COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Personal Property Securities Bill 2009

FRIDAY, 7 AUGUST 2009

SYDNEY

BY AUTHORITY OF THE SENATE

TO EXPEDITE DELIVERY, THIS TRANSCRIPT HAS NOT BEEN SUBEDITED

INTERNET

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

The internet address is:

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

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

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Friday, 7 August 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Marshall

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

Senators in attendance: Senators Barnett, Crossin, Fisher, Hanson-Young, Marshall and Trood

Terms of reference for the inquiry:

To inquire into and report on: Personal Property Securities Bill 2009

WITNESSES

BOBBIN, Mr Wayne, Principal Legal Officer, Personal Property Securities Branch, Attorney-General's Department 8

DUGGAN, Professor Anthony James, Private capacity 2

GLENN, Mr Richard, Assistant Secretary, Personal Property Securities Branch, Attorney-General's Department 8

PATCH, Mr Robert, Principal Legal Officer, Personal Property Securities Branch, Attorney-General's Department 8

POPPLE, Dr James, First Assistant Secretary, Civil Law Division, Attorney-General's Department 8

Committee met at 9 am

CHAIR (Senator Crossin)—I formally open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Personal Property Securities Bill 2009. At 10.30 am we will be considering the Migration Amendment (Immigration Detention Reform) Bill 2009. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

[9.01 am]

DUGGAN, Professor Anthony James, Private capacity

Evidence was taken via teleconference—

CHAIR—I invite you to make a short opening statement. We do have your response to the Attorney-General's Department, which we were provided with yesterday. After your short opening statement we will go to questions.

Prof. Duggan—I think I can reduce my submission to about five sentences, so this will not take very long. Firstly, the department took the wrong approach to drafting the legislation. It should have based the draft on the Canadian model PPSA instead of trying to reinvent the wheel. Secondly, it is pointless for me to keep making this argument because it is clear that the government is not going to buy it. Thirdly, the potential result is that Australia will have a world-class registration system and a second- or even third-class statute. Fourthly, I hope the three-year review will provide an opportunity to identify and correct mistakes that might not have crept in if the drafters had stuck more closely with the Canadian model. Fifthly, in the meantime I think the department should publicly disclose the reasons for its decisions on key policy and drafting matters. I think that pretty much summarises what is in my submission.

CHAIR—What do you see as the cornerstone difference between this legislation and the Canadian model, which you believe is the model for us to follow? What makes you want to drive the Canadian model that would be pivotal to improving this legislation?

Prof. Duggan—The differences in terminology, differences in layout and differences in policy choices to the extent that it is very hard in lots of places to determine at a glance whether what the Australian bill is saying is the same as what the Canadian or the New Zealand legislation says or whether it is different and, if there are differences, whether the differences are intentional.

There is also a point that I have made in previous submissions and writings. If you have legislation that is so different from overseas models as this bill is then you effectively disqualify yourself from being able to rely on overseas case law, textbooks and learning. You would pretty much have to invent on the spot your own body of learning. In the meantime, that is going to put stakeholders, lawyers and courts into a position of considerable uncertainty, which is of course costly.

CHAIR—It cannot be a difference of policy, though, because the policy outcome is surely the same. Is it not perhaps just a difference in style?

Prof. Duggan—At the very broad level, the policy is the same. At the very broad level, I would describe the policy as being to enact a set of rules which apply to all types of transactions that are in substance security agreements, without regard to the form they take. If you see that as being the policy then the answer to your question is yes, the Australian bill is on the same page as equivalent legislation in other jurisdictions. But at the micro level there are all sorts of differences in approach that have been taken in the Australian bill, and also differences in drafting. I give quite a few examples in both my present submission and my previous submission to the committee. For example, one difference is the way the Australian bill treats security interests in bank deposit accounts, ADI accounts. That is different from the approach that is taken in Canada and also New Zealand. Another difference is the limited scope of the enforcement provisions in Australia. As presently drafted, they are effectively going to be limited to cases where the debtor is not a corporate entity because, where the debtor is a corporate entity, typically the secured party will appoint a receiver and the enforcement provisions are expressly not to apply if there is a receiver in place. Instead, the corporation's statute provisions will apply. There is no equivalent bifurcation of remedies provisions in any of the other jurisdictions. There are also differences in the priority rules relating to purchase money security interests. There are differences in the priority rules relating to accounts receivables financing, as opposed to purchase money security interests. There are differences in the way the rights of third-party purchases are expressed—and so on.

CHAIR—In your last dot point you say that even the Bankers Association submission draws attention to the apparent anomaly. Are you saying that you do not believe there is a justification for this anomaly?

Prof. Duggan—That is right. I try and explain why in the submission. I guess there are a number of reasons. At the most basic level this legislation is supposed to codify the law relating to secure transactions, and it is inconsistent with the codification objective to have a whole swag of provisions contained in a separate statute. That is a drafting point, but it is important substantively because it means a reader is going to have to

consult two separate statutes and work out which statute applies from case to case. This is going to add to the time and cost of providing legal advice in determination disputes and that sort of thing.

If you have two separate regimes—and I confess to not being closely familiar with the receivership provisions in the corporations statute—then the likelihood is that there are going to be differences from one regime to another in the rules that apply. That invites parties to play games. So a secured party, if it sees discernible differences between the rules in the Corporations Act and the rules in the PPSA may say to itself, 'Well, I'm not going to appoint a receiver because I will do better if the PPSA rules apply.' Conversely, it may say, 'I will appoint a receiver not necessarily because I need a receiver but because I figure I will be better off if the Corporations Act rules apply.' That sort of opportunistic playing off of systems is bad policy.

I think the third point I make in the submission is that, from the debtor's point of view, this sort of distinction is unfair and irrational. So we work on the assumption that different rules apply depending on whether the PPSA governs or the Corporations Act governs. Why should the debtor's rights be dependent on whether the secured party has chosen to act through a receiver or to do the enforcement exercise itself. For all those reasons, I think the present structure is a bad idea. I have not read, seen or heard any justification for doing it this way except that apparently fiddling with the Corporations Act was controversial.

Senator BARNETT—Good morning, Professor Duggan. Thank you for being with us via teleconference. I understand that you are in Toronto?

Prof. Duggan—Yes, I am in Toronto. It is Thursday evening and the sun is just going down.

Senator BARNETT—We hope you are in a good place. We have fine weather here in Sydney. We appreciate you taking the time to be with us. I have a few general questions to start with before getting down to specifics. Do you think the bill is an improvement on the exposure draft?

Prof. Duggan—Yes, I do—partly for the reasons I think I addressed in paragraph 3 of my submission. I think it has fixed some of the specific concerns I raised about the previous draft. The accessions provisions are better, the commingled goods provision is better and the legislation now refers to the registration of security interests, as it should, rather than to registration of collateral. I think some of the more tortuous bits of drafting have been fixed up. So I think in all of those respects it is better than the last draft.

Senator BARNETT—But you have made the point again in that paragraph that it is no more than symptomatic of a wider concern—namely that they are trying to reinvent the wheel. So that is your point about the fact that it should simply replicate the Canadian model, is it?

Prof. Duggan—Yes, I think this draft moves closer to the Canadian model than the previous draft; but in my book it is not close enough.

Senator BARNETT—You have touched on this already in responding to the chair, but you seem to be totally supportive of and almost enamoured with the Canadian model as opposed to the New Zealand model and other models.

Prof. Duggan—I guess I am using the Canadian model as a shorthand expression. In most contexts I think when I refer to the Canadian model I mean also the New Zealand model because the New Zealand legislation is for the most part based closely on the Canadian model though there are some differences. The differences between the New Zealand model and the Canadian model are much less than the differences between the Australian bill and the Canadian model.

I guess my preference is for the Canadian model because the Canadian system is closer to Australia's than the US system. The drafting style, by and large, is closer to the Australian style than the US style. There is generally I think more familiarity with Canada in Australia than there is with the US. I think that revised article 9 ended up with an extraordinarily complex set of legislation after the revisions in the late 1990s. The Canadian model is simpler.

ACTING CHAIR (Senator Barnett)—You made the point, and I think it was the key point in your opening remarks, that you wanted the government and the department to disclose its position on policy and drafting matters. Can you be more specific there. You touched on it but can you say exactly what you are trying to say there and be more specific, or is it simply repeating what you have been saying—that they should have gone down the track of the Canadian model rather than trying to reinvent the wheel?

Prof. Duggan—No, proposition 5 is my fallback position—which is that if the government is going to go ahead with the legislation as it is presently drafted then at the very least it should provide a better public explanation for key decisions that it has made. So they are two different points.

ACTING CHAIR—Can you give some examples there?

Prof. Duggan—Yes, I give examples in my written submission. The first example I give is the treatment that the bill gives to security interests in deposit accounts.

ACTING CHAIR—Okay, so you gave four examples. You mentioned the ADI bank accounts and then the enforcement provisions, priority rules for purchase moneys and account receivable and third-party purchase. Are they the points that you are referring to?

Prof. Duggan—Yes, those and a few more. There is also the omission of the fixtures provisions, which I think we talked about at the last inquiry. I think it is a major mistake to have left the fixtures provisions out and there should be an explanation for why that was done. All of these examples are set out at some length in the written version of my submission.

ACTING CHAIR—So you think the department should set out policy reasons for why they have a different view to you on those points?

Prof. Duggan—It is not necessarily that they have a different view to me but rather that they have taken a different position from the one taken in legislation overseas. I think those differences really need to be explained—if only to give people a better understanding of what this legislation is about.

ACTING CHAIR—But they have responded to your substantive submission that we have in front of us and then you have responded to them. I must say that we only got this particular document yesterday—it is four pages with nine points on it.

Prof. Duggan—Yes, that is because I only wrote it yesterday because I only got the department's response yesterday.

ACTING CHAIR—That is right, and on behalf of the committee thank you very much for being so prompt in getting back to the committee. We appreciate it very much indeed because it does add value to our work. Can you walk us through some of the key points that you have in your response to the department's submission please. I note that in the first paragraph you raise the point that the bill's provisions raise competing policy considerations. Could you just flesh those points out—you have made nine points—by speaking to them briefly.

Prof. Duggan—The first point relates to security interests in deposit accounts. What we are effectively talking about here is a security interest taken by the deposit-holding bank in its customer's account. In substance the approach that the bill takes to security interests of this kind gives banks quite a competitive advantage over other lenders because it means that they do not have to register a financing statement. So they do not have to publicise the security interest in order to get priority. This is basically the approach that revised article 9 takes. The bill seems to have cherry picked from there.

ACTING CHAIR—So do you think it prejudices the smaller financial companies and providers?

Prof. Duggan—It may do, for the reasons I have set out under heading 2 in my response to the department. It made do or it may not. My main point there was not to say that the bill is wrongheaded in going ahead on this basis necessarily but rather that there are competing policy considerations and the public really needs to know what the policy basis was for the department to take the position it ended up taking. At the moment we do not know.

ACTING CHAIR—I do not know what he department would say in response—we will have them shortly. But in previous responses to the committee they have said that they are trying to legislate in law what is currently occurring. So is this different to the current law?

Prof. Duggan—Yes, and the reason for that is in paragraph B under heading 2 of my response. They say that this is really just replicating the advantages that the current right of set-off gives to banks, or the right of combination of accounts. But that is not the case because set-off and security interests are two quite different animals. So giving a bank priority with respect to a security interest is not the same proposition as saying that the banks right of set-off should have priority over competing security interests.

ACTING CHAIR—We have to keep moving because of the time factor. We can go through this but just highlight the key points for us.

Prof. Duggan—Another prominent example is, as I started to say before, the decision to leave out the fixtures provisions, which New Zealand has also done but there are provisions governing security interests in fixtures in all of the other jurisdictions. Personally I think it is a big mistake to have left the fixtures provisions

out because that is going to require fall-back to the common law, which is complicated and uncertain. According to the department, the fixtures provisions were left out because of opposition from the states, which seems to be okay as far as it goes but I think the public really needs to know what the states' arguments were and just how hard the department pushed back on the point.

ACTING CHAIR—That sounds to be a legitimate concern. Please continue.

Prof. Duggan—I am just skipping through here.

ACTING CHAIR—Can I jump to one. You raised the enforcement provisions and that they do not apply to receivers who have been appointed. Is this a one-off in the world? You said earlier that it was a unique provision.

Prof. Duggan—Yes; that is not quite true. New Zealand has done something similar, so the relationship between the New Zealand PPSA and its corporations statute receivership provisions is also unsatisfactory. But so far as Canada is concerned, no, none of the Canadian provinces have gone down this track.

ACTING CHAIR—Why should the enforcement provisions apply if a receiver has been appointed?

Prof. Duggan—To take a simple example: let us say that I am a secured party and I want to repossess goods by way of enforcing a security interest. I could do that personally or, for whatever reason, I could appoint a receiver to do it for me. Presumably, in an ideal world I would make that decision based on what I think is the most cost effective way of proceeding. But why should the debtors rights be different depending on the decision I make about the best method of proceeding on a cost effective basis. Why should the debtors rights be a) if the secured party elects to appoint a receiver but b) if she elects not to. That seems to me not to make sense.

ACTING CHAIR—Okay. Are there any other highlights you want to make from those nine points?

Prof. Duggan—In regard to the purchase moneys security interest provisions, the bill, in common with other jurisdictions, gives superpriority to a purchase money security interest in relation to inventory and also to other property. But, if the subject matter of the security interest is inventory, in other jurisdictions you have got to do two things if you want to get priority over a prior lender. The first thing is that you have got to register a financing statement before you deliver the inventory to the debtor. The second thing you have to do is give notice to the prior secured party that you will be claiming a purchase money security interest and that you will have priority. The purpose of that is to allow the prior lender to make an informed decision about whether it is viable to make further advances on not because a prior lender, particularly if we are talking about a line of credit situation when thinking about further drawings from time to time, will look at the state of the debtor's inventory with a view to determining how well it is covered in terms of the further advance.

In the absence of the PMSI holder being required to give the prior lender a notice, the prior lender is going to have to consult the register before every drawing and that may not be practical, particularly if the drawings are coming thick and fast, which is the reason why revised article 9 imposes the notice requirement and the same reason why all the Canadian provinces impose the notice requirement. The bill drops the notice requirement and there is no publicly stated reason for that.

ACTING CHAIR—You mentioned the third-party purchase earlier, one of your key concerns in the approach by the department that you did not agree with. Please explain that concern.

Prof. Duggan—We are talking here about the case where there is a security interest in a motor vehicle or another item of property and the debtor sells the vehicle or other property to an innocent third-party buyer, and the question is whether the buyer gets clear title or whether she takes the property subject to the security interests. The Canadian statutes along with the New Zealand act contain a set of rules governing the outcome in different fact situations. The Australian bill does more or less the same thing, but its approach to the drafting of these provisions is quite different, so it is very hard to tell without a meticulous analysis whether in substance what the Australian bill is doing is the same as what the legislation in the other jurisdictions is doing or whether there are substantive differences in the approach of the Australian bill and, if there are substantial differences, whether they are intentional or unintentional. That is the main point.

ACTING CHAIR—I want to ask you a few questions that came up yesterday from other witnesses, and you may or may not have a view on what I am about to share with you. One of the questions related to clause 111, which is the rights and duties to be excised honestly and in a commercially reasonable manner under chapter 4. Obviously the department has changed that from the exposure draft to limit it to apply to the enforcement provisions only. A couple of the witnesses, the ABA and I think it was Clayton Utz, expressed a

view that they were ambivalent as to whether it should remain or go. I would call this a controversial provision in the first exposure draft. Also, a witness late in the day had some reservations about how it would be read in that chapter. Do you have a view one way or the other?

Prof. Duggan—Yes. I think this is all a bit of a storm in a teacup for two reasons. Firstly, Australia already has unconscionability legislation coming out its ears, and so even if that provision were not there enforcement activity would still be subject to the provision in the Trade Practices Act governing unconscionable conduct. It strikes me that the question of unconscionability is pretty much the same as acting in a commercially reasonable manner, so simply getting rid of that provision would not remove the sorts of concerns that you are hearing from some stakeholders. Secondly, my prediction is that, if this were ever litigated, the courts would interpret 'commercially reasonable manner' by reference to pre-existing common law, case law, so they would be looking at the obligation to get the best price reasonably obtainable, to conduct any sale at an appropriate time and under appropriate conditions and that sort of thing. In other words, they would be likely to fall back on the case law governing a mortgagee's obligation in relation to enforcement activity.

ACTING CHAIR—All right. That is fine. Another issue was—

Prof. Duggan—Sorry—so the bottom line is that I do not think it matters much one way or the other.

ACTING CHAIR—No, I got your message there; no problem. Another issue was subclause 14(2)(c), relating to the PMSI and the meaning of PMSI, and I think there are at least two witnesses, Piper Alderman being one of them, that recommended the removal of that subclause. I do not know if you have read those submissions or have a view on that matter.

Prof. Duggan—Yes, I do, and actually my written submission has two footnotes in it and the first footnote addresses that particular point. I do not know where that paragraph (c) came from; it was not in the previous draft and it appeared, as if by magic, in the new draft. There is no counterpart to it in any of the other legislative models, and there is no policy basis for it. But, if you exclude consumer PMSIs from the operation of the legislation, the likely result will be to increase the cost of financing to consumers in certain situations—car financing and that sort of thing. But, again, there is no indication in the explanatory memorandum of why that provision was put in.

ACTING CHAIR—No. There was some discussion yesterday about the overlapping of consumer credit legislation which is going through our parliamentary system at the moment and the bill before us,—that there is duplication and really no necessity for that, and that, to clear things up and to provide some clarity to both bills, the consumer credit part of this bill should be removed. I think Ms Flannery from Clayton Utz expressed that view in their submission and verbally; I hope I have not misrepresented her.

Prof. Duggan—I do not know whether that is a reference specifically to 14(2)(c) or to the bill as a whole, but I think, in relation to 14(2)(c), the point was: I think somebody was speculating that it might have been put in because there is a provision in the consumer credit laws saying that it is not permissible to take a security interest in after-acquired property from a consumer. But if that is the explanation it is misconceived because 14(2)(c) is not limited to cases of after-acquired property. It would apply if I were to buy a car on hire-purchase terms from a financier or from a dealer, and there is no reason why the PMSI rules should be excluded in those circumstances.

If the reference is to the bill at large—well, wow! Going through the bill and trying to carve out every provision that might have a consumer application would be a mind-boggling exercise. And if overlap and inconsistency is a concern, a better approach would be simply to have a provision at the back of the bill saying, 'To the extent of inconsistency between the statute and the consumer credit laws, the consumer credit laws take precedence.'

ACTING CHAIR—Yes. Okay. I do not know if you have seen the combined law firms' submission, but they have a host of concerns. It is hard to summarise them all, but flawed assets and repos were two of their major concerns. Do you have any response to their views?

Prof. Duggan—No, I do not think so. I think that their submission was only posted yesterday, so I have only had a chance to scroll through it very quickly and I do not think it would be sensible to say anything on that basis.

ACTING CHAIR—No. That is fine. More generally, as to conflict of laws provisions under this new bill—

Prof. Duggan—Yes?

ACTING CHAIR—What is your feeling?

Prof. Duggan—We had some this time, which is an improvement on last time around. To a considerable extent what they have done tracks the conflict provisions both in the New Zealand statute and the Canadian statutes. There are some differences of detail which I touch on in paragraph 12 of my written submission. I am not sure what the reasons for those differences of detail are. Again, the explanatory memorandum does not touch on them.

ACTING CHAIR—And privacy?

Prof. Duggan—I am not sure what to say about that. I think there may be a bit of a preoccupation with privacy concerns and a bit of an exaggeration of what the privacy dangers of this legislation are. But I accept that these are concerns that are legitimately held—

ACTING CHAIR—Most people would say there has been a considerable improvement from the exposure draft of this bill in terms of improving and perhaps expanding the privacy provisions.

Prof. Duggan—Yes. I have got to say I have not looked at the privacy provisions closely because, coming at it from a Canadian perspective, this has not been a substantial issue during the history of the Canadian legislation, so I have tended to discount them in the Australian bill.

ACTING CHAIR—We have not seen the regulations because they have not been completed as yet. Talking about process now for a minute, as you know we have put back the implementation 12 months and the department and the government have agreed to that. Is that adequate time for further consultation and an education and information campaign so people know about it when it is ready to commence, as per the register, in I think it is 20 months time or thereabouts? Secondly, in terms of the regulations, do you have a view as to the process for reviewing them and approving them? Should it be done in the normal way in terms of how important they are? We have got a bill and it is a framework, but a lot of questions that people still have will be answered when the regulations are promulgated.

Prof. Duggan—Sure. The regulations are pretty important for this type of legislation, in particular because they specify the mechanics of registration. For example, they will spell out in detail what has got to be in a financing statement and the form the financing statement will need to take. If you look at the registration provisions in the statute itself, at the moment they say simply things like 'the financing statement must contain information that is specified in the regulations or in the circumstances prescribed by the regulations'. It is going to be important for people working with the legislation on a day-to-day basis to know what is in the regulations. So on that basis I would say that the regulations should go through the same process as the statute itself.

ACTING CHAIR—You think we should have a Senate inquiry into the regulations.

Prof. Duggan—It is hard to be definitive about that until we actually see the regulations, but at the very least I think the regulations should be released for public comment and there should be enough time for stakeholders to make responses.

ACTING CHAIR—You understand the process in Australia is that New South Wales has passed the bill, so what we have to do if we amend this bill is that New South Wales has to introduce a new bill. So the other option is to move and pass consequential amendments, either simultaneously or near the same time as the primary bill. Do you have a view on process?

Prof. Duggan—I really do not think I can comment on that except to say that these sorts of experiments in cooperative federalism are something that could never be achieved in Canada. I find that interesting as somebody who has lived in both countries, that you could have two federations that are so different. But that does not really answer your question.

ACTING CHAIR—We are all sitting here with a wry smile, pondering your comments. I do not have any further questions. On behalf of the committee, I thank you immensely for your work and the timeliness of your responses and for being with us today. It is very much appreciated.

Prof. Duggan—That is fine. I am glad to have been able to help.

[9.41 am]

BOBBIN, Mr Wayne, Principal Legal Officer, Personal Property Securities Branch, Attorney-General's Department

GLENN, Mr Richard, Assistant Secretary, Personal Property Securities Branch, Attorney-General's Department

PATCH, Mr Robert, Principal Legal Officer, Personal Property Securities Branch, Attorney-General's Department

POPPLE, Dr James, First Assistant Secretary, Civil Law Division, Attorney-General's Department

ACTING CHAIR—I welcome the officers from the Commonwealth Attorney-General's Department. I remind senators that the Senate has resolved that an officer of a Department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations for policies or factual questions about when or how policies were adopted. Officers of the department also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis of the claim.

Do you wish to make an opening statement before we move to questions from committee members?

Dr Popple—Not as such, but we had some ideas about how we might be able to assist you this morning. First of all, I will hand up, if I might, a written answer to a question you asked yesterday, Senator Barnett, about the budget for personal property securities reform for 2009-10 and the out-years.

ACTING CHAIR—Thank you very much. We appreciate that. It is so received by the committee.

Dr Popple—We have also handed up a few minutes ago a list of matters which we thought we might take you to. They are under different headings: matters that we think might warrant further consideration; questions on drafting issues that arise in relation to various clauses of the bill; matters which we think might warrant further discussion with stakeholders; matters that have come up in the context of the committee's consideration that will need to be dealt with in regulations. We have identified some of the top issues that the law firms have identified in their submissions, and also we have some comments we thought we might make on specific issues that have been raised with you in submissions and at yesterday's hearing.

I might quickly address some of the issues that Professor Duggan raised, very generally.

ACTING CHAIR—That would be excellent.

Dr Popple—We have dealt with many of the specific issues that Professor Duggan raises in our response to his submission. He makes, I suppose, a general point that there should be more justification for some of the policy decisions that have been made and are reflected in the bill.

ACTING CHAIR—I note that Senator Crossin has returned and is now chairing the committee.

CHAIR—Please continue.

Dr Popple—We would say that we have done this to a great extent through the explanatory memorandum and through the various submissions we have made here. We concede there is some scope for some more information and we can easily put that out, through our website, for example. What we have not done, and we say this is the appropriate approach, is go through explaining every minor departure from the Canadian legislation, the US legislation and the New Zealand legislation. We are trying to explain what the bill does and why it does it. We have taken the view that it would be a very large job for us to go through and identify every minor difference between those three slightly different approaches and we also think it might be of limited utility to stakeholders. That is all I propose to say in relation to what you heard from Professor Duggan this morning. I thought we might move to the issues we have listed on the piece of paper we have handed up.

CHAIR—Do you want to go through this list?

Senator BARNETT—Professor Duggan has given a paper that you have probably seen. It was tabled yesterday. He has expressed some serious concerns about them again today. Perhaps you would take on notice the concerns of Professor Duggan. We have a regard for his skills, abilities and experience. Would it be possible for you to take on notice that paper and respond in due course?

Dr Popple—We can do that.

Mr Patch—I think another course would be for us to try to respond to some of those issues now.

Dr Popple—Some of them appeared on the list.

Mr Patch—Most of them are on the list.

Senator BARNETT—If you think they are covered on the list, that is fine.

Dr Popple—The major one that is not covered is the concern he has that we depart in some ways from the Canadian model. That is true, but we would say that that is for reasons which we have explained and are happy to explain now in relation to those particular issues.

Mr Patch—We went into that yesterday, too.

CHAIR—Let us work down through this list, then.

Dr Popple—Mr Patch can assist you there.

Mr Patch—The matters we on further consideration of things which we think need serious looking at and will probably result in some sort of amendment to the bill. What I propose to do is read through the list, because I know there is a group of people out there reading the transcript and that they will want to know what these are. I suspect that what they are is reasonably apparent from the submissions made. I think we are probably better off spending more time with the comments on issues raised, where we are likely to have some useful discussion. These matters are likely to be agreed with by everybody. Section 12 (4), about an ADI able to take security interest in an account with it, is something where the bill could be clarified to make it clear that an ADI can take a security interest in an account with it. We think section 55 (4), about priority time control, was an inadvertent change made to the bill in an attempt to align it with Saskatchewan and which we now need to undo to give it the effect that it should have. Section 268, about assignment of accounts, needs to be amended so that silent accounts and chattel paper that do not secure performance or paper obligation are exempted from section 267 so that those security interests will not vest in the grantor on insolvency but will be affected by the priority rules.

We think that clause 79 overreaches slightly to the extent that it applies to agreements other than security agreements, and we think we should wind it back a bit to make it consistent with approaches taken in New Zealand and Canada. Section 39 (2) should trigger the benefit of enforceability against third parties in the originating jurisdiction. This relates to where property is moved from, say, New Zealand to Australia. The bill currently says that you get the benefit of a registration in New Zealand but you do not get the benefit of perfection of a different kind in New Zealand. We think it should be amended so that when property is moved to Australia you get the benefit of the earlier priority time from the earlier registration or earlier perfection in the previous jurisdiction. These are all things which I think will not be contentious and which stakeholders, in fact, asked for. The drafting questions at section 77 should be amended so that it applies to all kinds of security interests. The description there of perfection of originating jurisdiction is an error. We think section 77(1) already has the effect that it does not apply to the deemed security interests. The major law firms said they think that is a strange reading of the section. We propose to take it back to the drafters and see if we can do something about that. Section 151 is another issue on which we propose to go back to the drafters to see whether the drafting can be improved on.

We think section 77(1) already has the effect that it does not apply to the deemed security interests. The major law firms said they think that is a strange reading of the section. We propose to take it back to the drafters and see if we can do something about that. Section 151 is another issue on which we propose to go back to the drafters to see whether the drafting can be improved on.

I will go back to the things we want to discuss with stakeholders. The Privacy Commissioner raised some further issues. I think that is really a matter for Mr Glenn to talk about.

Mr Glenn—Senators, the Privacy Commissioner raised a number of issues, some of which go to the consequential amendments to the Privacy Act, with which we agree. We will be discussing with the Privacy Commissioner how best to effect those. There are a couple of other issues to do with possible amendments to the PPS Bill. I think we need to have further discussions with the Privacy Commissioner and the Department of the Prime Minister and Cabinet, which administers the Privacy Act, to clarify what needs to happen there and to make sure that the scheme is consistent with the Privacy Act.

Senator BARNETT—Do they relate in any way to the 14 Crompton report recommendations or are they separate to those?

Mr Glenn—They are separate to those recommendations. They are really addressing the points that the commissioner raised in her submission.

Senator BARNETT—Are any legislative amendments necessary flowing from the Crompton report recommendations?

Mr Glenn—Nothing in the PPS Bill. There might be a regulation.

Mr Patch—Section 267, attachment after insolvency, was an issue that was raised, at least to me, somewhat cryptically by the big law firms in their submission, but Mr Stumbles elaborated on that yesterday. I think I need to go and talk to him about it. It relates to the continuing effect of a registration after a company becomes insolvent, and whether the registration should stop when insolvent. It is a very technical point. I think we can resolve that in a way that will make him happy; I just need to work out how to do it.

The zero-hour rule is a technical rule that says a company is deemed to become insolvent on the first minute of the day the courts make an order for its winding up. So if someone makes a registration at 10 am but the court makes an order winding it up at noon then the company is deemed to have become insolvent the midnight before that. So in a sense the company is insolvent before the registration is made. It is a very technical sort of thing and we need to fix it up. I think the person at Allens who picked this up did very well.

Successors in title bound by earlier contracting out is something that we need to talk to them about; it is not a feature of New Zealand legislation. If something can be done quickly that does not take up too much space. We think it has this effect already, for the reason we have explained in our response to the Allens submission; we just need to talk to them about it a bit more.

They raised a couple of matters which we think could be addressed in the regulations about mortgage backed securities. They want to make it clear that these security interests are governed by the bill. We attempted to put them in the bill but the drafter said it would go to five or six pages. It is a very technical thing that effects maybe half-a-dozen law firms. We thought, 'Well, we'll just put it in the regulations rather than spell it out in the bill.' The same goes for securities lending arrangements. These are very technical and it is important to get them absolutely right. We have the capacity to amend the regulations if it turns out that we get them wrong. Both these things are incredibly technical and it would be very important to get the slight nuances of the drafting right. Putting them in the regulations give us the flexibility to do that. I think we will get an outcome that they are happy with. What we saying here is that we are looking to do something that they want us to do, and we need to discuss exactly how to do it.

CHAIR—Mr Patch, before you move on to the issues that the law firms raised, I would like to go back to some sections of the act that I want your comment on as to whether they need further consideration.

Mr Patch—Sure.

CHAIR—I think in this list we are moving on to issues you can comment on but you are not going to change. That is my reading of the bottom of this list. 'Comments on issues raised' does not necessarily mean there will be changes. Is that right?

Dr Popple—That is a matter for government, of course, having considered your report.

CHAIR—I am taking it from your list. Anyway, I have issues about which I want to know whether you think they warrant further consideration. Can I raise those with you?

Dr Popple—Certainly.

CHAIR—I want to ask about the definition of 'controller'. It was put to us by the Bankers Association that either section 9 of the Corporations Act or section 116 of the PPS Bill should be amended.

Mr Patch—This is a controversial question that is being considered by the Corporations and Markets Advisory Committee established under the corporations scheme. That committee, an expert body, recommended that it not be changed. It is properly a matter for the Corporations Act and the Department of the Treasury. We see that there are merits on both sides, but it is not really part of our remit.

CHAIR—It would be part of your remit if you decided to amend section 116, though. Wouldn't you do that in consultation with the corporations people or otherwise?

Mr Patch—There has been a broader process of extensive consultation and discussion on this very precise issue. There was a public process where people put submissions in and an expert body in the marketplace considered this. I think the best we could do is to take it back and ask Treasury to look at it again.

CHAIR—You are saying you would rather defer to amending section 9 of the Corporations Act, if Treasury decide to do that, rather than this bill?

Mr Patch—There is a need for harmony between the two pieces of legislation. This affects outcomes; we cannot act unilaterally. We are, in a sense, the tail in that exercise.

CHAIR—We often hear the phrase that the tail wags the dog, though, so you could—

Dr Popple—But in this case I think we are taking the policy lead from that part of the government that has already examined this in some detail.

CHAIR—The other thing you do not have listed here is that section 266 of the Corporations Act be amended to ensure the requirement of two registrations is avoided. Is that another matter you would take back to them?

Mr Patch—You mean sections 266 and 267 of the Corporations Act?

CHAIR—I see. So you—

Mr Patch—There is a bit of confusion here in that we have a section 266 and so does the Corporations Act. If we are talking about sections 266 and 267 of the Corporations Act, the intention there is to retain the effect of those provisions and relocate them to elsewhere in the Corporations Act. I had a quick discussion yesterday in the corridor with people from the big law firms. I think they now understand why we are doing that and are more comfortable with it.

CHAIR—Moving to section 127(6), ‘Reimbursement of enforcement expenses between enforcing parties’, there is been a suggestion from the Bankers Association that that should be amended so that those expenses should be reasonably paid or incurred by the enforcing party. Have you given any consideration to that?

Mr Patch—Our consultative group has discussed that. The bill does talk about the amount of any expenses paid or incurred, but we will go back and talk to the bankers about that. I think that in principle we agree with the outcome they are trying to achieve on that, but we think it is achieved already. We will talk to them.

CHAIR—Clayton Utz’s submission suggests that the conflicts of law provisions are too complex and suggested a new part 7.2.

Mr Patch—A new part 7.2?

CHAIR—I guess they are saying it needs to be simplified. It is too complex.

Mr Patch—We have worked very hard with the drafters to make part 7.2 simple already. This is inherently a conceptually difficult area of the law. You need a lot of expertise in this particular conflict law topic to get yourself across exactly what is being achieved. We have put a lot of effort into these because of the interest that people have shown. We think that these provisions are right. It is something that could be looked at in the review in three years time.

CHAIR—They also raised the issue of priority time. Inadvertently it was amended from the exposure draft, putting certain secured parties at a disadvantage. They think that needs to be corrected.

Mr Patch—That is the memo about 55(4) that we are happy to do.

CHAIR—The Consumer Action Law Centre had suggested amending items 7 to 10 in section 172, which they felt was too broad. This goes to the data mining for credit and marketing purposes.

Mr Bobbin—If you concentrate on item 7, which is the one about establishing to provide credit, it is inherent in the provision that we are talking about considering an application for credit and not considering providing an invitation to apply for credit, so I think that is a distinction. We would say that it already does that, but of course we would be happy look at it if the committee had other views.

CHAIR—But at this stage you are saying you disagree with the point they make for those reasons.

Mr Bobbin—That is correct.

Mr Glenn—It is worth noting that this was discussed in the privacy impact assessment process. The conclusion of that was that the issue that the Consumer Action Law Centre has raised was mostly illusory.

CHAIR—The other issued they raise in relation to the regulations is that section 184(1)(e) gives the registrar power to remove data if in the public interest, but the test is not outlined.

Mr Patch—The test is in the public interest or for reasons prescribed by regulations. Ultimately there will be a registrar appointed who will have to administer these sections, which will influence the registrar's approach to the questions and the advice the registrar takes on whether a particular matter is in the public interest. With that caveat, these provisions were inserted to allow the registrar to remove from the register data where some serious prejudice could happen to an individual, such as where a person has been threatened with physical harm and the removal of the data from the register would be required urgently to facilitate that.

CHAIR—So it will not include civil penalties. Are you intending to amend section 157 to include civil penalties?

Mr Patch—Is this a new point?

CHAIR—No, this is in relation to this area in their submission, where they suggest that a remedy would be to amend section 157.

Mr Glenn—I am not sure that goes to this point. I think the submission that was being made was that there needed to be better description of the circumstances in which a registrar might take action to remove material from the register. That was also addressed in the privacy impact assessment report, where the recommendation was that the registrar, when appointed, produce publicly available guidance about the approach that the registrar would take to that type of issue, which the Attorney has accepted.

CHAIR—They also raised the issue of verification statements. They say there is insufficient incentive to comply as there are no civil penalties for breach of clause 157. Is there a plan to create the civil penalties for a breach of clause 157?

Mr Glenn—No, not at this stage. The measure we took was to make failure to comply with that provision an interference with privacy which would be able to be subject to a complaint to the Privacy Commissioner.

CHAIR—To be enacted under the Privacy Act; you would defer to that act?

Mr Glenn—Yes. That was the remedy that we thought was the appropriate balance in that situation.

CHAIR—Another area that you have not listed that I want to raise is the consumer property definition. They also suggest that you should amend the definition of consumer property in clause 13 to personal property used predominantly for personal domestic or household purposes.

Mr Patch—When people are making registrations, they need certainty in terms of which box they tick because it can affect the validity of the security interest. At the moment, the bill says that if the property has any commercial application then you tick the commercial box, but if it is a wholly for consumer use then you tick the consumer box. That goes to which box you tick on the register. The bill itself in other provisions uses the 'predominantly' test when referring to consumer matters.

Dr Popple—The reason that it is particularly important is that, as well as providing clarity around registration, it provides clarity around search. When a person later goes to search against a particular piece of collateral, they need to know that they are looking in the right area, that they have chosen the right search parameters?

CHAIR—Are you telling me you cannot rely on a person's interpretation of 'predominantly'?

Dr Popple—The danger of putting 'predominantly' is that it would not otherwise be clear at a time when the registrants and the searcher need to be sure.

Mr Bobbin—People will have different interpretations, I think, is the point.

Mr Patch—It is when something is used predominantly.

CHAIR—Okay. They were the outstanding issues on our list that I wanted a response to. Could we go to the law firms' top three issues?

Mr Patch—We have the law firms' top three issues. Perhaps Mr Glenn should talk about the timing.

Mr Glenn—I think the submission from the law firms was that the extended period for the implementation of the system was going to be inadequate. With respect, that took us a little by surprise. All of the advocacy through the last committee process was that another 12 months should be added to the exercise. It seems like we are taking 12-month bites and that we keep extending it out forever. Certainly from our view, and from COAG's view in considering this issue, the thought was that if the legislation was in place by the end of this

year and the register was built by May 2010, you would have a 12-month period for business to be getting used to the idea of the system, to be receiving the benefits of the education information campaign that we will put together and to transition to the system in a seamless sort of way. I think there is always a question in these types of situations about when people will start paying attention to the fact that they need to do something slightly different and to accommodate a new regime. It is probably always in that last 12-month period where it becomes real for people. No matter where you put the end date, the last 12 months is where the work is really done.

Senator BARNETT—This issue of timing, frankly, is serious. The committee unanimously recommended more time in our report. We have received a bill. It was introduced into the parliament in June and now we are in early August and we are reviewing submissions. A key message that we have received on the bill, particularly from the submissions the committee heard from yesterday, is that of timing. They have not had enough time to review the bill, which is some 300 pages, express their concerns and get it right.

With respect—and thank you for raising the issues this morning—we have over a dozen matters for which there is agreement from the department that improvements can be made to the bill, notwithstanding other matters that we need to work through as a committee. Why have we, as some people would say, rushed the process? Why is it? We recommended an extension of 12 months and we have that extension in the report, but the bill has come in and here we are six weeks later and we have given the witnesses a few weeks to comment on the bill and, frankly, we have the same message again: we do not have enough time to review what is, frankly, an extremely important piece of reform.

Dr Popple—We take a different view. You point to the fact that there are a number of issues that we have identified that may need changing, and no doubt the committee will come up with others as well, but I would say that those are predominantly around the edges. We have, as you have said, a large piece of legislation, but we would say its fundamental structure has not changed. The changes that have happened since the last time this was looked at extensively by you and other stakeholders have been predominantly around drafting. The issues that were not predominantly around drafting were in response to stakeholder concerns. Some of the concerns that have been raised since come from those changes. It reflects the fact that there are stakeholders out there who take diametrically opposed views about some of the things that this bill does. But we would say, ultimately, the bill itself is still achieving the global policy end that was intended to be achieved. The concerns that are still being raised are minor when compared to the scope of the bill and the scope of the policy reform. So we would say that there has been sufficient time in the process, and there is process still to come. As we mentioned, there is scope for this change to be made within the parliamentary process. We think that should be sufficient. There are also of course some stakeholders out there—including, yesterday, I understand, the Bankers Association—who are ready for this to happen. This has been in the wings for a very long time.

Senator BARNETT—Likewise, they made seven recommendations, six of which require amendments to the bill.

Dr Popple—Certainly, but none of which require the commencement of the bill to be deferred beyond May 2011, we would say.

Mr Glenn—I do not think it is misrepresenting the ABA's position to suggest that they are very keen for the legislation to be settled in its final form quickly so that their members have a longer period to get used to the idea of the regime and to do the analysis that they need to do to implement it into their businesses. They certainly lobbied us very strongly on that point.

Dr Popple—I might add to that. That would be the case, I would imagine, with other stakeholders who have an interest, but once the bill is finalised they will need to make the changes to their processes.

Senator BARNETT—In terms of stakeholders, if we want to list them, we have Clayton Utz, Professor Duggan, Allens Arthur Robinson, the four law firms, the Australian Securitisation Forum, the Insolvency Practitioners Association of Australia and, no doubt, many others who have all expressed views in terms of the lack of time to review the bill. I do not want to delay the committee. You have a view, others have a view, which is obviously different, and it is up to the committee to review those thoughts.

Dr Popple—Certainly. Perhaps the committee would be assisted to know that during the period of the latest amendments to the bill, and before that, we maintained a very high level of consultation with stakeholders, including many of those you just listed. It would certainly not be true to say that the first they saw of some of these ideas was when the bill that we are currently looking at was introduced into the House. There has been more time beyond that during which the stakeholders who have a particular interest have been engaged in this

process with us. We have taken the opportunity to talk to them about what they think needs to be changed. We have responded where we have not necessarily agreed. So the process goes beyond—

Senator BARNETT—I know, but the point is that, if you had more time for that, at minimum you would remove the drafting inconsistencies and ambiguities, as you call it, around the edges and maybe we could have fixed some of the issues and concerns that are currently before us.

Mr Patch—The issues that we are talking about now are not ones that go to the length of time it is going to take people to come to grips with the system. There will always be new issues coming up with this piece of legislation. The corporations legislation dates back to 1850 and people are still going to court litigating issues around that.

Senator FISHER—I hope that is not the blueprint for this legislation.

Mr Patch—No, but the point I am trying to make is that it is the nature of commercial legislation that it is never 100 per cent settled; there are always clever lawyers out there trying to make new arguments. We just need to accept that we have reached a point now where there is a sufficient level of certainty that people are in a position to go forward with it and the commercial world now needs to deal with it.

Dr Popple—In summary, we would say we have reached that point.

Senator FISHER—I want to ask a question related to the answers given to Senator Barnett. Mr Popple, you talked about your consultations with stakeholders. Has the department consulted with industry organisations?

Dr Popple—Several of the stakeholders we are dealing with are peak bodies who have industry members.

Senator FISHER—Let me be more specific. Has the department consulted with the likes of the Business Council of Australia, Australian Industry Group, the Australian Chamber of Commerce and Industry or the National Farmers Federation?

Mr Patch—All those organisations are aware of our reform. We have drawn it to their attention.

Senator FISHER—How?

Mr Patch—I think at one stage we wrote to them asking, ‘Are you interested in this?’

Senator FISHER—Can you provide the committee on notice with confirmation as to whether you wrote to them and, if so, can the committee be provided with a copy of the letter or letters?

Dr Popple—Yes, we can certainly do that.

CHAIR—We went over this during our exposure draft, did we not?

Dr Popple—We are talking about some time ago but, yes, we did, absolutely.

Senator FISHER—It may well be, but we are talking about the bill.

Dr Popple—Mr Patch’s point is that early on in this process we engaged with a large group of stakeholders, some of whom have chosen not to engage directly with us since then because, I imagine, they took the view that the people who were taking a particular interest, for example in many cases their lawyers, were already taking their views into account for this process.

Senator FISHER—In that respect are you talking about the Australian Chamber of Commerce and Industry or the Business Council of Australia, for example?

Dr Popple—I believe we wrote to all of those.

Senator FISHER—Yes, but are you trying to suggest that they had professionals who they would consider to be representing their views?

Dr Popple—No, I was not suggesting that. I was saying that we alerted them to the fact that the government was considering this proposed change. We encouraged them to give us their views. Some, but not all of them, chose to engage with that process either directly with us and/or through this committee process and the previous one.

Senator FISHER—Was this during the exposure draft stage or in respect of this bill?

Dr Popple—I think this predates the exposure draft stage. This process has been going on for a very long time. All I was doing was speculating as to why a particular organisation might have chosen not to, given that they might have had a particular interest, as you say. They would also have been aware of the large number of stakeholders who have been taking an interest and they may have decided that that was—

Senator FISHER—Maybe. What I would like to know from the department is what the department has done from its perspective to reach out to these organisations. If they have been reached out to and then for whatever reason they have not responded, then that is a different issue. But I am trying to ascertain what the department has done to reach out to these organisations—

Dr Popple—We can take that on notice.

Senator FISHER—both in terms of the history of the issue, so you can go back as far as you wish, Mr Popple—

CHAIR—I thought we covered this in our last inquiry.

Senator FISHER—but particularly in respect of this bill. What attempts have been made by the department to consult with business organisations, for example and specifically: the Australian Industry Group, the Business Council of Australia, the National Farmers Federation, the Australian Chamber of Commerce and Industry, the small business association, COSBOA, in respect of this bill and, if by letter, can the committee be provided with copies, please?

Senator MARSHALL—I thought your party was critical of this government for doing too much consultation and you want to cast the net wide. If you had your way, nothing would ever happen. You would simply talk and talk and talk.

Senator FISHER—That is a raw nerve. Do you have a question, Senator Marshall?

Senator MARSHALL—This is just extraordinary.

CHAIR—Dr Popple, you will take that on notice?

Dr Popple—I will. We can certainly take that on notice and we can provide those letters. Mr Patch has just reminded me that there was also a process which was—in fact, Mr Patch, do you want to answer?

Mr Patch—In 2006, when this process began—

CHAIR—Under the previous government?

Mr Patch—Yes, that is right. We arranged a series of public seminars in every state capital city except in Tasmania. We advertised the seminars in the financial press. We held them after work hours. We had over 500 people. One hundred people came in Melbourne. The number of people who turned up—

Senator BARNETT—Chair, can I take a point of order, please.

CHAIR—No. Mr Patch is in the middle of an answer, so I think it would be appropriate if he finished.

Senator BARNETT—I have a point of order.

CHAIR—What is the point of order?

Senator BARNETT—Thank you. The point of order is that Mr Patch is responding to a different question. The question was about what consultation related to this bill, not to the exposure draft. So I would ask you to direct the witness to answer any questions relating to the specific question regarding this bill, not the exposure draft.

CHAIR—Senator Barnett, that is not a point of order I am going to accept. Mr Patch is giving us a history about these consultations. Mr Patch, please continue with your answer.

Mr Patch—We consulted through that series of seminars. When the consultation version of the bill came out, we arranged a second series of public seminars to discuss the bill, and that was equally well attended, because at that stage the bill was actually more tangible. We think anyone who has an interest in this bill has had ample opportunity to become aware of it and to participate in the process. One of the comments that we have consistently received from stakeholders is on the more than adequate nature of the consultations we have undertaken in the course of this process. We cannot make people come to our meetings or make people write submissions to us. All we can do is inform them about it. We are confident that anyone who has interest in this process is aware of it and has an opportunity to contribute.

Senator FISHER—Thank you, Mr Patch. Would you please provide the committee on notice with demonstrations of any ways in which the department has attempted to communicate or engage with the organisations to which I have referred by way of example in respect of this bill. If you choose to also provide information relating to consultations preceding this bill, then that is your choice, but I am not specifically seeking that. I am seeking the information specifically in respect of this bill.

Dr Popple—In respect of this bill, I think it is fair to say that we have not gone beyond the large pool of stakeholders who expressed interest through the process Mr Patch has just explained and through the Senate committee's process. So we can certainly provide you with letters that were sent out much earlier than that. I sense from your comment that you are not really looking for that, so I am proposing that we will not go looking for those. It is certainly the case that we have focused in this most recent part of the process on those stakeholders that expressed interest through this process. But, as Mr Patch says, we would say that we think that all stakeholders have been made aware of the process from a very early stage and we thought that that level of consultation in relation to the draft that the committee is now considering was an appropriate level. So, I think, Senator, the answer to your question is: I do not think we will find any such correspondence in relation to this draft but we would say that that was not an omission.

Mr Glenn—Senator, what we could provide is some information about some of the outreach activity we have had with at least the NFF in terms of seeking to place articles about PPS reform in some of their publications, which might help.

Senator FISHER—That sort of information is helpful as well and, I think, valid. Thank you. Given that, rather than provide copies of correspondence, you may choose to, on notice, list the programs—for example, to inform—that you engaged in for the committee, preceding the bill, and the extent to which those sorts of organisations were invited in and indeed came in. So I am trying to suggest a more economical way for you to provide that information in which I am not so specifically interested. I take your point that you take a slightly different view. So it would be good if you could inform the committee on that as well, but in the most efficient way possible.

Dr Popple—Thank you, Senator. We can do that.

CHAIR—Are there further questions?

Senator BARNETT—We are halfway through the paper by the department, so I suggest that we go back to that, Chair.

CHAIR—We can do that.

Dr Popple—I think Mr Patch was up to the description of collateral, which was one of the issues that the law firms raised.

Mr Patch—I think we have about seven minutes. Are there any particular issues that the committee would like us to go to? We are unlikely to get through all these issues now.

CHAIR—I have a particular issue about section 14(2)(c). There have been a number of people who have actually suggested that that should be removed from the bill. Do you have a response to that?

Mr Patch—The Australian Institute of Credit Management, in its submission to the committee, supported the inclusion of this provision in the bill. The intention of this provision is to promote and facilitate the availability of finance to small business. We are essentially talking about one- or two-person companies. I think you have heard that most of the people who gave evidence before the committee represent the other end of town—very big business—so it does not impact on their clients. It will increase the weight that is effectively given to things like directors' guarantees by making those things more attractive propositions. It is really directed at trade finance where one company is providing credit to another company, and this applies to retention of title bases and that sort of thing. It is not really directed at the sort of finance where you are lending money. That is why the Institute of Credit Management support it, because they are really directed at trade finance. They are more concerned about the wrinkle that they think does not need to be there, whereas we think that this provision helps small business finance.

CHAIR—Thank you.

Senator TROOD—The point, Mr Patch, is that, if it opens an avenue of finance for a particular sector of the community, that to my mind at least is a positive dimension of the provision. If it, in doing so, vastly complicates the capacity to do business for other sections of the community, that is not desirable. And if you wish to maintain the first purpose, perhaps you should look at the way in which the provisions are drawn so that you can avoid the confusion that may exist around the bill.

Mr Patch—I do not think that it has the second purpose of interfering with finance in the bigger area. There was some concern about the capacity to take consumer PMSIs. I suspect there will be fewer registrations of personal property by consumers on the register. So it is a privacy measure because there will be less incentive to register against consumers because they will not get their PMSI by registering. It will only affect consumer

transactions valued at more than $5,000 because there is a low-value consumer exception anyway in the bill. This is really a matter that will improve the position of small business in gaining trade finance, and it does not affect the financing of motor vehicles or things with a serial number.

Senator TROOD—In light of the fairly strong evidence we have received on the superfluous nature of this provision, or less severe criticism, you might like to look closely at the way in which it is drafted to make sure that, if you want to keep it there, it does not have any of the implications that others are concerned about.

Dr Popple—I do not think it is a drafting issue in this case; it is a policy decision on which reasonable people differ. It is either an exception or it is not. I do not think anyone is complaining about the way that exception has been drafted; it is more a question of whether or not that exception ought to be there at all. Mr Patch is explaining why we think that exception is a reasonable exception, but others have explained why they take a different view.

Senator BARNETT—Chair, there are some key points that the department have made in their comments on issues raised. You have a whole list of them there. Frankly, we need to be briefed on those points. I realise it is 10.30 am so, perhaps we could allow the department time to explain very briefly each of those key points for the committee, otherwise we will need to have something in writing because there are outstanding matters, some of which are quite important. We have just touched on one—section 14(2)(c).

CHAIR—Dr Popple, it is 10.30 am, so I will have to ask you to take that question on notice for us.

Dr Popple—We can do that.

CHAIR—We need to adjourn this section of our hearing today so that we can move on to the next piece of legislation.

Dr Popple—Given the timing and your concern about the timing, perhaps we could provide some very brief comments on each of these issues. Would that be sufficient for these purposes?

CHAIR—As long as it is very brief because we do need to move on. Can you do it in less than a minute?

Dr Popple—No, sorry; the written response we would anticipate would be quite short.

Senator BARNETT—A couple of paragraphs on each one; is that what you are thinking?

Dr Popple—That is what we are thinking.

CHAIR—All right, then we will ask you to do that.

Senator TROOD—Gentlemen, I am particularly interested in your views on the last three items on the list.

CHAIR—Perhaps you could ensure that you specifically address those three issues.

Dr Popple—We will address everything on that list.

Senator FISHER—Thank you.

CHAIR—We may well have other questions on notice that we need to provide to you once we have had a look at yesterday's or today's transcripts. That concludes the portion of our proceedings today in relation to the Personal Property Securities Bill 2009. I specifically thank people from the Attorney-General's Department for being with us yesterday and today, and other witnesses who have given evidence to the committee.

Committee adjourned at 10.32 am