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STANDING COMMITTEE ON ECONOMICS

**Reference: Trade Practices Amendment (Cartel Conduct and Other Measures) Bill
2008**

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**SENATE STANDING COMMITTEE ON
ECONOMICS**

Monday, 16 February 2009

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

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

Senators in attendance: Senators Eggleston, Furner, Hurley, Joyce, Pratt and Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

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Committee met at 8.30 am

ABBOT, Ms Simone, Acting Senior Adviser, Competition Policy Framework Unit, Competition and Consumer Policy Division, Department of Treasury

HOLDAWAY, Ms HK, Acting General Manager, Competition and Consumer Policy Division, Department of Treasury

ROGERS, Mr Scott, Acting Manager, Competition Policy Framework Unit, Competition and Consumer Policy Division, Department of Treasury

CHAIR (Senator Hurley)—I declare open this hearing of the Senate Standing Committee on Economics inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008. On 4 December 2008, the Senate referred the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 to the committee for inquiry and report by 26 February 2009. The purpose of the bill is to get tough on hard-core or serious cartel conduct by applying criminal sanctions. The bill provides that a corporation commits an indictable offence if it knowingly makes or gives effect to a cartel provision. The bill defines a criminal cartel provision as relating to conduct described as price-fixing, restricting outputs in the production or supply chain, allocating customers, suppliers or territories or bid-rigging. Corporations found guilty of this offence will face a maximum penalty of \$10 million or three times the value of the benefit obtained as a result of committing the offence. Individuals found guilty of cartel conduct face a maximum jail term of 10 years and a fine of \$220,000. These amendments give effect to the government's pre-election commitments.

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

Ms Holdaway—I have a short one. We very much appreciate the opportunity to discuss what we consider to be a very important bill in the competition policy arena. The bill is obviously designed to criminalise serious cartel conduct and, with that in mind, I think the current global financial crisis certainly reminds us that well-functioning markets are very critical to the wellbeing of citizens and to long-term prosperity. In this context we all know that competition is really at the heart of well-functioning markets and that restricting such competition can harm consumers and can harm growth potential, because it reduces the quality of services and goods and increases prices, and often it can remove incentives for firms to compete and innovate. It is also a well-known fact that, of all the different conducts, cartel conduct is probably one of the most harmful anti-competitive conducts that we see. We believe the passage of the bill will further promote competition and better facilitate well-functioning markets in two ways. Firstly, it will provide a deterrent effect so that firms do not engage in cartel conduct and, secondly, it will assist in detecting existing cartels in the market by providing the right incentives to the individuals involved.

We believe the bill is designed in such a way that it will allow proportionate responses to be provided depending upon the seriousness of the cartel detected. Following extensive consultation, it is our belief that the bill strikes the right balance between providing strong enforcement to promote competition and providing commercial certainty. Thank you for the opportunity to provide some introductory remarks, and we are happy to provide answers to any questions the committee may have about the bill.

CHAIR—Thank you. I think it is quite widely agreed that we do need to strengthen the sanctions against the conduct of cartels. Is this legislation based on any particular legislation from other countries or is it an amalgam?

Ms Holdaway—Very much so. It has been influenced largely by the developments in the international forum, particularly the OECD. For many years the OECD has been promoting the articulation of clear conduct that falls within the realm of cartels and providing very strong enforcement regimes to support that. So, very much so. Many of Australia's trade partners follow very similar regimes. My colleagues might be able to let you know which countries that includes.

Mr Rogers—It is probably worth saying that the design of the bill is built on the work of the OECD, which has been strongly recommending that countries review their existing cartel arrangements and ensure that they are adequate to meet the needs of a globalised market. The work that it produced in 1998 was a recommendation concerning hard-core cartel conduct. The OECD recommended that, in light of that work, member countries review their laws and ensure that they have effective sanctions and regulatory arrangements in place. So a lot of the design of the bill and the offences in the bill are taken from the work of the OECD and the particular conduct that it identified as being hard-core cartel conduct.

CHAIR—In the OECD countries, how many prosecutions have there been and with what success rate?

Mr Rogers—I guess it depends on the particular country. Each country is able to implement the recommendations in its own way, so you will see varying treatment of cartels, depending on the law of each member country. The UK, for example, have implemented a regime with mixed success. They are striking some technical difficulties in relation to some of the provisions in the law. Canada also is looking at its own cartel arrangements and deciding whether or not they need to be amended. We have been conscious of the changes that are being proposed in the design of the Australian law to ensure that we do not strike the same kinds of difficulties or uncertainty that we are finding in some of those other countries. Simone might be able to provide you with a list of those countries.

Ms Abbot—I understand that at least 15 nations provide for imprisonment at the moment but a number of other nations also provide for fines at the criminal level only. The nations that have cartel offences, as we understand it, include Austria, Canada, Denmark, France, Germany, Ireland, Japan, Korea, Mexico, Norway, the Slovak Republic, Slovenia, Switzerland, the United Kingdom, the United States, Brazil, Estonia, Israel and Taiwan, or Chinese Taipei. So at least 15 nations at the moment include criminal sanctions. As to the success rate within those nations, we do not monitor each of them individually, but over recent years we have seen activities that have been brought forward in the US and also in the UK. There have been various parties coming forward and indicating that their conduct was in breach and seeking leniency under the respective leniency programs that operate in those nations.

Senator EGGLESTON—I am quite interested in this issue of comparisons with other countries because there seem to be different penalties around with respect to these anticartel provisions. One of criticisms that have been made by Speed and Stracey Lawyers of your legislation is that they say a foreseeable consequence of the proposed provisions is that, because they are drafted too widely, the ACCC will be forced to exercise its own discretion to decide which conduct technically infringes the proposed provisions. They go on to say that quite trivial activities in the broad sense, such as GPs in country towns working out rosters to provide service over weekends, could be taken up under the provisions of this legislation. Given that there are international comparisons, I wondered whether our legislation is wider or whether it should be more focused on what I presume are the real targets rather than the minor targets. Another possible case they mentioned was two bakers in a town, one providing croissants to the second baker who did not have the capacity to make them in their own facility. Would you like to comment on those criticisms?

Mr Rogers—That issue is addressed in a number of ways, both on the face of the legislation and in the surrounding regulatory arrangements as well. As I mentioned before, the cartel conduct bill provides quite specifically what is to be considered hardcore conduct on the face of the legislation. There are four main areas that the bill targets: price fixing, bid rigging, output restrictions and market sharing. The provisions of the bill are very specific as to whether or not those particular activities will fall within the new provisions, and if they do not they will have to look to existing provisions in the TPA. It is difficult to address particular factual circumstances without knowing what is involved, but certainly for conduct that is already caught by the Trade Practices Act, the cartel conduct bill is a subset of that activity, as set out in that OECD recommendation, and that is the particular series of conduct that should be considered to be hard core.

The legislative treatment of it is to provide a subset of what is already in anticompetitive agreements as cartel conduct and apply the new regime to it, which could be either civil or criminal. The choice of civil or criminal is one that is going to be largely determined by the facts of the case, but the ACCC has provided guidance in relation to that in its work with the Director of Public Prosecutions on its memorandum of understanding on prosecutions under the cartel conduct bill. This was released in December last year and will be given force once the bill is passed. It basically sets out the relationship between the two agencies. As you are probably aware, once you get into the area of criminal prosecutions it is the DPP and not the responsible investigating agency that has the role of prosecuting the offence, so it will be a decision for the DPP as to whether or not it will take the brief of evidence that the ACCC has put forward and prosecute the matter.

Ms Holdaway—May I add that, as Mr Rogers indicated, what we have actually done is to narrow the scope, by identifying a subset of the existing prohibited conduct, into a much more articulated and defined cartel conduct. So there has been a narrowing, rather than an overreach, as some have suggested there has been with this bill.

Secondly, to answer your question about international comparison, we are seeing exactly the same system in the US. They have the parallel civil and criminal prohibitions in one, where it is up to the regulators to determine which way the case will go forward. I think it is fair to say that amongst our international colleagues the US is probably the one that has had the most experience in this area and probably the greatest amount of success as well.

Senator EGGLESTON—Catching doctors and bakers is very trivial. Is it possible to set some sort of threshold of monetary activity which would attract the attention of the regulator, rather than just having a broad law that might catch rather minor activities? It has been suggested in another submission that the civil section should be removed from this bill and be left to the Trade Practices Act and that this bill should simply deal with criminal prosecutions because there is confusion which might arise from having two sources of possible legal action for civil activity.

Ms Holdaway—In response to your first question, the memorandum of understanding between the ACCC and the DPP already identifies a number of thresholds—the so-called criteria that you refer to. Of course, in addition to that we have exceptions and exemptions and the ultimate safety net of seeking authorisation from the ACCC for such conduct. We believe that those trivial cases that you refer to are safe and will not be captured through this process. In relation to your second point—

Mr Rogers—In relation to the removal of the civil prohibitions—in the way that it has been designed the starting point is, as I have said, the OECD recommendation. At the beginning we have a definition of what is cartel conduct. That has been clearly defined in the bill. You would understand there are differences of proof between civil and criminal, and in investigating a matter the ACCC will be able to bring a proportionate response to the kind of activity that is brought before it. If the activity is of the nature that the ACCC feels it can recommend it to the DPP for prosecution, it will take that path. But, equally, if it does not reach the necessary thresholds as set out in the MOU but is still considered to be serious enough to warrant a civil penalty, the ACCC will be able to take action on the civil penalty path.

The question of removing the civil penalty provisions from the bill removes from the ACCC an ability to commence an investigation and consider the evidence brought before it on a particular matter—in this case the cartel conduct—and down the track, as things come to light and witnesses are examined, to make a decision then of which is the more appropriate path to take. This is not an unusual set up—it is a similar situation to what you might have in the Corporations Law. There are criminal offences and there are also civil penalty provisions and it is really a question of the facts of the case, the evidence and also the harm caused as to which particular path the regulator might choose to recommend.

Senator EGGLESTON—Your civil penalty is \$200,000?

Mr Rogers—There are a number of penalties that apply.

Senator EGGLESTON—There is a suggestion that it is far too light and that it should be more realistic at \$10 million or \$20 million or something.

Mr Rogers—Yes, I think there has been something—

Senator EGGLESTON—You are dealing with big companies when you are dealing with cartels—

Mr Rogers—That is not right, Senator. Basically what the bill provides under the civil prohibitions for a corporation is that the existing provisions of the Trade Practices Act will apply. That is basically the greater of a \$10 million fine or three times the gain obtained through the conduct. If that exceeds \$10 million, it is up to the court which maximum it will apply. Where that amount cannot be calculated, they can actually look at the turnover of the company in the corporate group to determine the penalty. Under the criminal regime exactly the same fine structure applies to corporations, so it is the \$10 million or three times the gain.

Senator JOYCE—With the joint venture exemption, isn't it the case that we now have a vastly greater net through what could be caught as cartel behaviour but now we have just given a vastly greater exemption, in that contractual joint venture provisions are exempt? Of course, contractual arrangements can be oral. I can just say, 'I'm in an oral joint venture provision with you. You haven't seen any paperwork for it because it does not exist, but that does not at all preclude that a contract between us is in place and it is a joint venture.'

Mr Rogers—In relation to the joint venture exception, that is one of a number of exceptions that are provided for in the bill. As I mentioned before, the definition of cartel conduct is a subset of what is currently captured by 45, so we are not talking about broadening conduct beyond what is already caught by the TPA. What we are providing for is a subset of serious or hard-core conduct that concerns cartels, and that is what the bill captures. In relation to the joint venture exception, in the submissions a range of views have been put about how that should be treated, and what we have done in the bill is to provide, if you like, a bright line exemption for a very strictly defined number of commercial arrangements that should be exempt from the offence. I guess this is treading the line between calls to broaden the exception to include a wider range of types or natures of agreements—beyond contracts or beyond the particular subject matter of joint ventures—and other calls to either remove that exception or to narrowly define it. That is something we have discussed with a range of parties. We have obviously also looked at the submissions as well and also had discussions with the ACCC. I understand they have put in a submission that touches on some of those issues. What we feel we have done is to strike a bright line balance there on the face of the legislation in relation to legitimate joint ventures and agreements that are binding at law—legally-binding contracts between parties who are engaged in legitimate activity.

Senator JOYCE—A legally-binding contract can be an oral contract, can't it?

Mr Rogers—It can be, but I think when you are talking about multimillion dollar arrangements it would be unusual. Certainly we have put a number of practical things into the face of the legislation to clarify how people would need to go about bringing that evidence before a court prior to it actually going to trial.

Senator JOYCE—So you are confident that someone cannot use it as a 'get out of jail' card, basically?

Mr Rogers—No. It could not be—

Senator JOYCE—It was a joint-venture. It was not a cartel.

Mr Rogers—You could not have a situation where you would be entering into a sham arrangement simply to get out of a cartel provision. It has to be a legally-binding contract for the purposes of a legitimate joint-venture. Without being able to show that before a court, it is not something people could bring to the table.

Senator JOYCE—Would you consider excluding oral contracts? The only contracts that would be considered for joint-venture would be written ones?

Mr Rogers—I think that would be something that we would not prefer to do. There is a long history of contract law, obviously, in common-law countries. It is clearly the case in the law that contracts are not simply written. Writing is a form of evidencing a contract. The contract does not live in the writing; it lives in the nature of the arrangement between the parties. People in commercial arrangements are for the most part, I would think, going to express them in writing, but the nature of things is that extrinsic material to that written contract may be relevant.

Senator JOYCE—We do have exemptions. You cannot go into a real estate contract on an oral premise; it has to be written. What wouldn't that be the case in a cartel?

CHAIR—Senator Joyce, you are very indistinct. Can you speak up?

Senator JOYCE—Real estate contracts have to be written. You cannot have an oral contract for real estate, so why can't we have that same condition on cartels or joint-ventures?

Mr Rogers—I guess that is a law about the regulation of real estate. What we are dealing with here is the law of regulating cartels. We are not setting out a legislative framework for joint-ventures. We are setting out a legislative framework for criminalising serious cartel conduct, and a number of exceptions provide for that under the bill.

Senator JOYCE—This is my final question. Just explain to me how you would stop someone saying, 'That was not a cartel; that was a joint-venture. We had a yarn about that over a cup of coffee some weeks ago.'

Mr Rogers—It is going to depend on the facts of the case. It will have to be a joint activity carried out for the purposes of production or supply as set out in the terms of the legislation. It is not possible for me to say one way or the other whether a particular factual circumstance is going to fall within the terms of the new offence. That is something the regulator will have to look into and, ultimately, the DPP will have to assess if it proceeds to a criminal trial.

Senator JOYCE—Fair enough.

Senator XENOPHON—To follow up in response to a question from Senator Eggleston about the OECD taking the approach of having both civil and criminal penalties, has there been any analysis of what impact that combined approach has had on the effectiveness of the enforcement of the legislation?

Mr Rogers—We are not enacting model OECD legislation yet.

Senator XENOPHON—I understand.

Mr Rogers—The OECD has put forward a number of recommendations about what member countries should do. It is quite specific about what serious cartel conduct is. We have picked up that wording and used it in the bill, but the actual implementation of that recommendation to member countries varies from country to country. Some have a civil and criminal dual track; others do not. Canada is now doing that based on its experience of a single-track criminal regime. Comparisons are difficult. They have been enacted over a number of years. With Australia, we are only now getting to it, though the recommendation came out 10 years ago.

Senator XENOPHON—For those countries where there is a dual track that has been in place for a number of years, is there an assessment of the effectiveness of that approach in prosecutions and enforcement?

Mr Rogers—We do not have that, but it is something we have discussed with the regulators.

Senator XENOPHON—Whether through the ACCC chair or, if it is more appropriate to take on notice, through the ACCC or Treasury, what has worked? Is there any literature or analysis with respect to that?

Ms Holdaway—We will do that. Certainly anecdotal evidence suggests that the US has been very successful with a dual track. The movement in the international arena is towards the dual rather than single track, as Mr Rogers has mentioned. Canada has made noises about wanting to do something similar to Australia. We will take that question on notice.

Senator PRATT—I have a question about joint ventures. With this legislation, is it thought that we would be expanding or narrowing the kinds of things that are currently included? I am thinking in particular of the campaign run by the DomGas Alliance in Western Australia about WA's domestic gas marketing provisions. I do not need an answer about this specific case necessarily—I think that is probably a question for the ACCC—but I am interested in whether we are talking about a wider, narrower or substantially the same kind of test.

Mr Rogers—We are mindful of developments in enforcement and issues that have been raised in relation to that. As you mentioned, the ACCC is currently investigating that arrangement. That is ongoing, so I will not comment further about that particular case here. We are mindful of the submissions on both sides of the joint venture debate that have been made about broadening or narrowing it. In the legislation we have tried to provide a very clear expression of what a joint venture exception should be. We are talking about an exception from a potential criminal prosecution. On the one hand, it may not enable you to escape scrutiny under the other provisions of the Trade Practices Act. On the other hand, if they do not fall within the exception, it is open to parties—as it is now, for example, for doctors—who routinely seek authorisation from the ACCC for conduct that would otherwise breach the Trade Practices Act. That authorisation regime and a number of other exceptions that are already contained in the TPA have been brought into the new division dealing with cartel conduct.

Senator PRATT—Thank you.

Senator EGGLESTON—A dishonesty clause has been omitted from this legislation, I have read in these submissions. I suppose you have various other tests of intent, but apparently there were problems with a dishonesty clause in the UK. I wonder if you would like to tell us about some of that background for the record and for our information.

Mr Rogers—Yes. The exposure draft of the bill that was released early last year contained a dishonesty element in the offence provisions of the bill. As it was previously, it provided for a cartel offence for agreements containing or giving effect to a cartel provision where that was done with the intention of dishonestly obtaining a benefit. That was in the exposure draft, and the government sought comment in relation to that—and a number of other issues raised in the bill, but particularly in relation to that issue. I think it is fair to say that, following a clear statement from submissions, the government decided to replace that dishonesty element. The feedback that was received was that it would greatly increase the difficulty of bringing a successful prosecution, to the point where there was great concern that cartel conduct would not be captured by the provisions of the bill. It would be provided for in the legislation, but enforcement would effectively become virtually impossible. So that element was removed and replaced, if you like, by providing

that a corporation commits an offence if it makes or gives effect to an agreement with its competitors that contains a cartel provision.

In the absence of the dishonesty element, what was inserted was that it would be necessary for the prosecution to prove that the corporation knew or believed that the contract contained the cartel provision. Without specifying that, the provisions of the Criminal Code, which applies to all Commonwealth laws, would make the necessary element mere recklessness, which was felt to be quite low. It is not enough, for a jail term of this magnitude, for parties to be simply reckless as to whether or not a cartel exists. What we are looking at is deliberate knowledge or belief on the part of the parties involved.

In relation to the overseas experience, we have obviously had discussions with the ACCC, and they are fairly heavily involved in the international competition and regulatory network. Their clear feedback was that, in countries where there is some analogous dishonesty element in the offence, it makes enforcement, if not impossible, certainly practically very difficult and subject to numerous appeals simply on the basis of the particular state of mind of the people involved rather than their action. Whilst we have not totally discounted that by including knowledge or belief, the need for dishonesty is, if you like, a higher hurdle and was seen by the government to be essentially a bridge too far.

Senator XENOPHON—I have a series of questions. In relation to the issue of legitimate versus sham joint ventures, can you explain how, in the legislative framework before us, you distinguish between those?

Mr Rogers—Yes. As I mentioned, there is a joint venture exception that applies to the offence—and I use that term broadly; it applies to the civil penalty provision as well. It applies where a number of set criteria are met by the particular agreement. The cartel provision concerned has to be in a contract—a legally binding agreement. It has to be for the purposes of a joint venture between the parties. The joint venture has to concern itself with the production or supply of goods and services, so the subject matter or content of what is in the joint venture exception is fairly narrowly constrained. The way that the joint venture is carried on has to be either jointly between the parties or in the nature of a corporate structure that they themselves set up.

Senator XENOPHON—Will there be a mechanism or procedure whereby two doctors in a country town deciding that one will work on a Saturday and one on a Sunday could get it ticked off to say that this is acceptable? In other words, if people want to make sure they are doing the right thing, what processes are in place to ensure that they do not find themselves facing a prosecution?

Mr Rogers—I guess there is a range of things. Depending on the nature of the agreement—the doctor is probably a good example—people can seek authorisation. That is a separate exception under the law and that is carried over into the cartel. So in relation to what those doctors are doing at the moment they can continue to get certainty by continuing to do that same activity in relation to seeking an authorisation from the ACCC.

The joint venture exception—and, I guess, in relation to any number of other exceptions that are in the cartels offence or pre-existing in the TPA or criminal offences generally—are in the nature of exceptions and people will have to make a determination as to whether they need to get legal advice, or perhaps talk to the regulator or seek guidance that is put out by the regulator as to whether an activity is going to fall within the exception. It is difficult to say on particular factual cases as to whether you will or not but the ultimate recourse people have is to get authorisation.

Senator XENOPHON—Is that something we should put to the ACCC in terms of how this will work in a practical sense in terms of process?

Mr Rogers—They may be able to give you an idea of the authorisation process and also, because we are picking up a framework that is currently dealt with under the TPA in relation to exceptions, they could give you an idea of how those things are handled at the moment. I do not see any difference under the new regime.

CHAIR—Could I just interrupt for a moment on that? What kind of status in law does the memorandum of understanding have that is going to be signed with the ACCC about how things will work generally? Will that be something which companies can read and then make some decision on their own, about whether they fall under it?

Mr Rogers—That memorandum is basically there to give clarity to people in understanding the practical issues of references from the ACCC to the DPP about cartel conduct. It will cover a number of things about that relationship. It gives fairly clear guidance about the kinds of factors the ACCC and the DPP will look at when determining whether conduct that may breach the TPA already should be treated under the criminal track. It is not a legally binding document. It is not something people can hold up in court and say, ‘Hang on a sec; I think I fall under one of these factors.’ It really guides the relationship between those two parties. One of

the things it includes is the \$1 million threshold for affected commerce in relation to the conduct. Some comment was made in the submissions that that should be made a lot more concrete. I guess the concern there—this might be something to raise with the ACCC—is that we are not about allowing repeat offenders or people who deliberately structure their arrangements to get under that threshold to be able to escape criminal prosecution in appropriate cases. We want to give the regulators flexibility in appropriate circumstances to be able to take the criminal track where, on the balance of the factors—not ticking every box—it is appropriate to go down the criminal path.

Senator JOYCE—What about in actions where the cartel is by implication? I look at the market and I act in a certain way. I have never actually openly discussed it but I get an understanding through the performance of the market. I know there are two big players in the market and I say, ‘Well, let’s see what happens if I take my price of whatever—fuel—up to this price,’ and this person says, ‘Well, I’ll go up there to match you.’ We’ve never had a discussion but we are definitely working in a cartel arrangement through an implicit understanding that it is in our best interests to follow each other.

Mr Rogers—You are getting, again, into factual situations. There is a range of conduct that will be captured by this bill—not simply contracts but down to understandings that could leave parties who are in anticompetitive agreements open to serious fines and possible jail terms for individuals. There is a spectrum on situations that can occur in relation to any market about how people behave in it. It is going to depend on the particular circumstances as to whether or not it will be possible to prove matters before a court and in a criminal situation beyond reasonable doubt. I am not sure that I can answer that question with any certainty other than to say that the government is currently considering the issue of what level of relationship between parties would trigger the provisions of the Trade Practices Act, cartels or more broadly, in relation to what is an understanding. The Assistant Treasurer and Minister for Competition Policy and Consumer Affairs issued a discussion paper earlier this year on the nature of understandings and, based on some analysis done by the ACCC, whether or not what is an understanding should be modified or otherwise clarified in the face of the law. That process is under way and we are currently open to receiving submissions as to what level of commitment or relationship between parties is enough to bring it within scrutiny under the Trade Practices Act.

Senator JOYCE—If you square away—and I am not as yet convinced that you have—the provisions of joint ventures so they cannot just be oral and people can use that as an overriding, all-covering defence on any action, don’t you find it a little peculiar that cartels will be implicitly a more litigious area, making you more prone to get into a whole bucket of trouble than being in a monopoly, so instead of getting into the cartels you would just buy the other person out and create a monopoly?

Mr Rogers—You are talking about two of the three issues we are trying to address in the Trade Practices Act. The other one is mergers and reduction of competition through acquisitions. There are different tracks that regulators can examine when considering particular anticompetitive conduct. It is quite often that a particular kind of conduct or course of conduct could raise a number of provisions under the Trade Practices Act. The TPA and this bill incorporate a number of mechanisms to enable that overlap and interrelationship to be handled. I stress that the bill is not broadening beyond what is in 45 at the moment in relation to the kind of conduct that is going to be caught by the Trade Practices Act. The bill is focused on looking at a particular subset of serious or hardcore conduct in relation to cartels—that is, anticompetitive agreements between parties—and subjecting that to serious fines and possible criminal treatment as well as, possibly, imprisonment.

The issue of monopolisation is not one that is dealt with in the cartels bill, but in relation to anticompetitive agreements we are focusing on what the OECD has said are the main offenders in relation to cartel conduct and bringing Australia into line with overseas treatment in relation to the kinds of penalties, investigatory techniques and imprisonment that can be available.

Senator JOYCE—Will you allow phone tapping? What sort of greater investigatory powers would you have in this bill than what are already there?

Mr Rogers—The main one is the availability in relation to the criminal offence for phone tapping. There are a range of surveillance and other arrangements that are currently available to regulators, including the ACCC. The bill prescribes explicitly that the new cartel offence is one that will fall within the existing Commonwealth telephone interception regime. We are making a number of other changes in the bill in relation to warrants and other search and seizure powers that the ACCC already has that have come to light which will greatly assist in detecting and ultimately stamping out cartel conduct.

Senator XENOPHON—Phone tapping and all those sorts of things are welcome but they are very expensive in terms of the resources needed for them. What additional resources will be given? Presumably the ACCC will be conducting these investigations through the federal police?

Mr Rogers—I guess there are two issues there. One is the resourcing of the ACCC generally. The phone tapping specifically is something that is actually carried on by the Federal Police, and the ACCC is given access to that regime through the bill.

Senator XENOPHON—And are there additional resources for that? This is a whole new ball game. It is all well and good to have legislation in place but unless you have got the resources to ensure enforcement it will not deliver the desired effect, will it?

Mr Rogers—The ACCC has been provided with additional resourcing in relation to cartel conduct. The previous government announced that it would be taking action to legislate for cartel conduct and, associated with that, the ACCC was given additional resources for enforcing that criminal sanction.

Senator XENOPHON—Can you take on notice how much extra—

Mr Rogers—I can give you those figures, if you like, Senator. Essentially, it was \$24.8 million over four years ranging from 2006-07 through to 2009-10. Obviously, given the nature of that allocation, the legislation has not been in place and over past years the ACCC has been returning that money to the budget because the legislation has not been in place. It currently continues until next year and it would be a matter for the government to consider, once that money expires, in the context of the budget whether additional resources are to be provided.

Senator XENOPHON—Associate Professor Zumbo in his submission is concerned that the drafting, which sets out the cartel provisions prohibited under the bill, is convoluted and will be difficult for a jury to follow or comprehend. Has it been considered that there are risks in terms of getting a conviction with the current drafting and so simplifying the drafting, taking into account Professor Zumbo's critique of that?

Mr Rogers—I guess there has been a range of suggestions made in relation to so-called simplifying the provisions. Whilst they may look complex on their face, I think that for the ACCC, and ultimately for the DPP and the jury, what they will be looking at is a particular range of conduct and whether or not it falls within a certain circumscribed series of circumstances under the bill. I think that the calls that have been made to simplify many of the provisions will have the effect of making them even vaguer. They try to provide an overarching statement as to what should be cartel conduct and what should be criminal cartel conduct and I think that results in not giving a clear road map or guidelines as to what falls in or out of that conduct. I take on board what Professor Zumbo and others are suggesting but the idea that you would bring a range of often complex economic or other evidence before juries and not a clearly circumscribed state of activities or actions is not one that we would support, and I do not think that it is one the regulator will support either.

Senator EGGLESTON—Why have it before a jury anyway? Juries find it quite difficult to understand some of these fairly complex commercial matters, and I think that is generally accepted.

Mr Rogers—It is in the nature of an indictable offence and, given the level of the penalty, that is essentially how the Commonwealth criminal law would work. It becomes a jury trial on indictment.

Senator EGGLESTON—Have you considered not having juries though, because these trials are often quite complex?

Mr Rogers—Yes, and I am not sure whether Simone—

Senator EGGLESTON—In other countries I think that—

Ms Abbot—My understanding—and I hope that I am correct in this—is that Commonwealth case law has provided that if you have an indictable offence it has to be heard before a jury.

Mr Rogers—It comes under the Constitution as well.

Senator EGGLESTON—Other countries are not using it as much. In the common law system they are using juries a lot less though, aren't they?

Mr Rogers—They may have a lesser penalty. It would depend on the nature of the regime in that country.

Senator EGGLESTON—The reason given often in complex commercial trials is that the issues are too complex for the so-called average man to follow.

Mr Rogers—I think that we have tried to address that in the legislation by pulling it right back to clear factual circumstances so that the jury can assess and make a decision on those facts, including in relation to the knowledge or belief of the parties involved.

Senator FURNER—I have a number of questions in relation to the issue that has been raised by a number of submitters with regard to the sanctions, but I think that you have exhausted that. It essentially applies to civil sanctions for individuals, and when we get to a cartel that becomes anything up to a possibility of criminal behaviour and the sanctions are much higher than what is currently proposed.

Mr Rogers—Senator, I might just correct you there. The fines are exactly the same as under the Trade Practices Act at the moment. It is only the jail term for individuals as the new additional sanction that is being brought in, and the possibility of criminal fines as well. It does bring with it a range of other associated things under the general Commonwealth criminal regime—such as, in relation to extradition, the possibility you might have your passport and travel otherwise restricted. The other one might be to do with proceeds of crime type legislation. It is about fitting that cartel offence into the general Commonwealth regime.

Senator FURNER—So the imprisonment applies to individuals or corporations?

Mr Rogers—You would have to be an individual to go to jail; you cannot imprison a corporation.

Senator FURNER—I understand that, but it could be—

Mr Rogers—Essentially, if the necessary company officers have that knowledge or belief and trigger the elements of the offence they will be the ones going to jail. The company itself may also be given a criminal fine, which is that up to three times the gain, the new maximum that applies under the civil regime, will also apply to the criminal regime.

Senator FURNER—You have recommendations from the OECD to make changes dating back to 1998. Probably the landmark case in Australia was the Visy case where that company was fined in 2007. Hypothetically, had we had these laws in place not long after 1998 when the previous government should have enacted these laws what would have been the possible fines or criminal sanctions applicable to the likes of Visy in that particular case?

Mr Rogers—That is a difficult question. We obviously do not enforce the law in Treasury, but I think from the regulator's perspective—and it may be something you would want to ask the ACCC about—it is something that they would consider in relation to any serious cartel conduct and certainly where it is a nationwide effect, as was the case with Visy, it would be something they would have to turn their minds to in looking at it. On the fines, the fine of \$36 million that was imposed was as a result of a number of civil penalties that were imposed. Prior to 2006 it was possible to get up to \$10 million for each breach. Post 2006, with the trade practices legislation amendment bill that went through, the new idea of three times the gain was introduced. So for any conduct that occurred after 2006 it is possible for the court to look at the nature of the gain and there would have to be evidence taken on how much the companies themselves got out of the arrangement so that they can never be in a position where the fine is simply a cost of doing business whereas the cartel may have reaped a great deal more. You are always going to be looking at the possibility of a fine of three times whatever you obtained under the cartel arrangement as the new maximum and that 2006 arrangement has been brought into the criminal cartel regime as well in relation to both fines and the dual civil track.

Senator EGGLESTON—Another of Professor Zumbo's criticisms was of the numbering system, which he said was far too complex. Have you noted his comments in that respect, and do you have any response?

Mr Rogers—I do not have any direct response to that other than to say it is a consequence of where the provisions have been placed into the bill—that is, after proposed section 44ZZ. Between proposed section 44ZZ and proposed section 45 there is not a lot of space and the numbering essentially falls out of that decision to put the cartel provisions at the beginning of the anti-competitive restricted trade practices provisions of the Trade Practices Act—that is, before section 45—and the numbering falls out as a result of that. It is really something for the Office of Parliamentary Counsel to decide how they number that. Regarding renumbering, there are any number of Commonwealth bills, I think, that have pretty horrendous numbering. Practically, I think there are issues about renumbering legislation and the value of doing that. It is something that practitioners and many others would have a view on. It is not something that we were doing as a result of criminalising cartel conduct. Renumbering is a separate issue.

CHAIR—Thank you, Treasury, for appearing here this morning.

[9.26 am]

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

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

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

CHAIR—Welcome. Do you have an opening statement that you wish to make?

Mr Delaney—Yes, we do. Thank you for the opportunity to appear before you today in relation to the cartels bill. The Motor Trades Association of Australia support the introduction of criminal sanctions for cartel behaviour. The MTAA have noted in our submission that we therefore support the passage of this bill. The MTAA first raised the issue of criminal sanctions for cartel behaviour in 2002 in our submission to the Dawson review of the Trade Practices Act. The association had around that time developed a small business charter of fairness, and the introduction of criminal sanctions for price-fixing arrangements was one of the elements of that charter. We therefore are pleased that the parliament is now considering a bill to introduce criminal sanctions for cartel behaviour. Put simply the association believes that cartel behaviour is theft; cartel behaviour results in consumers, including small business, paying more than they might otherwise for goods and services; it results in markets being foreclosed to other businesses that may be able to actually deliver goods and services more efficiently; and, generally speaking, as a result of such behaviour, markets are distorted. Securing adequate compensation for those who have been the victims of cartel behaviour is a long and difficult task and, in some cases, it may well be impossible to secure.

There is no denying that cartels have operated in Australia. Some have been international cartels. To those who might say that such criminal sanction regime is unnecessary, we would say that there has been a long history of cartel behaviour in Australia and it is time that the message was clearly sent to all businesses that such behaviour, such theft, will not be tolerated. Cartel behaviour in Australia in the past has not been confined to a particular sector of the economy. It has affected the markets for goods as diverse as vitamins to power transformers. As a society, we have not benefited from that behaviour. The unfair winners have been the corporations engaging in that behaviour and possibly the individuals whose packages have been determined by sales and revenue targets which were inflated by way of illegal and unethical behaviour.

I accept that proving cartel behaviour is not an easy task for our regulators and certainly we would agree that where the penalties available include the prospect of jail terms, then the burden of proof should be the same as in other criminal matters. Therefore, we do not expect that every price-fixing matter will necessarily be prosecuted by the DPP, but we would expect that the prospect of a jail sentence would serve to act as a deterrent for cartel behaviour.

In relation to this particular bill, we do believe that there are some elements of it which will need to be explained to the business community, both small and large organisations. To that extent, we believe there needs to be an active outreach program over the provisions of the bill should it succeed. As a business community we know very little about the operation of the proposed telecommunications interception powers, and I think it would be useful for the commission, once the bill has passed the parliament, to prepare guidelines for business on how those powers will be used and how the commission will deal with the privacy issues arising. Equally, we believe that it will assist all businesses to understand how the commission is to determine whether to pursue civil or criminal proceedings in the operation of the immunity provisions. If the commission were to publish guidelines on those matters too, that would be helpful, notwithstanding that the MOU between the commission and the DPP is a public document.

I understand that a number of submissions to this inquiry have raised concerns about the impact of the bill on joint ventures. In relation to that issue, I would just like to say that is not one that has been the focus of our attention, and I am sure that other parties appearing before you today will be able to address that issue. The MTAA has, for all of its 20 years, been a staunch defender of the rights of small businesses. This bill may well have an impact on small businesses and their owners and/or employers who engage in cartel behaviour. The MTAA has never sought to defend illegal activity by small business. Many other small businesses have been harmed over the years by illegal cartel behaviour, and it is time that the penalties for such behaviour are increased. The MTAA does recommend to the committee that the bill be passed by the Senate. I might just add in passing that some years ago we prepared a compendium of all the cartel actions that have been successful internationally—principally in the Western developed countries. It is quite a long document. I had intended to hand it to you just in case it should be a useful piece of background activity, but my deputy, Sue, reminds me

that we need to update it to include the past couple of years since it was written before we could possibly give it to you, so we will do that later. So thank you, and we would be pleased to answer any questions that you might have.

CHAIR—Mr Delaney, are you able to tell us specifically or generally what kind of cartel behaviour might have been evident in the motor trade industry in the past?

Mr Delaney—No, I cannot. I am not aware of perpetrators from the motor trade so much as victims. I guess it is fair to say that our federation, through its member bodies, dates back over 100 years, and from at least 1974 and the passage of the act, one of our highest duties and activities has been to educate our members in what they cannot do. We have a successful federation activity in deterrence and observation of the laws across almost all of the principal pieces of legislation.

I know that from time to time some benighted members, in circumstances where they felt they have been very hard done by, have, in ignorance, got together and sought to arrange prices. Fortunately, those cases are very few and far between. I think probably the very few of them that there have been in my more than 20 years with the association have been in body repair. There has been a belief in many places that insurers have organised to contain and restrict prices they are prepared to pay to body repairers, so body repairers have sought to deal with that. In the cases where that has happened it has been very quickly headed off as soon as we have heard about it. We have usually had them make confessions of some sort or another and come to an accommodation with the TPC and now the ACCC and that has been the end of the matter. We put a great deal of effort into constantly educating our members in what they must not do. That is the only instance that I know of.

Ms Scanlan—There is the Ballarat petrol one, but the commission took that.

Mr Delaney—Yes, and did not succeed in the end.

CHAIR—That is interesting, because some of the submissions talk about smaller businesses that might be caught up in this because of not knowing provisions or just continuing their normal pattern of conduct. But you do say that as a professional organisation you actively educate people on what the requirements are.

Mr Delaney—Yes, we do, so we have no particular fear of any of the small-business members being caught up in this. The reality is that if it is occurring, if they are doing it, they are going to be caught up anyway, albeit this would be a new regime which is much more onerous. Perhaps I need to explain that we are a federation of the automobile chambers of commerce, motor trades associations, the Service Station Association and the Australian auto dealers association in each state and territory.

Senator JOYCE—I am going to have to take a break for half an hour. I will be back.

CHAIR—Thanks, Senator Joyce.

Mr Delaney—Those associations go back to the start of the 19th century. In the 25 years since the passage of the act, we have put an extraordinary effort into educating members about the Trade Practices Act. I think we have been quite successful about it. You could not find a convocation of the ordinary small-business members of any of our member bodies that did not know of the Trade Practices Act or have high expectations of it—so much so that they regard it as being something that it is not. They see it as securing for them protection from unfair competition and the like to an extent that it, of course, does not.

CHAIR—Yes, and I think many members of parliament have had representations from small businesses looking for protection from the Trade Practices Act when it is difficult to deliver it. So I think many of us look forward to the tightening of provisions in the act.

Senator XENOPHON—You have said in your submission that there ought to be some guidelines issued. Is there a concern that some of your members could be inadvertently caught by this? Have you had any discussions with either the ACCC or the government on the formulation of those guidelines or what will be in place?

Mr Delaney—We have certainly had discussions with the government about the need for guidelines. I will make the general comment, perhaps a little self-indulgently, that the parliament will pass amendments to the act and then the commission will issue guidelines and we often find that the amendments and the guidelines do not seem to cohere in quite the way that one wants. I instance the issue of collective bargaining. The guidelines of the commission do not meet at all what the previous government and the parliament wanted there. The other point I will make is that the commission needs to issue the guidelines. We often find, as a trade association, that our interpretation may not end up being the statutory or official interpretation, so the guidelines are

needed as a starting point from which we can draw down and prepare our educative materials. We do that pretty extensively. Each of our member bodies, for example, produces a quite large—by which I mean number of pages—publication between 10 and 12 times a year in which we regularly place all of the advice and educative materials on these sorts of things. We do not think the job is finished until the commission prepares guidelines following passage and royal assent.

Senator XENOPHON—Thank you.

Senator EGGLESTON—One issue that has been raised is that, in your industry in particular, there are a lot of franchises operating. Suppose there was an agreement between a franchisor and a franchisee such that a franchisor agreed not to establish another franchisee in a geographical area provided that the franchisee did not operate outside that allocated area. Isn't that an anticompetitive activity? Would that be subject to these provisions or not?

Mr Delaney—We raised with the government early in the piece some of the assumed or claimed provisions or effects which would have interfered with franchise businesses, particularly in the case of franchises setting a standard price for a particular good and whether that could become a cartel-like activity. We got assurances from the government that it would attend to that issue at some point for the avoidance of any doubt over that.

In the case of franchises, there is typically a prime market area attaching to a franchise, and it will be part of the treaty between the two parties that neither will alter or affect that prime market area without some consultative process. No, I do not think it is anticompetitive because, in effect, a good and successful franchise system will have at its core a body of knowledge about what is the prime market area population or quantum of demand that can sustain that franchise and it is in no-one's interests to overextend or underextend that by replicating other franchises. I think it is actually pro competitive. In saying that, I would not want to ignore, or fail to let you know, that many franchisors do not behave in the spirit that I have just talked about. Indeed, they go out and seek to extend franchise outlets and intrude into prime market areas that they have previously sold, and many of them seek to operate factory outlets in competition with franchisees—but that is another story, which we put before another committee.

Senator EGGLESTON—I understand Professor Bob Baxt has criticised the bill for placing the onus on the joint venture party to establish they are conducting a genuine joint venture activity and restricting genuine joint venture activity to contracts, rather than, as is currently the case, contracts, arrangements or understandings. What is your response to this and why should the onus be on the joint venture parties to prove they are conducting a genuine activity?

Mr Delaney—We saw that criticism. It is not one that we sought to pursue or felt ourselves obliged—or perhaps even competent—to comment on, as I said in my opening remarks. I suppose I would only go beyond that to say that, in our dealings with the minister, when we—and I believe others—brought issues of unintended consequence or result to notice we have had a very fair hearing. I can only say that if Professor Baxt and the other critics are correct, then I expect someone will attend to it.

Senator EGGLESTON—Another big issue is whether the ACCC should issue or include guidelines on the administration of the new provisions. Would you be in favour of inserting a list of factors in the bill similar to those in the ACCC-DPP MOU which would establish a basis upon which cartel related matters could be referred for civil and for criminal proceedings?

Mr Delaney—I am not sure about that. As legislators, you know very well that there are two philosophical schools about the extent of black-letter law and what is appropriate and what is not. I will make a general comment and then ask Hank—who has a life-time of experience with the act, having begun with the TPC in 1974 upon the act's passage—to comment. My general point is that we often think it would be better if the guidelines that are to issue from the ACCC were composed and available before the passage by the parliament. We often say that the act is amended, there is a clear intention—there is an information memorandum, there is a second reading speech—and then we get a set of guidelines, we look at it and we say, 'But we don't think that does what was intended.' But, anyway, that is just a beef that we often have, so I will now defer to Hank's long experience.

Mr Spier—Briefly, to put the details or the criteria that are in the ACCC-DPP MOU into legislation, they would have to be very carefully drafted to make sure that they bring in a certain amount of flexibility, because the administration of any competition law needs some flexibility. The criteria in that draft MOU are quite flexible—it talks about a million dollars, amongst other things, and you need to be able to change that. I think putting it in guidelines—and very public guidelines that have also been subject to public discussion—is a

better way of going than putting it into legislation. Legislation, as you of course know better than most, is not that easy to change.

Senator EGGLESTON—But you would support publicly published guidelines—

Mr Spier—Yes, most certainly.

Senator EGGLESTON—which would be of assistance to your industry and many others, I guess.

Mr Spier—Most certainly.

Senator FURNER—There have been some suggestions submitted to the committee that the numbering of the bill is convoluted or different to understand. How do you propose to overcome that—if it is such a problem—in educating your members on these new changes?

Mr Delaney—I do not think the members have given a hoot about the number of any part of the TPA ever. With some parts of the act, they recite the number as if it is almost a biblical number but generally speaking, no, they do not worry. I do not think that is an issue for us. In any event we have to educate in the broad as to broad principles, reasons and things that are absolutely precluded. We leave it at that. You could talk to pretty much any motor trader and they will tell you about section 51AC and all the powers that are there that the commission will not use. As to other numbers, I do not think there is a problem.

Mr Spier—From someone who has been involved with the act for many years I would like some common numbering. We talk in our jargon about section 45 or section 52. Having said that, when you talk to business, you are really talking about concepts and things that you should and should not do rather than sections of the act. The trade practices mafia—which I am probably part of—would love to have numbering that is consistent, but it is not always possible.

Senator FURNER—I thought that may have been the case. I just thought I would ask the question.

Mr Spier—When I hear about sections such as 44ZZRJ, I say, ‘Wow, what the hell does that mean?’ After a while, I probably will know what that means.

Senator FURNER—So to your members it really means nothing. Practitioners such as you and others in the field, who have a common knowledge of the new bill, will pick it up with little problem I imagine. When it comes to explanation to your membership, it is about what it means in terms of changes to the act; it is not necessarily an issue with the numbers.

Mr Spier—No, not really.

Senator EGGLESTON—Is cartel operation an issue within your industry?

Mr Delaney—I do not think so. I would say that market distortions due to cartels in small business are very infrequent and very low level. I am not sure that the skill and deliberation required to give them effect is as possible in small business as in big business. That said, the commission has prosecuted our members and certain individuals in a very heavy-handed way on one occasion at least in 1992 over petrol prices. I am pleased to say that it was resoundingly rebuffed in the Federal Court and on appeal.

CHAIR—Thank you for coming in this morning.

Proceedings suspended from 9.48 am to 10.14 am

SPEED, Mr Peter Stuart, Solicitor, Speed and Stracey Lawyers

CHAIR—I welcome here today Mr Peter Speed from Speed and Stacey Lawyers. I invite you to make an opening statement.

Mr Speed—It is my view and the firm's view that the bill should be amended to ensure that the proposed provisions do not catch a number of innocuous transactions which occur in everyday commerce. At the present it seems to be left to a number of defences which, for reasons pointed out in the submission, are inadequate. It should not be left for a person to have to rely on such defences to exculpate themselves from conduct which is everyday, commercial and innocuous.

Ideally, the bills should be amended such that you have distinct criminal offences and leave the civil offences much as they are. The civil offences are largely operating effectively and the criminal offences need an additional level of scrutiny and additional requirements to prove an offence, much in the line of what the Dawson review has suggested. In our view it is inappropriate to leave such a wide discretion—what the ACCC talks about as 'flexibility', which is really just power and an incredibly wide discretion to choose whether doctors get prosecuted or whether they do not. They have a massive lever over these individuals, which is just inappropriate. The legislature should be defining the provisions more specifically such that it is clear what is criminal and what is civil. That is it. Thank you.

CHAIR—Mr Speed, you do not take any comfort in the fact that the DPP has some collaboration in the decision whether to prosecute or not?

Mr Speed—Obviously, the more people involved, the more likely it is you will have a rational decision. But it is a little bit awkward, starting from my point of view, trying to advise in terms of these provisions, because I am then having to second-guess what the DPP or the ACCC is about to do. In terms of the DPP, you could answer that by saying, 'Well, let's just have laws that say, "Love thy neighbour", and leave it up to the DPP to figure out whether you are complying with that or not.' You need to be more specific and you need to identify what is criminal conduct, what is cartel conduct; it should not be such that lawyers and doctors et cetera are having to determine whether just to take a Saturday or a Sunday off they need to figure out how the wind is blowing at the DPP or the ACCC.

CHAIR—I think the response to that from Treasury was that companies might then find a way around any legislation that is too specific. We all know that some corporations are inclined to indulge in this kind of conduct and might employ people to specifically find their way around provisions. If you have it as a more flexible arrangement then you can make a decision whether that warrants prosecuting or not.

Mr Speed—If you are looking at the civil offences catching a wider ambit, I am not suggesting that section 4D gets changed—it covers a wide ambit at the moment. The doctors have had a problem under the existing provision of 4D. That does exist in terms of civil provisions and in the past there have been a number of issues with the exact example we have been giving. But in relation to criminal, the law should be clear. The law should have sufficient clarity. Invariably, as exists in all criminal offences, the DPP does have some discretion, but the discretion is much more confined than what we are talking about here. In my view it is extremely broad here and it is a question of degree. There needs to be some flexibility such that the law cannot be easily avoided. Here it is too wide.

CHAIR—But there are indications, for example, that the threshold will be about \$1 million. If we are talking about a doctor with a \$1 million turnover, then we are talking quite a large—

Senator EGGLESTON—That would be any orthopaedic surgeon.

Mr Speed—There are obviously a number of other examples that we have heard. I initially referred to the doctor example. But that memorandum of understanding is unable to be challenged and questioned. If they get it completely wrong and think your turnover is \$1 million and that it is only going to affect \$20 or \$50, that is a major mistake, but you cannot do anything about it. There is no review. These provisions are intended to protect a substantial lessening of competition. Hence that threshold. However, there is no way for the person who is being challenged or who the allegations are being made it against to actually challenge whether it is a substantial lessening of competition under the current provisions.

Senator XENOPHON—Can I just follow on from that. Mr Speed, other commentators, such as Associate Professor Zumbo, have also been critical about it being simply too broad. But you do agree that we do need to tackle the issue of cartels much more effectively than the current provisions in section 45?

Mr Speed—I think the current civil provisions work quite well—that is, in terms of section 4D. The Treasury, the ACCC et cetera are indicating that we are really not expanding those provisions under the cartel provisions. So, in terms of the civil area, you still have your 4D type provisions.

Senator XENOPHON—But you acknowledge the need for—

Mr Speed—For criminal offences, yes. I do acknowledge the need for criminal offences, but for more specific criminal offences.

Senator XENOPHON—So how do you get that balance between being too general—which is your concern—and being so specific that the legislation is not effective?

Mr Speed—Having read Professor Zumbo's submission, I largely agree that you really start with the civil offences and tighten them. The Dawson review was talking about the civil offences that exist at the moment and was suggesting what should be criminalised. That review said that we should only criminalise serious cartel conduct—so something more than what is presently section 4D relating to civil offences. On my reading, and going through these provisions, they are broader than the existing civil provisions, particularly because of the output and the capacity constraint provisions. Expanding upon the civil offences that exist seems to be contrary to what a detail review analysed and what I would have thought appropriate. Professor Zumbo described a key factor in cartels—he was indicating the essence of cartels, and I thought he described it well—as:

... tampering with or manipulating the competitive process ... to benefit the cartel participants by raising prices—

So, ultimately, there is an indicator—and I think that is probably appropriate—of price being the matter that is relevant. Some of these provisions could, for instance, identify that the capacity constraint is there to influence price and the market allocation restraint is there to influence price. So, with the examples of the doctors or the helicopter relief service, if they were colluding such that they would get Saturday off and Sunday on, such that they could charge higher prices, then there is obviously an issue in terms of cartel conduct. But if it is not related to price et cetera, and it is simply to get the day off, and the prices will not change and it has no purpose in relation to price, then it is hard to see why it is offensive or why it is being caught by these provisions.

Senator XENOPHON—Just on the example of the two doctors in the country town, if the primary purpose is a genuine one—to give the doctor a day off—but the consequence of it is that it could put prices up for Saturdays and Sundays, what do you do with it then, even though from the personnel point of view the doctor needs a day off?

Mr Speed—This is where you draw a distinction between criminal and civil offences. A criminal offence is morally reprehensible and really requires a guilty mind. Therefore, if your purpose in doing it is simply to get the day off, and it is not offensive—obviously, doctors need to have days off; otherwise, we are going to be losing members of the profession, which is how the Medical Association criticised it—then it should not be a criminal offence. If it has an effect such that it does substantially lessen competition, which is the typical test for when conduct that is slightly anticompetitive is too great, then that should be the test applied to that example. Therefore, if it is substantially lessening competition, if prices by effect are substantially changing, then you have a civil provision to prevent the problem.

Senator XENOPHON—I am just putting the arguments here—it is not necessarily my position—but, in that case, the consequence of the doctors' actions may be that it will put up prices, but if it is a civil offence and the doctors say, 'Well, I'm not going to stay in this country town, because it is just not worth it; I'm not going to be able to have a day off. It's just ridiculous', then there are consequences even from a civil offence.

Mr Speed—There certainly are. In the doctor example the AMA was very critical of the way the ACCC was enforcing the current provisions, which do make that a civil offence.

Senator XENOPHON—So is there some scope to have a public benefit test as well, such that it is not just prices; it is also about the benefit of actually having a doctor in your community? You may want to take that on notice. I am just raising that as an issue in terms of whether there is another layer of protection that ought to be considered.

Mr Speed—That is where you do hope the ACCC exercises its discretion appropriately, and you do have the power of authorisations. Certainly, I would be suggesting the recommendations of the Dawson review, which were, in terms of section 4D, that the test be that there is a substantial lessening of competition. I think in circumstances such as that it would then be a case of wait and see as to whether you needed a public benefit test in addition to that, because I think you will find that, if section 4D were amended, with a number of

examples of that nature, you would have to prove a substantial lessening of competition and I think, for most doctor scenarios, where the price is not going to be increasing dramatically, that is unlikely to be met. So I think you have a defence.

CHAIR—We have been talking a lot about doctors, but what kinds of people advise on these kinds of issues and what kinds of cases have you run in the past?

Mr Speed—We prepared and got the advice in relation to the Shopping Centre Council, so we do advise some members of the shopping centre industry. We do advise a number of other large corporations as to their practices. It is not in the nature of something that you would think is offensive or you would be concerned about. For instance, I often have to advise on section 47 of the Trade Practices Act, which covers the exclusive dealing provisions, and they are so difficult and prescriptive to go through that you often have to give that sort of advice. So here, where you have got such a detailed set of provisions, it is obviously of concern because we are having to do the same thing—plug through them. You have an enormously large set of provisions which attempt to be prescriptive but can catch very unusual transactions, which makes it incredibly difficult, because if it does catch innocuous transactions then people will not know if they need to come to you or not, because it does not ring alarm bells. We are having to do that with some of our more savvy people who say, ‘Well, I’m dealing with a competitor; I can’t see anything wrong with it, but can you check that it gets through all of the provisions that are currently in force,’ and we have been advising a number of people in relation to that circumstance under the proposed provisions: is this going to get through?

CHAIR—It seems to me, Mr Speed, that might be an argument for not enshrining it in the legislation, if you already describe these things as difficult and prescriptive for relatively innocuous behaviour. If it is in legislation you will not be able to have the ACCC or the DPP say, ‘Clearly, this is not a problem so we’ll just let it go.’ If it is in the legislation you will have to prosecute regardless.

Mr Speed—Generally, most of the provisions in part IV are reasonable. The one provision that is awkward and always difficult is section 47, which is of a similar nature to this one in that it is very prescriptive, not done in terms of concepts of substantially lessening competition. It is the way is prescribed. Here, under this provision, you have to go through a very detailed piece of legislation to figure out whether you meet each of the holes, whether it is a capacity constraint and you have to go through a paragraph or subparagraph of something or other—and it is very difficult to meet. The legislation at the moment is already prescriptive. What we are suggesting is that it has to have had the purpose of influencing price or has to have had a dishonest purpose such that people will be able to appreciate upfront that there is something sinister about it, because at the moment it catches transactions which are innocuous, which you would not understand or comprehend unless you plugged through the provisions that cover them. The provisions need to be clearer about the offensive conduct that they are catching, because the examples that we have put in our submission and also the ones that Brent Fisse has put in his are examples that have been caught, and they are everyday transactions. And it is hard to figure out that they are caught by those provisions, but they are.

Senator FURNER—One of the measures that might alleviate your concerns is the ability to use telecommunications interception. Imagine if you are exploring a complaint of collusion or cartel conduct—certainly, with that ability that has been proposed by the bill—and that evidence is forthcoming. That would establish whether this is serious cartel conduct or not, just a matter of a pair of doctors in a small country town communicating with one another to try and get some time off.

Mr Speed—Certainly I think the fact that the ACCC are going to have much greater investigative powers means that you do not need to be lowering the bar to the extent they are suggesting that you are. They will have much greater capacity to prove collusion than they had in the past. What you are effectively suggesting is that we should be comfortable and relaxed that the ACCC will have all the information to be able to make an informed decision as to whether or not this is serious conduct. In my view, it is really up the legislature to determine under the rule of law what is criminal and what is civil, rather than leaving it to and having faith in the ACCC which may or may not be misplaced.

Senator FURNER—Do you have an issue with the ACCC?

Mr Speed—Certainly in my dealings with the ACCC I have had a mixed reaction. I have dealt with them on a number of occasions. I have had circumstances where the comments of Dr Phelps would not be inappropriate as to what I thought in terms of how they dealt with us or the conduct and then had to back down when they actually establish the facts. As a general rule I think the ACCC do a great job and they act professionally, but in my experience they do not always act professionally. Therefore, I think having faith in them, or the DPP, to the extent that the laws are not sufficiently prescriptive is an error. It is an error (a) in

having faith in them and (b) in putting laws out there that have sufficient clarity such that I know when a doctor comes in to see me and says, 'Can we do this or can we not?' I can say more than, 'I hope you can because I hope the ACCC will go that way or I hope the DPP will go that way.'

Senator FURNER—I suppose that as any piece of legislation is amended or varied, however, case law is established based on any changes. In this circumstance, if we are looking at better prescriptive measures to catch criminals, that will no doubt develop so that people in your profession can provide information to your clients as to how they should conduct themselves.

Mr Speed—But just taking the doctor example, if that matter we went to the judges they would have no choice according to the law but to determine that the individual is guilty of a cartel or a criminal cartel. They would have some flexibility in terms of the sentencing, but the provision is quite prescriptive and they must follow what the legislature puts down. If it is limiting or restricting the supply of services, then you are guilty of the offence. You are suggesting that the judge will have discretion. Judges are bound by what the legislature says. If the legislature says, 'That is an offence,' then they are bound by that. They will have discretion in terms of sentencing, but it is at that point only. So you can be found guilty of that criminal offence if the ACCC has a particular bent against you. I am not suggesting it will, but the ACCC, like everybody else, has human foibles. You should not leave the discretion, particularly as wide as it is, to the ACCC.

Senator EGGLESTON—You say in your submission that, in short, nobody will be watching the watchdog.

Mr Speed—Yes.

Senator EGGLESTON—Quite a lot has been said about international comparisons with other countries having anticartel laws. Are they administered in a different way in other countries? Do you see anything we could learn from other countries?

Mr Speed—From the comparison that I have done with overseas countries, what I can say is that whilst this bill is based on the OECD suggestion as to the four basic grounds or types of cartel conducts—which are: capacity constraints, price fixing, bid rigging and market allocation—overseas provisions do not attempt to outlaw those types of conduct per se for the very good reason that you may be constraining capacity, even if it is an agreement between competitors, for very good and legitimate purposes. So the overseas laws do not try to do what these provisions are trying to do. I am not aware of particular examples overseas where there is an overseer watching the watchdog—however, you have provisions that require less watching of the watchdog because the provisions are more confined or constrained in the first place. In terms of the Australian scenario, one body that does have a large degree of discretion and influence and power is the tax office and it has an inspector-general. If you are going to have such wide provisions then at least you would have a review, potentially for, say, the example of the million dollars. You do have a body that is overseeing that entity.

That is a possibility here. However, the better suggestion is to have provisions upfront that are tighter and more prescriptive. They do not necessarily mean massive changes to the provisions that are there, but at least have some criterion that ensures 'criminal conduct' is not innocuous and does not catch commercial transactions. I have only put a few examples of what innocuous commercial transactions are there. Brent Fisse has put a number of others. I cannot imagine the full spectrum of actions that get caught by these provisions. I do not know how the ACCC is going to act on them or how particular individuals, today or tomorrow, are going to act on them. That makes it difficult for me to deal with the provisions every day and much, much more difficult for someone who does not know the provisions, like the doctor, like the baker or like the franchisee and the franchisor in the examples that we have been giving.

Senator EGGLESTON—You say in your summary that that is your principal concern, so we note that. Who administers the anti-cartel laws in the UK, for example?

Mr Speed—As I understand it, it is a body equivalent to the ACCC in the sense that it is the same sort of body. But they have a dishonesty test, for example, in their cartel provisions, as I understand it. If you have to prove dishonesty, at least I or an individual out there can understand that I am dishonestly getting a gain. I have a conspiracy for a personal gain and I can understand when I have done something that is offensive, but if all I as a doctor was trying to do was get a Saturday off then I am not sure that I would pick up that I really should be worried about the cartel provisions and that I should be getting legal advice as to whether I have done something that is criminally offensive. So it is done by a similar body, as I understand it. But, as I say, that particular example is a much more confined example where you have an overriding test or requirement of

proving dishonesty for gain, which would shrink dramatically the chances of the provisions catching an innocuous transaction.

Senator EGGLESTON—That is quite an important point, because the dishonesty test has been taken out of this legislation.

Mr Speed—Yes, it has.

Senator EGGLESTON—You are really saying it would be a good thing to have a dishonesty test there, are you?

Mr Speed—Certainly I think it would be better to have a dishonesty test in the existing provisions, and there are obviously a number of precedents in other Commonwealth provisions of having such a test. The alternative is having a tighter provision. You do understand dishonesty, but it is hard to explain or express and to confine exactly what it means. It is something that is generally understood.

The alternative is more along the lines of what Professor Zumbo was putting forward—that it must be influencing price. I would have issues with Professor Zumbo's drafting, but certainly if you are trying to allocate markets or trying to rig bids—which technically meet these criteria, which are incredibly broad when you see how the definition works—or if you are reducing production capacity with the purpose of influencing prices, then I think you will find that you are catching the sort of serious cartel conduct that you are intending to catch. But if you do not have the additional rider of influencing prices then I think you are going to catch a large range of innocuous commercial transactions.

Senator XENOPHON—Can I follow up on Senator Eggleston's point on the issue of dishonesty. Won't that raise the bar and make it more difficult? You have an extra element that will give a way out to a number of people who have been engaging in conduct that increases prices, because you need to prove dishonesty?

Mr Speed—Arguably, it would, but why should the doctors—

Senator XENOPHON—More than arguably.

Mr Speed—Yes, it definitely would lift the bar—no doubt about that. I am not saying that it would not. But why should doctors go to jail unless it can be proven that they did something dishonest? Why should the franchisee or the franchisor go to jail unless it can be proven that they had done something dishonest? Why should the ACCC have the additional investigative powers that they would have, to tap phones et cetera, and then not have to prove dishonesty?

Previously they have complained they could not meet those tests because it was too hard to get the proof. Well, what is proposed is to give them the chance to get the proof, so why is it that you allow them to get the proof but then say they do not even have to bother proving it? They would not have to do that. It is sufficient—for instance, in one of the Visy cases—to say, 'We happily accept that we can't prove substantial lessening of competition, but technically it is a per se breach, so we are going to go for you.' Technically, that is what they can do, so why get rid of the dishonesty test or have an additional test of the purpose of trying to influence prices or something of that nature? Why get rid of that test just so that it is easier for them to find proof when they already have greater investigative powers?

Senator XENOPHON—I would just ask, because this would affect a lot of people, about the agreements between franchisors and franchisees such that the franchisor agrees not to establish another franchise in a geographic area provided the franchisee does not operate outside its allocated geographic area. You are saying that, on the face of it, that would be anti competitive and therefore be in breach of these provisions. Would you be able to get an exemption for that?

Mr Speed—You may. First off, I am certainly not saying it is anti competitive; it could be very pro competitive. But I am saying that it would fall foul of these provisions because these provisions are not about necessarily catching what is competitive and anti competitive. So it would fall foul of these provisions because the way section 47 is drafted—which, as I was saying, is the complex and awkward provision at the moment—there are three restraints. Firstly, that a franchisor agrees not to itself open up a franchise within that geographic territory. I do not think that would be caught—section 47 overlap saves that one. Secondly, a franchisor agrees not to allocate that territory to other franchisees—so not only do you get that provision but it is exclusive to you. I think that would fall foul of these provisions because section 47 and the anti-overlap provisions do not save you. Thirdly, the provision that the franchisee not operate outside its allocated area. So the franchisee itself agreeing to only operate within that confined area. I think you will find the anti-overlap provisions do not save you in that provision such that you are caught for those two aspects of what is

effectively the one transaction to give you an exclusive zone. When you divvy it down—and you how to divvy it down according to how the act works—they do not get caught by exclusive-dealing provisions. Therefore they are not saved from that by the anti-overlap provisions and therefore they are caught by these cartel provisions.

Senator XENOPHON—Who is going to want to invest in a franchise then?

Mr Speed—I do not know—with that hanging over your head. Certainly what you say and what would be put is that they can get an authorisation. I have done a number applications for authorisations—and there is a \$10,000 cost there in the first instance if you are trying to do it because the ACCC rightly wants to know all the tax and other circumstances and to be sure that this is not some sham or some additional material. So you have a lot of upfront costs even if you thought that it was potentially an issue in a provision where you think anti-overlap provisions save you.

Senator XENOPHON—But with franchises, because again this affects many thousands of small businesses in this country, wouldn't you expect that there would be a template for franchises? So it would not cost \$10,000; it would be a matter of ticking a few boxes if it is a standard type of agreement.

Mr Speed—Certainly I would hope that if this provision went through then the ACCC would take a pragmatic view like that and you could have such an approach.

Senator JOYCE—We have a threshold of \$1 million in this legislation, is that correct?

Mr Speed—It is not in the legislation; it is under the memorandum of understanding, which is not enforceable.

Senator JOYCE—Is there a possibility of lifting the threshold somewhat—and I do not know what level you would lift it to—so as to exclude minor players who obviously cannot afford \$10,000 for authorisation and catch the fish that we want to catch, which are the big players in the market who are ripping everyone off?

Mr Speed—Certainly the higher the threshold the less transactions it catches, as long as the memorandum of understanding is being properly adhered to. The difficulty is that when the ACCC assess it at a certain level then that is really their judgement and their assessment and that may well be inaccurate. I do not know in the context of franchises how much the commerce is going to be involved. I can see \$1 million in turnover getting blown very quickly. You might have an extremely high threshold just to cover that particular example because some of these franchises no doubt do very well and have very high turnovers. So you might have a very high figure to get what are really small business but with decent turnovers, and that seems a very blunt mechanism to solve the problem when really the problem is that the provisions should be tighter.

Senator JOYCE—In 2008 a million dollar turnover sounds like a lot, but it is not a million dollar profit. A million dollar turnover might only be a \$150,000 or \$200,000 profit, particularly if it is a small business.

Mr Speed—It could be. It depends on the mark-ups et cetera. It seems very arbitrary, because it is not really going to distinguish between small and large business. In any event, small business is not going to have the ability to challenge or question someone else's assessment of it, which could be completely incorrect.

Senator JOYCE—Yes. Thanks for that.

Senator XENOPHON—If we have covered this, just tell me. You raised in your submission that the ACCC could have too much discretion under the proposed legislation to decide which conduct would attract civil penalties, which conduct would attract criminal penalties and which conduct would be allowed to continue. You argue that it should be the parliament which should settle these questions. Can you explain how the parliament rather than the ACCC could legislate to give certainty to business such as to which activities would attract civil penalties and which would attract criminal penalties. Further to that, would you be in favour of inserting a list of factors in the bill, similar to the ACCC-DPP MOU, which would establish a basis upon which cartel related matters could be referred for civil proceedings and for criminal proceedings? Also, can you elaborate on your claim that the ACCC should not be burdened with determining on a case by case basis when to prosecute and when not to prosecute.

Mr Speed—Certainly. In relation to the first issue, the correct approach is really to leave the civil provisions largely as they are and to have separate and distinct criminal provisions. They do not necessarily have to be substantially different to what is being drafted. However, they do need to have an additional requirement. It needs to be either in the nature of, as Professor Zumbo suggested, influencing prices, or in the nature of having a dishonesty requirement. They are the two that come to mind in terms of what I would draft.

In relation to the ACCC having this discretion and the fact that it should not be burdened with determining on a case by case basis, the situation is that laws are to be prescriptive. As the legislature you typically do not make laws that are retrospective. Upfront you should have a flag and know what is criminal conduct and what is not. That increases the disincentive for individuals to do it, since they know what is across the line and what is not across the line. It also has the benefit for advisers and for the community at large that they can know with some comfort that they can do this and they cannot do that. At the moment it is inappropriate that, retrospectively, once the ACCC forms its own view and has its own investigations, with or without the alleged person having much say in that, it gets to choose where the line is. It is more appropriate and shows good practice and good principles of legislation—which I think is endorsed by this government—that it should be prospective and it should be clear. It will not achieve that unless you have distinct provisions as opposed to parallel provisions with a wide discretion.

Senator JOYCE—Have you answered the question about how you deal with the broad based exemption of joint venture agreements? Professor Zumbo probably touched on it. Have you spoken to that issue? Do you see that just as an out clause for any person who is cunning enough to use it as a defence?

Mr Speed—The Shopping Centre Council is appearing today, and I obtained the legal advice for their document. It may be more appropriate to deal with the joint ventures in that context, because my submission really was not addressed to that.

Senator JOYCE—Fair enough.

Mr Speed—I am happy to answer the question, but I would rather answer the question with the people that I briefed on that matter.

Senator JOYCE—Sure.

Senator EGGLESTON—Some people have suggested that the criminal sections should be dealt with through the Trade Practices Act and that these two areas, civil and criminal sanctions, should not be combined.

Mr Speed—I think keeping them in separate acts—for instance, putting it in the Crimes Act—would make it a lot cleaner, and you would know from which one you were proceeding from the start. You would need to know about the criminal offences if you are doing any advice on trade practices. So in some sense it is convenient to have them in the one act. But because they do have different investigative regimes et cetera, it would be of some benefit if they were kept separate so that when you know you are under one, you are going down that path rather than another path and having it intermingled.

Senator EGGLESTON—In other countries are they separate? We have heard a lot of reference to the other countries that have this kind of legislation.

Mr Speed—I cannot recall. I do not know.

Senator XENOPHON—You have a concern about the discretion the ACCC will have in relation to these matters. But the ACCC already has a discretion, for instance, in dealing with predatory pricing.

Mr Speed—Yes.

Senator XENOPHON—Why should it be so different here?

Mr Speed—If you are talking about predatory pricing, I think you will find that the provisions, in my view, are more specific than what we are dealing with here in the sense that they are less likely to catch innocuous transactions than they do currently. So, therefore, you are talking about what I think are much broader provisions here catching a lot wider range of innocuous transactions. Ultimately at some point of in time with a piece of legislation there is going to be a line which is not going to be crystal clear. So there is going to be some discretion about whether you pursue predatory pricing or whether you do not think it is predatory or whether you think it is inoffensive. But the line should just be clearer than what has presently been drafted. There should be a clear example of what is criminal. It should not just be the onus of proof, which is really no line at all.

Senator JOYCE—If the ACCC are in high pursuit, you want them to be high in the saddle on predatory pricing, especially with the Birdsville amendment. You can hardly accuse them of being overzealous. They have hardly caught one.

Mr Speed—With respect, I have different views in terms of the Birdsville amendment in particular, so I will not go into that provision.

Senator JOYCE—It would change the whole complexion of this interview.

CHAIR—Thank you, Mr Speed, for coming here and giving us the benefit of your experience.

[10.53 am]

COCKBURN, Mr Milton Roy, Executive Director, Shopping Centre Council of Australia

SPEED, Mr Peter Stuart, Solicitor, Shopping Centre Council of Australia

WALSH, Mr Timothy Gerard, Legal Adviser, Shopping Centre Council of Australia

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

Mr Cockburn—I would like to thank the committee for hearing us today. I appear with Mr Tim Walsh, who is a member of our council's legal advisory committee on competition law and also with Mr Peter Speed, who has appeared before you in his own right and who was involved in advising the Shopping Centre Council on this matter.

Other submissions have drawn attention to more general concerns with the bill. We limit our submission to a very specific problem—that is, a defect in the joint venture defences. I note that the same point has been addressed in a number of other submissions before the committee. Although our submission presents this defect in the context of the shopping centre industry, I want to stress that this is not only a problem for our industry but a problem that potentially affects all joint ventures. This was presumably not the intention of the drafters of the bill, but it is an unintended consequence which we believe must be corrected. We have presented a legal opinion with our submission, a legal opinion by distinguished counsel, which supports our concerns and which also provides a suggested drafting amendment which would cure this defect.

Various statements have been made in the second reading speech and explanatory notes that it is not the intention of the bill to limit legitimate business activity. But we have demonstrated in our submission that the bill in its present form places in jeopardy the joint venture structure, which is a highly efficient and effective means of allocating scarce capital resources.

It seems to be the case—and we note no official explanation has been given—that the drafting changes made since the first exposure draft of the bill, and specifically the deletion of the words 'arrangements or understanding', are to ensure that a joint venture structure is not used to camouflage cartel conduct. We believe this argument carries little weight. First, sections 44ZZRO(2) and 44ZZRP(2) provide that it is the joint venturers who bear the onus of demonstrating that a joint venture actually exists. Second, as Professor Bob Baxt notes in his submission, the courts will quickly see through artificial attempts to use defences that are not appropriate because there is not a genuine joint venture. Third, it is our strong view that any attempt to cloak cartel conduct under the guise of a joint venture would be obviously transparent and would fail.

I should also add that we believe the ACCC suggestion in its submission of 12 February, that joint venturers can seek authorisation for coordinated activity not specifically contained in a contract, is impractical and, quite frankly, absurd. Is it seriously suggested that every joint venture in Australia having to lodge an authorisation to the ACCC—and, by the way, having to lodge continuous applications for authorisations—is a sensible and practical solution to this problem?

Finally, the legal opinion we have provided also draws attention to a possible defect in the drafting of the definition of a joint venture as it relates to those conducted by real estate investment trusts and recommends that this ambiguity be corrected. Once again, we have provided suggested drafting to remove this possible—and I stress possible—defect.

Senator XENOPHON—What you are seeking to do is to broaden joint venture arrangements to the defence. Is that right?

Mr Cockburn—We are seeking to have the words 'arrangements and understanding' reinstated in the bill as they were in the original draft.

Senator XENOPHON—But that would weaken the effectiveness of the bill, wouldn't it?

Mr Cockburn—We do not believe it would weaken the effectiveness of it. It would obviously broaden it from that behaviour which is specifically contained in a contract to that which is contained in arrangements and understanding, but, as I said, while it might broaden it we do not believe it would actually weaken the bill.

Senator XENOPHON—Leaving aside the word 'weaken', which was a pejorative term, if you broaden it more defences will be available to people so they will not be prosecuted under this proposed legislation.

Mr Cockburn—I do not think that is the case, because the bill still sets out what the—

Senator XENOPHON—How can it not be the case, though? If you have more defences available to you—if the scope of defences is broadened—that would make prosecutions more unlikely.

Mr Cockburn—The bill still sets out what you would have to establish in order to show that a joint venture actually exists.

Mr Speed—The defence would certainly be broadened. What we are suggesting is that it broadens it to exclude sensible, commercial, everyday joint ventures and protects what the Shopping Centre Council is particularly concerned about, which is management communities making decisions under the structure of a joint venture in the nature of what you are proposing, a contractual joint venture, but with management decisions being made at committee level, which could arguably be provisions of an arrangement or understanding, just fixing the price of that particular joint venture. So, for instance, if the setting of rents at shopping centres or setting the price of coal that is being supplied by a joint venture is being done at the committee level and not done pursuant to a contract then the expansion of the defence would allow those sorts of arrangements not to be caught by the act.

Mr Walsh—I would just make the comment that we are putting this forward on the basis that we understand that most formal joint ventures in Australia—not only in relation to the Shopping Centre Council—are genuine. The joint venture activity is in fact prescribed in a contract, but they do undertake many activities, all of which are contemplated by the contract but all of which quite legitimate activity could, nevertheless, fall foul of the cartel provision because they are not committed. They cannot be said to be formal contracts in themselves. That is the problem that we have. We would suggest that cannot be resolved by saying, ‘We’re not out to proscribe here genuine joint venture activity; if there are these situations that you are concerned about, simply go to the ACCC and get an authorisation.’ We do not see that as a practical or meaningful response. As to your concerns—

Senator XENOPHON—Sorry—just further to that, Mr Walsh: if the processes for authorisation with the ACCC were streamlined and there were adequate resources to deal with that, that would go a long way towards dealing with your concerns, wouldn’t it?

Mr Walsh—Well, I am not so sure that it would because no matter how you streamlined the process there would still be a process, and the questions would then arise as to whether you could get a blanket authorisation for all, for example, committee meetings that might take place in the future, over an indefinite period, or whether, from time to time, particular circumstances would arise where a committee which had to meet and make a decision might fall foul of a cartel provision but might not precisely fit within the authorisation that exists. So there would be the ongoing concern about having to go back to the ACCC to get a further authorisation and subsequent authorisations for what is, after all, simply routine commercial activity.

Mr Cockburn—And I am not sure that the ACCC, given what it is required to do in order to grant an authorisation, could really streamline those processes substantially. There is obviously a fair amount of investigation that it has to undertake before it does authorise these situations. And the fluidity of the conduct that might take place in a management committee, for example, is such that, as Mr Walsh said, you would probably find you were having to go back a significant number of times in order to maintain that authorisation.

Mr Walsh—I will just make one further comment. I think your earlier question to Mr Cockburn was, ‘If you add the words “arrangement and understanding” into the defence, with your cartel provision, provided it is for the purposes of a joint venture, you could still rely on the defence, even though it is within an arrangement and understanding, as opposed to a contract.’ I think your concern was that that opens the gate to non-genuine activity, and a lot of commentators have made the same point. We consider—and I think Mr Cockburn said in his opening statement—that that concern is overstated. That is because, when you actually look at how you establish whether the purpose test is satisfied within the context of the defence—and there are three levels of that—bearing in mind that the onus is on the applicant relying on the defence to establish that the defence applies, there are sufficient levels in that to make it highly improbable that anybody who was trying to cloak non-genuine cartel activity, non-genuine joint-venture activity, and using the defence for that means would not be able to succeed. When one envisages the types of cartels that might be put into what has this appearance of a joint-venture, that would be highly unlikely to survive judicial scrutiny because they would never make out the defence.

Senator JOYCE—Obviously, in real estate law an oral contract does not stand the test; it has to be in writing. Why can’t we have it in joint ventures, just so people—

CHAIR—Senator Joyce, could you speak more distinctly please.

Senator JOYCE—Yes. I have asked this question before but I will ask it again: in real estate contracts, an oral test does not stand; it has to be written if you want to force it to be honoured. With joint ventures, why can't we just have it in the law that if you want a joint venture you must have it in writing?

Mr Speed—The issue that the Shopping Centre Council has is not that the overriding joint venture is in writing. That is invariably and inevitably the case. It is where the cartel provision, or the so-called cartel provision, falls. If, for instance, at a jointly-owned shopping centre, the representatives on a management committee agreed to set the budget for the leases of some particular shops at that premises, that exercise of the committee agreeing is arguably a cartel provision, pursuant to an arrangement or understanding falling foul of this piece of legislation.

So, whilst you have an overriding joint venture which is contractual, you have a committee which is fully contemplated by that joint venture, completely innocuous and typically commercial, making a decision where it is agreeing about what the budget should be. Whether that agreement is a contract and whether it is legally enforceable between the two competitors—who are not in this circumstance competitors because it is their joint shopping centre and they are only determining the rentals or setting the budgets for rentals of particular shops within that shopping centre—when they are doing that process—that is, doing what is called the cartel provision—it is that process which is not contractual and it is that process which we are concerned about.

Senator JOYCE—Wouldn't it be open to kill two birds with one stone, so that in that joint venture agreement you stipulate the process and arrangements that, by reason of that document being in existence, would be part of that document, such as negotiations between joint venture parties on the commerciality of rents?

Mr Walsh—I will just respond to that. The joint venture agreements that are typical within our industry—and most, I would imagine—are already committed to writing, but, as Mr Speed said, that is not really the issue. In fact, not only are they committed to writing but they do all prescribe the procedures that will take place between committees constituted by representatives of the joint venture parties to conduct the business of the joint venture. The problem is that, whilst you do have a contract for the joint venture, because of the way this defence is technically drafted, it is those procedures—even though they are foreshadowed in the legitimate joint venture contract and even though they are necessary for the effective operation of the joint venture—that of themselves are arrangements or understandings; they are not formal contracts. They are not contracts at law. There would be issues of establishing whether they were contracts at law because there is no consideration and they are not enforceable, but they are arrangements that are foreshadowed by the formal joint venture contract. The problem is that these perfectly normal procedures, even though they are enshrined in the formal joint venture or foreshadowed, of themselves do not fall within the terms of the defence as it is currently drafted.

Senator JOYCE—From your perusal of it, is there a capacity to amend the legislation in such a way that they do, without going against the tenet of the legislation, which is precluding cartel arrangements, and which I am strongly in support of, and being stronger on cartels without completely stymieing every joint venture that was ever considered? Can you see how that can be done?

Mr Walsh—Bear in mind that a number of other parties who have submitted to this committee have a range of propositions which range from basically recasting the entire approach in the bill, making the criminal provisions, particularly, more prescriptive. We have views about that, but we are looking at the problems that are particular to our industry and the very narrow problem of the joint venture defence. The beauty of what we are proposing is to submit a very simple amendment to the joint venture defence which we think covers our issue neatly and deals with the issue properly, and that is merely to insert, in the appropriate places within the relevant joint venture defences, both for the offence provisions and the civil liability provisions, the words 'arrangement and understanding'. That deals with the issue.

As I have already said, we do not think that broadens the ability of non-genuine joint venturers to cloak their cartel activity as a genuine joint venture, because there is already in the elements of the defence an onus, and a substantial onus, for anyone seeking to rely on it to establish that the relevant elements of purpose are made out. We do not believe that any sham of the kind that certain parties who have made submissions to this committee are concerned about would be likely to survive the scrutiny of a court.

Senator JOYCE—Do you think the public, without knowing the specific details, should know there is a joint venture in place, that company A and company B have engaged in a joint venture which you see as project C? If the public knows that, that is, I think, the foundation stone for defence. It is just that when project C, the joint venture of company A and company B, only becomes known later that people start to ask questions about whether you are manipulating the whole market process.

Mr Cockburn—In our industry, it is usually the case that these things are well known. At the time that a sale may take place where one other company buys a share of a shopping centre or centres, there is obviously an announcement and publicity about that matter. It is also the case in our industry that there is published a directory of shopping centres which gives the ownership and managers of shopping centres. That information is already public. The annual reports of the particular owners of the shopping centres would be detailed, as well. That would also be available through their website. I can only speak for our industry, but I think in our industry it is fairly widely known who the owners of the particular shopping centres are.

Senator JOYCE—I think people are looking for the difference between commercial, which they understand, and sneaky, and the legislation should be addressing sneaky, not commercial.

Mr Speed—The suggestion that we have an issue with does not have the words ‘arrangement or understanding’. You can bury a contract just as much as anything else. If you had an illegitimate purpose and you were, for instance, the owner of a series of petrol stations agreeing to one price, and you described that as a joint venture to fix your prices, you could do that in a contract or, just as well, in an oral arrangement or understanding. The fact that the provision requires only contracts means that a savvy illegitimate person could just put it into a contract. If the purpose of getting rid of arrangements and understandings from this provision is to stop shams, it is not going to do that.

Senator JOYCE—Of course, a contract can be oral.

Mr Speed—A contract can be oral, but it can be in writing and put in the bottom drawer.

Senator JOYCE—Exactly. As an accountant, I can assure you they always exist.

Mr Speed—As a consequence of that, if you are addressing the sham problem, that is not the answer. The answer to addressing the issue of a sham or an ultralight joint venture is what Mr Walsh was describing in the other provisions. There is the requirement—and this is again where the onus is on the defendant—that the joint venture be for the production and/or supply of goods and services and that the joint venture be carried on jointly by the parties to the contract. Going to the petrol station example, the petrol station owners are not going to be jointly supplying the petrol; they are selling their own petrol at their own price. To get through the thresholds, if the court is doing its job, you as the defendant have the onus to prove that this is a genuine joint venture genuinely producing or supplying goods and services and that you have been involved in it. That is the test to ensure that shams do not get through; it is not the reference to ‘contract, arrangement or understanding’. That makes it no harder; in fact, a conscious person just has to sign a piece of paper to solve his problem. It is a blunt mechanism which gives our industry—and, basically, every industry that engages in ongoing joint ventures—a real problem at the management committee level, which is presupposed to and is contemplated by our overriding joint venture agreement. It gives them a problem but does not even solve the difficulty of the sham issue that you are trying to address.

Senator JOYCE—Thank you for that.

Senator XENOPHON—Further to that, how, specifically, would you like to see the joint venture defences of the bill redrafted?

Mr Speed—It is simply by the reintroduction of ‘in relation to a contract, arrangement or understanding containing a cartel provision’. It is inserting three words—‘arrangement or understanding’—after the word ‘contract’.

Mr Cockburn—And we mentioned—

Mr Speed—And there is another, consequential change—

Senator XENOPHON—That is incredibly broad.

Mr Speed—No, because the tightening of the defence and the bit that attracts the sham bits are the requirements either for the purposes of that provision or arrangement or understanding. So in our context, the setting of budgets for particular leases has to be for the purpose of a jointly-owned shopping centre. It is not like you can set the budgets for leases of everybody’s shopping centre not in joint ownership; it is only for that particular joint venture. The particular joint venture has to be for the production and/or supply of goods and services and it has to be jointly carried on. So in relation to the petrol station examples, they are individually supplying petrol and, if they have agreed to fix prices, they have not jointly supplied the petrol so they do not get the benefit of the defence. They are not jointly producing or supplying services in a joint method so they cannot prove the defence in any event. That is the protection for the sham problem not the contract arrangement or understanding.

Senator XENOPHON—Putting it another way, suppose this legislation goes through in its current form, what practical implications will there be for your industry?

Mr Speed—I cannot think of any ongoing substantial joint venture, which has any flexibility, not falling foul of it on a regular basis, or not arguably falling foul of it.

Senator XENOPHON—You could still seek authorisations but they—

Mr Speed—You could certainly seek authorisations but the difficulty again with authorisations is (a) why should you? Why should you have a law that catches something that is so generally legitimate? Alternatively, you have got the difficulties of the authorisations invariably being quite specific and limited and you have deliberately not been too prescriptive in your joint-venture document—the overriding contract—because it needs flexibility. We are dealing with a commercial arrangement which needs to change and different decisions need to be made, which is why you set up management committees and why it is not all written into the original document in the first place. Therefore, when you go for authorisations, if you seek authorisation upfront, you do not have the flexibility and the ability to change, because the ACCC would be prescriptive as it is authorised to be. So you are going to have to put in supplementary authorisation after supplementary authorisation—

Senator XENOPHON—Wouldn't there be scope for the authorisation to have enough flexibility to give parameters as to what can be done by these management committees? That is possible, isn't it?

Mr Speed—It is not my understanding of the current practice for the ACCC, because they like to have all of the information to ensure that it is not problematic or presenting a difficulty. So they are usually quite specific, from my general understanding—

Senator JOYCE—Can't we just change the riding instructions for the ACCC so that they do?

Mr Speed—But it seems back to front. It seems that we are not asking for a provision that is particularly going to protect us or solve the problem of a sham or ultralight joint venture. It seems strange that we do not get the benefit of the defence upfront. Instead everybody in this country that has a joint venture has to keep writing to the ACCC for authorisations.

Mr Cockburn—I just want to draw your attention to the legal opinion that we attached to our submission and in particular paragraphs 24 and 41. That gives some of the history in this matter. We did write to the Assistant Treasurer on 28 November. At that stage it was prior to us obtaining the legal opinion that we have attached. We suggested that, if this were the concern, the re-insertion of the words 'arrangement and understanding' was a step too far, then suggested that the drafting in paragraph 24 was that the arrangement and understanding in question must be 'contemplated by a contract'. That was our suggestion prior to obtaining the suggestion of counsel. I think that there is no doubt that the suggestion of counsel, for the reasons Mr Speed has just explained, is the purest and the best method of curing this defect. We did initially suggest that we could narrow that by inserting those words 'contemplated by a contract'. I do think that it is a case where it would appear to solve the problem that we are addressing but, nevertheless, I think that unquestionably the best form of addressing this is what has been suggested in the legal opinion.

Senator XENOPHON—How have your negotiations between the Shopping Centre Council and the government gone on this? Can you give us an idea about that? You raised these concerns—

Mr Cockburn—Yes. You will see from the date that we sent that letter on 28 November, and I think the bill was introduced on about 4 December, so we were obviously unsuccessful in getting that included in the bill.

Senator XENOPHON—But have you had a response since then in terms of amendments?

Mr Cockburn—Yes, we have had a response from the minister, but it did not specifically address this particular issue, because the response from the minister came not only long after the bill was introduced but also after this committee had been established. I must say, by the way, that the negotiations and consultations we have had with the minister's office have been excellent. They have been very receptive to the matters in consulting with us, but that particular aspect was not adopted prior to the bill being introduced.

Mr Speed—I think they have a misunderstanding as to our concern about 'arrangement or understanding.' The view that came back was, 'You're already covered, because a contract that deals with such matters can be oral or in writing; it can be quite broad,' whereas the legal advice which we subsequently got from getting those indications, which is the advice that I had been given anyway—it is the advice that Brett Walker and Jason Potts have given me—is that the contract is not broad enough to cover the circumstance or the committee decisions that we are concerned about, so we are back to our problem.

Senator XENOPHON—Has that misunderstanding about the definition of ‘understanding’ been sorted out yet?

Mr Speed—I think no. The legal opinion is the end of that trail at this point—the opinion that we have put there.

Senator XENOPHON—Okay, thank you.

CHAIR—Thank you to the Shopping Centre Council for coming in this morning.

[11.23 am]

ZUMBO, Associate Professor Frank, Private capacity

CHAIR—Welcome, Associate Professor Frank Zumbo. Do you have an opening statement you wish to make?

Prof. Zumbo—I do. I will be brief. Firstly, obviously, I would like to thank the committee for allowing me to appear before it. I have heard evidence this morning and I have looked over the submissions. It is an area that I have been long involved in. In fact, I was very surprised to see some old words of mine being quoted back to me in the *Bills Digest*, in the conclusion, summarising what cartel behaviour is; that was dated 2001. So it is an area that has been at the top of my list for a very long time. I have to stress that I am very clearly in favour of the criminalisation of cartel behaviour. It is very important that we have the strongest possible laws against cartel behaviour. I have long advocated that the crooks, as I call them, be put in jail and that the jail terms be as long as possible. I have also argued that we need telephone interception power because this conduct is often undertaken over the telephone—it is secretive and covert—so you need the strongest possible apparatus.

Yes, it is theft. It is consumers being ripped off. It is consumers being robbed. I put it in those fundamentally simple terms because that is essentially what a cartel does. A cartel is an organised syndicate of competitors who get together to, at the end of the day, rip off consumers. They do that by basically driving up prices. There is economic research which I am very happy to provide to the committee where a study was done of all the relevant studies on cartels and it was clear that there was an average overcharge of 25 per cent.

Senator XENOPHON—I would find that useful.

Prof. Zumbo—I will table that research. It was done by Professor Connor and Professor Lande. It is called *How high do cartels raise prices? implications for reform of the antitrust sentencing guidelines* and it was in the *Tulane Law Review*. I will give that to you at the end as I may need it during the course of my evidence. They reviewed all the literature and they found that the average overcharge domestically was 25 per cent. It was actually higher at an international level. The suggestion being that, at the international level, there was more freedom of action and competitors were more likely to engage in a cartel at an international level. The sentencing guidelines have long had a presumption of a 10 per cent overcharge. This study suggests there should be a presumption of a 15 per cent overcharge. Ultimately consumers, small businesses and others, are being ripped off to the tune of anything up to 25 per cent.

That is a significant piece of information and it is basically what has driven me to make the suggestion that ultimately what you need is a criterion to distinguish serious cartel behaviour from other behaviour, whether it is innocent behaviour or less anti-competitive behaviour, if I can put it that way. The suggestion was the raising of price as the criterion. I want to pause and make some comments about that. I think a lot of people have concerns with this legislation. Some may be philosophically against criminalising cartels but, putting those aside, I think even those who accept that cartels should be criminalised, as I do, are concerned that there is no distinguishing criterion between a serious cartel and ‘other behaviour’. In fact, the cartel provision that defines the conduct applies to both criminal and civil offences. So the same conduct is used to define what is a criminal offence and what is a civil penalty offence. That causes a lot of unease because there is no distinguishing feature. The same conduct could be treated as criminal or could be treated as a civil offence. The only thing distinguishing them at the moment is the discretion of the ACCC.

In the past, the distinguishing criterion has been dishonesty. I am totally against ‘dishonesty’ because it is a confusing concept to try to explain to a jury. At the end of the day, a serious cartel is inherently dishonest; they are getting together in an organised fashion to raise prices. So dishonesty is not the criterion. But I do see that the drafter and maybe Treasury and others have struggled with finding a distinguishing criterion. They have not got one in this bill. As I said, the same conduct is used to define a civil or criminal offence. The only distinguishing criterion appears to be the discretion of the ACCC and, obviously, the Commonwealth DPP.

I am a bit nervous about criminal laws being fashioned in a way where there is a lot of discretion given to the prosecutor. Absolutely put these people in jail. Put the crooks in jail—maybe even throw away the key. I have no problem with that. But I do have a problem if some innocent people may be caught up in this conduct. The old adage about it being better that nine guilty people are let free than one innocent person be put in jail is very true in criminal law. I do believe you need a criterion.

We talked about the 1998 OECD recommendations. Treasury was correct in saying that a hardcore cartel is defined in a particular way—that is, to capture price fixing, bid rigging, output restrictions and so forth. That is what motivated them to draft the cartel provision. However, what has been missing in that discussion is that, in the OECD recommendation, the OECD go on and say:

- b) the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies ...

So, yes, in those recommendations they define what is a hardcore cartel in terms that are picked up in this legislation, but in paragraph (b), which no-one has mentioned, even the OECD suggests that there should be some distinguishing criteria.

Having looked at this issue for a very long time, I believe strongly that the distinguishing criteria is the concerted, organised behaviour to raise prices, because the economic literature is quite clear that these cartels are there to raise prices. On that point, I use price for another reason: it allows you to have a ready detection mechanism. If there were two country doctors whose prices went up on a Saturday or Sunday because only one of them was operating, that may raise some questions about whether there had been discussions. Once you saw that the prices had gone up, you may have a case to get telephone interception powers to see what they were saying to each other or to actually monitor their conversations.

Senator XENOPHON—With that example that has been given, where there are only two doctors in a country town and the doctors say, ‘We’re not going to stay in this town with our families unless we can get that day off,’ and they deserve to have a day off, but the consequence of them having that day off is that prices will go up—how do you deal with that?

Prof. Zumbo—Absolutely. It is very important that you see what has happened in that example. They might have discussions and say, ‘We’re going to take off Saturday and we’ll raise our price,’ then they see that the price has gone up and they say, ‘Well, maybe we should take Friday off, and the price will go up on a Friday.’ The problem with that example is that at the moment the legislation captures that conduct—full stop. They could be prosecuted as a criminal cartel. Yes, there is discretion. Yes, it may be less than a million dollars. Yes to all those discretionary factors. But, as the legislation is currently drafted, those doctors will be caught, irrespective of what happens to the price. Even if the price stays the same on a Saturday and Sunday, they could be caught because there is an output restriction. That is my concern. I would have no problem with them simply reducing by one day a week without price changing. If, however, the price changed significantly and it looked like a front for trying to jack up the price, then I would be concerned. But the suggestion earlier was that you would have these immense powers and you could use those powers to go fishing to see what they were trying to do. I think you avoid that temptation for a fishing expedition by looking at price to see why the price has gone up.

Senator XENOPHON—If the two doctors in the country town had arranged between themselves to each have a day off, and they both had genuine family or personal reasons to do so, and the consequence of that arrangement, notwithstanding that its primary purpose was for family reasons, was to push up the price—

Prof. Zumbo—It depends what they say. If they have a discussion and say, ‘We’re going to take the day off on Saturday and, by the way, we’re going to charge 20 per cent more,’ then I would be concerned about that conduct. If they said, ‘Look, we’re going to take the day off but our scheduled fee will be the same every day—

CHAIR—Professor Zumbo, have you finished your opening statement?

Prof. Zumbo—No, I just wanted to make a few additional comments.

Senator XENOPHON—Sorry; I will leave it.

Prof. Zumbo—At the moment there is no criteria distinguishing between a serious or hardcore cartel offence and other innocuous, innocent or less anticompetitive conduct. The fact that that criteria is missing is a severe limitation of this legislation, which then has a knock-on effect. Because there is no distinguishing criteria, so the same conduct could be caught under civil or criminal law, people start getting nervous and start looking at exemptions, so we see that there are those who present evidence and make submissions where they want the widest possible defences to avoid that problem. Because there is no defining criteria of what is serious, because all sorts of conduct can be caught under ‘serious’ and people can go to jail, people get nervous and then they want the widest possible defence. I think, if there was a criteria that distinguished between serious and innocuous behaviour, people may be less concerned about how wide exemptions should be.

We have talked about putting the perpetrators in jail. That is very important. At the end of the day we need to distinguish between the behaviour of serious, hard-core cartels and other behaviour. The bill does not do that. I think it would have been better for the bill to concentrate on criminalising cartels—and that's it. We have civil penalty provisions in section 45A. They should have been left alone. All this bill should have done was just deal with the criminalisation of cartels.

In the same way that there are no criteria distinguishing between what is a serious cartel and what is other behaviour, I believe there are no criteria distinguishing between what is a legitimate joint venture and what is a sham joint venture. Under section 76D there is a criterion that tests the joint venture by reference to purpose and likely effect. At least there is a criterion under section 76D that distinguishes between legitimate and sham joint ventures. I still think that the 76D defence may still be a bit broad, but at the moment the defence proposed under this legislation is even broader than that defence under 76D because the joint venture defence under this bill has no criteria distinguishing between legitimate and sham joint ventures.

Ultimately my final comment is this. We have talked about the perpetrators. We need to put the right people in jail. But we have not spoken about the victims. The victims need an opportunity to be able to collect compensation, to get compensation. There are aspects of this bill that may make it harder for victims to get compensation in relation to protected cartel information where there appears to be a restriction: a managing of what information the ACCC is required to give to plaintiffs in an action to recover damages. So that is an issue there. Are we giving the ACCC too much power to prevent the disclosure of information that could help a class action? I know what the ACCC are going to say. They are going to say, 'Well, if we disclose that information informants will not come to us.' But I have to speak for the other side, to balance the debate, and say, 'Well, yes, you may discourage informants but remember that you have got telephone interception powers and that you can get a lot of information without the need of informants overall.' Ultimately if you restrict the information available to class actions the victims will find it difficult to recover their losses. So I think we need some streamlining of the processes by which affected classes of people, particularly consumers and small businesses, have the opportunity to recover their losses in a streamlined fashion.

Senator FURNER—I accept your opinions as to how you have endorsed this government's objectives in introducing jail terms for those offenders, as overwhelmingly heard from you today in your oral submission. That brings us in line with what is in place in the United States, I understand.

Prof. Zumbo—Absolutely.

Senator FURNER—Certainly given your profession as a lecturer, I am sure you would have come across examples of how that operates in the United States. I am wondering if you are able to provide either some evidence here today orally or on notice of some examples of how that has been operating over there in terms of the likes of cartel operations and the people who have been jailed.

Prof. Zumbo—We need to criminalise cartels. It is long overdue. It is essential. In terms of the US there is quite a bit of literature, which I do not have with me but I am happy to provide to the secretariat, about enforcement rates, how much is recovered and who has gone to jail. They actually measure jail days. It is also about how many people have gone to jail and the sort of conduct. Largely these are US cartels but there are international cartels whereby the overcharge is, say, 25 per cent for domestic cartels. There is a whole body of literature there on enforcement. In general they work very effectively. I think in the United States executives are terrified of the powers that the antitrust division of the justice department has and of the powers of the FBI. In some cases these cartels are pulled up on racketeering charges which have serious ramifications. Of all the countries the US has been the most effective in dealing with this conduct. That does not surprise me, because the essence of a market economy is a free-functioning price mechanism. If you interfere with that, as cartels do, then that does impede the free flow or free functioning of a market economy for the benefit of consumers ultimately.

Senator FURNER—So clearly this objective that the government is proposing will bring us in line with the states and most likely bring about the same outcomes where, possibly, individuals or corporations down the track will be jailed as a result of attempts to commence cartel operations.

Prof. Zumbo—As I said earlier, yes, I agree with the objective of putting cartel participants in jail. There is no doubt about that. That is the objective, and I totally agree with that objective. All I am concerned about is whether we will arrive at that objective. My concern is that if the defences are too broad people who should have gone to jail will escape. On the other hand, I am concerned that if the offence is too broadly defined you may have innocent people being caught up. I am concerned that we put the right people in jail. Absolutely let's put them in jail—no problem with that; use the full coercive powers of the Federal Police to get that

evidence—no problem with that. So yes, I agree with the objective. I am just concerned that the path that this bill takes may not totally realise that objective. That is my only concern. I would not want that objective to be undermined by faulty legislation, and I have to say, with all due respect, that I think this legislation is flawed.

Senator FURNER—But all those cases that you refer to in the states no doubt would have been of a serious nature.

Prof. Zumbo—Yes.

Senator FURNER—It would not have been a case of a pair of doctors in a country town discussing opportunities to have a day off as such.

Prof. Zumbo—There are examples where small businesses have been caught up by the cartel legislation in the United States because they were found to be fixing and influencing prices. My concern here is that there is too much discretion in the hands of the ACCC. I think in our system we would like our criminal offences to be as precisely defined as possible. I think where the draftsman has got confused—if I can use that word with all due respect—is that they are trying to achieve too many things in one go. They are trying to deal with cartel behaviour that is civil and cartel behaviour that is criminal and in between they are defining cartel provisions very broadly.

I think that is the wrong starting point, with all due respect. I think the starting point should have been: what are we trying to do with this legislation?—that is, criminalise cartels. All right, let's do that. Let's be clear as to what a criminal cartel is. Let's be very clear about what that is and let's have a criterion that distinguishes this type of behaviour, the serious cartel behaviour, from other anticompetitive conduct or innocent conduct. That is all I am suggesting—that we need to make sure that the criminal offences are defined to capture the evil conduct they were trying to stop. By using the same definition of cartel provision to cover offences, or conduct, that relate also to civil offences, they have obviously defined cartel provision very broadly. That is the flaw in the logic. I think that is the wrong starting point. The starting point is: what are we doing?—criminalising cartels. Let's do that. Let's define what is criminal, full stop, and leave the civil to the existing provisions. But what they are trying to do is repeal one of the existing provisions, section 45A, then they are trying to make some other conduct per se illegal. Per se makes it automatically illegal; there is no competition test.

So obviously the cartel provision definition has cast its net very broadly because it has to because it is dealing with both criminal and civil offences. But if you put that approach to one side and you say, 'Is there an alternative approach?' the alternative approach is to leave the civil penalty provisions alone—they are already there in the act; they have been there since 1974—and just look at what we are going to do. What is criminal? What should be criminal? Let's define those, and that way we just target the conduct for which people should be put into jail.

Senator FURNER—But, if the net is too loose and we let through people who are possible criminals, aren't we all about trying to tighten this area up so we catch them? You will have a greater field to catch the people who should be caught in the net.

Prof. Zumbo—I am saying we have cast the net too wide to capture all this conduct, so we capture a lot of people who should not be caught. Then we try to overcompensate by trying to make the defence very broad. Because the defence is very broad, that will allow people to escape. On the one hand we have defined the conduct broadly. That would catch a lot of people—a lot more people than ordinarily would be caught under a serious cartel offence. We have acknowledged that, I think. The draftsman has acknowledged that. So they have to have these broad defences, and, because you have these broad defences, those people who may use those defences for sham joint-ventures, for example, are the ones that escape liability. So if you are concerned about making sure that the right people are caught you have to make sure that the criminal offence is properly defined and you have to make sure the defence is not so broad as to allow guilty people to escape.

Senator FURNER—I guess that comes down to the test and the evidence in front of you. One of the measures that the government has introduced is the ability of authorities to use phone tapping. That will provide evidence to demonstrate what has gone on and whether or not there has been an attempted cartel.

Prof. Zumbo—That is a very intrusive power, which I have no problem using when there is clearly a negative impact on prices. If I could see that the prices had gone up and had stayed up I would be very nervous about that, and I would then trigger the use of the interception powers. If as a criterion I do not have price but I have a whole series of anti-competitive conduct by which they can be caught, for me to then use the interception power to try to find out who are the legitimate ones and who are the illegitimate ones is a use of a

lot of resources in a very inefficient way. If you are saying that the use of the interception powers can help us distinguish between serious cartels and innocent behaviour, with all due respect, Senator, you are using a very powerful instrument which is time consuming and very expensive as your criterion to distinguish between legitimate and illegal conduct. That is a very inefficient use of resources.

Senator FURNER—I am not suggesting that they use it for every case but I certainly think the trigger would be, as you stated, when there has been a significant increase in price. That would ring alarm bells and people would then have the opportunity to introduce some form of tapping to see what has been going on.

Prof. Zumbo—If you are happy to use that as a trigger then obviously you would be comfortable in having that as a criterion in the legislation. Why wouldn't you? If you say that the ACCC would be looking to see which cartels lead to price rises as the criterion to use their interception powers, then the obvious thing to say is, 'Put that in the legislation so we all know that is a criterion.' Otherwise, you would be at the total mercy of the ACCC and the Federal Police deciding which cartels they investigate and which they do not. We need that distinguishing feature. I have to emphasise that. Dishonesty was used in the past. I totally disagree with that. So we need some other mechanism. The only one that I can find through all my research and extensive review of the literature is that cartels are there to raise prices. So why don't we use that as a criterion? That is a rhetorical statement.

Senator FURNER—I am sure there would be objectives other than prices that they would use to bring about a cartel operation.

Prof. Zumbo—They use other things to define conduct but, ultimately, what they look at is the increase in price; and, hence, the literature on the presumption of 10 per cent overcharge and the literature that suggests that 15 per cent should be a more appropriate benchmark because the evidence shows that it is 25 per cent overcharge for domestic cartels and more—it is 33 per cent—for international cartels. So when you look at all the literature, the one constant theme of serious cartel behaviour is the raising of prices to rip off consumers—full stop. So I just thought that would be a very good criterion to put minds at ease. We are going to put people in jail. To explain to consumers and juries that this person should go to jail because they have ripped you off in a coordinated fashion by 25 per cent is, I think, a very simple concept to put to them.

CHAIR—Often in a market where the price is already high, competitors will move in to take advantage of the healthy profits. Often a cartel might be formed to maintain the price rather than to raise it. That would not be dealt with under your submission.

Prof. Zumbo—My proposals are draft proposals, and I have drafted them to deal with the fixing of prices, the maintaining of prices, the stabilising of prices and the influencing of prices.

CHAIR—Is your proposal in your submission?

Prof. Zumbo—Yes. As I said, it is a draft to try to illustrate my point. Obviously, people will have different opinions on drafting style and what have you, but on page 6 of my submission I have provided draft provisions to illustrate my point of how my criteria would work in terms of 'fixing, raising, controlling, maintaining, stabilising or influencing the price'.

The other thing that I should say to you, Senator, is that what you are asking there also goes to the issue of cartel discipline. Cartels can break down over time. There are all sorts of issues about freeloader effects and what have you. But, ultimately, if you have an industry which is an oligopoly—two or three players—and they have their prices high, there may be significant barriers to entry to break into that market successfully. But, if you have new entrants, they may join the cartel or they may just freeload off the cartel knowing that there is a cartel and they just keep their prices high. So you get into a whole raft of issues about cartel behaviour and cartel discipline, which I am happy to get into—

CHAIR—No, the question I asked—you are talking about price raising being the criterion—

Prof. Zumbo—That is one of the criteria.

CHAIR—Just one. You are actually talking about fixing, raising, controlling, maintaining, stabilising or influencing the price, so it is that much broader.

Prof. Zumbo—Yes, because it is tampering with the price. I have drafted in a way that is obviously legal drafting because there might be an argument that they are not fixing the price but they are behaving in a way that stabilises the price. There are different variations. My other pet project, as you know, is petrol. OPEC is trying to stabilise prices by reducing supply, so it reduces supply to try and stabilise prices, not necessarily to push them up, because there is a glut of oil.

CHAIR—So the definition in the current legislation of cartels, would you not think that the way cartels are treated in the bill would address all of those?

Prof. Zumbo—Yes, plus a lot of other things.

CHAIR—That is quite a wide definition.

Prof. Zumbo—Yes, but the focus is price. Tampering with price is the evil you are trying to remove. You are trying to stop the overcharge. When you look at my provisions, the basis of my provisions is the government's provisions. I have just added another criterion, and the criterion is if it has the purpose or likely effect of maintaining, fixing et cetera the price. Price is the governing factor.

Senator JOYCE—I have got some questions. I apologise for the inconvenience of doing this over the phone. First of all, to declare an interest, I obviously know Professor Zumbo. Professor, in any commercial arrangement, if I am going to try and go into an arrangement with another person, there are going to be times when I do not want to wear all the risk but someone else is willing to wear the risk with me. That happens all the time in commercial arrangements. How do we stop that from being deemed a cartel and that in itself being an inhibitor of commercial activity?

Prof. Zumbo—The sharing of risks is a legitimate reason for a number of relationships, including joint ventures. But if the sharing of risk transforms into something else, such as, 'We will share the risk but now let's rip off consumers to the maximum extent,' then they have crossed the line. So sharing of risk can be efficient, pro-competitive, what have you, but if that is sharing of the risk then transforms into something else, which is, 'Let's rip off consumers, let's raise our prices as much as we can and let's get other people involved in the cartel,' then that ripping-off of consumers through the manipulation of price is what I am concerned about. But the sharing of the risk in the same way as you want one doctor to have a day off in a country town, that in itself is innocuous. But that conduct would be caught. That sharing of the risk, depending on how the arrangement is formulated, can be caught under this cartel provision definition under this legislation. So there are no distinguishing criteria between legitimate pro-competitive or innocent conduct and once again serious hardcore cartel behaviour.

Senator JOYCE—If I go to an area and I say, 'There is a far greater risk in this project so I expect a far greater return,' then ipso facto they would say that is cartel.

Prof. Zumbo—Obviously price is related to risk and it is a commercial transaction, a risk assessment is made. That may be the case at one point in time, so when it starts, yes, you may have a higher return because there is a risk and looking at the analysis of the transaction and the dealings between the parties it is not an unreasonable price, for example.

My concern is that, over time, once the risk has been removed the cartel remains in place and then, having paid off the risk and having to return to pay off your capital cost, you try to milk the arrangement for what it is worth. There are some suggestions with certain joint ventures around the country that they were very risky once upon a time. Yes, they needed to work together but, once the risk had gone and the return has been there, more recently they have raised prices, to the detriment of consumers in quite a significant way.

Senator JOYCE—Why can't we have it so that if you have any queries about a joint venture you put it in writing and send it off to the ACCC, and that will always be your quarantining from any criminal provisions? They might come back to you on civil proceedings but they will never pursue you on criminal positions. Then you could have vaguely similar arrangements with the taxation department—when in doubt, get a ruling. Why can't we go down that path?

Prof. Zumbo—Yes, there is a path there; it is called authorisation. But we know from, say, the North West Shelf project that even though I believe there is some risk associated with that arrangement other parties have decided to withdraw their authorisation. They do not want the benefit of the authorisation so some parties do not seek that authorisation. Other parties may not seek that authorisation because it is time consuming and expensive. The last thing you want is the ACCC inundated with applications for authorisation which may take time for the ACCC to resolve. I have to explain to the committee that the authorisation process is a very formalised process. Yes, there is a cost associated with lodging the application and there is a cost for legal advice representation, but there are formal rights of appeal. So even seeking an authorisation could take an extended amount of time. But I note your point that if you are going to have an exemption you need to have it tightly drafted, because if you allow oral agreements or if you have contracts or arrangements and understandings and you are facing a jail term—I am sure there will be some recollection that you had an arrangement.

Senator JOYCE—Yes, I understand the process of authorisation, but I am just thinking about prior to authorisation. Someone might say, ‘I don’t want authorisation; I’m just letting you know that I’m in a joint venture with these people. Whether you authorise it or not is up to you, but that should give me some sort of coverage of any criminal proceedings. I would say that in my heart of hearts I don’t think it’s a cartel. I’m letting you know that I’m in a joint venture with this person and that’s it. You stick that in your filing cabinet, and whether or not you get to it is your business, but I’ve told you.’

Prof. Zumbo—Yes, that is entirely possible and people do approach the ACCC from time to time and seek letters of assurance and what have you but, at the end of the day, the ACCC may not give them those. The ACCC may make them highly qualified and you may not get the level of comfort. The other problem I have with that arrangement in terms of an informal process with going to the ACCC is the lack of transparency. People may be given assurances by the ACCC that their conduct is not illegal, but the rest of the world do not know about that and other parties can bring action for damages, for example, or even injunctions in relation to those parties even though the ACCC may have given an informal clearance, if I can use that expression. So I am not sure the parties would be comforted with that. They may be comforted if they have a letter from the ACCC but other parties may pursue their own rights.

Senator JOYCE—We know that, in some instances, commercial penalties for big organisations are just meaningless. The numbers they deal in are way and beyond—we talk about penalties of tens of millions of dollars, and that can be completely meaningless. That might be half a day’s turnover; it’s irrelevant. The criminal proceedings for directors are completely the other side of the dial. Unbeknownst to them, a person who is a director could literally be in the loop to go to jail; they could be on their way to the big house. Don’t you think there is the propensity there that, with the interpretation of the act, someone who is not a criminal ends up as a criminal?

Prof. Zumbo—That is the real danger with this legislation. We have talked about franchisees. Franchisees would be caught under this legislation, and I do not think that people would say that franchisees are criminal just because they are franchisees. But franchisees would be caught. Distribution agreements would be caught.

Senator XENOPHON—On the issue of franchises, who is going to want to become a franchisee if they might be caught under this cartel legislation?

Prof. Zumbo—It does raise questions, because once again there are no criteria. A person may be given a geographical area because they want an area to conduct a business. So a franchisee buys that area and that will not necessarily be to raise prices because there will be other competitors in the marketplace. So if it is a lawn-mowing service there are going to be other people who can cut the lawn if you and your franchise do get to a point where you are just allocated a territory. In that case the concern is that you have got innocuous behaviour. There is no competition test here so you do not know what the effect is on competition. But those franchises would be caught in that particular instance.

Senator JOYCE—In the memorandum of understanding, where they are talking about \$1 million, that is simplistic. A \$1 million turnover business in some instances could be just a one-person operation from a house. It is your margin rather than your turnover. Can’t we raise the threshold to a level where it starts to get serious, like—and this is a bush accountant once more—\$10 million. At that level you are starting to talk about serious numbers. It probably won’t be serious in 10 year’s time but it is serious today. So wouldn’t there be a capacity just to raise the threshold and say, ‘We are not really interested in anything under \$10 million.’ That will knock out most of your doctors—country doctors and the sort of examples that have been put forward in this inquiry so far—and yet still leave the major retailers, the major shopping centres and the major oil companies, who are the people in the loop who can have huge ramifications throughout our nation.

Prof. Zumbo—That goes back to the memorandum of understanding. You have to put a lot of faith in that memorandum of understanding between the DPP and the ACCC. Yes, that may give you some level of comfort but at the end of the day they are just factors that can be taken into account. There is an enormous amount of discretion involved. If you put them into legislation then the ACCC, I am sure, and the DPP would be concerned that their ability to prosecute would be hampered. So once again there is an absence of a distinguishing feature, such as influencing price, and in that case you are left to rely on the discretion of the prosecutor and the ACCC. Once again, it is a very dangerous place to be, particularly if you are an innocent franchise, for example, or distributorship. In that case you would be a bit nervous that you might be prosecuted for criminal offences.

Senator JOYCE—The way it is, a director of a major company, or their company, would throw the town hall, the cathedral and the kitchen sink at a legal case to keep themselves out of jail, and rightly so. I would do

exactly the same and expect the same if I were working for a corporation that was caught up in one of these cartel cases, because a criminal conviction would mean that I may no longer have a passport and my life as I knew it would be finished because I could no longer be a director. But a small company is not going to have the capacity to take on the ACCC all the way to the High Court; they will just have to cop it.

Prof. Zumbo—The danger with giving the prosecutor too much discretion is that that discretion could be misused. If it is misused you have got no recourse because, as I said, the criminal offences are too broadly defined. There may be an argument that some legitimate activity may be discouraged because they are fearful of this legislation. That is a matter for others to argue. My concern is that if you are going to criminalise an offence you should be very clear about it. You do not capture conduct that is not egregious, as a hard-core cartel is. I keep coming back to the proposition that if you engage in this conduct to influence prices or raise prices then that sets you apart from other legitimate practices where there may be a legitimate reason for geographic areas and for distribution arrangements. It is efficient, it keeps costs down et cetera.

Senator JOYCE—That finishes my questioning. Thank you.

Senator EGGLESTON—We have had some discussion today about other jurisdictions in terms of cartel legislation. Do the UK, Canada and the US, for example, have very clear guidelines as to what is considered to be illegal activity?

Prof. Zumbo—They all have guidelines and they all to some degree have discretion. You cannot totally remove discretion. I have to say that the DPP and the ACCC will have to have some discretion. My proposition is that we are trying to reduce that amount of discretion to a point where you have clarity as to the offence and to the joint venture. But there will always be an element of discretion. You need to have faith in your regulator to exercise that discretion appropriately and to not misuse that or use it for personal reasons. But when you are talking about criminal sanctions and criminal offences, you need to specify what the offence is very clearly. That is part of the educative process. It is about getting the message across to juries about what is wrong with this behaviour. For example: 'These people did not simply have a distribution agreement; they had a lot more. They were trying to raise prices, for example, and they did in a covert, secret way such that telephone interception powers could detect it.' At the end of the day, you need discretion. You cannot totally remove it, but you want to minimise that discretion as far as possible.

We heard earlier today that there is some debate about the guidelines. We see that in taxation, where there may be taxation rulings on what the commissioner thinks the position is in terms of a tax issue, but people disagree and they have to go to court. We do not really want that in a criminal case. If I have a difference of opinion with the ACCC on the guidelines, there is too much at risk for me if I get taken to court when I am facing a jail term.

Senator EGGLESTON—Is that a concern at the moment with the way that this legislation stands?

Prof. Zumbo—I will state it as simply as I can: the cartel provision is defined for criminal purposes as broadly as a cartel provision for civil purposes. That is the essence of the problem. You have the one definition of a cartel provision that is used in relation to criminal offences and civil offences. There is no distinguishing feature other than the discretion of the DPP and the ACCC. That is why people are very uncomfortable. That is why people are pushing for as wide an exemption as possible in particular categories.

Senator EGGLESTON—That would be an area where perhaps this bill could be tightened up a bit.

Prof. Zumbo—Yes. If the committee does not think that influencing or fixing price being the ultimate goal is the appropriate criterion and they can think of another criterion that would be good. We have raised and dismissed dishonesty as a distinguishing criterion. But, as I said, in all my research the one criterion that keeps coming back as a distinguishing characteristic of a criminal offence is raising or interfering with the price mechanism. The economic literature is quite clear that these hardcore cartels are about raising prices in a significant way—not in a trivial way; you are talking about a 15 per cent or 25 per cent overcharge. When you look at the value of that in an economy, that is a lot of money.

Senator EGGLESTON—So the objective of the people involved is making excessive profits off the—

Prof. Zumbo—Off the victims.

Senator EGGLESTON—'Victims' is a good word.

Prof. Zumbo—You and I, ultimately, as consumers, but small businesses along the way. Those victims are being robbed, basically.

Senator EGGLESTON—Do you think that without that criterion of excessive price charging this legislation is not as effective as it could be?

Prof. Zumbo—It will catch those people who excessively charge, but it will catch all those other people—like the doctors—who may not excessively charge or who may have no impact on the price. To catch those people who want to rip off consumers, you have cast your net very wide and you have caught all these other people. These other people may be engaged in conduct that is anti-competitive and which I may object to, but they should be dealt with under civil law. They should not be dealt with under criminal law, because the criminal offence goes beyond mere anti-competitive behaviour; the essence of the cartel is ripping off consumers. That is what we should be limiting the criminal offence to. We should leave the existing civil offence to deal with the other conduct that we may disagree with.

Senator JOYCE—I just want to interrupt for one second. What about the issue of raising prices? What about relationships between the government and organisations? Unfortunately, I am thinking about doctors here, where you have certain medical centres or whatever that have Medicare provider numbers. They are in a relationship with the government, especially if they head towards these new superclinics that they are talking about with the latest health policy. A person basically has a segmental control of a market such as radiography or something like that, and the exclusiveness of their relationship with the government could be deemed to be a cartel like behaviour at which they are definitely able to exploit a better price. All they have to do is stick up in their window, ‘You can use your Medicare provider number here’. Could that morph into a form of cartel like arrangement?

Prof. Zumbo—It can, but typically those arrangements will have some sort of authorisation, whether it be legislative or through the ACCC. If the government enacts legislation allowing conduct to occur, then it can be an exemption under the Trade Practices Act. We would like to think that those types of government cartels, if I can call them that, are more concerned about lowering prices, making health more affordable because you are lowering costs and getting synergies and whatever. That conduct may be authorised, might be exempted in some way—legislatively or through the Trade Practices Act—or there may be those instances where a government-sponsored cartel may be for the purpose or effect of reducing prices, giving a better deal to consumers. Mind you, all experience with cartel behaviour is that it is about ripping off consumers, but there may be charitable cartels out there.

Senator JOYCE—What about professional organisations? Chartered accountants, certified practising accountants, all working together—I am an accountant; I declare that. One of the biggest closed shops is doctors, access to the medical profession. These are all restrictions that give a premium to the price they can charge.

CHAIR—I think we are getting a little bit off the topic of the legislation here. We can talk about that, but I think that is—

Prof. Zumbo—But that is unilateral conduct. I can set my price, and if I set my own price but I happen to shadow someone else, that is not a cartel because there is no contract, arrangement or understanding. In the old days, trade associations used to give out price lists, which everyone followed. There were arguments about those price lists, whether they were a contract arrangement or understanding. As an independent accountant, you are free to set your own charges, but if all the accountants in a town got together and they decided to raise their prices, then that would be objectionable. If they wanted to have a roster where they had an accountant working on a Saturday and an accountant working on a Sunday because someone had to do something—it is less likely than a doctor—and that is just for ease, that is one issue. But if it is to raise prices then you have crossed the line.

Senator XENOPHON—That is my concern. I think we all agree that we need to deal with cartels much more effectively, criminal conduct and the additional powers of enforcement, but how do we deal with the issues of the two doctors in the country town, the two bakeries—one of them supplies croissants to the other so they do not have to have extra baking equipment—the franchisee/franchisor situation? How do you arrange appropriate exemptions without going through a convoluted authorisation process? I think the Shopping Centre Council says that is their concern. How do you deal with that?

Prof. Zumbo—I have confidence in my proposal so that if you had criteria, such as you had to show that there was purpose or effect in raising prices or interfering with the price mechanism, that would remove all of those. With the country doctors, if they charge the same price on a weekend, but one of them worked one day and the other on the other day, that would not be covered by my proposal.

Senator XENOPHON—But there are penalty rates. Many years ago, when I was a shop assistant you would get more on the weekend because you were away from your family. What do you do then?

Prof. Zumbo—At the end, you would have to have some discretion by the ACCC. I cannot come here and say, ‘Don’t give the ACCC or the DPP any discretion’. I am not saying that. You have to give them some discretion. What I am saying is that, at that moment, you are capturing conduct where the doctors roster off on a Saturday, but it is the same price. Obviously I cannot speak for the committee, but I do not think anyone in this room would have a problem if the doctors charged the same price but one of them did not work on a Saturday and the other did not work on a Sunday. If they charged exactly the same price, would anyone have an objection? I would not have an objection, but under this legislation they would be caught. Maybe the ACCC would exercise its discretion not to prosecute, but why don’t we remove that problem by saying: if there is no adverse effect on price, do not cover them. That is it. They are immediately outside the net. If the price goes up five per cent or 10 per cent, that is one thing, but if they double the prices then the discretion of the ACCC kicks in at that point. Then you tap their phones and see what they are actually talking about. Is it just a day off or is it a good opportunity to rip off the consumer? So you have to look at the different layers involved. We cannot say—

Senator XENOPHON—What if they genuinely need a day off? Perhaps they each face divorce if they do not have a day off.

Prof. Zumbo—Sure.

Senator XENOPHON—But if the consequence of that is that it reduces output and puts up the price by 50 per cent, what would you say to that?

Prof. Zumbo—Why would it have to increase the price?

Senator XENOPHON—If there is a reduction in output.

Prof. Zumbo—If there is a reduction in output, why can’t they charge the same price on a Sunday as on a Friday? Yes, they are reducing output, but why does it necessarily follow that they have to charge a greater price on a Sunday? Maybe if they were both working on Sunday they would charge higher prices because it is Sunday, but why does it necessarily follow that, if they do not work on a Saturday, the price has to go up? Look at that example of the doctor.

CHAIR—Thank you, Professor Zumbo.

Prof. Zumbo—Thank you.

CHAIR—The committee will now have a private meeting and then a lunch break.

Proceedings suspended from 12.16 pm to 1.15 pm

CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission

COURT, Ms Sarah, Commissioner, Australian Competition and Consumer Commission

GREGSON, Mr Scott, General Manager, Australian Competition and Consumer Commission

LAWRENCE, Mr Ian, Director, Information Research and Analysis Branch, Australian Competition and Consumer Commission

CHAIR—We welcome the Australian Competition and Consumer Commission again this afternoon. Mr Cassidy, do you have an opening statement that you want to make?

Mr Cassidy—We are conscious that we only have an hour—or now a bit less than that—with the committee so we did not plan to make a long opening statement. The commission has been on record for a number of years now as supporting the criminalisation of cartel conduct so we are certainly very happy to see a bill to that effect now being considered by the parliament.

We have noted that in a number of the submissions the committee has received there has been some comment on the so-called joint venture defence. I have given you a short submission focusing particularly on that issue, which I am afraid you only received late last week, but it is fairly short. I will let that submission speak for itself on that issue.

I am aware that in the comments the committee has received there has been some discussion of the definition of a cartel offence and some worry about the complexity of it, with some seeking of a more simple way of defining what a criminal offence is and what a civil offence is. From the commission's point of view, we are simply not aware of a satisfactory way of doing that. Inevitably, whether a particular conduct should be treated as criminal or civil will depend on the particular circumstances of the conduct. If you take price fixing, for argument's sake, it certainly is regarded as being at the more serious end of cartel conduct. But even there, there is some price-fixing behaviour that should be subject to criminal proceedings. On the other hand there is other price-fixing conduct about which, because of its circumstances, or perhaps the lack of knowledge of those involved in what they were doing, or the minimal effect that the conduct has, you can make a fairly compelling argument that even though the category of conduct itself is fairly egregious in terms of those sorts of criteria, it really does not warrant being pursued as a criminal offence. So while we understand what has been put to the committee in some of the submissions and comments you have received about the desirability of a simpler world in this area, I am afraid that from our point of view that is just not the way the world is. We are not aware of a simple approach in this area of the law, as I suspect you could say in a number of other areas of the law—a simple approach to be able to ex ante define exactly what is criminal and what is civil.

Senator FURNER—I have several questions for clarity on some of the information and evidence we have heard today. You touched on one just then. How would the bill apply to franchises and distribution agreements?

Mr Cassidy—Our view is that, by and large, the bill would not capture franchising arrangements. The bill is about cartel conduct, which is basically conduct based on some sort of contractual understanding between competitors. If you think of franchising arrangements, basically a franchising arrangement tends to be an arrangement between a supplier of goods or services on the one hand and a seller of those goods or services on the other. In other words, franchising agreements are typically not agreements between competitors and therefore, in our view, would not be subject to the provisions of the bill.

Senator FURNER—And distribution agreements?

Mr Cassidy—I think distribution agreements would basically fall into the same sort of category, in the sense that you have a supplier who is making some sort of agreement with someone who is going to, if you like, on-supply. Again, typically, they would not be competitors in the normal course of those agreements and therefore they would simply not be covered by the provisions of this bill.

Senator FURNER—On the area of prescriptiveness of the measures for criminal proceedings, why doesn't the bill provide a more prescriptive measure at the particular point where it comes to those sorts of proceedings?

Mr Cassidy—Sorry, I am not quite sure I have understood your question. Are you going back to the point I raised earlier on about the definitions of the offences?

Senator FURNER—More or less, yes.

Mr Cassidy—As I say, I think it is terribly difficult—even if you take a particular form of conduct such as price fixing, for argument’s sake—to, in an ex ante sense, specify exactly which types or forms of price fixing should be dealt with criminally and which should be dealt with civilly, because it will very much depend on the circumstances of the particular price-fixing arrangement. They are just judgements that have to be made. You may start thinking of, perhaps, including things like size criteria or whatever as a way of trying to delineate criminal from civil, but that sort of approach can become very prescriptive and can limit the ability we have to pursue cartel conduct. Indeed, the more prescriptive you get as to what is criminal and what is civil, the more you run the risk of having gaps between the two, so that you end up with some forms of conduct—even specified conduct like price fixing—which, for argument’s sake, may end up being neither criminal nor civil. While, as I say, we understand, if you like, the desire on the part of some parties for greater clarity, on the other hand it is in the nature of the conduct that it is very difficult, ex ante, to say precisely what is a criminal offence and what is a civil offence.

Senator FURNER—On this subject, if you were trying to differentiate between the civil and criminal aspects of the bill, could you find yourself in a situation where you are examining evidence based on a civil matter and then it turns out to be a criminal matter?

Mr Cassidy—If we started an investigation believing a cartel was probably going to fall into that civil category and then we decided, because of the nature of the conduct and the extent of damages caused and so forth, to pursue it criminally. However there are problems in making that sort of transition in that there are certain restrictions between civil and criminal. For argument’s sake, there is no self-incrimination privilege in civil proceedings but there is in criminal proceedings. So if we got very far down the track of a civil investigation and then decided that we wanted to pursue it criminally, we would almost have to go back and start again. So our thinking on this in an operational sense is that we in conjunction with the Commonwealth Director of Public Prosecutions will probably need to decide fairly early in the piece whether a particular form of conduct will be pursued criminally or civilly, which is one of the factors which points towards only the most egregious types of conduct being pursued criminally.

CHAIR—I think we have had two strands of criticism—sometimes I think both from the same group—one, that everything comes under the legislation, so the most innocent arrangement such as doctors in a country town who decide to split up the weekend between them, for example, come under this legislation and they cannot guarantee that that is not going to be caught under this legislation. The other strand of argument is that the ACCC has too much discretion to decide what is or is not going to be prosecuted. Could you just comment on both of those?

Mr Cassidy—I think that the two are in a sense related in that we, the ACCC, firstly, will have to make a decision as to whether we pursue something criminally or civilly, bearing in mind that criminal prosecutions carry a much higher burden of proof and therefore will be somewhat more resource intensive for us than a civil prosecution. Certainly it would do the commission no credit at all if we pursued something criminally and then, if we did get to court with it, either had the court throw it out or, alternatively, find that, yes, there is a technical criminal offence but because of the very minor nature of it there is going to be no penalty imposed and, indeed, perhaps even no criminal conviction recorded.

There is a second set of decisions which need to be made by the Director of Public Prosecutions since he is the entity who undertakes any criminal prosecutions for the Commonwealth. He quite separately to whatever we may decide has to decide whether he believes, firstly, that there is a criminal offence—in other words, whether a criminal provision has been breached—secondly, whether he has reasonable prospects of success and, thirdly, whether it is in the public interest for him to pursue the matter as a criminal case. So, if you like, there are two quite separate decision-making processes that have to be gone through before a matter will be pursued criminally.

In terms of a doctor with a rostering arrangement—and I might say, historically, we have been very favourably inclined to rostering arrangements particularly as far as doctors are concerned, and we have guidelines to that effect—and using that one is an example, even if we decided to pursue that criminally, and I would have to say to you that I think that there is very little prospect that we would, then quite separately the Director of Public Prosecutions, using those criteria which are specified in the Commonwealth’s prosecution policy, has to reach his own separate decision that there is something there that is worth pursuing criminally.

Senator XENOPHON—Following on from that, so in the doctor’s example in a country town, is there a template? How quickly could an authorisation be given in those cases?

Mr Cassidy—I suppose there are two points to make here. Firstly, if it is a straight rostering arrangement then, certainly during my time, we have never, even under a civil regime, pursued a straight rostering arrangement for doctors or anyone else. There are a couple that we have pursued which are well known, such as the Rockhampton case and a more recent case in South Australia, but in both those cases it was not the rostering arrangement itself that we found objectionable; it was some associated arrangements and the way in which they were being used to block new entrants. That is the first point I would make. Secondly, if parties to a rostering arrangement were feeling uneasy, our authorisation process can be quite quick, and, once we get the application, we can decide to grant interim authorisation which gives every protection while the authorisation process is being gone through.

Senator XENOPHON—The example that has been given to us relates to franchisors-franchisees in terms of an exclusive geographic location. Obviously if you are a franchisee then you want certainty that that is your patch for your Subway or Baker's Delight or whatever.

Mr Cassidy—Yes.

Senator XENOPHON—What is contemplated there in terms of processes? This adds to the question in terms of the country doctors. Will there be almost a pro forma? How costly will it be and how lengthy do you anticipate the process will be if this legislation is passed?

Mr Cassidy—Again, as I said earlier, in terms of what you might call the conventional franchisor-franchisee arrangement we would simply see that as not being something which is subject to this bill because this bill is about competitors getting together and making agreements about price, market sharing and so forth. If you think of what I might call a conventional franchising arrangement, that is an agreement between a franchisor and a franchisee and they are not competitors.

Senator XENOPHON—What would happen if a franchisor, and this happens sometimes, has their own outlets in an area for training or whatever purposes?

Mr Cassidy—That is why I keep referring to conventional arrangements, because there are some arrangements where the franchisor is also a franchisee in the sense that they have some corporate stores. Again, we regard those arrangements as being fairly benign and in fact, if you like, a quirk of the fact that a franchisor is wearing two hats. But, given our view on that and the nature of the conduct, if they applied for authorisation in order to make sure they were covered and protected then I would envisage that in that situation we would be able to grant an interim authorisation very quickly just to provide that reassurance, because franchising arrangements are not what this bill is about. I might add that, again, to the best of my knowledge and recollection, we have not attacked a franchising arrangement under the existing provisions in the act.

Senator XENOPHON—So is it anticipated for those sorts of arrangements that have been outlined—the doctors and the franchise arrangements—there will be some templates or faster processes in place? How long do you think it would take to authorise these sorts of things?

Mr Cassidy—We have been giving that a bit of thought, and indeed I would have to say as a general proposition that when there is any change to legislation you do get some unintended quirks being thrown up, if I can put it that way. So we are considering how we can deal with those in the quickest possible manner. For instance, when collective bargaining and the associated notification arrangements were being considered it seemed to us that, while that was being considered and even afterwards, there would be a need for some fast-track authorisation processes to cater for collective bargaining. We put those in place and they have been used. So we would envisage that we would have a similar set of arrangements in relation to any unintended consequences coming from the passage of this legislation.

Senator XENOPHON—I hope I fairly state the concerns of the Shopping Centre Council of Australia. They say that, even if they get an authorisation for a joint venture, there is subsidiary work that needs to be done by management committees. They have to make decisions on a daily basis, and that is something that—if I can get a nod from the Shopping Centre Council representatives—could not possibly be covered by an authorisation, because that is a fluid thing that involves a lot of ongoing decisions. In those circumstances, could you foresee that there would be an authorisation that would set out the parameters in which a management committee could operate so that, if you were within those parameters, it would not be a problem?

Mr Cassidy—Authorisation is a very flexible thing. The scope of an authorisation really is only limited by what is put to us. The way authorisation works is that, at the end of the day, we can only respond to what is put to us. If someone puts forth a fairly narrow basis for authorisation, that is what we have to adjudicate on. If

someone casts the scope of the authorisation fairly widely, that is what we adjudicate on. There is no actual limit on the scope or breadth of the authorisation that we can give. The only limit is imposed by what is put to us. The other comment I would make, without wishing to get into a debate about shopping centres and the like, is that I wonder about the extent to which the sort of conduct envisaged would fall under the bill anyway. In a sense, if it were conduct being undertaken under the head contract where the head contract was in turn subject to the joint venture exemption, I do not think it would fall within the scope of the bill anyway.

Senator XENOPHON—You can understand why there is some uncertainty.

Mr Cassidy—Yes, I can, but I say that, perhaps with the exception of the joint venture defence, which has been changed—whether it has been tightened or not is debatable—a lot of what is in the new bill has been transposed with the existing provisions. In many cases, you can say that, if conduct has not been caught up until now, it will not be caught under this bill. While there is a bit of uncertainty out there, I think the changes that have been made to the bill, particularly since the exposure draft and the inclusion of the so-called ‘overlap provisions’, have addressed a lot of the uncertainty that had previously been expressed.

CHAIR—The Shopping Centre Council had said that their concern would be remedied by talking about ‘contract, arrangement or understanding’ rather than just ‘contract’. Do you have any response to that?

Mr Cassidy—There have been a couple of changes made to the joint venture defence. One is that there is now a focus on contracts rather than contracts, arrangements and understandings. It also focuses on particular types of behaviour, production and supply as opposed to also including marketing and sales arrangements. On the other hand, the caveat on the joint venture defence—whether it results in a substantial lessening of competition—has been removed, so where that leaves you on whether the defence has been tightened or loosened is debatable. From our point of view, we see the focus on contracts as we move into a criminal regime as being desirable. The reason for that is that we are aware, from overseas experience, that there have been instances where cartels have been dressed up as joint ventures in an effort to evade the law.

We are particularly aware that this has happened in the Canadian case. Their law in this area is fairly similar to ours. It seemed to us that any genuine joint venture is likely to rest on some sort of contractual arrangement, be it written or oral. Once you start getting into somewhat looser things—a joint venture based on an arrangement or an understanding—you are starting to get into territory where creative people can use a joint venture to try and dress up and protect what is otherwise a cartel.

Senator EGGLESTON—Both Professor Zumbo and the Speed and Stracey submissions think that perhaps the ACCC is given too much discretion in deciding what conduct technically infringes proposed provisions. Do you think that there is a case for tightening up the guidelines and making it clearer to businesses what you will regard as cartel operations and what you will regard as not falling within that area?

Mr Cassidy—In a way, I think that goes back to what I was saying earlier. If it were possible to have a clearer, more concise definition of exactly what constitutes criminal conduct then I think we would all probably welcome that. But the problem is that in this area—as, indeed, in a number of other areas of law—to do that in an ex ante sense is rather difficult. In terms of the bill, if we are to pursue something criminally, we have to be satisfied that it is a cartel arrangement as defined. We have to be satisfied that the people involved had knowledge and intent—that is to say that they knew what they were doing and there was no inadvertence in it. That is a requirement and the fourth element from the criminal code. We have to be satisfied in our own minds that we can prove that before a jury on a unanimous verdict beyond reasonable doubt, which is the highest burden of proof. As I said, having made those sorts of decisions ourselves, we then refer it to the Director of Public Prosecutions, who will be the one to pursue criminal matters. He then has a separate set of criteria that he has to go through before he decides to pursue a matter criminally. There are, if I can put it this way, a fair few hurdles that firstly we and then the DPP have to be satisfied about before we decide to pursue a matter criminally.

Senator EGGLESTON—I think what Professor Zumbo was talking about really was not so much from your point of view but from the point of view of businesses. We have had some reference to international comparisons and that there were clearer guidelines in, I think, the United States’ legislation, for example, around what constituted cartel behaviour. He thought that perhaps there should be some clarification and clearer definitions of the guidelines in our own legislation.

Mr Cassidy—In that spirit, we already have the memorandum of understanding with the Director of Public Prosecutions, which has been published. That, if you like, takes us a certain way. Basically, that memorandum says that where relatively small businesses are involved or where the cartel arrangement has a relatively small

impact in terms of the overall Australian economy then these are not matters that we will be pursuing criminally. Beyond that, I can envisage—

Senator XENOPHON—You are looking at the overall Australian economy. Is that one of the criteria to take action?

Mr Cassidy—No. If you look at the that draft MOU between us and the DPP, really what it says in so many words is that where you have either relatively small business involved or, indeed, where the amount of commerce that is affected by the cartel is relatively small then that is simply not something we will pursue criminally. To jump back—

Senator XENOPHON—I will follow that up, sorry.

Mr Cassidy—The other thing I would say is that we have a whole range of guidelines in the public arena and I can well envisage that we will be putting out guidance on our approach to the criminal bill, assuming it is passed by parliament. In doing that, we will seek to provide as much guidance as we can. But you understand that, on the other hand, it is difficult in an ex ante sense to give everyone the reassurance that they might be after in terms of exactly what we will be inclined to look at criminally and what we will be pursuing civilly. But that is something we certainly are contemplating.

Senator EGGLESTON—We will look forward to the observations of commentators like Professor Zumbo on your final decision and see whether or not that fits within his definition of clarity.

Mr Cassidy—I suppose the other comment I would make is that, of course, these things evolve. The US has had criminal sanctions for quite some time now. As to our guidelines in various areas—mergers, for argument's sake—we do revise and refine those guidelines as we learn more about conduct and, indeed, as we get some jurisprudence from the courts indicating their attitude as well. So that will be an evolving process. I cannot say that we will immediately have something which is exactly comparable to perhaps what the US has, given its much longer experience with the criminal regime and associated jurisprudence.

Senator EGGLESTON—The other issue is that the criminal fine for individuals engaging or attempting to engage in criminal cartel behaviour is only about \$200,000 at the moment. There has been a suggestion that they should be increased considerably because \$200,000 is not a lot of money compared to the proceeds which individuals or companies might gain from cartel operations. You need a meaningful sum to make it a meaningful penalty.

Mr Cassidy—That is really a matter for government.

Senator EGGLESTON—Indeed it is, but it is something that you could comment on.

Mr Cassidy—I suppose from our point of view the real bite is not the monetary penalty; the real bite is the fact that for individuals there is also an associated jail sentence.

Senator EGGLESTON—That is true, but we have proceeds of crime legislation where people who are convicted of drug offences, as well as the other penalties, forfeit all their property and so on. That is now a well-established precedent.

Mr Cassidy—I think we are getting into an area which is a bit difficult for us because it ends up being a policy judgement, but I suppose what I am flagging to you is that from our point of view what is important is the possibility of jail. We have said in the past that we do not regard pecuniary penalties as being particularly effective, almost regardless of how high they are, because they do not concentrate people's minds in quite the same way as the possibility of going to jail does.

Senator EGGLESTON—My point is that very large penalties do have an impact on companies, but I will defer to Senator Xenophon.

Mr Cassidy—Don't get me wrong, there are obviously questions of degree and a very large penalty will concentrate someone's mind more than a smaller penalty will, but I think whatever the pecuniary penalty it probably does not concentrate an individual's mind quite as much as the possibility of ending up in jail.

Senator XENOPHON—Associate Professor Zumbo was critical in that he thought that the proposed criminal offences were drafted in what he calls a complex and confusing manner that it might be difficult for a jury to follow or comprehend. Has any consideration being given to the risk that it may be difficult to get a prosecution with the current drafting? Were alternative ways forward considered in relation to this?

Mr Gregson—The drafting of these provisions is obviously not a matter for the ACCC. The actual cartel prohibitions follow, I think, international best practice in terms of the definitions of what cartel behaviour is. Ultimately, however, the drafting is not a matter for the ACCC and is perhaps one to take-up with Treasury.

Senator XENOPHON—That is fine. Mr Cassidy said that there could well be unintended consequences—and I understand that—but to what extent will effort be made in terms of administrative arrangements to minimise them? How do you minimise unintended consequences so that people are not being charged or so that people are not reluctant to enter into what might be quite a reasonable commercial arrangement for fear of being prosecuted? To what extent will there be administrative arrangements to deal with those unintended consequences?

Mr Cassidy—I should say that, with the changes that have been made to the bill since the exposure draft, our view would be that any unintended consequences would be fairly minimal. We have given this a fair bit of thought, and we cannot think of too many situations where there will be an unintended consequence. We think the bill, particularly with the changes made since the exposure draft, has done quite a reasonable job of trying to anticipate most of them. Where there are any unintended consequences in terms of parties being potentially covered by the bill when clearly they are not meant to be or where—and I think this is also perhaps part of the issue—they feel they might be covered by the bill and our view is that they are not, we will be looking through our authorisation process to provide a speedy way in which those parties can get some reassurance that their conduct will not be subject to the bill.

Senator XENOPHON—An example given by Speed and Tracey Lawyers is of a joint venture arrangement without a contract between two competing coalminers who agree to set the prices for which the coal produced by the mine is to be sold. Firstly, are you concerned that joint ventures which are not formed through a contract might be subject to criminal sanctions and civil penalties under the proposed legislation? Secondly, can you comment on the suggestion by Mr Brent Fisse from the Law Council that the bill should be amended to exempt joint venture activity from cartel activity if the dominant purpose is to further a pro-competitive activity of a joint venture?

Mr Gregson—On the scenario of the coal producers, the first thing we would note is that joint venture arrangements, particularly those that will set out the terms and conditions on which coal is dug out of the ground and ultimately sold, would ordinarily be the subject of a contract that in many cases would be in writing and, if not, certainly one that would be enforceable being oral and, hence, why we have some comfort in the reference to contracts delivering the protection required for joint ventures.

In circumstances where that is not the case, the ACCC is unlikely to be rushing off to court either civilly or criminally without identifying exactly what the issues are and whether indeed there is detriment there to the Australian community. So it should not be assumed that the ACCC will simply launch into court proceedings if there are some of those unintended consequences. I might also emphasise what Mr Cassidy has said here, which is that in the majority of these arrangements, and it is a little different in the joint ventures, the goalposts are not significantly changing and, in many cases, what is prohibited under the new provisions will be prohibited currently. So, with the queries we have had in relation to doctors and in relation to franchising, there should not be a mad rush to the authorisation table in that, if there are concerns, they should be present now. The thought that, again, these would somehow be elevated into a criminal sanction is perhaps not the case.

Senator XENOPHON—I have a question on enforcement. I welcome the telephone interception powers that are proposed to be conferred. A question has been raised about how you deal with those who use alternative methods of communication—face-to-face communication in the basement of a car park, for example. Has it been considered that there may be different ways for those who want to set up a cartel and that they will just their way of doing business?

Mr Cassidy—In any sort of area in which you are dealing with conspiracies, I do not think that there is any power that you could give us where we would say, ‘Okay, that’s it: we can be absolutely certain of detecting any and all cartels.’ The bill gives us not only telephone interception powers but also electronic surveillance powers, which can be used in parks, restaurants and out of the way hotels and various other places where cartelists seem to meet to organise their cartels.

Senator XENOPHON—So if nothing else it will boost the tourism industry or the hotel industry?

Mr Cassidy—I would not want to necessarily promise that, because we would rather hope that passage of this bill would lead to fewer rather than more cartels and therefore fewer such meetings. It is all a question of

degree. As you would be aware, we are breaking cartels at the moment through the investigative powers that we currently have. The new investigative powers that are in the bill will be very helpful, particularly because if we pursue something criminally we have a higher burden of proof. From our point of view, I must say that that is very welcome. But we have no doubt that cartels will still exist and people will still try and find their way around our various investigative powers. But the additional powers that we are going to be given will make it that much harder.

CHAIR—What about the innocent parties that may unwittingly take part in behaviour which is regarded as cartel behaviour? That is the lingering thing: someone could do something which then becomes the subject of a criminal investigation and they could face jail when they were not aware that they could be caught up in this—hence the nervousness of some people.

Mr Cassidy—As I said, one of the checks and balances in the bill, if I can put it that way, is that we have the fault element from the Criminal Code of ‘knowledge or intent’. In order to pursue someone criminally for cartel activities, we have to be able to show that they knew that they were entering into a contract arrangement or understanding that had a cartel arrangement in it and that they knew what that cartel arrangement was. In other words, someone who signed up to something without fully appreciating what it was that they were doing would not be caught up by that particular criteria or fault element. Therefore, that action could not be pursued as a criminal offence.

CHAIR—Thanks, Mr Cassidy—and others from the ACCC—for coming in this afternoon.

[2.14 pm]

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

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

CHAIR—Welcome. Would you care to make an opening statement.

Ms Lowe—We will make a very brief opening statement. I am sure the committee is aware that we have made submissions both in relation to the discussion paper and now the proposed bill. In broad terms we are supportive of the bill and the intent behind the bill to attack this very serious conduct and the impact that it can have on our economy. We have obviously gone into detail in relation to some specific issues.

In terms of concerns that we have with the bill and its provisions, there really only are two substantive concerns. One relates to the level of fine that applies as distinct from the proposed term of imprisonment. We consider that that is too low and should be lifted to \$500,000 to make it consistent with other civil penalty provisions in the act.

We are also concerned that the bill mirrors the current language in the Trade Practices Act around refunds and compensation, effectively, for consumers. The committee would be aware that the current wording in the act means that the commission is unable to obtain compensation for consumers unless they are named parties in a representative action. The real effect of that limitation is that those actions simply do not occur, due to their administrative complexity.

So those are the two matters that we have raised concerns about with the bill, but overall we are very supportive of the bill and the intent that it reflects.

CHAIR—A number of comments have emerged from submissions today and I think it is fair to say that one of the key ones is the level of discretion afforded to the ACCC. The other half of that is that the legislation is not particularly prescriptive in what it regards as the kind of conduct that would invoke criminal prosecution. Can you give a general comment on how you see that.

Ms Lowe—I suppose, firstly, on one level we understand those concerns; however, there are a number of genuine constraints in our view on the ACCC running out and using these powers in a way that might be of concern to the community. First and foremost, of course, the standard of proof that they will be required to make out in order to take forward a criminal prosecution is of a very, very high standard indeed. An examination of cases that have been taken forward in that framework reflect that it is not an easy standard to meet, and it is one that the regulator will be required to meet in order to take proceedings forward. Furthermore, the question of resources, of itself, will be a natural constraint. We have indeed called for specific resources to be made available to the ACCC for this sort of work because it is obviously important that the laws are used and are seen to be used. But it is equally important that the ACCC is able to continue many other important aspects of its work as it rolls out these powers, if indeed they are brought forward in legislation.

CHAIR—You just mentioned something that perhaps we should have asked the ACCC as well. How would you regard the criteria of success of this bill: numbers of prosecutions, or successful prosecutions or a reduction in the number of cartels in Australia?

Ms Lowe—Certainly we would hope, particularly in the early days, to see the provisions used, because we would take the view that the deterrent effect that is ultimately desired by these sorts of laws will not bite until people are seeing them used. I am aware that cases that have been taken, for example, by the Irish Competition Authority. Shortly after the first media footage of executives being taken to court under these laws there was an immediate and dramatic increase in calls upon compliance professionals and so forth as companies took very real steps to make sure that they were not infringing these sorts of provisions. So it is very important in our view, not only that the law is there on the statute books but that it is used.

Senator EGGLESTON—You believe that the government was correct in dropping the dishonesty clause or test in the exposure draft. Can you explain why you think that was not necessary?

Ms Lowe—Certainly. We were of the view that the inclusion of the requirements to make out dishonesty would have had a severe hampering effect on the effectiveness of the legislation, particularly in view of, as we have already mentioned, the high standard of proof that will still be required to make out an offence under these provisions. We are aware that the UK is one of the only other major jurisdictions that has a dishonesty

requirement, and that law is notable for its lack of use. We were concerned that the inclusion of such a requirement would hamper the intent behind the legislation.

Senator EGGLESTON—Okay. Other people have said similar things. The other issue I would like to raise with you is the question of the \$220,000 fine, which might be imposed in addition to or as an alternative to imprisonment in criminal prosecutions. You hold the view that that penalty is too low. Would you like to expand on your views on that for the purposes of the record?

Ms Lowe—Certainly. It is not least in part a consistency argument. Obviously the parliament, over the course of time, has seen the case to raise other penalties that apply under the act from \$220,000 to \$500,000 in relation to other infringements. It is clearly recognised that this bill clearly reflects the view—in our view, a correct view—about the seriousness of cartel conduct, and, therefore, in our view it ought not only carry the serious criminal sanctions, but it should also carry commensurate civil penalties sanctions to enable it to be applied in a consistent fashion.

Senator EGGLESTON—It has been said that a term of up to 10 years in prison is a very serious deterrent to the individuals involved in the cartel companies, but of course these companies also make huge amounts of money out of the cartels they operate. Do you think there is a case to be made for not only imprisoning the people in the company responsible for the cartel operation, but also for effectively fining the company very heavily against the profits they might have made from such operations, bearing in mind that in drug prosecutions these days, we not only send the drug dealers to jail, but we also confiscate their property as proceeds of crime. Should that principle apply to cartel operations?

Ms Lowe—We certainly are most concerned that consumers who ultimately pay the price as the result of increased prices and so forth are able to obtain compensation for those losses or, in the absence of compensation for individual consumers, that those excess profits, if you like, are effectively disgorged to the benefit of consumers. It is for that reason, for example, in earlier submissions that we have supported power on the part of the court to make what is called cy pres orders, which is effectively where it may be too administratively costly or where damages cannot be directly attributed to consumers or calculated effectively, but nonetheless the ill-gotten gains, if you like, are earmarked into a fund that would act for the benefit of that group of consumers. We gave an example that, if there was some form of cartel involving gambling institutions, moneys could be put aside for consumers who gamble and, in particular, problem gamblers so that there is some link between the nature of the harm and the compensation that flows from it.

Senator EGGLESTON—These are my last questions. In his submission, Professor Bob Baxt has criticised the bill for placing the onus on the joint venture party to establish that they are conducting a genuine joint venture activity and for restricting the description of genuine joint venture activity to contracts, rather than using, as is currently the case, a contract arrangement or understanding. I wonder what your response to that would be. Why should the onus be on the joint venture parties to prove that they are conducting a genuine activity?

Ms Lowe—I will make a few comments about that. Firstly, it must be said that we would not hold ourselves out to be experts in relation to the intricacies of the provisions applying to joint venture parties. However, we understand the tenor of the criticism that has been made. Clearly, it is a balancing act between encouraging genuine ventures and discouraging shams or ventures that are entered into for the appearance that they create. Clearly, that is an easier balance to strike where there is evidentiary material available in, for example, the form of a written agreement between the parties. The nature of cartel offences is such that they are obviously conducted in secret, and therefore they are very rarely the subject of written agreements and so on. That seems to us to be one way of being able to distinguish those activities and indeed to enable parties that want to engage in those sorts of mechanisms to have the safety of a very clearly understood agreement in place.

CHAIR—Thank you, Ms Lowe and Ms Rich, for assisting us this afternoon.

[2.28 pm]

BAXT, Professor Bob, Member, Trade Practices Committee, Business Law Section, Law Council of Australia, and executive member, Business Law Section, Law Council of Australia

PODDAR, Mr Dave, Chair, Trade Practices Committee, Business Law Section, Law Council of Australia

REID, Mr William, Member, Trade Practices Committee, Business Law Section, Law Council of Australia

CHAIR—Welcome. Do you wish to make an opening statement?

Mr Poddar—Yes, we do, thank you. I will try to keep it very brief. I am a partner at Mallesons Stephen Jaques. The Trade Practices Committee would like to thank the Senate Standing Committee on Economics for inviting us to attend this hearing. We appreciate that the bill is an important piece of legislation which is aimed at tackling and preventing unlawful cartel conduct in Australia. In seeking to criminalise cartel conduct, the Commonwealth government is moving Australia into line with a number of its leading trading partners in comparable jurisdictions. As a result, the intention behind the bill is welcomed by the Trade Practices Committee.

However, the committee is concerned that the current draft of the BILL has significant limitations which may adversely impact lawful and routine business activity in Australia. Indeed, our committee fears that if the bill is passed without amendments it may discourage investment and enterprise by Australian businesses, including small businesses, and importantly joint ventures, which are part of the lifeblood and history of this country. It may also through its current drafting result in the criminalisation of commercial conduct that would not be subject to criminal sanctions in other jurisdictions, in particular some of our leading trading partners. Given the current global economic climate, it is important that legitimate commercial activity in our view not be undermined by the introduction of legislation that has such unwarranted consequences.

The committee is committed to doing what we can to support the introduction of well drafted and rational legislation. In line with our previous submissions throughout the consultation process we are supportive of this. However, the current draft in our view requires further amendment in order for its practical application to match the intention and commitment which has underpinned its introduction.

In particular, we advocate a number of key changes to the bill. First, in line with the recommendations of both the OECD and the Dawson review, we believe that criminal liability for cartel conduct should be confined to serious cartel conduct only, that is, egregious price fixing, bid rigging and establishing output restrictions. Second, we believe the joint venture exceptions to illegal cartel conduct should be broadened so that they apply to arrangements and understandings as well as contracts. This will ensure that non-contractual arrangements which are common in business practice, in particular in relation to management committees of joint ventures, can also benefit from the exceptions. Third, in relation to the joint venture exceptions themselves, we believe the definition of legitimate joint venture should be broadened to include those which are formed for the acquisitions of goods or services as well as the production and/or supply of goods or services. Further consideration should be given to the need to make it clear that research and development joint ventures in particular can benefit from the exceptions under the cartel bill. This will ensure that legitimate joint venture activities will not give rise to potential criminal liability for ordinary Australians. Finally, the extended meeting of party we believe should be removed. This will avoid any overreaching by our prosecutors in future enforcement proceedings and will ensure that the prospective liability of associated entities is clearly understood by Australian and international companies.

We will not seek to reiterate all the points had been made in our submission to the committee. We would hope that if you wish to raise any particular questions from our submission or the examples which we will provide, you will ask them of our committee members.

CHAIR—Thank you. In terms of behaviour which would be criminal here, I think you said, but would not be so in other jurisdictions, we had Treasury saying that the legislation was modelled on OECD legislation. Where do you see the key differences that might criminalise behaviour that is not criminalised elsewhere?

Mr Poddar—I think the issues that we clearly see, to give you an example, is that the US has a very clear carve-out for joint ventures under a rule of reason or a test whether or not they lessen competition

substantially. Professor Baxt has put his own submission in. Bob, do you wish to speak to the joint venture example?

Prof. Baxt—I am happy to. I am a partner at Freehills and a member of the trade practices committee of the Law Council. I did put in a separate submission. I was invited by the minister to do so. As you will see from the speech made to parliament in introducing the legislation, a number of representatives of the Law Council and others were asked to meet with the minister to assist in forming some policy issues. We did not look at the drafting as such and so we have no real input in that particular context, but it became quite clear that the joint venture area is an area that is not understood and, listening to the representatives of the ACCC earlier today, is still not understood in my view by the commission.

I could understand if there had been examples where the commission had pursued joint ventures and had found that they had failed in the pursuit of joint ventures, which they alleged were anticompetitive even within the context of the current exceptions. One could understand in those situations that perhaps one might look for some further drafting illustrators. But there are no examples. There are none. In fact, what come to mind are situations with the anti-overlap provisions, which again were not initially included in the draft legislation which was circulated before it was finalised and were introduced at the request of the Law Council and various others. The High Court in a very classic case involving anti-overlapping made it quite clear that they are not going to be fooled by the misuse of the anti-overlap scenarios where people try to characterise an arrangement as coming within one part of the act in order to rely on a defence to avoid—

Senator XENOPHON—Which case, sorry?

Prof. Baxt—It is the case involving the ACCC and Visy. It was the anti-overlap between sections 45 and 47. To me, for the ACCC to keep harping on this and saying, ‘We need this blanket prohibition,’ is ridiculous—with the greatest respect to the ACCC, a body which I chaired in a previous life.

I want to emphasise a point. A previous witness made a point about the difficulties of the slippage between civil and criminal. They are going to get into a terrible mess in this area. We can see clear examples of this in the corporate law area where under the Corporations Act we have both civil and criminal prosecutions available. ASIC has got into terrible difficulties because they have slipped from one to the other and are not able to extricate themselves from the situation. The last thing I want to see happen is for this legislation, which I totally support in principle, to founder on cases which are thrown out because there was a mistake made by the commission in how they pursued these matters. I agree with David Poddar. I think the commission would be well advised to concentrate on the very serious cartels that clearly need to be stamped out and pursued and stop worrying about some of the issues that are on the margins.

I think there is a genuine concern that we do not give joint ventures appropriate recognition in this country. They are essential to Australia’s future. We see in the west and in Queensland huge joint venture developments. Many of them are not confined to pure contracts. There are a lot of ancillary arrangements that we advise on on a regular basis. It would be very sad if those were excluded from the exception that should be in the legislation in this area.

CHAIR—I take your point, but also the ACCC stated quite clearly that anyone operating under current legislation would not be the targets of the bill before us. I think the implication was that they would concentrate on serious cartel behaviour. Have you seen examples? I take it that Visy would not be an example of where they have gone for cartels at the margin.

Prof. Baxt—No. The Visy situation was a different case to the current litigation, which is still extant and there is some civil action. In that situation Visy tried to rely on the anti-overlap provisions in section 47 to characterise certain conduct as ‘exclusive dealing’ rather than contracts covered by a section 45. I am not dealing with that scenario. I am dealing with the basic situation: why do we need to exclude arrangements or understandings from the definition of joint ventures? Why do we need to exclude acquisition research joint ventures? They are part of the lifeblood of Australia, as Dave Poddar has suggested. I think it is a terrible mistake to try to cut that back.

Unfortunately, we have in this country—and it is something that we pay the price for in the way in which litigation has to be pursued—very strong blank letter law drafting. As a result, with the exception that Dave referred to in relation to joint venture activity operating under a rule of reason, we just do not have that approach in this country. So we have to be careful in our drafting, and we have to make sure that we do not create barriers to genuine commercial activity. To me, the way that some of these provisions have been drafted does not achieve that.

CHAIR—Why shouldn't companies making a joint venture write a contract?

Prof. Baxt—Why shouldn't they? There are many issues that surround a joint venture. There are tax reasons. Our tax laws are such that sometimes it is important that the joint venture is drafted in certain ways to obtain the benefits of the tax laws. They may well require the arrangements be written in a different way. A lot of these joint ventures are evolving. There are wonderful opportunities in this country—and hopefully the current economic crisis is not going to slow them down too much—to resource and develop our huge opportunities in Western Australia. Many of those joint ventures need to develop and evolve in ways that are unique and do not always allow themselves to be turned into a contractual situation. In fact, Bill Reid was saying to us before we walked in this morning that he was actually advising in relation to the kinds of arrangements that are not necessarily covered, and not usually covered, by strict contractual scenarios which might be excluded from the operation of the defence.

Mr Reid—Let me put some very small pieces of flesh on those bones. In the case of a joint venture, which is to contract in relation to its current activities, where the parties wish to extend or develop the commercial relationships between them—go into a new line of business, into a new area, whatever you might be looking at in the particular circumstances—the negotiations and arrangements as they are made and formed between the parties before they are reduced to writing may well fall, and in fact, in many cases will fall, within the description of cartel arrangements under the current proposed legislation unless the exception is broadened so as to permit arrangements or understandings that might be made in that context. That is just one example.

CHAIR—The ACCC have told us they would not consider prosecuting unless there was a deliberate intent by the joint venture involved to get around to engaging in market manipulation. By that criterion, the situation you describe would not be prosecuted.

Mr Reid—You are correct to say that if the ACCC were good to its word in that context our clients would be insulated from prosecution. However, the written law is the written law; it is set out with great specificity already. If a client finds itself in a position where, on the face of the written law, it has contravened it and exposed itself to its executives spending many years in jail, with enormous financial penalties as currently provided for in the provisions, that is not an adequate way forward, in my respectful opinion, to frame the law of this country.

Prof. Baxt—I will add a point there. The onus is on the joint venturers to prove that they are pursuing a genuine joint venture. There is a very heavy onus on them already and we do not want to create uncertainties. Many joint ventures are going to depend on huge financing and other benefits. People advising the financiers are going to be very concerned if the legislation is drafted in such a way that it leaves them in doubt as to whether the exception applies.

Mr Poddar—Can I give you some more practical examples of some of the issues that are concerning us in the joint venture area. In my opening statement we talked about the fact that the joint venture current language in the bill talks only about joint production; it does not talk about joint acquisition. So if you have two parties that are seeking to do a research and development joint venture, that arguably is not captured by the current drafting. For example, in my home state of South Australia if we had a joint venture—of which I have given you some examples—seeking to do a water desalination plant or other type of plant, and if you had parties who are competitors in other parts of the world, they would also be subject to these types of laws if it were initial development which would not involve a production jointly. With the way the current language is drafted these things would all be subject to criminal prosecution. We do not see any current sense in the way they are drafted. This afternoon when we were listening to the ACCC, Senator Xenophon asked some questions of the ACCC as to whether they would grant authorisation very quickly to some situations of distribution or franchise arrangements. We were interested in the issue that was raised by the commission that they would grant authorisation very quickly. We would see difficulties with two parties who may otherwise be in competition with each other, as in the example that was talked about, in that there would be—

Senator XENOPHON—Are you saying a franchisor that actually has outlets as well, for instance?

Mr Poddar—Yes—that example that you raised. We would see difficulties—that there are actually any public benefits—in granting under the statutory test an authorisation to that arrangement, because it is not exactly clear to us that that would satisfy that test.

Bill, there were some other examples, I think, that we were talking about earlier today, about distribution type arrangements or the definition of what hardcore cartel is. I think we all see numerous issues that are raised by the current drafting along those lines. I think it is not sufficient to have very general statements that

‘a prosecutor would not prosecute things’ if you have ordinary businesspeople, ordinary individuals, who can be subject to criminal prosecution, which is a very serious issue. I would be very uncertain as to the application of these laws. These are some of the general concerns of our committee as to the breadth and reach of these provisions.

CHAIR—I go back to that prosecution, though. Even though the joint venture needs to prove that it is a genuine joint venture, if the ACCC did decide to prosecute, it would not be enough to show that the joint venture was not set up properly; they would have to actually prove during the court proceedings, as I understand it—and the DPP would have to be satisfied with this—that there was some intent to break the law.

Professor Baxt—I am not sure exactly how that will all pan out, but the burden is clearly on the joint venturers to show—because they are the ones that are defending. They are being prosecuted. The ACCC prosecutes them for breach of the broad cartel prohibition, which is drawn very, very broadly and much more broadly than we think is necessary, as we have said in our submissions. It is the defence who have the onus of establishing that they fit within the exception. They have to show that they are not a cartel by virtue of the fact that they are a genuine joint venture. Like so many defences that are available in business law, they are very, very difficult to establish. Very, very few of them are established.

Mr Reid—I will respond specifically to your question in relation to the possibility that two joint venturers in the context I described before who are currently in a joint venture wish to extend the operation of their joint venture into a new line of business, where each of those joint venturers independently of the other might otherwise be interested in pursuing that business opportunity but they have come together as existing joint venturers and agreed that they will pursue it as a joint venture because it is more efficient to do so and will result in a better, stronger business for Australia et cetera. The arrangement by which they agree per an understanding between them which is as yet unwritten could quite easily qualify as a cartel offence, in that it is made between two parties who are competitive with each other or might otherwise be but for the arrangement; it may involve agreement between them as to the price at which they will supply a product as they enter into that new line of business; and it may well involve an agreement between them that neither of them individually and independently of the joint venture will pursue the opportunity, such as to be an output restriction. That falls within the definition. In falling within that defined area of conduct as a cartel offence, the only way forward then is to look to the defence and to make out that defence in the way required in the act. That would require them to have that reduced to a contract and confined only to a joint venture that produces something and does not acquire something in a way that might be contrary to the cartel offence.

They are three constraints: (1) that it must be in writing or a formal contract, (2) that it must not involve an acquisition, and (3) that it be only in relation to the production of goods and not the acquisition of goods. Those three constraints do not exist under the current law in the quasi-criminal jurisdiction in which we find ourselves currently, and they are the issues about which we are most concerned.

CHAIR—What about the idea of them going to the ACCC and getting an authorisation?

Mr Reid—That works up to a point, where there is a clear public benefit over and above the anticompetitive detriment, but it is not every case where that is clearly made out, nor is it every case where, efficiently, the parties ought to be going cap in hand to the regulator in relation to an authorisation where otherwise the activity is efficient and pro-competitive, as it is under the current state of the law in Australia.

Professor Baxt—There is a further problem with the authorisation process which is often overlooked, and that is that there is a review process. If people wanted to be mischievous, they could be in delaying the proposal. The point I was making earlier about the financing et cetera is that is often very closely linked to the development of these projects and people are just not going to invest and opportunities are lost because of the delay. Going back to our previous teleconference submission, I am very concerned that once this legislation is passed—and I hope it will be passed soon and then put into operation swiftly and effectively—that the ACCC will take the easy way out of picking off small and inconsequential arrangements rather than going for the really serious cartels that it is intended to deal with. The ACCC wants to score some victories very early in the piece, and it may well choose to go against some of the smaller players because they will not be as able to fight these matters in the way in which bigger parties who genuinely believe that they are protected by the defence will be able to do. So I am concerned about that. I am concerned about this legislation being put into effect speedily and effectively.

Mr Poddar—What we are raising here are issues about tightening the proposed drafting of this legislation. We are not seeking to do anything other than to say that there is legitimate business conduct where large international companies or large international companies dealing with small Australian companies, particularly

in technology or other areas, where there is no need to put those types of businesses at that type of risk, which may deter investment. When the ACCC chief executive Brian Cassidy was talking earlier, he made it very clear that the commission, because of the statutory rules, will be seeking to only authorise things which are put to them initially. Successful joint ventures morph over periods of time. They expand and develop. It is very costly for businesses, large or small, to come to the ACCC, to a regulator, each time to seek an authorisation of a new agreement or development in the joint venture. We do not believe it is appropriate to increase red tape, to increase the amounts of costs, on businesses, large or small, in this country if we can improve the drafting of the legislation. We are not seeking to do anything other than say that there are some clear areas for improvement of the drafting of this bill.

Senator XENOPHON—You basically said that it is simply too broad in terms of the current provisions, and the ACCC's response is that we can deal with this by administrative arrangements. You heard the questions in relation to that. What do you say is the solution? The view of the government and of many others is that we need some reforms in relation to this in order to tackle cartels. How would you deal with it? What would your approach be?

Mr Poddar—We also noticed in the ACCC submission that was lodged very recently that the Canadians have just put forward a bill to simplify the drafting of their cartel bill. As we put in our submission, we think the language could be tighter about what actually is hard-core conduct. We think what has occurred here is that, in order to ensure that the criminal offence is readily able to be prosecuted, all of the civil provisions in the key parts of the Trade Practices Act have now become overly complicated. They have become so complicated as they are very broad ranging, and we think they are difficult enough under the current bill for experienced competition law lawyers to interpret, let alone the ordinary individual. We think that is a problem. We would like see tightened drafting of the hard-core cartel offence as—

Senator XENOPHON—Have you provided that information in your submission? You have, haven't you?

Mr Poddar—We have, yes.

Senator XENOPHON—You suggested redrafting, yes.

Prof. Baxt—Yes. And, after all, we have now had the Trade Practices Act in force for nearly 35 years—I think it is 35 years in March—and those provisions that we have in the act, which have been by and large very successfully administered, are now understood. We are now going to create a new set of rules. The exposure draft is worse in that particular context; it moves away from all of the preconceived context and I congratulate the government in bringing the bill more—

Senator XENOPHON—It is better from your point of view now, isn't it?

Prof. Baxt—Yes. What we want is a sensible piece of legislation that the ACCC will be able to administer effectively and under which we will be able to work with our clients and the ACCC in order to ensure that we advise our clients not to engage in silly cartel behaviour. We do not want our clients going to jail. It is the last thing we want.

Senator XENOPHON—I will put to you the four sorts of cases that have come up, and I think you may have discussed them in part. There is the case of two doctors working in a country town restricting the services they provide, one working on Saturdays and the other on Sundays, which may have an effect almost like penalty rates—you can understand that—if they are going to take time off from their family to charge a bit more. There is the case of two bakeries, one of which supplies croissants to the other because one bakery wants to forgo the capital costs of building a special oven for the croissants. There is the franchise or franchisee situation that Mr Poddar has referred to. Also, Speed and Stracey have referred in their submission to a joint venture between two competing coal miners who:

... establish management committees comprising representatives of each competitor to agree on the operational aspects of the joint venture—

and they—

subsequently agree to the prices for which the coal produced by the mine is to be sold.

There is a big difference between the situations of the coal miners and the two doctors but, in terms of the so-called hardcore activity which I think you will agree ought to be subject to criminal sanctions, how do you distinguish between those in a way that is either legislatively clear or administratively simple—or relatively simple—to operate? I am not asking much, am I!

Prof. Baxt—It is a very interesting and difficult question. Dave is going to answer it.

Mr Poddar—Thank you very much! Senator Xenophon, the examples that you just went through were broad ranging but they were examples of where the current drafting may otherwise catch what we would describe as ordinarily quite legitimate efficiency-enhancing conduct. We have given some more examples, such as chemists in regional WA seeking to stock only certain types of pharmaceutical products to try and save on costs. We have given similar types of examples. The coal-mining joint venture one that I think the other law firm referred to is an example of something which is subject to the bill and which would be caught because the management committee decisions were not encapsulated in the original draft agreement. The croissant bakery example is something where you have two competitors who, again, are trying to do efficiency-enhancing behaviour like the two pharmacies that we have used in our example.

What we see in those types of situations or examples, first off, is multifaceted, so let me deal with them one by one. With the coal-mining joint venture one, we would see a relatively easy fix in relation to that, as in the example that Professor Baxt referred to. Our difficulty with what has been put forward in this bill is the requirement that it be reflected solely in a contract. Joint ventures are living, breathing and changing. They change over periods of time. They may not always be reduced to writing in every detail. We think that if they extend, as the current law does, to contracts, arrangements or understandings then that will be sufficient to deal with the type of example of the coal-mining joint venture. In relation to the bakery example that you alluded to, about the croissants, we believe that if we had the type of defence that we talked about in our submission, which they do in the US—a rule of reason for efficiency-enhancing joint ventures—that would not be subject to the bill.

Senator XENOPHON—Does that follow on from Mr Brent Fisse's suggestion that the bill should be amended to exempt joint venture activity from cartel activity if the dominant purpose is to further a procompetitive activity of the joint venture? Is that the sort of thing you are talking about?

Prof. Baxt—That is one way of doing it, yes. It would stop the ACCC tackling the bakers and the doctors, which would be very foolish and a waste of resources. Why would they want to tackle those when they have much bigger fish to go and fry?

Mr Poddar—We understand the argument that has been put forward by the commission, and the commission does a very good job in its authorisation notification procedures, but we do not believe it is appropriate to have a law which requires everyone to go to a regulator. It is a retrograde step to receive a tick for this conduct. What should in fact occur is that the conduct, if it is procompetitive, efficiency enhancing and to the benefit of Australians, should not be subject to this legislation.

We take a view that there should be those types of defences that should apply. We also think that the drafting of the joint venture exception, as it is put here, or defence, should be such that it should be broader than a contract and it should also apply, as I think we were saying to Senator Hurley, to the acquisition of goods and services for the purposes of the joint venture. There seems to be no reason it should not apply in those circumstances.

Senator XENOPHON—Sorry, isn't there a danger in those cases that it might give a way out for the hard-core conduct that you are concerned about?

Mr Reid—The current exception in 76C and 76D for current joint venture exceptions to the civil prohibition that is currently in the act and relates to price fixing and exclusionary provisions provides for an exception where the provision is entered into for the purposes of a joint venture. There is no, as yet, definitive case law on those provisions, but I think common practice—

Senator XENOPHON—How long has that case law been in?

Mr Reid—The provisions have only been in force for one or two years. My colleagues will correct me if they recall the exact date it was introduced, but it is only a short time. The accepted, standard way of interpreting those provisions, consistent with US practice, is that a straight forward, naked, cartel price-fixing arrangement between my colleague and I would not be for the purposes of a sham joint venture if there were nothing more to the joint venture. Therefore, it would not fall within the exception. That same approach prevails in relation to the proposed draft before us and provides a clear way forward for the ACCC and the courts to determine that, while my colleague and I as competitors have entered into this arrangement to fix prices, if we have done nothing more than that, there cannot ever really be a joint venture there. That is not a joint venture; it is simply—call it as it is—a price fix. It needs something more: it needs to establish a joint venture that has some business activity beyond the individual interests of each participant.

Senator XENOPHON—Thank you.

Mr Baxt—There is a further arrow in the quiver: you do not get authorisation for these matters, because people will not go seek authorisation. Then maybe the public benefits will not be there. These are ongoing activities. A year from now, if the ACCC finds that that joint venture is actually not doing the sorts of things that are assumed, they can bring the proceedings then. There is nothing to stop them. They do not have to challenge them at the time that the agreement is entered into. They are still pursuing it. They are giving effect to the joint venture activity et cetera in a way that is not covered by the defence. The ACCC has plenty of ammunition available to it in dealing with these issues. What we want to see is not them tackling the genuine initiation of joint ventures that will lead to increased wealth in this country.

Senator XENOPHON—Sorry, are you saying that the ACCC can always intervene a year later?

Mr Baxt—Yes.

Senator XENOPHON—But what happens if significant investment decisions are being made?

Mr Baxt—If they are being made in breach of the act, then so be it. That is what happens in many prosecutions that the ACCC brings. They only find out about the illegal activity later and they bring proceedings and they obtain penalties. People will go to jail in those circumstances if they try to pull the wool over the ACCC's eyes. So I do not see any difficulty with that. People are not going to be so foolish as to think they can pull the wool over the ACCC's eyes by camouflaging what is not a joint venture by looking like a joint venture and then being discovered later. They just won't do it.

Mr Poddar—There is no debate from the Law Council that the legislation should deal with the economic harm that hard-core cartels do. Our concern is that, as it is currently drafted, it needs refinement. It is overreaching towards legitimate business conduct. We have not seen the examples—at least on our side of the table—as to the sham type of joint venture conduct to try to cloak hard-core cartels that the current wording of the bill seeks to deal with. It would be fair to say that it is overreaching to ensure that there is no sham cartels. We have seen no evidence in recent times of the commission having any difficulty in cutting through cloaking of any joint ventures which are in fact hard-core cartels or other cartel conduct. We have not seen that argument of a joint venture being raised, not in any case that I am aware of, that has caused the regulator to defer prosecution. We have not seen that, as far as I am aware. Bob?

Prof. Baxt—That is exactly right. And in the case where you could argue that there was a sham in relation to the use of the anti-overlay provision, the Visy case that I referred to, the ACCC succeeded in prosecuting. It took them a while—they had to go the High Court—but they succeeded.

Senator XENOPHON—This may have been covered, so I apologise to the panel if it has been. Have you received any feedback from Treasury about your proposals to amend the draft exposure?

Mr Poddar—That is a very good question.

Senator XENOPHON—It was not meant to be good or bad; I just was not sure!

Mr Poddar—We have been consulted in Treasury discussion papers and by the government. We are not aware of the reasoning for certain elements of the current draft of the bill. If I could put it this way: we have made submissions but we are none the wiser as to why certain provisions have been drafted in the manner they currently are.

Senator XENOPHON—So, in plain English, they haven't got back to you?

Mr Poddar—Correct.

Senator XENOPHON—Okay. That is all I wanted to know.

CHAIR—As there are no other questions, thank you to the Law Council for coming in this afternoon.

Prof. Baxt—Thanks for the opportunity.

Committee adjourned at 3.06 pm