannery—Sections 233 and 234.

Senator BARNETT—Can you point to a section where there are certain leases you are saying are exempted or entitled to damages under certain lessors or consignors—is that 234?

Ms Flannery—Yes, correct. Section 234 is just clarifying that, if you have a lease which does not secure performance of an obligation or a payment, and you lose title to your assets—so an operating lease—you can still then claim in the insolvency or bankruptcy proceedings for the full value of the property that you have lost title to. Otherwise you might not have that protection in your contract.

Senator BARNETT—What is special about those leases as opposed to other leases you are referring to?

Ms Flannery—They are the same type of leases, essentially. Section 234 is trying to give some protection, because section 233 is taking away the title of the owner of those leased assets to the leased asset. So 233 says,

'Okay, you didn't register. Therefore, on insolvency, you will lose title to those assets.' And 234 is saying, 'But if you lose title, you can make a claim in the same way as another unsecured creditor can make a claim and get 10c in the dollar or whatever.'

Senator BARNETT—Sure. Excuse my ignorance, but what make the latter special so that they can claim?

Ms Flannery—In other circumstances you will already be able to establish under your security interest that you are owed money. It is just a concern that you will not actually be able to demonstrate that you are owed any money otherwise—without the protection of 234.

Senator BARNETT—But is it related to the duration of the lease, because there is a reference in your submission to short-term leases? Is that part of this argument or is that a separate discussion?

Ms Flannery—It is separate, because the PPS lease definition is generally of leases of more than 12 months. As a result of submissions made on the earlier bill, in certain circumstances it extends to short-term leases between 90 days and a year. But generally the regime only applies to leases of more than a year.

Senator BARNETT—Did I interrupt you, or can I continue?

CHAIR—On 233?

Senator BARNETT—Yes.

CHAIR—Keep going then. I was going to go to another area, so keep going.

Senator BARNETT—I still have not nailed this one. I am sorry. Ms Flannery, I am trying to see where you are coming from with your recommendation. I have the exposure draft in front of me. You are not supporting that; you are supporting changes to that. I am trying to understand what you are recommending more specifically.

Ms Flannery—I will just give you an example. I am a lessor of manufacturing equipment. I lease it to my colleague Karen for a term of two years but I fail to register it. As the law currently stands today, when Karen became bankrupt, I would just take my equipment back because I own that equipment. I would take it and lease it to someone else. If the PPS regime is introduced, my lease will be a PPS lease and I will have to register it.

Senator BARNETT—And if you do not, you lose right and entitlement to that and you would have to file with all the other creditors for the five cents in the dollar on that equipment.

Ms Flannery—Yes. Say Karen went bankrupt three months into the two-year lease—it is only an operating lease anyhow—and she has paid me a total of, say, $100,000 for equipment that is worth $40 million; it is very expensive equipment with a long shelf life. Her unsecured creditors will get the value of that property and I will have to claim. Even though under general law at the moment I have an asset of $40 million that I can take back because I have legal title to it, I will not be able to take it back if I have forgotten to register. I will have to claim for what I am owed, because section 234 says I can claim that, but I will only get what every other unsecured creditor gets.

Senator BARNETT—I am with you there, but are you also recommending that there be certain circumstances where you have to register to claim, or are you simply saying that all leases, whatever the current arrangements, apply, and under the new regime the current arrangements will continue to apply? Are there any exceptions?

Ms Flannery—The exception is that, effectively, when I fail to register I am not putting the world on notice that it is actually my equipment. So Karen turns around two weeks after I have leased the equipment to her normal bank and says, 'I have this equipment. I am running this business. Give me a loan and I will give you a fixed and floating charge over all of my assets.' The bank goes and checks the register, sees that there is nothing there and therefore has no way of knowing that I own the equipment. That gives security to the bank. If they do everything that they have to do to perfect that security then I think that, on enforcement, because they have done everything that they were supposed to do, they should get priority for those assets over me. But this is effectively a windfall gain for the unsecured creditors who have not done that sort of check.

Senator BARNETT—I can see your point, but, with respect—and I am being devil's advocate—this goes against the principle of having a national register. At the time and date of the registration, you get set up as a priority over others. So this goes against that principle.

Ms Flannery—Yes, there is no doubt that that is true, but subsection 3 of 233 acknowledges that, in certain circumstances, there are good reasons for an exception to that policy.

Senator BARNETT—Okay. I am with you.

Senator TROOD—Why can't you accept the consequences of your failure to register?

Ms Flannery—It seems that in this case it is unusually harsh, in the same way that it has been accepted by the drafters that, if you take a transfer of an account that is not a security interest, in the sense of securing performance of an obligation, you should not lose title in those circumstances. So it is a similar policy analysis for that exception.

Senator BARNETT—Is it fair to say that there would be a whole range of other potentially important exemptions that should apply? You have talked about these leases but surely across the regime if we do not apply this principle consistently then you are going to have, I would imagine, a number of exemptions that would arguably be more fair and reasonable, based on past experience or at least the current experience.

Ms Flannery—In my view, no. The fundamental point with this is that under the general law it is not a question of someone who has failed to register a charge so they do not actually own the property. What you are currently looking at is a circumstance where the general law recognises that person as the owner of the property. It is giving a windfall gain to people who would never have expected it and would not have expected those assets to be available to them.

Senator TROOD—But if you had done what you should have done under the legislation, you could avoid that windfall gain being given, couldn't you?

Ms Flannery—Yes.

Senator TROOD—So if you complied with the process you would have protected your interests.

Ms Flannery—But it is exactly the same for each other exception that is already recognised.

Senator BARNETT—But we do it with respect to real property—that has to be registered.

Ms Flannery—Yes, but there are still exceptions to that regime as well.

Senator BARNETT—Yes, that is true.

CHAIR—I have two other matters that I want to go to, unless you want to talk about the conflict of laws. The conflict of laws rule was in the May 2008 draft, taken out and is now an appendix and it has been changed. We have had evidence to say that people like the change but that they think the changed version should now go back into the legislation. What is your view about that?

Ms Flannery—So pick up, holus-bolus, the regime that is in the appendix?

CHAIR—Yes, in appendix A.

Ms Flannery—I definitely support a conflict of laws regime going in.

CHAIR—Into the bill?

Ms Flannery—Yes. Otherwise I think it would be a missed opportunity to simplify what is currently an unclear area of the law. But if you compare the regime that is in appendix A with, for example, the New Zealand regime, it is a lot more complex. To be honest, I am still struggling to understand some of the permutations of the rules once you get into assignments of accounts versus security interests over investments and financial products. I think that it is a bit too complex and that is essentially where our submission was getting too. But generally I support most of it.

Senator TROOD—So you just want some tweaking of the proposals?

Ms Flannery—Yes.

CHAIR—Of appendix A?

Ms Flannery—Yes.

Senator TROOD—Do you think that New Zealanders have lost anything by the simplified regime that they have and which we gain by this rather more, in your view, complex approach?

Ms Lee—There is not a lot of New Zealand case law in relation to the conflict of law area regarding personal property securities. So from that perspective maybe the New Zealand legislation really did not lose that match, or there are things that just may not have happened. But it seems to be working okay at the moment.

Ms Flannery—They have an unusual regime for how they deal with mineral rights, which rightly the Attorney-General's Department did not pick up. I can understand the rationale, in part, for some of the

additional complexity in appendix A, but I think that a simpler set of rules would be better. You should not really need to treat tangible and intangible property differently, on the whole. I think that the main reason that appendix A has adopted a difference between the two is that they say it is hard to establish where intangible property is actually located. But you could just deem it to be located in a particular place. If you want the simplest rule possible, you just say, 'If it is intangible property it is located where the person who owes the obligations is situated.' You would have a much simpler set of rules.

Senator TROOD—You have not had an opportunity to put these suggestions for change to the AG's Department, have you? This is a new set of proposals.

Ms Flannery—Correct. I am aware the AG's have read all of the submissions but I certainly have not had a chance to discuss them.

CHAIR—Can I finally ask you if you have some concerns about the privacy issues with the register?

Ms Flannery—We know that there have been various privacy submissions made. It is sort of six of one and half a dozen of the other. There are always issues with a public register, I think, but we do not really have too many specific concerns. In part, I think that reflects our client base as well. We deal mainly with companies rather than with individuals. I am sure that is part of the reason why we are not so concerned about them.

Senator BARNETT—I appreciate your last comment, because I have been asking each of the witnesses their views on privacy and on whether we have got the balance right. You are probably coming from a perspective based on your past experience and your client base, rather than a consumer concern privacy perspective. I just highlight for your interest the Privacy Foundation's views that setting up a register 'remains wholly inadequate'. They say there should be a privacy impact assessment undertaken. They also say about the register:

The whole issue of who can get access to the register, for what purpose, and what information about individuals might be returned in response to a search, remains very unclear—

and concerning to them. That is in their submission, and I think it is reflected in a couple of the other submissions we have got from the Privacy Commissioner from Victoria and the national Privacy Commissioner.

Ms Flannery—But I think balanced against that you also have to look at what sort of publicly available information you can already get from doing, for example, REVS searches and the like. Anyone can go down to the land titles office and find out how much I paid for my house. You can work out from the amount of stamp duty on my mortgage how much money I borrowed from the bank. You can do a whole heap of these things already.

Senator BARNETT—Thanks for that. Just to recap: Senator Trood asked about this. Have you raised the issues you put in your submission with the Attorney-General's Department and, if so, what has been their response to date? Or is this all new and fresh since the new exposure draft came out at the end of last year?

Ms Flannery—We raised some of the issues in relation to the May draft. But there were substantial changes between that earlier draft and this draft. I think on the whole the access we had to the Attorney-General's Department through the consultation process and the time that they made to talk to us and answer questions we put in emails et cetera has been just fantastic. We at this table have not had much involvement in new legislation in our careers. Not all that much happens in pure banking outside of consumer credit, AFSL and things like that. I had not really had any experience of dealing with the Attorney-General's Department before, but I have found them very willing to listen. They did not always agree with us. Some of the issues we have raised before but some of them were new because of the new way in which the amendments have been made to the bill.

Senator BARNETT—Why are you here and why are you taking a special interest in this bill? Is it because it is very substantial reform? We were advised this morning by one of the witnesses that it was one of the most substantial reforms of the last decade. Why are you as a law firm here?

Ms Flannery—I will say a few words, but I will hand over to Sonia as well. It is the most substantial reform in the area of law that I practise in, which is commercial banking—and 'commercial banking' is probably the best way to describe it—because a lot of the work that we do is secured lending. It will impact on almost every single transaction that I work on on a day-to-day basis.

Ms Goumenis—It would be the same with securitisation, obviously, now the transfer of accounts is being caught within the regime.

Senator BARNETT—We have not read and I have not reviewed the Australian Securitisation Forum's submission, but we can obviously have a look at that. Do you endorse that and support it? You said you were an author of it.

Ms Goumenis—Yes, I was involved in preparing it and, yes, I do support it.

Senator BARNETT—We were advised yesterday that some very substantial draft regulations have been promulgated. We have not had a lot of discussion about that. Do you want to share any comments or views on the regulations as you understand them?

Ms Flannery—No. We actually did not put a submission in in relation to the regulations. There was an opportunity to do that. They pretty much said what we thought that they were going to say. Their main impact, I think, is really in terms of the content of what you will put on the register. We thought they were basically fine.

Senator BARNETT—Okay. Can we turn to your concerns with proposed section 235. Thanks for setting them out. I just want to flesh them out with you and get you to expand on your views as to why this is unnecessary. We had a submission this morning from Mr Wappett from Piper Alderman. His view is that we already have legislation under the Trade Practices Act relating to unconscionable conduct and relevant consumer credit legislation and other legislation that says that it must be fair and reasonable and not unconscionable—that type of legislation. It is already there as a catch-all and so his view was that we do not really need a further 'must promote commercial reasonableness'. Is that your view or do what you want to expand on your view as to why this legislation, as drafted with those words, is inappropriate?

Ms Flannery—Those words just do not have a settled legal meaning in Australia. It is not a phrase in this context that you can point to and say, 'Okay, "commercially reasonable" means that you have to do to X, Y and Z.' This legislation, unlike other legislation, particularly the Consumer Credit Code, covers every spectrum of security interest transactions. So it is looking at situations where there is equal bargaining power in the process for agreeing the terms. We are not talking about pro forma documents that borrowers are told to sign—though in some circumstances we are—and the protections for those sorts of consumer credit-type transactions that are in the Consumer Credit Code and, to a lesser extent, in the ASIC Act et cetera. We think that is where they should stay, where they are more targeted to the particular circumstances and they already have now a history of how they are interpreted. In preparation for this presentation to you, I was reading a few New Zealand textbooks which were talking about the fact that this 'commercially reasonable manner' provision had been used in deciding whether you could trace your security interests into other, different types of property, which is way beyond what I thought it actually meant. I think if it were introduced, it would provide uncertainty for both parties and really just be a potential for litigation.

Senator BARNETT—Presumably there would then be litigation and, once that was litigated, it would be more clear and concise following such litigation.

Ms Flannery—Potentially, but I have discussed this with other lawyers, and a point someone made to me was the fact that what is commercially reasonable changes over time, so what you will get is a court saying one year that something is commercially reasonable and then someone will say two years later, 'We think that the markets have changed'—and, as we all know, financial markets are changing daily at the moment—'and something else is now the normal commercially reasonable standard.' So you will never get a line in the sand.

Senator BARNETT—In your penultimate comment, you say that in these situations under the PPS there is an equal bargaining power. Why would somebody assume that that is the case?

Ms Flannery—In some circumstances there is an equal bargaining power, but this legislation, unlike, for example, the Consumer Credit Code, applies across the board to individuals and companies. I can certainly see the need for regulation of consumer credit, which is in the Consumer Credit Code, but in a case where BHP is taking a secured loan why should BHP be able to rely on a clause that says, 'We negotiated this document with you. We gave you, Mr Bank, these rights. Now if you try to exercise them we are going to argue that you are not being commercially reasonable in exercising the rights that we gave you'?

Senator BARNETT—But BHP is covered by the Trade Practices Act. What about where individuals have agreements under the PPS regime and they are not covered by the Trade Practices Act or consumer credit legislation?

Ms Flannery—That is a broader policy issue. If you were concerned about that type of transaction, you should be concerned not just about secured transactions but unsecured transactions as well. It should be dealt with in a specific piece of legislation targeting individuals.

Senator BARNETT—We could do that in a separate legislative initiative.

Ms Flannery—Yes.

Senator TROOD—Are you saying that there is no case law here that provides any guidance as to what this phrase might mean?

Ms Flannery—There is case law on what 'good faith' means and what 'acting honestly' means and I think that is where Australian courts would draw it from and there is a UK decision, which I am sure the Australian courts would rely on, but there is no real legislative equivalent of that phrase that is currently in a similar piece of legislation in Australia.

Senator BARNETT—You are talking about the phrase 'commercially reasonable'?

Ms Flannery—Yes. There is no problem with saying that you have to exercise your rights honestly—

CHAIR—It has been put to us in other submissions that that is covered by ASIC—

Ms Flannery—'Acting honestly'?

CHAIR—Yes, and other pieces of legislation cover 'behaviour' essentially which is why a lot of submissions advocate getting rid of proposed section 235.

Senator TROOD—I am not sure that 'honesty' and 'commercially reasonable' are similar kinds of concepts. It seems to me that they are different.

Ms Flannery—Yes, I agree they are different.

Senator TROOD—So using 'honesty' does not help you very much.

Ms Flannery—I think the Australian courts would rely on that. If you look at the cases which talk about when you act 'honestly' they sort of morph into talking about acting in good faith. I think it is the good faith element with a bit of objective analysis that would probably inform them as to how 'commercially reasonable' should be interpreted.

Senator TROOD—The problem is clearly uncertainty and what that phrase may mean legally, but is it also your view that there is no need for it, apart from what the legal consequences might be? The nature of these transactions is not such that there is a requirement for parties to be made by injunction to act commercially reasonably?

Ms Flannery—I do not think you need it in the context of corporate finance transactions. I think you need some equivalent concept in dealing with individuals, but I do not think this is the legislation to put that in because in the case of individuals or even small companies you should regulate secured and unsecured lending. You should not just regulate them when you are in a position where you have a security interest.

Senator TROOD—How do you get around the problem that this in fact applies broadly in the legislation?

Ms Lee—It talks about a 'commercially reasonable manner' and commercial aspects of any transaction really would be negotiated at a pre-contractual stage, so by the time the contract agreement is signed those commercial aspects would have been settled. Rights should be enforced in accordance with those contracts.

Senator TROOD—I see the force of your argument with regard to corporations and those commercial enterprises that can afford legal services—and correct me if I have misunderstood the legislation—but what do we do about individuals who might be in a weaker negotiating position?

Ms Flannery—You cannot have two tests in this legislation.

Senator TROOD—But that is essentially what I am putting to you: you have to have a test which applies to all of the contracting parties, and some of those contracting parties are in a better position to seek and acquire the kind of legal advice they need to protect their interests, and some of the other contracting parties are not in that position. So a clause which protects those who are of weaker status might have some virtue.

Ms Flannery—But not in this legislation where it means that you have to cover other types of contracts, which will create legal uncertainty. If parliament forms the view that, outside of consumer credit transactions, individuals that do business transactions on a secure basis should get this sort of protection then there should be legislation that is focused on that, rather than including something in this bill that might be needed for some of the people that the bill covers but not for everything that the bill covers. And it would still be inadequate in here if it is actually the intention to provide protection to individuals for business-type transactions since this will only cover secured business transactions and will not cover unsecured business transactions.

Senator TROOD—So do it somewhere else?

Ms Flannery—Yes. It is my understanding that we have really just picked this up because it is in the legislation in the other jurisdictions, and I am not sure that there was initially any more thought behind it than that it is consistent with what is in other jurisdictions, which may or may not have other protections.

Senator TROOD—I suppose the question there is whether or not it is a new concept for those other jurisdictions or whether they have created the concept and, it having been put in the legislation, it has or has not created any difficulties.

Ms Flannery—In New Zealand what they did with the wording was to match the wording that they had used already in a pre-existing statute, although I think the wording is different from our wording. They already had jurisprudence which allowed them to know what it meant, or to have a better understanding of what it meant.

Senator BARNETT—This is one way to avoid the courts determining what our law means and what is conventionally reasonable, rather than the parliament and, indeed, individual parties.

Ms Flannery—But not by having it in here.

Senator BARNETT—By not having it in there—by removing it?

Ms Flannery—Yes. If you leave this in here, the court will tell you what that means.

Senator TROOD—Tell me what the result of the Peregrine case was in relation to this vast sum of money, and the difference—by which I am just fascinated: US$9.5 million as distinct from US$87 million.

Ms Flannery—I think they went with the lower amount because it was unreasonable.

Senator TROOD—I suppose I can go and read the case, but thank you.

Ms Flannery—They did go with the lower amount, didn't they?

Ms Lee—I believe so. I actually do not know the answer off the top of my head.

Ms Flannery—They went with the lower amount because it did not make commercial sense to have the higher amount.

Senator BARNETT—We have got into a position in terms of banking arrangements with personal loans and so on with the banks now because, I think, of some litigation years ago—was it the Amadio case? It was a Greek name. I cannot recall whether it was the High Court or the Supreme Court.

Ms Flannery—It was the Amadio case.

Senator BARNETT—The banks are now making you sign a document to say—and you have to get your lawyers to witness it and have independent adult witnesses—that you actually understand the terms and conditions of the arrangements between you and the bank. Do you think that, under the currently drafted arrangements, we will see that type of scenario play out? To say that 'Yes, I believe that this is a commercially reasonable arrangement,' it must be independently signed and you must have your lawyers confirm that you understand that it is commercially reasonable? Is that the sort of scenario we could see, possibly?

Ms Flannery—Possibly, but I think that the concern from someone who is the actual security holder will not just be what is in the document but what they do when they actually enforce their rights—the steps that they actually take at enforcement. What it is talking about is that all rights must be exercised and discharged in a commercially reasonable manner. So you have got past the point where you have signed up your contract. A good example would be that most loan agreements say: 'If you default we can enforce our security. If you default in payment we do not have to give you extra time to make that payment. We can take steps as soon as you default and enforce our security.' If you have that clause in your loan agreement and your borrower says to you, 'I just need another two days to pay', will it be commercially reasonable for you to nonetheless say, 'My right is to enforce today and I am going to exercise that right'? That is where the problem is going to arise, I think.

Senator BARNETT—It would be a legal nightmare. I have a quick question on the Hague Convention and whether Clayton Utz has given any consideration to the merits of Australia signing that document and implementing it into Australian law.

Ms Flannery—I have had to deal with the Hague Convention on a couple of transactions, and Sonia has as well. I am not going to profess to be an expert on it, but I do not think that you can just take that convention and drop it into Australian law and say: 'Yes, that is fine. We should just follow that and not think about how it should apply in Australia.' I do not think that we should adopt that approach.

Senator BARNETT—Are there reasons why we should not sign it? I understand that that was in 2006; it is now 2009 and we have had a bit of time to think about it. I am interested to know. I do not know and I am sure that others would be interested to hear your views on it.

Ms Flannery—The benefits of signing it would be that it would bring us more in line with other countries—the European countries et cetera—that have signed it. But I do not think that it is essential that we do.

Senator BARNETT—Okay, so it is not a key ingredient to the success of any legislative reform in this area, as far as you are concerned?

Ms Flannery—Correct. What we should be looking for in this legislation is a clear set of defined rules which may pick up things from the Hague Convention. You need to look at the Hague Convention from an Australian perspective and what works for Australia.

Senator BARNETT—Finally, do you think we are heading down the right track in terms of process? We have a deadline of May 2010, I think it is, for all of this to be kicking off and coming into being. Do you think that it can happen by then under the current proposed process?

Ms Flannery—Do you mean in terms of people being ready or in terms of the legislation itself being ready?

Senator BARNETT—Both.

Ms Flannery—The timing is quite tight. Perhaps Sonia wants to comment on that as well. Certainly from the perspective of our clients—and we act for a range of different people, borrowers, banks and financial institutions et cetera—a lot of concern has been expressed about having to implement the AML legislation. We are now looking at the recent announcements in relation to the consumer credit legislation and bringing margin lending into the AFSL regime. There are quite a lot of things that a lot of people need to do before mid-2010. In a sense, the sooner the legislation is passed the better for everyone because then it will be in a fairly definitive state. It is quite hard now for people to start changing documentation or training their staff, which will be a very time-consuming process, because they do not have the final legislation.

CHAIR—I think that there is a two-year transition period.

Ms Flannery—That is correct, but for new transactions you will still need to be compliant straightaway. So that two-year transition period would really help to get the old transactions on board. But I think that your task is difficult. Getting the legislation passed with a sufficient lead time to allow people to get ready will be quite difficult.

Senator BARNETT—Thank you very much.

Senator TROOD—Ms Flannery, I just wanted to pursue a policy question with you. Your approach to this legislation seems to be different to that of your brothers and sisters in the law. I would have thought your firm would be one that might have come on board with the submissions of Allens, Mallesons et cetera, which you have no doubt seen, but you seem to take a different policy approach to their position, which is much more conservative and raises a series of concerns about the legislation and what its impact might be on rights, uncertainties and things of that kind. You have taken up some of those, but you have taken a much more supportive view of the legislation. Can you explain to me why that is?

Ms Flannery—Initially—two years or so ago—I thought the legislation was terrible; I thought it was a very bad thing. I thought that personal property security law as it stood in Australia was fine. When we saw the first discussion papers we talked to our clients and our colleagues in New Zealand about what they thought of the legislation and how it had been implemented in New Zealand, for example. We were surprised at how generally positive those people were. I looked at the ABA's submission for the most recent legislation. It is not particularly positive, but they have certainly been supportive in the past and I think they are still generally supportive of the legislation. But in New Zealand, every time we spoke to either a financier or a lawyer and we put the question to them, 'If you could get rid of the legislation there, would you get rid of it?' everyone said that, no, they would not. That made us look at the legislation with different eyes.

I do support the aim of simplifying personal property security law in Australia because it is currently not simple. If you sat down to design a system, you would not pick the system that we currently have. It does have the benefit that people know their way around it, but I do not think you can just have a registration system, for example, because registration implies all of these other things. You have to deal with priority issues if you are

going to have a registration system. It is not just priority with other security interests; it is priority with people who take different types of interests. We are supportive of having a simpler regime.

Senator TROOD—Have you had an opportunity to look at the Allens Arthur Robinson submission to the committee? It is quite long, but have you had an opportunity to look at any of it?

Ms Flannery—I have not read it in detail, but yes.

Senator TROOD—That is okay. They, as you would appreciate, raise a series of significant issues with regard to the legislation and for dealing with these issues they propose what they call a cutback model. Am I right in saying you do not share their view about that particular approach?

Ms Flannery—Yes, you are correct: I do not share that view.

Senator TROOD—For example—I just cite this as one of numerous concerns they raise—they propose deleting references to 'chattel paper' in the legislation. You have alluded to chattel paper in your submission but you do not seem to think that there is any need for that to be excluded from the legislation or that it might lead to any particular advantage to anybody if it were taken out.

Ms Flannery—I do not think it would necessarily have the beneficial impacts that the draftspeople expected it to have in the sense of fostering more of a chattel paper industry, but I do not think there is any harm in leaving it in there.

Senator TROOD—Their concerns on that issue seem to be around the consequences of leaving it in—that it might affect rights that already exist et cetera. But you are not worried about that sort of thing?

Ms Flannery—No.

Senator TROOD—If it is there for a particular reason, to stimulate usage of that kind of instrument, you do not think it is going to have that consequence. But that is neither here nor there; it may or may not have that impact.

Ms Flannery—I think in the early stages the Attorney-General's Department were considering limiting it in some way. Those changes did not come through, but we would have supported those. I certainly do not support its deletion.

Senator TROOD—Can I take it that, whilst you clearly have some issues with the exposure draft of the bill, your view is and your position is that these can all be corrected with some finetuning and closer attention to detail—that whether we are talking about the conflict of laws provisions or whether we are talking about the provisions with regard to the definition of 'account' et cetera, these are all fixable? Is that your position recently?

Ms Flannery—Yes.

Senator TROOD—So there is nothing here that you see that would have such serious and deleterious consequences that it needs to be removed from the bill? The problems that you see can be attended to with a creative legal mind being turned to them; I suppose I would put it that way.

Ms Flannery—Yes.

Senator TROOD—I have just a couple more things to ask about. In relation to your other issues, you make some allusions to definitions in your submission. In point 1 on page 2 of your submission, under the heading 'Other issues' and about investment instruments, you say that there is a definition of those in other legislation. Are you putting the proposition to us that we ought to be consistent in the application of our definitions, or are you saying that these definitions as applied in, for example, the Corporations Law, are inappropriate to this legislation?

Ms Flannery—I think they are inappropriate to the legislation. One of the examples is that the definition of 'debenture' from the Corporations Act has been picked up, and there are specific exclusions from that definition which relate to how debenture is used in the Corporations Act in the provisions about public disclosure et cetera and information memoranda and offering circulars that are not relevant to this legislation. Another way in which I do not think it particularly works is that in the Corporations Act the definition of 'debenture' is 'debenture of a body', but where it is used in the bill, 'debenture' is used as being as defined in the Corporations Act issued by a government. So it does not even fit into the context because the Corporations Act only refers to debentures of a body. It would be much better, instead of cross-referring to other legislation, to put the definitions in the bill so that you can actually see what you mean. I think it would prompt the drafters to take out the exclusions that do not work and make it fit for this definition.

Senator TROOD—I have had encounters, shall I say, with the Attorney's department on common definitions in the past. It seems to me as a matter of legislative approach that it is desirable to have one meaning for the same thing in Commonwealth legislation. Having a debenture being defined in 15 different ways is not helpful to the understanding of the law or the practise of the law or the cost of the law.

Ms Flannery—You would keep the core definition the same. You can have exactly the same initial wording, but you would not have the same list of carve-outs, because those carve-outs are specific to where they are used in the Corporations Act and do not have the same application in this legislation. You would keep the core definition the same.

Senator TROOD—I think you are actually agreeing with me that we ought to stick to the same definition but we can use it in different contexts in different legislation. Is that right?

Ms Flannery—Yes. There would be different exclusions from it.

Senator TROOD—We may have covered this in relation to 125 but, in your second point under 'Other issues', you talk about the exposure draft varying significantly from the existing law and having unintended consequences. I am conscious of the discussion we had about that, but could you just clarify this for me. Are you saying that we ought not vary the existing law, or are you saying that you are happy to vary the existing law but we have to be conscious that it will have consequences and we have to make sure that we attend to the consequences?

Ms Flannery—It is more the latter. Where there is a variation from the existing law, making sure that it makes sense is, I think, the issue.

Senator TROOD—So if there is an element of reform here then you are not troubled by that—you do not think that is going to have any difficulty—but we have to be attentive to whatever might be the implications of it.

Ms Flannery—Correct.

Senator BARNETT—We have got a regime change here for PPS security. You have talked a number of times during your testimony about unsecured arrangements. Do we need law in respect of that?

Ms Flannery—No. I mean, there are policy reasons which it is obviously for parliament to decide. Where you have unequal bargaining power between two parties, that deserves to be addressed. But, as a general concept, I do not think you need a regime like this for unsecured lending.

Senator BARNETT—Why not? If we have all of this regime in place, why should we not consider that, or why is it not important?

Ms Flannery—I guess that, in a sense, there is already a whole heap of regimes that apply to unsecured lending—companies need to do their accounts in a fair and reasonable manner; if you are an individual and you are trying to obtain a loan, you have to give details to your bank—so the informational side of things does not to be dealt with. And then when things go wrong we have a well established insolvency and bankruptcy regime, in the Corporations Act and in the Bankruptcy Act, to deal with that side of things. So, other than the inequality of bargaining power issue, I do not think legislation is required.

Senator BARNETT—We can rely on the common law.

Ms Flannery—Yes.

Senator BARNETT—Thank you very much. It has been most informative.

CHAIR—Ms Flannery and your colleagues, can I thank you once again. It has been a very long session—an hour and a half. We certainly appreciate your expertise and your knowledge, which has helped us to pull together what is happening with this legislation. Thank you very much for your submission and for your time this morning. It is much appreciated.

Ms Flannery—Thank you very much.

Proceedings suspended from 12.38 pm to 1.48 pm

MICHAEL, Dr Katina, Board Member, Australian Privacy Foundation

CHAIR—Welcome. We have a submission from the foundation and, for our purposes, it is numbered 17. Do you need to change it or make any amendments to it?

Dr Michael—No, thank you.

CHAIR—I invite you to provide some comments and make a short opening statement, and then we will go to questions.

Dr Michael—Good afternoon, Chairwoman, ladies and gentlemen. I would like to thank the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to speak regarding the Personal Property Securities Bill. My talk will take the following structure. I will provide a summary of the Australian Privacy Foundation's most recent submission. I will then outline the two major concerns the foundation has and conclude by highlighting what we believe are the key issues that need to be addressed. I will then accept questions from the committee.

I would like to begin by emphasising our disappointment at the failure of the Attorney-General's office to address concerns raised by the Australian Privacy Foundation in submissions made in August and September 2008. In short, the foundation is of the opinion that information privacy has been, for the greater part, ignored and placed in the too hard basket perhaps or simply not given the appropriate attention that it deserves. We note here that the summaries of consultations on the personal property securities website and in the newsletter were mainly industry submissions and did not really represent the consumer perspective and related privacy concerns. We are not alone in this belief and we can refer to submissions 3, 20 and 25 in support. As an accredited information technology professional it is my understanding that we have not done the proper information security due diligence required for the proposed national PPS register to go towards implementation. And yet, financing for the system has been approved; the department will be proceeding to contract for the design of a register before some critical parameters have even been legislated.

So at this stage we have not only the failure of the Attorney-General's Department to address previous concerns in submissions but also the premature expenditure for system components without parliamentary authority. The executive has obviously just taken it for granted, unfortunately, and this smacks of the access card debacle when millions of dollars were surely wasted to get the proposal off the ground—an example of premature contracting. We submit that no further contracts should be let until the legislation is enacted. So this is the first major concern that we have: due process has not been followed.

The second concern has to deal with more substantive issues. We feel that the register has not been adequately explained in detail. What does it record? What are the data fields that will be stored? What of the main problem of creating a new proposed national register that will duplicate large parts of the existing credit reporting databases? The credit reporting database has protection for the consumer under the Privacy Act; the proposed register does not. We can in actual fact have a scenario where there are two entries in the two registers and some information could be incorrect in one and correct in another. That leads us to a significant data quality issue. Scope is also central to the proposed register. What will be included in the broad definition of personal property securities? The contents of the register—what are they? There are data-matching issues and the potential risk of ID crime, which is quite serious in today's society, given the register will contain the name and date of birth of a number of individuals.

So here are our key issues; I will outline them. No. 1: who has access to this register? Where does the authority for access come from and where are the relevant points for access control mechanisms? No. 2: how can the register be searched? On what parameters? How often? What kinds of query responses can be achieved? No. 3: what kinds of audit checks and logs are kept with regard to interactions with the register? No. 4: what happens if there is an error in the register? How can consumers submit changes and even be aware of them in the first place? No. 5: how many individuals will have their personal details included in the proposed register? Are we thinking thousands, or more? Is there a potential for function creep?

Senator BARNETT—Function creep?

Dr Michael—Function creep we can define as using an existing register for purposes different from what it was originally intended for. No. 6: how do we ensure robust identity verification and matching, especially when an individual has legitimate multiple identities—in their married name, for example, and other names?

The Australian Privacy Foundation's conclusion is that we must measure the risk involved with such a register. We must perform a privacy impact assessment to understand the real impact of the proposed register. It is not too late to do this. We must not simply speculate but find out. How to go forward? We could proceed on the PIA, interview the department and find out the proper requirements for this project. It is a step-by-step investigation based on sound methodology. For the time being this is missing from the procedure.

While these are obvious and there are obvious technology measures that you can use to institute safeguards in the proposed register, it is the human factor element we really have not considered very much here. We recommend to the committee that a privacy impact assessment be completed. As always, we need to introduce safeguards to protect the rights of consumers. Thank you.

CHAIR—Thanks, Dr Michael.

Senator BARNETT—Thanks, Dr Michael, for your submission. It is very much appreciated. You are probably the first witness we have had who has really focused on the privacy issues, so we appreciate that. We realise that is important and we realise the importance of balancing that with the other issues of reducing costs, complexity and so on. We need to ask some questions and be devil's advocates. I would like your views on the real property registers and the fact that there is a public register in each and every state and jurisdiction in the country. You and I can access that. We can access the names, the addresses, the cost of a particular purchase and the parties to the agreement et cetera. Do you have concerns about the current arrangements regarding real property registers?

Dr Michael—At present I do not. I think we can point to things like the births and deaths register and the electoral roll to look at the tighter controls that those registers are instituting, and I would recommend on this occasion that we follow those tighter controls. I guess the real property register that you mentioned has gone through its due diligence and its course. While there are a number of privacy issues that we could raise, I think that is for another committee hearing and is another matter. I would be more concerned and focus on looking at how we can propose tighter controls for this forthcoming register to ensure that it is correct from the beginning. I would try to link it back to what we are doing on the electoral rolls register and how are we tightening access controls there and then try to mimic that approach.

Senator BARNETT—Just explain that to us. We have got a real property register out there and you do not have concerns with it at the moment because of the way it has been framed and, I presume, because of the impact of time. Over time everyone has become used to the fact that it is there, and nobody seems to have a real issue with it. Now we are looking at a non-real property register. The questions are these. What is the difference? Why do you have concerns about placing a person's identity and their date of birth on it? Can you just explain to the committee the terms and conditions applying to births and deaths and the electoral roll and why you think they are appropriate and this is not appropriate?

Dr Michael—I will start with the first question, with regard to the real property register. That has been available. I would have a concern if the data were being taken and sold, for example, to a commercial entity and reused for taking advantage of people's personal property information. There would be an information privacy concern there if the information were being resold. There is a study currently being conducted at the University of Queensland which is looking at these issues.

Senator BARNETT—Do you think that study might be relevant to this committee? Is it available? Who is undertaking the study?

Dr Michael—It is Mark Burden. It could be relevant but not at this point, I guess. We are talking about the property register, and I think the real estate register is a whole different scenario. If the information is being resold, yes, there is a problem. If it is being abused or taken advantage of, yes, that is a problem. To date to my knowledge we have not seen any major case law examples to tell us if there is any problem at the moment with that particular register. What is the electoral commission doing to tighten controls? I guess it is making it very difficult for people to access information. It is going through an authority and procedural mechanism, where people are taking steps to find out who is asking for the data and why. Then access is being granted on that. I cannot see that with the proposed register at the moment. We do not have any information on who has access, how often and why.

Senator BARNETT—Do you think those questions need to be asked in each and every case?

Dr Michael—Yes, I do, certainly. We need to know the motivations behind individuals who are requesting information on any register. I think we have transactions here of up to $5,000, but that is a grey area at the moment as well.

Senator BARNETT—Should there be a threshold in terms of when questions are asked as to the motivation for accessing the register? Do you think it should of a certain value?

Dr Michael—Sure.

Senator BARNETT—What should be the threshold?

Dr Michael—That is for the study to conclude. That is why you do a privacy impact assessment. It is not for me to answer that in this hearing.

Senator BARNETT—I have not reviewed privacy impact assessments before. Are they done regularly by the Office of the Privacy Commissioner or other entities?

Dr Michael—Yes, they are. There is a zone on the Privacy Commissioner's website which will tell you about privacy impact assessments. Basically, for any significant project or register that is put forward, a PIA is promoted by the commissioner. You will find that in their own submission as well as in the Consumer Action Law Centre's submission.

Senator BARNETT—Yes, I have the Office of the Privacy Commissioner's submission here. Do you support the recommendations that the office has made?

Dr Michael—Yes. I think they have a number of similar concerns to those that we do. I mentioned earlier the three other submissions that are along very similar lines to ours.

Senator BARNETT—We are meeting with the Office of the Privacy Commissioner shortly. You have recommended in your conclusion that they must address the privacy concerns, including through a full and public privacy impact assessment. How long would that take and could it be done in advance of the legislation going forward?

Dr Michael—Yes, it can be done in advance. The length of time is dependent on the scope of the projects. It is a national project. From my consulting background, I would say it would be roughly between two and four weeks. A consultant would come in to interview the Attorney-General's Department staff who are in charge of the register and the PIA findings would inform of issues to deal with cost of impact versus cost of controls, information security and access control matrices apart from the identification analysis and management of privacy impacts in general.

Senator BARNETT—I am advised that OPC will be here tomorrow, so we will talk to them about that. You have been pretty firm in your views about the serious privacy issues. Just to get clarity, you do not support the bill in its current form; you would strongly oppose the legislation as it is currently drafted?

Dr Michael—Correct. I think we need to introduce those safeguards to ensure the protection of the consumer. Once we introduce some kind of protection for the consumer, I will have no problem with the bill going forward. It is those elements which we should really be honing in on and making sure, for example, with the credit reporting databases and registers that there are protections under the Privacy Act. In this case, this register was not even on the radar of the national consultation process that occurred in Canberra in December by the Department of the Prime Minister and Cabinet—and it should have been.

Senator BARNETT—On page 2 of your submission you said that there has been a failure by the department to publish submissions. Can you expand on that? The submissions to our committee are on the website. They are public. Which submissions are you talking about? Are you talking about the consultations on the exposure draft last year?

Dr Michael—To my knowledge, they are of the draft. The end of the last line in the second paragraph states:

… the Department has not even recognised the consumer and privacy concerns.

I think that was related to the fact that the submissions were mostly by industry alone and not really consumer related.

Senator BARNETT—Do you think they should all be published?

Dr Michael—Yes.

Senator BARNETT—We can ask the department further about that and get some further clarity on it. Page 2 of your submission says:

In the earlier Draft Bill, privacy was acknowledged as an issue but was supposedly taken care of by a single proposal—to make unauthorised access to the PPS Register an 'interference with privacy' ...

Is that a big concern?

Dr Michael—That was just a single change; it does not cut it, basically, with the concerns that the Privacy Foundation have raised. It is one line.

Senator BARNETT—We have received 30-odd submissions to date. You have expressed a view that the 'Reforms have been designed and driven by a large community of corporate lawyers ...' We have heard from some witnesses today and we have received submissions from a range of law firms. Why do you think that is? Surely they would be representing the views of their clients, to a large degree, whether they are financial institutions, banks, corporations or commercial entities. They have a justified right to express a view and put their views forward, would you not agree?

Dr Michael—I have no problem with other individuals putting their views forward. One of our concerns was that it was done in very detailed and technical legal speak. It was not really accessible to the wider audience or the wider public and it was very narrowly focused. They have set out to achieve this. Reforms are always positive, but it was a very narrow and blinkered perspective that was presented by those organisations.

Senator BARNETT—Do you have a problem generally with the language in the legislation? Do you think it is to legalistic? You have talked about corporate lawyers helping prepare the legislation. Do you think that the language is an issue or is it the substance of it or both?

Dr Michael—On occasion the language is an issue. I believe that somewhere in the submission there was a question about grantors, debtors and securities and the differences between these three stakeholders. Yes, it is heavily technical legal speak.

Senator BARNETT—Going to the other jurisdictions and other overseas experience, we have heard about Canada, New Zealand and other places. Are you familiar with some of the overseas experience and would you recommend that we look at some of those as good models, or would you say that there are certain ones that we should avoid?

Dr Michael—I am personally not aware of that, but I did see some submissions on the website in PowerPoint format that showed some American and Canadian models.

Senator BARNETT—In terms of the points in your opening remarks, you talked about correcting errors. You are on a consultation committee with the Attorney-General's Department, aren't you?

Dr Michael—No, I am not.

Senator BARNETT—You are not?

Dr Michael—No.

Senator BARNETT—Your organisation is not part of that consultation process?

Dr Michael—I am not aware of it being so, no.

Senator BARNETT—Did you put your views to the Attorney-General's Department last year with respect to the points that you have made in your opening remarks about error in registration, function creep, multiple identities et cetera?

Dr Michael—There were two submissions made by the Australian Privacy Foundation when the draft bill came out in August 2008 and then when the discussion paper came out in September 2008.

Senator BARNETT—Was there an improvement in the second bill compared to the first one, as far as you are concerned?

Dr Michael—There was an awareness raised of the privacy issues, which perhaps previously there was not. But out of the 163 pages of the bill, I think privacy gets a mention quite far down towards the latter end of the pages—around page 162 or so. So the improvement has been in the awareness but not in the execution in terms of a deep privacy impact assessment and awareness.

Senator BARNETT—Right. I am just wondering what the department would say in response to the issues you raised in your opening statement. Have you raised them with them; have you had feedback from them? Were they raised in your earlier submissions, for example, and they just have not been responded to or addressed?

Dr Michael—I am not sure. I will take that on notice.

Senator BARNETT—Were those points that you raised with us raised in your earlier submissions?

Dr Michael—Yes, they certainly were.

Senator BARNETT—That is something that we can follow up on in due course. The issue of multiple identifiers: is that people with double-barrelled names where at work they might use one surname and at home they might use another—is that the point that you are making there?

Dr Michael—Correct. For example, I may use my married name at work. However, with family I may use my maiden name. I may have initials. I may be known as MGX or something or other or otherwise have an abbreviated name, depending on the circles I mix in. It is each individual's right to be called by their name in whichever way they see fit.

Senator BARNETT—Finally, in terms of the process and your recommendation for how the process should go from here: we are having a Senate inquiry; we have had two exposure drafts. What is your advice in terms of the process?

Dr Michael—I have a problem with contracts being awarded or even put to tender without a privacy impact assessment having been completed and, in addition to that, without the authority of the parliament. We have a procedural issue here. You cannot just assume that a system will be accepted or that a register will take root. You must do the relevant work behind that to ensure that the system will work, it is relevant, it is acceptable to the public and the parliament has agreed to it. You cannot actually go out and finance a system, to my knowledge, before agreement has been reached.

Senator BARNETT—I will play devil's advocate again. The argument against that would be that COAG have an agreement. You have an intergovernmental agreement between the various jurisdictions, and that discussion has been taking place for several years. Shouldn't they do the preparatory work so that the parliament then knows and can be better informed about its deliberations before legislation is passed?

Dr Michael—Yes, but going forward and choosing a system's integrator, for example, as we have identified in our submission, is probably not the right way to go about it. 'Preparatory' is the word that I think we should stress here. It is not really implementation, and anything to do with getting systems integrators on board is about deployment.

Senator BARNETT—So you think the 20 May deadline is way too soon?

Dr Michael—Things could happen between now and then. It depends on what the PIA finds: on what the privacy impact assessment conclusions are. It may not be too soon or too far away. It depends what is found in the preliminary investigation.

Senator BARNETT—If there were just one recommendation you could give to this committee, you would say that a PIA is towards the top of the list or is your strongest recommendation?

Dr Michael—It is that. A PIA must be done. That is in agreement with the Privacy Commissioner's office, at the national and Victorian levels, and also with the Consumer Law Action Centre.

CHAIR—Dr Michael, who would actually conduct a PIA and how would that occur? What would be the parameters of it?

Dr Michael—A PIA can be conducted by an accredited consultant in the information technology space. It could be someone with a legal background, it could be someone with an IT background or, preferably, with both. I would look for accreditation: someone who has some association with a privacy organisation which is not just an advocate organisation but one which actually does organisation level PIAs and consultancies.

CHAIR—What sort of turnaround time are we looking at?

Dr Michael—That question was previously asked. I propose two to four weeks as an initial phase. It all depends on how many people are on the project: on how many human hours we are talking about.

CHAIR—In your submission you said that under the draft bill, if there is a breach, an unauthorised access to the register, the default mechanism is the Privacy Act that is currently in place. Is that right?

Dr Michael—Yes.

CHAIR—And that Privacy Act actually exempts small business and individuals. What is the cut-off for small business? Do you know?

Dr Michael—The Australian Bureau of Statistics describes—to my knowledge, the last time I looked—a small business as being under five employees. There are certain thresholds. We have the sole trader, between one and five and between five and 10, and then we start getting into medium organisations in Australia.

CHAIR—So the Privacy Act would just reflect the ABS definition, essentially?

Dr Michael—Essentially, yes.

CHAIR—So essentially the bottom line is that in this draft exposure there is no protection if an individual gives unauthorised access to the register. Is that correct? For example, I would not be able to take action if you, for example, authorised access to my details.

Dr Michael—Yes.

CHAIR—Has this been raised in previous versions of this bill or in public consultations about this, or has it been in the bill and removed, or has had just been overlooked?

Dr Michael—To be honest with you, it has probably just been overlooked. We clearly stated those concerns early on. I do not think there was a direct response to that question.

CHAIR—Your submission says that the Australian Law Reform Commission has recommended the removal of this exemption. Do you mean the removal of that exemption from the privacy act?

Dr Michael—Yes. Everyone then has to answer for it.

CHAIR—So the Department of the Prime Minister and Cabinet and the Department of the Treasury, but not the Attorney-General's Department, are involved in the consultations on the report on privacy in Australia?

Dr Michael—Correct.

CHAIR—So we have two issues running side by side with no collaboration. Is that how you see it?

Dr Michael—Correct. There is no discussion between the two.

Senator TROOD—On that last point, is it your proposition that, if someone accesses information, that by itself is enough to trigger a concern?

Dr Michael—No. I think people should be able to access information when there are legitimate reasons for access. But when that information is taken in an unauthorised way, there are at the moment no parameters for who has authority to access what. An access control matrix has not been defined. The issue is about when the information is taken and misused against the consumer—for example, for ID fraud.

Senator TROOD—I am with you there. If people access a register or information of any kind and then misuse it, we all ought to be concerned about that. But I am not persuaded that there should be an issue when people access information—for example, it could be inadvertent access—and it does not cause any harm or immediate disability to the individual. I am not quite clear why we should be worried about that.

Dr Michael—I think your question goes back to Senator Barnett's question about the real property database, and I would like to focus on that point. Why, for example, did the electoral roll, which used to be available as a CD soft copy, end up going away from that kind of technology where anyone could acquire the database? And there was a well-known case where CDs of the Yellow Pages database were floating around and information was being accessed willy-nilly. I think where it differs in this instance is in moving towards tighter controls on access to things that are particular to individuals. One individual may have multiple items on that register. How much can we find out about one individual? A lot. I overheard a discussion previously in which someone said that it would cost $2 to make a search of this proposed register. If you are a marketing company or a telemarketer you can access a lot of information and do commercial things with that information. So it is about the ability to access a large amount of data, for a relatively cheap price, and do whatever you want with it.

Senator TROOD—It is true of the telephone book too.

Dr Michael—Correct.

Senator TROOD—You are not advocating the secrecy of the telephone book, presumably?

Dr Michael—No. But the telephone book does not have your date of birth in it.

Senator TROOD—But it provides you with telephone numbers, addresses and, presumably, the correct spelling of names.

Dr Michael—But you have the option of getting a silent number, so you do not have to advertise your number to the world. I think this is the difference. Once you are on this register, you do not have an option. There is no alternative. You are on this register because you have made a transaction of X value. With the telephone book, you can opt out.

Senator TROOD—Your submission seems to be directed purely at the privacy dimensions of the bill. Leaving aside the privacy implications, do you want to say anything to us about the desirability of the broad reforms we are talking about here?

Dr Michael—Yes, I do. We welcome reforms where they are to the advantage of the consumer, the public and the government. On one point, I would like to stress the similarity between the two national registers or databases. As I mentioned, we have the consumer credit reporting database, which houses a great deal of information, and this parallel proposed PPS register. I cannot help but think that there will be some overlap between the two. And what does it mean for data quality comparison issues if errors creep in?

Senator TROOD—Do you mean that an individual or an enterprise could be on both registers?

Dr Michael—Yes.

Senator TROOD—That would not be a problem, presumably, because I take it that you are reasonably comfortable with the arrangements in relation to the credit register—or maybe you have problems about that too. So if the protocols which exist in relation to the credit register were similar to the protocols that will be applied in this register, would your concerns be allayed?

Dr Michael—Yes, because the consumer would be protected by the Privacy Act.

Senator TROOD—With regard to the problem of names and birth dates, the difficulty I think everybody is wrestling with is how you would meet the concerns of functionality and privacy for an individual, who may not have an ABN or an identifier which is readily available and which gives no information as to who owns it or what kinds of activities they are involved in. The best solution we can come up with seems to be a name and a birth date as the means of doing it—and I understand that the is the method used in other jurisdictions as a solution to the problem. If that is not satisfactory, how do we solve that problem? Do you have a recommendation as to how we might try and address this difficult issue?

Dr Michael—We do. We have put that under 'Data quality and matching issues unresolved' in our submission. We suggest that the address not be excluded. I am restating what is in the submission. We said that a reliance on names and date of birth alone will not work. When name search is fundamental to the scheme design, relying on name and date of birth alone is fundamentally flawed: The experience of other public registers and the credit reporting databases shows that name and date of birth alone are not sufficient to achieve required levels of accurate matching. What do we propose in order to achieve accurate matching? Whole drivers licence numbers will assist in matching because they are unique and will ensure that individuals are distinguished from each other.

Senator TROOD—So you are uneasy about birth dates but not so much about drivers licences or addresses.

Dr Michael—Our drivers licence has our date of birth on it.

Senator TROOD—I know. But if you give a drivers licence number does that you give you access to the licence anywhere else?

Dr Michael—The number would not be published to the individual requesting that information, but it would help you to actually locate that data in the database.

Senator TROOD—That is what I am saying. If I have to register a security of some kind in which I am involved and I do not have an ACN, an ABN or any other number I might otherwise use which gives no information about me as an individual or my enterprise, if I happen to have one, but I do have an address and a drivers licence number, does that create any particular concerns for you?

Dr Michael—No. I think I would feel quite safe as a consumer. At least I would not be confused with somebody else.

Senator TROOD—So your anxiety is about being confused with another individual rather than this particular information being available. If there were the individual's name, address and a drivers licence number, for example, then you would be comfortable with that, would you?

Dr Michael—I think from data quality matching perspective that would resolve the original problem that was stated.

Senator TROOD—So that, in your view, would give a measure of security or certainty about who it is we are talking about at the very least. That is one of your concerns.

Dr Michael—Yes.

Senator TROOD—But does it give too much information about an individual?

Dr Michael—I guess it is a question of: which one is worse? Being confused with somebody else is much worse, from our perspective. I think identity verification and matching has enormous privacy implications. I would rather be identified as the correct individual in that register than not. I think that might actually cause more problems than the other scenario that you posed.

Senator TROOD—Along those lines, then, some people do not have drivers licences. What do we do in those circumstances?

Dr Michael—We can revert to alternative data or just state: 'No drivers licence.'

Senator TROOD—I suppose if there were two Smiths at the one address or two Smiths with similar first names and one had a drivers licence and one did not, that would solve the problem. If there were two Smiths without drivers licences you might get around the problem if they did not have similar birth dates.

Dr Michael—I guess your question is: would they live at the same address as well? We are advocating that the address also be included to get around this particular problem you mention.

Senator TROOD—I am sympathetic to your concerns; I am just troubled as to how you solve the problem. It has been helpful to hear you say that you are more concerned about the correct identifier than about there being too much information out there. That helps clarify the dissonance in relation to some of the views that exist.

CHAIR—Dr Michael, I am wondering whether the lack of explicit consultation with the Privacy Foundation is based on a view from A-Gs—and I am being hypothetical here—that a lot of the information that would on the register is already recorded in some form in databases in states and territories, and so this is just a collation of what is already out there.

Dr Michael—That could be an assumption that has been made but not communicated. Again, I will stress what is written in bold under the heading 'Searching the register'. For us the issue is who can get access to the register, for what purpose and what information about individuals might be returned. If it has been assumed that this information already exists in public databases and therefore what is the big deal, then that assumption needs to be communicated. When you start putting personal data items together, it depends what those data items are. Senator Trood mentioned the drivers licence number, address, date of birth and name, but what else will be there?

CHAIR—So you are unsure about what exactly what is going to be on this database.

Dr Michael—Yes.

CHAIR—You want to be reassured or you want the legislation made tighter.

Dr Michael—Yes.

CHAIR—We have no further questions, so thank you very, very much for your submission and for your time this afternoon. It has been very helpful.

Dr Michael—Thank you for the opportunity.

[2.29 pm]

EAST, Mr David, Partner, DLA Phillips Fox

FALUDI, Mr Peter, Special Counsel, DLA Phillips Fox

CHAIR—I now welcome representatives from DLA Phillips Fox. We have your submission. Thank you very much for sending that to us. For our purposes, it is numbered No. 2. Before I ask you to talk to the submission or to provide us with a brief statement, do you have any changes or amendments you need to make to that?

Mr Faludi—We actually have an addendum to our submission which is being handed out at the moment and which we will discuss with you after we have gone through our initial presentation.

CHAIR—Thanks very much for that. I invite you both to provide us with some comments and then we will go to questions.

Mr East—Thank you. The thrust of our submission has focused on some detailed comments, but there is a broader concern, I think, around the impact in the wholesale financial markets, particularly in relation to the corporate lending space, with the reforms contained in this bill having some substantive law changes. Our additional submission is an attempt to provide a way through those concerns but still recognise the benefit of this reform inasmuch as it is dealing with the plethora of state-based security interests over goods and the various state regimes. So the core mischiefs of this bill are directed at that plethora of various registers in the various states and the various acts that are in place. We will get to the detail of this supplementary submission if you like, but it echoes the concerns of others in industry that there is substantive law change through this legislation. There is in existence a national register dealing with security interests in the nature of charges granted by companies. We already have that system. There is not a call for substantial reform in relation to that; there is a call for reform in bringing all the state based registers together as a national system.

Since our earlier submission, we have seen public submissions by others in this context, and we are inviting the committee to consider the possibility of dealing with the core concern of bringing the various state registers together in one register, to deal with individuals. But, in the context of companies, there is a national register; there is a well-understood system of security interest priorities et cetera. So you could maintain the existing charges register and bring in a new national register to deal with security interests granted by individuals. That is the core of our supplementary submission.

Those were my opening remarks. Peter will now go through some of the other issues we have identified and will be happy to respond more generally.

Mr Faludi—The first point, which I think has been made in a number of submissions, is the degree of complexity in the bill. It is a very substantial bill and it involves, as David said, substantive law changes. In the submissions that have been made, there seems to be a view, which we endorse, that there is unnecessary complexity in the bill. In reading the bill, it draws an analogy with the tax legislation in a sense; the tax legislation, as it has evolved over time, seems to try and identify and deal with every possible circumstance in which there may be a tax issue which should be dealt with. Given that the basis of the reform is to improve certainty and to simplify the laws, it just seems that, by trying to deal with every particular issue that may be relevant to security interests, we are overcomplicating the bill. Even though you get rid of 70 pieces of legislation, the one that you are left with may still be extremely complex, involve substantial compliance costs and be difficult to understand.

The next point that we have identified deals with the issue of constructive knowledge. Although most forms of security interest provided for by the bill would be perfected by registration, there are still some security interests that are perfected by either possession or control, and they do not actually need to be registered to be perfected. In addition, there is no mandatory requirement to register a security interest. Of course, if you do not register a security interest, there are consequences. It may affect your priority; it may in fact go beyond priorities and affect the validity of the security interest in cases of insolvency. We are aware of other submissions that have been made which are advocating that registration be made compulsory for all security interests. Our concern is more to do with the fact that, if a security holder has a perfected security interest which is intended to be the ultimate, if you like, in a security interest, there are still a number of avenues provided for in the bill which allow a third person to have a priority which beats the original security holder, notwithstanding perfection.

A lot of those circumstances come back to whether or not that other person has knowledge of the security interest. If a security interest is not registered, it is very difficult for somebody to have knowledge. But, assuming that most security interests will be registered, there are still circumstances where people will say that they do not have knowledge, even deemed knowledge. The bill in this new form provides in section 56 a means by which a person is deemed to have knowledge if they have done the appropriate searches that a prudent or honest person—I cannot remember the wording—would have done. That still leaves it open to somebody who is not in the business of taking security interests to argue, 'I am not in that business so, as far as I am concerned, I did not need to do the search.' So there are circumstances in which somebody could raise that argument and argue that they did not have knowledge of somebody else's security interest. In the circumstance of that being a successful argument, a person would be able to defeat the original security holder, notwithstanding the fact that they actually have a perfected security interest. So we have a concern that the bill does not deem there to be knowledge of what is on the register. I suppose there is a separate issue, which we have not put forward, of compulsory registration.

The leasing industry is obviously substantially impacted upon by the bill. The bill has the effect of making a lease a security interest. So even though, in a normal leasing transaction, the lessor of the asset which has been financed is the owner of that asset and has title to the outset, that person, if we understand section 233(2), could lose their ownership and title to an asset because they had not perfected the lease as a security interest by the time the lessee became insolvent. We believe that that is not appropriate because that is a substantive law change. People understand that, in a lease scenario, the lessor is the owner of the asset, yet the bill does not necessarily give the protection to the lessor that has been in place for decades if not longer.

There are provisions in the bill which allow states to actually exclude the operation of the bill. Again, if the intention behind the bill is to have a national system, a one-stop shop, if you like, there really should be very limited circumstances in which a state should be able to exclude the operation of the bill because that defeats the one-stop shop idea; it defeats having to just look at one register and consider one law. So we would suggest that, until it is abundantly agreed that a state can actually exclude the operation of the bill only in very limited and unlikely circumstances, one of the prime benefits of having one system may be eroded substantially.

It has been raised in a number of submissions, including ours, that section 124 of the bill seems to provide a statutory right for a grantor of a security interest to essentially disregard and ignore the restrictions contained in the security interest. The whole purpose of somebody being granted a security interest is to prevent the person who granted the security interest from dealing in an authorised way with the asset that was provided as security. Consequently, we just do not understand why a statute would have a section in it which actually or tacitly authorises somebody to ignore that restriction and deal with the asset and then just leave it to the security holder to sue for damages for breach of contract. The whole purpose of having a security interest is that you can hold on to the asset as security, so we do not understand why that is in there.

Senator TROOD—Under what section is that?

Mr Faludi—Section 124. With regard to the priority rules, which start at section 100, there are some anomalies in there. In particular, there is a statement that if somebody has a security interest that is 'perfected by control' and somebody has a security interest perfected by another means, the person who has the security interest perfected by control has priority, notwithstanding that it may actually be subsequent to the previous security holder perfecting their security interest by, say, registration. The other priority rules which talk about perfection in the same manner all have a reference back to a time, so if you have two people who have priority perfected in the same way then the person who perfected first in time has priority, which is consistent with current laws. But that particular section, which is section 100(3), does not have that time factor built into it.

Insolvency is an area which, in our view, is one of the key reasons why we put forward this additional suggestion. At the moment I think it is fair to say as a basic statement that if a natural person becomes insolvent you deal with that person's assets in accordance with the bankruptcy laws and if a company becomes insolvent then you deal with that company's assets in accordance with the Corporations Act. There are some sections in the bill which are inconsistent or appear to be inconsistent with, say, the Corporations Act. Section 116 is the one in particular that concerns us. It seems to ignore the unfair preference provisions of the Corporations Act.

Section 233, which I have mentioned previously, has the effect not only of making a security interest void against an insolvency practitioner if it is not registered—and that is consistent with the Corporations Act: if you do not register a charge it is void against the liquidator or administrator—but 233(2) actually goes on to say that the security interest then vests in the grantor of the security interest. There is some uncertainty as to

what that means. If a person has a security interest and the only document they have between them and the grantor is the security interest—say it is a mortgage which covers the loan term et cetera—it is a bit unclear what is left if the security interest vests in the other person. Surely the outcome of not being perfected by registration or otherwise at the time of insolvency should affect only priorities and validity against the insolvency practitioner, but it should not vest back into the borrower or the grantor anything and the holder of the security should still be able to enforce its security, albeit perhaps not as a secured creditor but as an unsecured creditor. That section has particular concern in leasing, as I have mentioned before.

On the enforcement procedures and duties, we agree with the comments made in other submissions that the bill imposes some duties which go beyond the current duties applicable to mortgagees and opens the way for people to take up litigation against holders of securities in a way which perhaps is not open to them under the current law.

If it assists, I will mention another section, section 181. Section 181 talks about the ability of the grantor of security interests who is in default with the security holder to stop the security holder from completing enforcement against the asset if he pays back to the security holder the interest in default and costs and expenses but not the amount which has been accelerated. The standard documentation provides that if somebody is in default the lender can accelerate the principal and make a demand for the whole amount owing. The current law provides that the person can prevent the sale of their asset by essentially paying that lender the amount owing, including the amount that has been accelerated. That is called the equity of redemption, and they have a right to redeem their property by paying to the lender what is owed.

Section 181(1)(a)(i) says that essentially the grantor who was in default can at any time—even if the person has already gone through the process of trying to find buyers for the goods—say, 'Here's the interest that I didn't pay you and here are your costs of enforcing up to this point and we will return to the status quo.' That can go on repetitively. If a person is in default, our experience is that normally the financiers will not call up the loan and enforce unless they believe it is a serious issue. If they were able to be stopped each time by somebody paying them a bit of the interest and the costs and going into default a few months later and doing the same again, it would not really be appropriate.

So that touches on some of the larger issues that we put into our previous submission. As David mentioned, our addendum or supplementary submission, which you have there, is to deal with the suggestion of having two systems—one that clearly relates to companies and one that relates to individuals. In our view, as David has mentioned, there is already a national system for registering security interests by companies, which is the charges register under the Corporations Act that is maintained by ASIC. All the relevant referral laws have been passed, obviously, as the Corporations Act has been operating for many years.

The bill itself does not disturb some issues and actually acknowledges that the Corporations Act has merit in so far as it applies to security interests. It does not disturb the ability of a receiver to enforce as it sees fit, because the bill provides that if a receiver is appointed then it does not need to comply with enforcement restrictions in the bill. It does not seek to affect the ability to create fixed and floating charges. It just says that instead of calling them fixed and floating charges you would call them something else: a security interest over a circulating asset and over a non-circulating asset.

Clearly there is no intention to affect the register that is already there. If someone is dealing with a company, they will do a company search. They will do it at ASIC. That search will show the name of the company, its ACN and ABN, the directors, the shareholders and any charges registered against the company. So even if our suggestion were not adopted, somebody dealing with the company would still have to do two searches, one against PPS and one against ASIC, but they would still need to get the detail that is provided in a normal search of a company.

We concur with the joint submission that was made that the charges system is a flexible and clear system, that the priority rules are relatively few in number and have worked for a number of years and that there is a one-stop registration system. We have put this forward because it is clear from the submissions that there is a concern as to the complexity of the law. We have a concern that if you were dealing with an infrastructure project where you were financing a desalination plant or something like that, you would not expect to have to register under the PPS system rather than just lodge a charge against the relevant parties through a system which is already understood and in place and which is a national system.

The compliance costs involve complying with the PPS, and a large number of financiers in the market never, ever take security over personal property, certainly not of individuals. Essentially, they take charges from companies, they take real property security. Obviously, there are different types of charges, but personal

property securities from an individual is generally not part of a security package in a corporate or wholesale lending environment. Yet, even though you may have financiers who just deal in that segment of the market, they will now have to re-educate their staff, re-document their documents and change their systems to comply with the PPS regime, which, from their perspective, it would be reasonable to say, does not actually provide them with any great benefits because they already have a lot of those benefits in the Corporations Act.

CHAIR—Perhaps if we go to questions we might be able to tease out some more of these ideas. Have you been part of the consultations with the A-G's Department about this draft legislation for the last year or for longer?

Mr Faludi—Yes, we have had meetings with the Attorney-General's Department. We have submissions in respect of all the discussion papers and the previous draft bill.

CHAIR—So you have constantly put the position then that corporations should be excluded from this—

Mr Faludi—Just once at a meeting, but it was not seen as something that was likely to be accepted. So we have not pushed that particular point, but we have seen that there is now a Senate committee considering this matter. We felt that it was appropriate to raise it again.

CHAIR—When you say 'corporations,' you are referring to those companies registered under the Corporations Act?

Mr Faludi—Yes. The charges provisions also apply to a registered foreign body. So if you have an offshore entity that is registered in Australia and it grants a security over assets it has, then that is also registered.

CHAIR—So small business would still be part of this legislation?

Mr East—Small business operating through a company would be covered by the Corporations Act. Small business operated through a sole trader, an individual or a partnership would be outside the Corporations Act provisions.

CHAIR—It would need to be covered by this legislation, according to you?

Mr East—We see there is a benefit and that there are advantages in the legislation of bringing together the various state registers. We are not saying that the concept of a single national register for personal property securities for individuals is misconceived or unhelpful. We think it is helpful and a good idea. We are saying that the bill, in the way it has proceeded, adopts different approaches to substantive law issues. It follows a model from article 9 in the US. It treats security interests and transactions and the nature of security interests like leases, title retention and absolute assignments. These are areas where there is not a concern in the commercial world. It almost follows a philosophic approach between one regime and another. If you consider some of the detailed comments by us and others, particularly in the joint law firms' submission, the nature of the substantive law changes is at the heart of the concerns. There is a call for cutting that back and taking it back to its core intent of a national register system, not to create new law. Or, as would be our submission, you can deal with securities granted by individuals through the PPS and maintain the existing system, which is well understood.

CHAIR—But isn't the very thrust of this major law reform to actually take what is happening internationally and totally reform what is happening in this country? You say there is a philosophical difference, but isn't that the idea—to actually produce a new system here, to bring it all together and to have a unified system?

Mr East—I think that opens up the very core question: whether the reform intent is to address the difficulties associated with our federal system where we have the state registers and state legislation, dealing with bills of sale, crop liens and stock mortgages, and bringing that under one federal law which requires transfer of powers et cetera. Is it just to bring those registration systems together or is it an attempt to rewrite the law of security law in Australia?

CHAIR—And if it is the second?

Mr East—If it is the second, there is a question: why, what is broke and who is calling for it?

CHAIR—Wasn't that question asked four years ago when, even under the previous government, COAG first started this discussion and there was an agreement with the states and territories that, instead of having 70 pieces of legislation and registers, it would all go together? Isn't this about streamlining it, not that it is necessarily broken? Isn't it about streamlining, ease of access and modernising the legislation?

Mr East—That is right, although I do not think it has ever been articulated that there is a concern with the substantive law in relation to securities, that there is some mischief in the way we currently deal with the granting of security, the priority and the enforcement of security. The mischief is that each state has its own particular legislation, its own registration for goods and vehicles and various provisions. I guess the devil is in the detail. We are not dealing here with what you were saying, bringing all of those things together and having a single register system. At the same time we are making substantive law changes and that is the concern that is being echoed.

CHAIR—Why is that a concern? If we are going to modernise legislation and have a look at what has happened, say, in Canada and New Zealand and what is perhaps best practice in terms of what we would do here, what is the concern? Are you saying you support this approach, but not for corporations?

Mr East—I support a national register.

Senator TROOD—The argument has to be, does it not, that there can only be substantive law changes which are bad? That must be your argument because, presumably, you would support substantive law changes which actually modernise and are 'unmischievous' if I can use your term.?

Mr East—If there are concerns in the way the law operates today and there are things that should be fixed and there is general consensus on that then I would support that. I guess changes will change the way secured lending operates.

Senator TROOD—That is not necessarily a bad thing, but if there is complexity, uncertainty, confusion across eight, nine different jurisdictions—

CHAIR—Let me just follow this. Let me be a bit of a devil's advocate here and say that all of the submissions I have read, other than yours and the one that has been put together by the four major companies, actually welcome and call for this change. I put to you that perhaps you, along with the other four major law companies, are just protecting your patch by resisting this legislation change?

Mr East—No.

Senator TROOD—They will profit from it, anyway!

Mr East—Going back to Senator Trood—

CHAIR—Does this mean that you are not answering my question?

Mr East—No. I am looking at the value of the changes and asking the question: does it improve efficiency, does it assist the capital markets, will it assist in the way business operates?

CHAIR—Most people have put to us that yes, it will.

Mr East—In terms of a national register, absolutely. In terms of changing the way this country operates in understanding ownership, possession, title and leasing it is a different model. I guess there is an acceptance and an understanding of the current system and if this stays as it is, clearly the market will have to learn the new rules and the new system and will operate under that arrangement. The question is: is it assisting the community and the market? Does it add value or is it change for change's sake because it was adopted in the US 50 years ago, it has been adopted in some states in Canada and it has been adopted in New Zealand?

Senator TROOD—That in itself may not be enough to answer the question. I am sympathetic to you and I agree with the proposition that you and Mr Faludi have put regarding substantive changes in the law which deliver uncertainty and injustice. For example, with regard to this problem of perfecting entitlements where you do or do not register, which has been an issue drawn to our attention previously, that would be an issue that needs attention because it not only changes the law but actually potentially leads to a substantial injustice in relation to a lessor's entitlement to property. From my perspective, that seems to be an issue that requires attention, even though I could make a perfectly persuasive case that if you do not register then you should take the consequences of not registering your interests. And that is not unusual if you fail to fulfil processes in some areas. If you fail to lodge an appeal to a court in time then you lose your right of appeal, unless you can make a case et cetera. It is not unusual in the law to have situations where people fail to fulfil processes and take the consequences of that. That would seem to be a situation one could argue in this case, but it seems to have a very substantial, serious consequence to a person's interests.

The general point I am making is: if the law is changing and it is being modernised in a sense but it creates substantial injustices, that is not something, from my perspective anyway, that I would be inclined to support. If, however, the law is being altered, is delivering certainty, is being modernised and is more consistent with a

country which has essentially an integrated economy, then that makes a certain amount of sense, I would have thought.

Mr Faludi—The PPS is to go down from 70 laws to one, and that is fine. What we are suggesting does not really detract from that except that you are going from 70 down to two—and two which have totally different operations. One is clearly to do with companies and one is clearly to do with everybody else. I do not think we have put a proposal which continues the uncertainty or complication or creates multiple legal issues. We are not suggesting that the Corporations Act could not be amended; there might be some things in the PPS which actually have effect on companies granting securities and could be built into the Corporations Act to align them. But to have a total rewrite of the priority systems, registration systems et cetera applicable to companies—particularly for those financial transactions which never involve taking security over personal property of individuals—and changing the law as suggested it seems that it will require those financiers to incur substantial compliance costs and not really get too much benefit out of it. They already have a Corporations Act which they are familiar with. They know how it operates with the priority rules, the receivership rules and the insolvency rules that everybody is familiar with. I agree that, if we were advocating some system which resulted in multiple laws having to be complied with, clearly that is against the spirit and objective of the reform. What we are suggesting is to have two systems which operate side by side but do not actually cross over.

Senator TROOD—You have just brought this proposition to us, of course, and it deserves some consideration. Why that is not a satisfactory public policy position for it to take is certainly something that we will want to put to the Attorney-General's Department. We will look into that.

This seems to present a third position in relation to the law, because we seem to have a group of advocates for the legislation in its integrated form and the comprehensive changes that are advocated. At the other end, if we take the Allens, Mallesons et cetera position, they use the charming phrase 'cutback approach'. Then there is your position, which seems to be different again; I suppose it is closer to the other law firms, but it seems to be conceptually rather different. The question I have is: do you have sympathy with your brothers and sisters in the other law firms, leaving aside Clayton's position? Have you looked at their submission?

Mr East—Yes, we have sympathy with their submission.

Senator TROOD—There is some overlap in some of the submissions you have made, but are you sympathetic to their general approach to this legislation or not?

Mr East—We are sympathetic to their general approach.

Senator TROOD—You think the cutback approach has some merit?

Mr East—Yes.

Senator TROOD—But that is different to the one you have advocated in relation to the Corporations Law and the personal and individual, as I understand it.

Mr East—Although I think if you work through it, the cutback approach takes you closer to the existing Corporations Law charges regime, which is a system of registration and priorities. So it gets to the same result through a different means. It is an acceptance that there seems to be now a commitment to a system that covers corporations and individuals and a single register—in other words, the Corporations Act and charges register is not an option. If that is the case when the new legislation is presented, if we can cut it back to more of what we have got, then you achieve the same outcome.

Senator TROOD—Just to clarify, are the specific issues you have raised in relation to particular sections et cetera proposals for change that you have put to the Attorney's office?

Mr Faludi—In the submissions, yes.

Senator TROOD—Are they proposals which just have not found favour but you think they deserve to be pressed?

Mr Faludi—When the new bill came out we only lodged submissions, obviously, with the committee.

Senator TROOD—That is what I am asking, whether or not—

Mr Faludi—In the previous bills we did raise the same issues.

Senator TROOD—So some of these concerns are concerns that you have had consistently throughout the whole consultation process—

Mr Faludi—Yes, correct.

Senator TROOD—But some are new in relation to the new consultative draft. Is that right?

Mr Faludi—Yes.

Mr East—There are some new provisions in the consultative draft, particularly the new general duty of acting in a commercially reasonable manner—an overarching duty. We echo the comments by others that that would leave open opportunity for litigation and contention, and what does that really mean?

Senator TROOD—Section 235.

Mr East—Yes, 235. The other provision, section 181, about a grantor of security being able to pay the amount owing but not the accelerated amount, is a new provision, I think. I may be wrong on that, but certainly that is—

Senator TROOD—Would it be possible, Mr East, for you to disaggregate your submission so that we are clear which reforms or changes you are advocating as a result of the consultative draft that has emerged as distinct from the ones that you have been pressing all along? Could you just identify the ones that have emerged as a consequence of the new consultative draft?

Mr East—Yes, although obviously we are not going to do that now.

Senator TROOD—No, just take it on notice and provide it when you can.

Mr Faludi—Can I mention another point that is relevant to our approach: under the Corporations Act, as you know, there is a distinction between wholesale clients and retail clients. What we are suggesting is analogous to that, in a sense. You have the wholesale market, which does not take security over personal property from individuals, and then you have the retail market with the leasing and financing of cars, flat screen TVs and those sorts of things. We would say that that is the retail end of the market. What we are putting forward is a means of achieving a similar distinction, which has been seen as appropriate to make in other pieces of federal legislation because the interests and concerns and the things that need to be protected are different between a wholesale client and a retail client. I thought that might be worth taking into account.

Senator TROOD—Have you pressed that proposition over a period of time?

Mr Faludi—No.

Senator TROOD—There is a problem about whether or not registration or perfection should be conclusive, and you have raised the debating point about the confusion that is created here. What is your view on that, because existing law, as I understand it, is clear: if you own the assets, you are of course entitled to keep it and you are entitled to the value of the asset. But this proposal confuses that existing law by introducing the problem of registration. You might end up losing your priority. What is your view on what the law should be?

Mr Faludi—If the bill is intending to get away from technical ownership and is more focused on apparent ownership, then that is a big, substantive change, which you have acknowledged. If leases and 'security interests' where the security holder is actually the owner of the asset are to be caught by the legislation, then registration should essentially be paramount—

Senator TROOD—So you are saying that it should be compulsory?

Mr Faludi—What I am saying is that if something is registered—and as you say if a person fails to register something, that is their concern—people should be deemed to have knowledge of the registration. I have to say that the knowledge section was improved substantially from the original draft and now contemplates there being deemed knowledge in certain circumstances. My concern is that there may be certain circumstances where you cannot rely on the deemed knowledge. There are other sections of the bill that talk about 'actual knowledge' and it is very hard to prove that somebody had actual knowledge of something because they will obviously say that they did not have knowledge if they want to argue about it. If by having something on the register people are deemed to have knowledge of it, then that should go a long way towards overcoming the possibility of third parties or other people getting security and claiming that they have priority over the original security holder because they will be deemed to know that there is a registration and that they have to perfect its exchange.

Senator TROOD—As a legal principle, are you comfortable with the idea that there should be deemed knowledge if you are registered?

Mr Faludi—Well, it is a public register—

Senator TROOD—Absolutely!

Mr Faludi—I am happy with that, yes.

Mr East—I think that if you have a register then—

Mr Faludi—It has to have a consequence.

Senator TROOD—I am not troubled by this proposition; it seems to me to be pretty straightforward.

Mr Faludi—If there is a register, it should have a consequence. Unless there is a consequence like that there is really—

Senator BARNETT—Then why have a register?

Mr Faludi—Well, yes.

Senator TROOD—But you are saying to us that there is a bit of confusion about deemed and actual knowledge through the bill and it needs to be clarified as to whether or not one applies. Are there circumstances that you can think of where one needs to make a distinction?

Mr East—The broader question is the way in which the bill deals with ownership transactions as if they were security transactions. That is particularly in relation to leases where the lessee of the asset is treated as if they are really the owner and that they have granted a security interest back to the real owner—that is, the lessor.

Senator TROOD—That is the point that Mr Faludi made earlier, as I understood it.

Mr East—That the real owner can lose title by something that the lessee is doing.

Senator TROOD—Indeed. That has potentially serious consequences for a very large and valuable asset, doesn't it?

Mr East—Yes, like a dragline.

Senator TROOD—Or a bulldozer or something like that.

Mr East—Or a new Boeing 777 aircraft.

Senator TROOD—Yes. So that has serious consequences. The question is: what do we do about that?

Mr East—It goes back to this question of: does this bill need to make substantive law changes or does it just address the plethora of state based registration and security interest laws?

Senator TROOD—You can take us back there, Mr East, but you can also deal with the substantive question.

Mr East—To answer the substantive question, I think the legal system should recognise ownership and should protect ownership, whether or not you actually continue to possess and control the asset.

Senator TROOD—If you have lost the argument about disaggregating the corporate law from the individual thing and we are now dealing with this omnibus bill, tell us how to solve that problem of ownership.

Mr East—The solution to that problem of ownership is to recognise that the way in which the title to the asset can be lost should never cut across a circumstance where the true owner has not done something to lose their title. In other words, in the case of a lessee, they should not be able to defeat the interests of the lessor when all the lessor has done is give the asset, by way of lease, to a lessee.

Senator TROOD—But if a lessee then seeks security over that asset fraudulently—as it would be, because it is not their asset to seek—

Mr East—For example, to transfer to someone else—fraudulently, because it is not theirs to give—

Senator TROOD—Precisely. That would be a fraudulent act, as I understand it.

Mr East—Yes.

Senator TROOD—If the lessor's interests are thereby compromised, how do we protect the lessor's interests? Is it enough if the lessor registers the interest or the transaction? Is that enough to solve the problem? Does that protect the interests? I agree with you. I think this is a really—

CHAIR—You have had half an hour now, Senator Trood.

Senator TROOD—Have I?

CHAIR—I have a few questions, and I am sure Senator Barnett would like to have a go.

Mr East—There are some recommendations of detail in the joint submission that would be worthy of consideration on this point.

CHAIR—Mr East, when the first options paper was released in 2006, did your firm get involved in the discussions? Have you been involved in the discussions over the last three years or only since last year?

Mr Faludi—I was at a previous firm at which I lodged submissions on all three discussion papers.

CHAIR—Yes, but along the same lines as you have put to us today?

Mr Faludi—I believe the first submission that I lodged for the first discussion paper raised this issue about the Corporations Act and charges, because that was the time to raise it. Subsequent to that, after I had moved to DLA Phillips Fox, we had a meeting with the Attorney-General's Department and we raised it at that meeting.

CHAIR—That would have been last year some time—is that right?

Mr East—Early to mid last year.

Mr Faludi—At which time we were pretty much given the impression that that is just not an option. That is why we have not pursued it further.

CHAIR—Have you seen the commentary on the exposure draft?

Mr Faludi—Yes.

CHAIR—It actually outlines why the PPS reform is necessary. It says:

Australian finance law has failed to keep pace with these changes.

There is now widespread recognition that such considerations are immaterial to the substance of secured transactions.

It goes on to outline why it believes that finance law imposes unnecessary red tape and outlines in four quite succinct paragraphs, I think, why there is a need to modernise and change this law. Are you not convinced by these arguments or do you not agree with them?

Mr East—We are not convinced.

CHAIR—What evidence do you have for us that suggests that these conclusions are not accurate?

Mr East—As we mentioned before, in terms of the core concern, the national register and dealing with the state based legislation governing security interests, this is a valuable and useful reform—no question. But the changes to the way in which security interests are preserved and enforced, the ability to lose priority, to lose control: those areas of the substantive law are not areas that I understand this market to have a concern about.

CHAIR—So where this paper says, 'Australian finance law must be reorientated around the rights of parties to enforce their interests in personal property in the event of a debtor default,' you would say Australian finance law does not have to be reorientated, that it is okay as it is? There is no demonstrable proof that it is not working, so leave it alone?

Mr East—There is no demonstrable proof in the context of corporations granting security.

CHAIR—So only in respect of corporations, but not small business or individuals?

Mr East—That area of the law does need reform.

Mr Faludi—What we are saying is that we are not disputing those outcomes, but we are saying that those outcomes are outcomes that are relevant to—

CHAIR—Everyone else but us?

Mr Faludi—No, everybody else who is not already covered by a national system that everyone understands and has been around for however long. Those recommendations are dealing with a system which needs to be simplified. What I am saying is that the system that needs to be simplified is not the system that applies to companies because they already have a simplified system under the Corporations Act and a national register. We are not actually disputing those outcomes or conclusions, but what we are saying is that those conclusions are relevant to that area of the market, rather than the other area of the market. I think there has to be an understanding that, in the same way as the FSR legislation distinguishes between wholesale and retail and different disclosure requirements, there is a distinction between corporate financing, larger infrastructure project financing and things like that and the financing of a small business—there just is. That is why those conclusions are correct in relation to that part of the market. That is where—

CHAIR—How do you get around the fact that there might be some times when corporations do actually finance smaller arrangements or finance individuals? Does that mean that they are in this legislation some of the time but not all of the time?

Mr Faludi—No. If the grantor of the security—the person who is granting the mortgage over their TV or car or whatever—is not a company then they would be covered by PPS.

CHAIR—What if it is a corporation?

Mr Faludi—A corporation granting the security?

CHAIR—Yes, over an individual, and it is for a TV. What if it is? I cannot understand why you want to fence everyone else but not corporations.

Mr Faludi—Are you saying if a corporation granted a mortgage over a television?

CHAIR—Well, if it was something simple, like a boat, a marina, a catamaran or something.

Mr Faludi—And it was owned by a company?

CHAIR—Owned by an individual.

Mr Faludi—If it is owned by an individual then it is covered by PPS. We are saying if it is owned by a company. The grantor of the security—

CHAIR—That company might be two people.

Mr Faludi—Okay. Then the multiple registration system should not necessarily apply because the security being granted over it would be registered as a company charge, or a charge over that boat, because they already are subject to the Corporations Act.

CHAIR—Yes, but I cannot quite get a handle on why you believe they should be excluded in this instance.

Mr Faludi—We have taken an approach of company versus non-company. I am not saying that there are no situations where you might want to have a monetary threshold or have a wholesale/retail distinction like in the FSR, but I think there does need to be an understanding that there is a difference between one end of the finance market and the other. We have got one end of the finance market that has a system that applies to them which they all understand and it perhaps does not give that end of the market any benefit in going into this system, which is more appropriate to the other end of the market.

CHAIR—If there was an FSR or a monetary component then what would it be, or what ought it to be? What do you think it should be?

Mr East—At the moment there is a reference in the bill to $5,000 as a threshold to recognise the low end, but the question of dealing with the concerns about substantive law change is really the nub of why we have put forward this proposal. If those issues can be addressed in another way then that would be a satisfactory outcome.

CHAIR—What is the other way?

Mr Faludi—The cutback suggestion.

Mr East—Recognising that the way in which the legal system operates in Australia over security interests works well. What does not work well is a state based set of registers for, predominantly, consumer goods. That is what this PPS system addresses very well, and that is a good thing, but in doing that it is shifting the balance, changing the ground rules, for a system that worked well. That is the nub of the friction in here.

CHAIR—You put to us in your submission that you think it is a system that works well.

Mr East—Yes.

Senator BARNETT—I think most of my questions have been covered, and I appreciate your comprehensive responses to the questions that have been put, Mr East. Just for clarity in regard to chapter 2K of the Corporations Act and to remind us exactly how the registration system works, can you describe for us what is on it, what is required and what is not on it?

Mr East—The charges provisions in chapter 2K require companies that grant charges to register those charges within a certain period. It defines a set of charges that must be registered, including a floating charge. It does not deal with charges over land, for example, because it recognises that there is a system for that. And there are certain possessory type securities where the control over shares, for example, does not need to be registered by a company. The most common form of corporate security is a fixed and floating charge by the

corporate. That must be registered. There is a system of priorities that are governed. So it is a registration system and a priority system. Then there is whole body of recognised general law that deals with the creation of security interests, when they can be enforced and the law of receivership. That body of law is derived from English law. It is a registration and priority system for company charges.

Senator BARNETT—Relevant to corporations, of course.

Mr East—Only.

Senator BARNETT—Only. Let's get clarity on what it does not cover. For corporations it covers whatever the entity is—whether it is a vehicle, a crop or anything else.

Mr East—Yes. If it is a mortgage over wheat, cropland, and it is in the nature of a charge—which includes a mortgage by a company—

Senator BARNETT—So tangible and non-tangible.

Mr East—Tangible and non-tangible. In that case, it is required to be registered and the provisions in that section say that, if you have registered there, you do not have to register under the various state provisions.

Senator BARNETT—I am just trying to compare that to what the proposed PPS would cover. Are there things that it would cover that the Corporations Act is not covering?

Mr East—One of the core differences is that under the corporations provisions it must be registered; registration is a requirement. Under the PPS it is not mandatory.

Senator BARNETT—You would be silly not to, though, wouldn't you?

Mr East—You would be silly not to if you are the beneficiary of a security interest.

Senator BARNETT—If you are the grantor?

Mr East—No, if you are the beneficiary. The grantor grants it to the security holder, so the security holder would want to be registering.

Senator BARNETT—Is there anything else that it does not cover?

Mr East—In some ways the PPS is wider. It says that any security interest, even those that are in the nature of possession, can be registered. It can be in the nature of leases, which are not strictly security interests, and title retention arrangements. Anything in the substance of a security interest can be registered. So it broadens out the circumstances.

Senator BARNETT—So the definition of what can be registered is broader?

Mr East—Yes.

Senator BARNETT—What impact does that have? It gives a broader scope, but what else does it do? Does that say that the Corporations Act should perhaps be amended to broaden it? If you are not going to have two systems under your possible proposal, you are going to have one system that is slightly different from the other. Corporations is not going to have as broad a scope as the PPS? Is that correct?

Mr East—If you assume for a minute that you have two systems and that the existing system for charges is not changed and that the PPS is as currently drafted, yes. You could bring it into alignment. But if you brought it into alignment there would be no point in having two separate ones.

Mr Faludi—You could bring them into alignment but there would be opportunities where that alignment is limited to things where there is a crossover. For example, if, for whatever reason, leases, despite the problem we have raised, have to be subject to PPS, I suppose they would not need to be subject to the Corporations Act provision. There is a reference in the PPS bill to serial numbered goods, and you need to register serial numbered goods. There is actually flexibility already in the Corporations Act. When you lodge a notification of your charge, you can attach to the form that you lodge electronically online a list of all the serial numbered goods. So there is already flexibility to cover that. So there may be provisions to bring them into alignment, but if that were to occur we would be advocating that it be limited because the priority rules, the registration rules and the application consultancy laws are already there.

Senator BARNETT—Have you bounced this around with other colleagues in your profession and in the banking and financial world? This is a proposal in your submission, and we have the supplementary paper that you tabled today. Have you got feedback on it from others, and what has the feedback been?

Mr East—We have not done extensive consultation.

Mr Faludi—Because of the time frame—it is not going to become law until 2010 and then there is a two-year transition period—the number of people who are focused on the legislation is a lot less than the number of people who are not. So it is often difficult to engage people in discussions because it is something they have not really focused on.

Senator BARNETT—A number of the major substantial law forms, including you, have made submissions. Why is that? You obviously act in this area. You represent a whole range of clients with interests in this area—financial, business corporations, whatever. You are doing it because you want to see improvements in the law, but we have only had 31-odd submissions. We have had submissions from the Bankers Association and a few of the key players but we have not had dozens of your clients submitting their views.

Mr East—I think one of the reasons around that is partly that there are a lot of compliance requirements—anti money laundering, new consumer credit laws and privacy—that are being actively considered at the moment. The financial community are very aware of this reform but it has not yet stopped moving. There are consultative drafts and exposure drafts. It is an area where financiers turn to their lawyers about security. There is not really enthusiasm for the detail; they just want to know that they are properly protected. Hence, it is an area for heavy involvement by lawyers to consider perfecting security and having the right enforcement regime. It is a fertile area for—

Senator BARNETT—I do not think we have the finance section of the Law Society appearing before us. Have you discussed it with them?

Mr East—We have not discussed it with them. I know there were discussions on this issue at the banking law association meeting in the middle of last year and there have been papers on it. I may not have mentioned at the start that we have offices in New Zealand and our lawyers and partners who practise in this area understand PPS. It is a system that can work. The question is: do we get benefit from the changes? We get benefit from a national register. We get benefit from removing the plethora of state laws. Do we get benefit from changing the substantive law? That is the key question.

CHAIR—Mr Faludi and Mr East, thank you very much. We have kept you a very long time. I hope that has been okay. We certainly appreciate your time this afternoon. Thank you again.

Mr East—Thank you.

Proceedings suspended from 3.36 pm to 3.54 pm

GILBERT, Mr Ian Bruce, Director, Retail Regulatory Policy, Australian Bankers Association Inc.

CHAIR—Good afternoon and thank you very much for your time this afternoon, Mr Gilbert. The Australian Bankers Association has sent a submission to us, which we have numbered 24. Before I ask you to provide some comments about the submission, do you need to make any changes or provide us with additional information?

Mr Gilbert—No, thank you; I am happy with the submission as it stands.

CHAIR—I invite you now to talk to the submission and at the end of that we will go to questions.

Mr Gilbert—I thank the committee for the opportunity to appear. I only want to make a couple of opening points. The first is that the ABA supports this PPS reform in both elements: the concept of the national register and also the substantive law reform. The second is that the Attorney-General's Department is to be commended for its consultative processes over the period of time that this has been developed. The association is very appreciative of the time and attention that the Attorney-General's Department has given to assisting us to understand things.

The national electronic register and the law reform together are an important microeconomic reform initiative. It is going to replace a patchwork, a collection, of state and territory laws and also state and territory registers. Some 70 statutes are to be folded into a single, unified, national regime. It is obviously of interest to the banking industry—banks being companies that operate in a national context—that there be a unified national approach to personal property security. One need only reflect on the decision by COAG last year for this federal government to accept responsibility for the regulation of consumer credit nationally so that we do end up with a single, national, unified law, with a single regulator and not eight different regulators looking after that law. That is a positive: it is a good thing for consumers and it is a good thing for the finance sector.

While the PPS law reform—the substantive law reform—is a new framework for Australia, it is not necessarily an untested framework, and I am sure the committee has heard evidence about the genesis of PPS law 50 years or so ago in the United States and adoption of those models by Canada and New Zealand, and Canada and New Zealand are both countries that have derived their legal history from the English common-law legal system.

Understanding and implementing the new law for financial systems will be a significant task—particularly developing information technology systems to interface with the national register. That will be a large task and it will be an expensive task but, at the end of the day, we consider it is a worthwhile thing to do.

Implementation requires two certainties. The first certainty is that implementation cannot really start in earnest until the final law is known, settled and understood, and we expect that to occur sometime later this year, in the second half of 2009. It is only then, when the black ink is on the page, including the regulations, that our members can sit down and say, 'Right. This is what we have to do; we know what we have to do and this is what we are going to do about it.'

The second certainty is the commencement date. It is very important to know what date you are working towards. We anticipate it is unlikely that the terms of the legislation will be finalised until quite late this year, so a commencement date in May 2010 would be far too soon to allow banks to get all their systems, compliance arrangements, documentation and everything else redone to take advantage of the new law. There are other factors also that come into the timing of the commencement. There is the electoral cycle. There are other legislative reform initiatives that I am sure the committee is aware of which are significant in terms of resourcing by our members as well. They include the national consumer credit legislation project, which is a two phase project—the first phase will be completed in July this year and then the second phase next year in 2010—reform of privacy laws and so on.

As a result the ABA believes that, taking all of those factors into account, a commencement date in the third quarter of 2011 would be an appropriate date for the regime to commence. This would also allow those who have submitted concerns over certain technical and other aspects of the reforms to work through and resolve them leaving adequate time at the end of that for the implementation of this nationally worthwhile project. Thank you.

CHAIR—Thank you very much, Mr Gilbert and thank you for your submission. You made a comment on page 2 about the current financial market conditions. We have had mixed views put to us about whether or not this is the right time to make a change such as this given the financial market we find ourselves in. Your

submission suggests though that you believe there is sufficient time for the bill to actually be understood and implemented and that might see us through this current scenario. Could you provide us with a comment about that?

Mr Gilbert—I think the timing is the issue that will get everybody over the hump, if I can put it that way. Current market conditions still mean that the industry certainly has to keep business flowing and to keep credit flowing. The government is obviously very keen to ensure that that credit market is maintained and that there is adequate supply of credit out there, so we will be in the business of providing credit. That is an important thing that needs to happen. The question is really: when do you start something like this? With the banks going into this with their eyes open and understanding the current situation we are in, they support the reform going forward on the basis that there is an adequate time prior to commencement to allow all of these things to be done in an orderly and sensible way.

CHAIR—In terms of the information technology issues, has some work been started on them or are you waiting to see what the legislation is going to look like in its final form?

Mr Gilbert—There are 80 people from our members and other parts of industry engaged with the Attorney-General's Department. There have been two meetings to date to start to develop the look and feel of the register. As you are probably aware, consultants have been arranged to design the register and that work is starting now but of course the law drives to a large extent what must be reflected in the register. Those two need to come together at some point and the law will not be settled fully until the end of the year.

CHAIR—I am sure my other colleagues here will raise that you mentioned section 235. I will leave that to them because they will probably enjoy asking questions about that.

Senator BARNETT—All right. Why don't we kick off with that? Mr Gilbert, thank you for your submission and advice today; it is appreciated. In terms of section 235 and your strongly held views concerning the words 'a commercially reasonable manner', have you consulted with your members about this and other parts of your submission?

Mr Gilbert—The submission was certainly approved by members before it was provided to the committee. That is standard practice within the association. The 'commercially reasonable manner' is another test that is being put into a piece of legislation. We have other pieces of legislation with different tests. We are not sure what 'commercially reasonable manner' means. It applies to all parties in the PPS transaction, in respect of all aspects of the PPS conduct and in terms of the legislative requirements themselves.

It does introduce a level of uncertainty. There are different tests in the Corporations Act. There are common law tests, for example, on what a credit provider should or should not do if they have to enforce a credit facility. There is a provision in the consumer credit code which talks about what a mortgagee's obligations are in realising on a security. Firstly, this is adding to a patchwork of tests that we believe is unnecessary because there is also common law. Secondly, it is introducing an area of uncertainty. It is not that we are seeking licence to behave in an inappropriate way; it is what 'commercially reasonable manner' means, particularly when, unfortunately, sometimes credit facilities need to be enforced. Commercially reasonable is part of that equation to the extent that we understand what that means, but there are certain other necessities that need to be taken into account, including prudential requirements.

Senator BARNETT—When you talk about the patchwork of regimes that cover this area, what are you referring to? Are you talking about the Trade Practices Act and consumer credit legislation, or what?

Mr Gilbert—Certainly both the ASIC Act and the Trade Practices Act in terms of behaviour—unconscionable conduct provisions, deceptive and misleading conduct provisions and so forth.

Senator BARNETT—Are you saying that the legislative regime in those different areas is adequate as it is?

Mr Gilbert—We believe so. The courts certainly keep their eye on what I would describe as egregious behaviour, and these statutes along with the body of common law certainly can be relied on. It is what new flavour or what new aspect of commercial dealings that 'commercially reasonable manner' brings with it. It is an element of uncertainty.

Can I also add that this law is basically related to simplifying the law surrounding personal property securities. The establishment of a single national electronic register is going to put greater efficiencies into the credit market in relation to personal property securities. It is unclear why a provision such as that should find

its way into that piece of legislation when in fact there are other pieces of legislation with different tests or measures depending on what circumstances are involved. It is that area that we have some concerns with.

Senator BARNETT—That is a good point. Would you take on notice and advise the committee of the other areas where it is covered and those where it is not covered. We have been advised of the Trade Practices Act and consumer credit, but if there are other legislative instruments that you could point to and that you would feel happy to advise the committee of through your lawyers or through your association that would be of use to us. Frankly, this is an area of contention and there are arguments both for and against, and as a committee we have to balance them. At first instance everyone would say: 'What is wrong with that. It has to be commercially reasonable.' So I think there are arguments for and against. If you have any further particulars you would like to share with us, please let us know.

Mr Gilbert—I will do that.

Senator BARNETT—Just on the issue on conflict of laws, which is on the fifth page of your submission, you note that the bill does not cover the conflict of laws—

Mr Gilbert—International conflict of laws.

Senator BARNETT—Yes. But you think it should.

Mr Gilbert—Yes. We would support that. We see good reason for doing that. The other jurisdictions have done that, and I think it is a point that has been made in a number of submissions. We would certainly be supportive of that.

Senator BARNETT—Have you had a look at attachment A and model A in the exposure draft? It is appendix A.

Mr Gilbert—Not in any detail.

Senator BARNETT—Would you be happy with that, or is it too early for you to say?

Mr Gilbert—It is too early for us to say. What we do believe is important and necessary is to ensure that the international dimension of conflict is dealt with. We would obviously be happy to discuss the ups and downs of that model.

Senator BARNETT—That is there, and I draw it to your attention. There are two other areas that I want to touch on. Firstly, leasing has come up a number of times and in a number of submissions, including today, from witnesses. There is a strong argument that sections 234 and 235 go too far and that there should be exemptions to protect owners of property who lease equipment, perhaps of a substantial value. Unless they register under the PPS regime, they potentially lose right and entitlement to that. Do you have a view on the issue of leasing?

Mr Gilbert—I think an important purpose of a register is to ensure that whatever interests are claimed in personal property by way of security can be known and that any proceeds can be traced through that reservation—that registration.

Senator BARNETT—I just draw it to your attention. The view from a number of witnesses is that it would be unconscionable or unfair on the owner of that equipment or that property. If they did not register, they would lose their right and entitlement to that. Perhaps in an insolvency situation they would end up with 5c in the dollar, like everyone else, rather than maintaining their interests in that property.

Mr Gilbert—We have not considered that. It would just be routine for a bank to ensure that whatever transaction was in the nature of a PPS that it would be register, or it would rely on the control mechanisms for perfection.

Senator BARNETT—You could develop those habits very swiftly, I am sure, and it would not be an issue.

Mr Gilbert—I am sure there are plenty people around who would ensure that we did.

Senator BARNETT—Yes, indeed. The final area of special interest for a range of people, Particularly on the consumer side,is privacy. Have you considered the area of privacy? I am sure that it comes up regularly at your association meetings and with your members. We regard to the proposed legislation, we would like to know whether you think the balance is right with respect to privacy, what should be on the register, how should the interests of the consumer be protected and is the balance correct?

Mr Gilbert—Perhaps if I could just preface my response by saying that there seems to be a particular concern about name and address information on the register. I noticed that the Security Interests in Goods Act 2005, NSW makes provision for that. You must include that.

Senator BARNETT—Name and address?

Mr Gilbert—Yes, name and address in a registration.

Senator BARNETT—And date of birth?

Mr Gilbert—Not a date of birth but certainly name and address. I am not sure whether date of birth will or will not be included. The regulations for the register have not been completed. I did look at the Privacy Commissioner's submission, and it contains a list of key points that were being made. I felt that that was quite a reasonable and sensible approach to matters that might concern people concerning privacy. They seem to be thought through and not unnecessarily disruptive of the key objective here, which is about having a national register that is robust and sufficient enough to ensure that, if there is a security interest out there, you will know about it if you are thinking of acquiring a piece of personal property.

Senator BARNETT—So you would not have any opposition to a privacy impact assessment being undertaken?

Mr Gilbert—I do not see that that is something that the ABA should necessarily concern itself about. I simply say that the recommendations that the Privacy Commissioner was making seem to me balanced and sensible.

Senator BARNETT—Did you look at the regulations at all last year when they were promulgated?

Mr Gilbert—We did. We made a submission on the regulations last year.

Senator BARNETT—Do you have any concerns with them or views that you wish to advise the committee?

Mr Gilbert—Not in particular. They were more administrative types of issues. The regulations are really the workhorse. Effectively they are going to dictate what we need to do. We were more concerned with issues of technicality and so forth: how they would work, what it would look like, what sort of screens will be available—all the operational side of it, which is what regulations are really all about. That goes back to the point that until all that is done it is very hard to start the serious business of implementation.

Senator BARNETT—Thank you.

Senator TROOD—Have you looked at the submissions from the four large law firms?

Mr Gilbert—I have looked at some of the material in the firms' submissions; I have not been through them in a high level of detail.

Senator TROOD—You have perhaps had enough familiarity with them to express a view of the position that they set out, which is essentially in opposition to elements of the legislation. Does the association have a view about their position?

Mr Gilbert—Not in an adversarial sense, no. The association's view is quite a simple one: they are very supportive of the two-pronged PPS reform proposals—register and substantive law reform—and they are keen to see that delivered given that there is reasonable time to ensure that we can implement it.

Senator TROOD—Allowing that you have not looked at the specifics of their submissions and some of the detailed criticisms they have, you do not share the reservations that they have about the complexity, injustice and uncertainty likely to be created by the legislation?

Mr Gilbert—We do not share that view. I think the legislation is something that obviously needs to be fully understood, and time will ensure that that happens. The evidence from both Canada and New Zealand is that there have not been such levels of uncertainty that would cause us to reflect on whether this is the right course to go down. Some of our members have significant banking interests in New Zealand and are obviously aware of how that has been working in New Zealand, and those concerns have not come to the surface in our discussions. The questions of uncertainty may materialise in the minds of some who may have a strong adherence to the existing system, but I can only point out that in times of difficulty—in two previous economic downturns in Australia—the common law in relation to the enforcement of securities and the rights of secured creditors and others is continually subject to change. So I do not support the view that a codified approach to PPS necessarily increases levels of uncertainty. There will always be uncertainty and there will always be litigation. Bear in mind that in the current state of play there are many security interests that are

incapable of registration in the states and territories. So there are all those sorts of legal disputes to have to unwind under the current system. This system should at least deal with all of those uncertainties.

Senator TROOD—I think you were in the room when the last witnesses were giving some of their evidence. They were putting the proposition to us that the legislation should be divided and that the existing rules which apply to corporations, which are extensive and cover many of the proposed reforms here, are already in place and that we ought to have a separate set of rules for individuals and perhaps have smaller transactions. Do you have any sympathy with that argument?

Mr Gilbert—No, not really. The reason for that is that there are many small businesses that are incorporated entities and there are many farming enterprises that are incorporated entities, and this law is going to enable, for example, a business that wants to sell goods on a reservation of title basis—that is, retaining title in the goods until they are paid for—to give notice to the world that it has that interest. At the moment, it is unable to protect that in any particular way. That is often a common cause of litigation in a receivership or insolvency situation. This law also creates some additional benefits for rural producers in terms of taking security interests over stock that they may not actually own at the moment. They can take that prospectively provided the stock is taken in within six months. There is a comingling provision that would allow a variety of security interests in grain, for example, to all be proportionately distributed when all the grain goes into the silo and it is just one commingled mass. They are things that currently do not work under our system, and there are benefits and potential innovations in financing, given the novel approach that this law takes over the Corporations Act, which is entirely proprietary based.

Senator TROOD—I understood them to be saying that we have a parallel system for corporations and other enterprises or individuals and that, in relation to corporations, much of that legislation was already in place, so we did not have to do a great deal of work. But clearly we would have to do work, as the bill suggests, in relation to individuals and enterprises. That separation between those two commercial activities does not commend itself to you. If we can allow those comingling exercises in relation to corporations, for example, and the leases over livestock et cetera—things that may not be covered at the moment—would the division have any virtue, from your perspective?

Mr Gilbert—No. As I mentioned, the banks are basically nationally operating entities. There is an opportunity to refine security agreements significantly. With a unified national approach, relatively few security agreements are really going to be needed because they will all meet the requirements within the system, whether the entity that is granting the security is an individual, a partnership, a trust or a corporation.

Senator TROOD—Thank you for that. On this matter of timing, May 2010 is too early, assuming the legislation is through the parliament by the end of this year, but you suggest the third quarter of 2011.

Mr Gilbert—September 2011, yes.

Senator TROOD—It seems a long way down the track.

Mr Gilbert—It is a long way. But there are factors that we have taken into account. Let's assume that the work of implementation really starts in earnest once the legislation is through and we know exactly what it is we have to do and the regulations, of course, are finalised at the same time. The government then has to complete its project in terms of building the national register and the banks have to then develop their IT systems and interfaces to work with that register. Demands within banks for IT enhancements will not be just confined to PPS in this period. There will be many projects, including the credit legislation, privacy and whatever else making demands on both the IT systems and resources. So there is a time factor here.

The sorts of things are documentation reviews, system reviews and staff training. All of these things are very standard in dealing with a new regime and they take time if you are going to do it properly. There is also the electoral cycle. This is coming towards that point in terms of timing. As I said, there are also general demands on institutions' time and resources with regard to other initiatives that need to be undertaken.

Senator TROOD—Did you say the third quarter of 2010 or 2011?

Mr Gilbert—2011.

Senator TROOD—Is that your most wishful thought or is it what you think you need as a minimum? What if the committee said, for example, 'That is plainly too far away'? I have some sympathy with your view that May next year may be too early if it does not emerge from the parliament until late 2009. But if we said 1 January 2011 or 30 June 2011, is that practical?

Mr Gilbert—1 January is never a good date to start any new regime. It is perhaps one of the worst. If it starts midyear, it should ideally be either side of the end of the financial year—

Senator TROOD—I was thinking about the financial year.

Mr Gilbert—because that is always a busy time as well. You are really looking at the first quarter, March-April, or August-September. Allowing room for unforeseen things, it would be prudent to take that extra measure of time if it is only a matter of three to six months. This regime goes right across the banking finance units of banks. It is not just in one department. It is right across the spectrum. It brings in a whole lot of other people, including systems and so forth. It is a big exercise, a substantial exercise, and it will cost quite a lot of money to do.

Senator TROOD—We will think about that introduction date. What about the two-year transition provisions? Are they, in your view, adequate?

Mr Gilbert—Yes. That is basically to take account of the migration of data that has to come from the proliferation of state registers. That has been discussed at length with the Attorney-General's Department and we are quite comfortable with what is needed there.

CHAIR—Mr Gilbert, thank you very much for your time this afternoon and the effort that has gone into providing this committee with your submission. We appreciate that.

Mr Gilbert—Thank you for the invitation.

Committee adjourned at 4.28 pm