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Reference: Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2007; Tax Laws Amendment (2007 Measures No. 5) Bill 2007; Trade Practices Amendment (Small Business Protection) Bill 2007

TUESDAY, 28 AUGUST 2007

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SENATE STANDING COMMITTEE ON

ECONOMICS

Tuesday, 28 August 2007

Members: Senator Ronaldson *(Chair)*, Senator Stephens *(Deputy Chair)*, Senators Bernardi, Chapman, Hurley, Joyce, Murray and Webber

Participating members: Senators Adams, Allison, Barnett, Bartlett, Birmingham, Boswell, Bob Brown, George Campbell, Carr, Conroy, Cormann, Eggleston, Chris Evans, Faulkner, Fielding, Fifield, Fisher, Forshaw, Hogg, Kemp, Kirk, Lightfoot, Ludwig, Marshall, Ian Macdonald, Sandy Macdonald, McGauran, Milne, Nettle, O'Brien, Parry, Payne, Robert Ray, Sherry, Siewert, Watson and Wong

Senators in attendance: Senators Bernardi, Hurley, Murray, Ronaldson and Webber

Terms of reference for the inquiry:

To inquire into and report on: Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2007; Tax Laws Amendment (2007 Measures No. 5) Bill 2007; Trade Practices Amendment (Small Business Protection) Bill 2007

WITNESSES

Committee met at 9.03 am

CHAIR (Senator Ronaldson)—I declare open this meeting of the Senate Standing Committee on Economics. This hearing has been convened to receive evidence in relation to the inquiry into the following bills: the Tax Laws Amendment (2007 Measures No. 5) Bill 2007, which I think we will probably refer to as 'TLAB 5' in the course of this inquiry, and the Trade Practices Amendment (Small Business Protection) Bill 2007. TLAB 5 is an omnibus bill with 12 schedules, and the majority of submissions received by the committee confined their comments to schedules 1, 7, 8, 10 and 11 of the bill. It is on those schedules that today's hearing will concentrate.

Schedule 1 of the bill removes section 51AD and division 16D of the Income Tax Assessment Act 1936 to enable access to tax benefits for the finance and provision of infrastructure and other assets. Schedule 7 amends the Income Tax Assessment Act 1997 to extend the statutory licence capital gains tax to provide for a rollover where one or more new licences are issued in consequence of the ending of one or more licences. Schedule 8 amends the Income Tax Assessment Act 1997 to provide a capital gains tax rollover for investors in the stapled group where a public unit trust is interposed between them and the stapled entities.

Schedule 10 introduces a refundable tax offset of 40 per cent for Australian feature films and 20 per cent for documentaries, television series, telemovies and animations. Schedule 11 amends the Income Tax Assessment Act 1936 to extend the premium 175 per cent research and development tax concession to companies belonging to a multinational enterprise group for additional R&D expenditure on behalf of a group foreign company above a rolling three-year average of expenditure.

The Trade Practices Amendment (Small Business Protection) Bill 2007 amends section 87 of the Trade Practices Act 1974 to allow the Australian Competition and Consumer Commission to seek compensation for damages on behalf of parties affected by unlawful secondary boycotts.

These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

If a witness objects to answering a question, the witness shall state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

I welcome witnesses to these hearings. Officials from the Department of the Treasury will be participating in today's hearing from committee room 1S5 at Parliament House in Canberra, and Mr Potter from the ACCI will also be presenting evidence from the committee room. Thank you for accommodating the committee's request to have this evidence given from a committee room in parliament. It is a lot easier from our point of view.

[9.07 am]

POTTER, Mr Michael, Chief Economist, Australian Chamber of Commerce and Industry

CICCHINI, Mr Raphael, Manager, Small Business and Trusts, Department of the Treasury

REGAN, Mr Anthony Clive, Manager, Company Tax Unit, Business Tax Division, Department of the Treasury

COOKE, Mr Trevor, Executive Director, International and Capital Markets Division, Property Council of Australia

Evidence from Mr Cicchini, Mr Potter and Mr Regan was taken via teleconference—

CHAIR—Do you wish to make an opening statement, Mr Cooke?

Mr Cooke—In the first instance, I appreciate the opportunity to speak particularly to schedule 1 of TLAB 5. Division 250, as it is referred to, is a very welcome initiative and one that, as the committee is probably aware, had a reasonably long gestation period, but we are pleased to say that the offspring born by it is one that will be welcomed. We see investment in infrastructure and tax measures designed to facilitate greater investment in Australia's infrastructure as long overdue. It replaces, as you would be aware, divisions 16D and 51AD, which I think well and truly served their usefulness over a long period of time.

Overall, the Property Council's position is one of great support, and nothing that I am about to say in terms of what I would like to see corrected should be taken as mitigating our overall support for schedule 1. That said, we do have a particular concern with the provisions in division 250 as they relate predominantly to offshore assets. As the committee would be aware, nonresidents' use of assets captured by division 250 results in the use of non-recourse debt to finance those assets which are domiciled offshore at a lower threshold than for assets which are domiciled onshore. It is our contention that there is no sound public policy justification for that discrimination.

If I can put it in context, our industry—and senators may recall this from my last meeting with this committee—is heavily engaged in the purchase of assets domiciled offshore. To put that in context, 90 per cent of the public equity raised in Australia today in listed real estate space is used to buy assets offshore. That money is predominantly sourced from the Australian superannuation sector, which is an important point to make. So our future growth and the retirement incomes which are contingent upon growth in our sector are driven by our ability to effectively compete in offshore markets for assets. Therefore, we feel that the 55 per cent test is too low and that it should be harmonised with that applying to domestic, which is 80 per cent.

We felt that there were probably some unintended consequences as a result of the decision that has been taken to date. It is our contention that, by leaving it at 55 per cent, you would boost tax in a foreign jurisdiction—that is, if you were to align it at 80 per cent you would actually increase revenue to the Australian government, which is an important point to make. The synopsis for that is set out in point 1, under 'Areas of Concern', in our submission.

Importantly, as I have indicated, our view is that this artificial threshold handicaps Australians competing for investment products in foreign markets. These are markets where we have no choice but to compete because, quite frankly, everything in Australia has already been securitised—there is more capital than there is investable product in Australia—and therefore we are forced into offshore markets, and this measure would handicap our ability to compete vis-a-vis other markets.

I will not go into detail on points 3, 4 and 5. I will take it as read unless the committee would like me to go through it in some detail. Those are really the two major points that I wanted to make on this schedule. In conclusion, overall it is a very welcome initiative. We think that there is a substantial role—an increasing role—for Australian institutional investment to play in the field of infrastructure investment. It is ironic that today we see significant amounts of Australian superannuation capital going into foreign jurisdictions to fund their infrastructure when we could be using it to fund ours. We think division 250 will take us a long way towards doing that; however, in the offshore context we could go a little further and harmonise those debt tests.

CHAIR—You might move to schedule 8 and then we can take questions.

Mr Cooke—Schedule 8 is right at home, if you will, with my core membership. It is, again, a very welcome measure. It is one that we have spoken to government about over some time. If I am being too general, please pull me into line, but a stapled entity is an entity which includes, in most cases, a public unit trust in a company. The units and the shares are stapled together and then traded as a single security. Most of the large members that I represent are stapled entities, and include names like Westfield, Lend Lease, Stockland, Mirvac, major institutional investors and, often, developers. Stapled entities came into being in the Australian context predominantly for a tax reason. Division 6C precluded certain types of real estate income from passing through a trust untaxed. As our members moved into more active property management, that income had to be deviated through a corporate structure. For the sake of simplicity, they then stapled their entity to trade as a single security. So stapling was predominantly a consequence of tax regulation; however, it is a reasonably sui generis structure and does not operate well in the international marketplace. Staples, for example, are not recognised in the US. Under US tax law they look straight through a staple; they treat it as two separate entities, which causes us some problems.

In the context of international competitiveness, which builds upon my earlier comments in the sense that our guys are now competing substantially offshore in an offshore market both for product and also for capital, we as a sector control about $55 billion, $60 billion, worth of assets offshore. We have about $40 billion to $45 billion worth of foreign investment on the registers of these listed vehicles, so it is truly globally integrated. International competitiveness is the benchmark by which our members are now being judged and in my role with the Property Council that is predominantly our focus—that is, to enhance and improve the international competitiveness of Australia's real estate capital market.

The measure allows companies to destaple and to effectively allow—and I am sure Treasury will correct me if I get the precise details wrong—that part of a staple which is receiving active income to be a wholly owned subsidiary of the trust. Why is it important? It is important in the sense that, if a major Australian institution, for example, wanted to make a

scrip bid for an offshore company—and growth through acquisition is a very real strategy for our members; in fact, it is imperative going forward—they cannot do it under a stapled arrangement because—I will use the US as an example—the staple is not recognised, there is no capital gains tax rollover relief and the whole thing becomes very uncommercial.

This measure will overcome that and will allow, for example, scrip bids to occur. However, we see this in the overall context as the first step in an overall reform of division 6C and the way that our sector in particular—real estate investment trusts—operates under the tax law. It is a very welcome measure. We entirely support it. However, our concern is that there may have been, through a completely innocent mistake, an oversight in the drafting. The drafting, as we read it, currently contemplates CGT rollover relief for staples of any sort—for example, a staple which could be a trust in a company or a staple which could be a trust in a trust, stapled together. Division 6C relief, though, concomitantly, which must go with this measure, does not seem to apply to any staple, except a company and a trust. It is our submission that this is a simple drafting error and one which can be corrected very easily.

A failure to correct it, however, would cause substantial prejudice within our sector. For example, Stockland, which is a company and trust stapled arrangement, would be able to take advantage of this measure, whereas another company, DB RREEF, for example—which is four unit trusts—would not be able to. Again, it is our view that there is no public policy interest at stake here; the measures were designed to create a level playing field within our own sector. It is a simple drafting error, but a very important one which must be corrected.

CHAIR—Have you discussed your concerns in relation to schedules 1 and 8 with Treasury?

Mr Cooke—We have.

CHAIR—When was the last of those discussions?

Mr Cooke—I believe, Friday. Would you like me to elaborate?

CHAIR—I am sure the committee would be interested to hear the outcome of those discussions.

Mr Cooke—In relation to schedule 8, I spoke particularly with Raphael Cicchini—who I thought was appearing today—who understood the matter. He had indicated that he would take it under advice, he agreed with our analyses, and my understanding was that he was going to speak to the Assistant Treasurer's office with a view to determining whether the government itself would introduce an amendment along the lines of that which we are proposing. To be honest, I have been on holiday since, so I have not caught up with Raphael.

CHAIR—Schedule 1?

Mr Cooke—Our position with respect to schedule 1 is a position which we have maintained throughout the consultation process. I am sure Treasury do have reasons as to why they have taken the position. Unfortunately, as is the case with most consultation processes, we are not privy to a detailed understanding of their rationale. We have raised it, we have raised it again and we are not entirely sure we understand Treasury's objections to our proposal.

CHAIR—Were the changes under schedules 1 and 8 made in response to concerns expressed by industry?

Mr Cooke—Absolutely—and for schedule 8, very much so, because it goes right to the core of the measures under schedule 8. Schedule 1 is, again, very real, particularly given the fact that most of the large institutions—frankly, all of them—are now international and all of the growth is coming from buying offshore assets. They typically use debt, domiciled in the jurisdiction where the asset is located, as a natural hedge to, for example, foreign exchange risk. If you borrow in the country where the asset is domiciled and offset against the income in the jurisdiction, you mitigate, for example, your currency risk, so your need for hedging, for example, diminishes.

CHAIR—Should I take it that you want these matters to proceed irrespective of the outcome of the matters addressed or your concerns addressed?

Mr Cooke—Yes.

Senator MURRAY—Chair, do you want to hear from Mr Potter on this?

CHAIR—Yes.

Senator MURRAY—Then I think my questions would be best directed to Treasury because the case has been made to us.

Senator BERNARDI—I firstly have a question for Mr Cooke. You talked about non-recourse debt. How common is non-recourse debt in the property investment industry and what forms does it take? Is it simply bank financing or are we talking about debentures and other debt instruments?

Mr Cooke—I think it is fair to say that our sector alleviates itself of all options within the capital markets. Non-recourse debt is absolutely standard. To be honest, very few offshore loans would not be non-recourse debts. Principally in those situations it will be debt financing, by and large originated from a bank. But you would appreciate that that can also be derived through other debt-market related products.

Senator BERNARDI—Would it be fair to say that, if a financier is going to lend money on a non-recourse basis, there would be an expectation that there would be a larger equity contribution from the borrowing entity?

Mr Cooke—Your point makes theoretical sense, but the reality is that these are $12 billion, BBB+ rated organisations. The institutional wholesale banking sector feels much more comfortable dealing with a major institution rated at that level. So, yes, particularly if you are dealing with a smaller player, then 'skin in the game' becomes much more important.

Senator BERNARDI—I think you said in your submission that the financing component is typically 60 to 80 per cent—so the equity component is somewhere between 20 and 40 per cent?

Mr Cooke—That is right.

Senator BERNARDI—From a non-recourse debt perspective, is there a standard or is it according to your credit rating?

Mr Cooke—In this case, the asset value will drive that. Clearly they are not going to lend more than the value of the asset. I would have to get specific advice on what the current market norms would be, but I think it would be fair if we split the difference and say that it would be 70 per cent.

CHAIR—Mr Potter, we might get you to go through your submission and, if required, committee members can ask questions of both you and Mr Cooke. Otherwise, we will go straight to Treasury. Would you please formally identify yourself, and, if you would like to make an opening statement, please feel free to do so.

Mr Potter—I am the Director of Economics and Taxation at the Australian Chamber of Commerce and Industry. The ACCI is the peak council of Australian businesses. We represent around 350,000 businesses, of which 280,000 are small businesses. In that context, we are very strong supporters of the Trade Practices Amendment (Small Business Protection) Bill 2007, which is going to be considered by the committee later today.

I will go on to TLAB 5, at schedule 1. I should just mention that, in the whole of the bill, we are quite supportive of all of the measures in schedules 1, 6 and 11. As requested, I will focus my comments on schedule 1. We support division 250. There is some anecdotal evidence that the current rules about the taxation of infrastructure have been hindering infrastructure. These generally are private-public partnerships but I might mention that the rules do not relate just to infrastructure; they can relate to any transaction where one of the parties is not fully taxed. In particular, it can apply to transactions with charities, although my understanding is that the exemptions in the bill mean that it would be only the very largest transactions involving charities which would be covered.

Our submission is that the changes have taken too long to develop. I do not know when the issue was first raised but it was certainly raised in detail in the Ralph review of business tax and it has taken too long to develop since then. We also think that the rules in schedule 1 are too complex. I might mention that part of the reason for its taking a long time and for its being complex is industry—we wanted exemptions and we got them, so we cannot complain too much about that. The submission that I have is that the rules in schedule 1 should be passed. There is a case for a review of the rules to try to simplify them, but not immediately. We need to have a year or three of examining how the rules operate and see if they can be simplified.

I will go briefly to schedules 6 and 11. Schedule 6 is the removal of the same business test cap. We strongly support the removal of that cap but our submission is that those rules should never have been introduced in the first place. With regard to schedule 11—that is, the R&D tax concession for multinationals—we strongly support that.

CHAIR—Mr Potter, you mentioned the Trade Practices Amendment (Small Business Protection) Bill this afternoon. Why do your members support the bill?

Mr Potter—I am not an expert at this but I know that our members—the small business members, at least—do not have the financial resources to take actions under the Trade Practices Act, and that is why they are keen to see the ACCC having the ability to take representative action on their behalf. It does not require the agency to do these things; the ACCC will still have to have funding and resources to do it and the ACCC will have to take a

view on whether the action would be successful. So it is not going to happen willy-nilly. It will happen in those cases where the ACCC forms a view that the action is likely to succeed.

CHAIR—I just thought that, given you had made the comment, it was useful to ask that question.

Senator MURRAY—Mr Cicchini, I would like to start with the same business test cap. I do not know if you know my history with the consolidation losses legislation but I and my party have been very strong supporters of the change to the law with respect to freeing up the market in relation to tax losses and that sort of thing. I always envisaged that doing that would result in greater revenue loss than was being estimated by Treasury. That never stopped me supporting it because I thought it was a very important market freedom measure. But I am surprised to see that the Treasury estimate for the cost of lifting that $100 million cap is a little under $200 million over four years. I would have thought it would have been far greater because I would have assumed that the greatest loss release, if I can phrase it that way, would reside in the biggest companies not the smallest. How confident are you that you have got an accurate estimate there?

Mr Regan—I will answer that question, Senator. We are reasonably confident of that costing. It is very much behaviour driven. When the same business test cap was brought in there was a relaxation of the continuity of ownership test, so basically it was easier for some companies to be able to claim losses applying the continuity of ownership test, which meant that fewer companies needed to rely on the same business test. We are confident of that costing.

Senator MURRAY—Did you base your costing on sampling of a couple of companies' accounts, or did you base it on what you were told when you engaged in consultation?

Mr Regan—It was based on tax office data relating to losses and the number of companies who were potentially affected.

Senator MURRAY—So the tax office would have had a look at company accounts to assist you with that calculation?

Mr Regan—I cannot answer that; I am not sure of the answer to that question.

Senator MURRAY—Turning to Mr Cooke's propositions, and dealing with section 8 first, as I understand it that case is well made because essentially Mr Cooke is saying that if you confine a definition to a company you exclude the broad range of legal instruments under which corporations structure themselves, that 'an entity' is a far better and all-encompassing term and that you save yourself a lot of future problems by making that simple adjustment. He seemed to indicate in his answer to the chair's question that you were sympathetic to that view, at least in concept, and you would be prepared to take it to the Assistant Treasurer to discuss it. Did Mr Cooke give an accurate representation of your reaction?

Mr Cicchini—That is correct. I have certainly spoken to Trevor and we have been through the provisions as they work. I acknowledge that that works where you have a public unit trust stapled to a company and that it does not work if you have a trust and another trust that is taxed as a company. It is certainly a matter that Treasury is aware of, and we will be having

discussions with the relevant minister's office to decide whether the government wishes to pursue any changes at this point. There is not much more I can say on that matter.

Senator MURRAY—I will just comment that for my part I was persuaded by the argument. I would be surprised if there was much resistance because I cannot easily see that there is a revenue threat arising from it and I can see that there is a considerable advantage to the sector concerned. Would that be accurate, that there would not be much revenue consequence from that change?

Mr Cicchini—The idea of the measure is to basically allow what was a previously stapled arrangement to essentially remain as it was, except that the trust would have 100 per cent or at least a controlling interest of the company. So we would not expect there to be revenue consequences if that were all they did. If there were some way that they could manipulate the provisions and do things, then there may be, but we do not envisage that.

Senator MURRAY—My simple attitude is that if it is not going to cost you much, why not do it? It seems to me to be a legal device which would broaden the grounds and make it less complex for the sector itself.

CHAIR—Senator Murray, I think the witnesses, in all fairness, have said that they will be consulting with government in relation to it. I do not know whether this witness can really say much more than he has at the moment.

Senator MURRAY—That is probably true. I just wanted to let you know how I felt. Schedule 1: I have a basic principle I operate on that, unless there is a significant public interest reason for discriminating in law, you should not discriminate. Essentially Mr Cooke's argument is that the 55 per cent allowable limit where the end user is a nonresident, compared with 80 per cent for domestic based people, does not have a public interest element attached to it. His evidence was that the discrimination is not clear to him. He has obviously had detailed discussions with the Treasury. This seems a more thorny issue if we are not to be made clear as to what Treasury's reasons are. Do you think that there is any further information Treasury could supply us, apart from that which is already contained in the minister's second reading speech and in the explanatory memorandum, to indicate the public interest reason for this discrimination?

Mr Regan—In essence, the issue here concerns what level of equity an Australian taxpayer should have in an asset in order to get capital allowance deductions in Australia. Basically, capital allowance deductions are intended to encourage investment in Australia rather than investment offshore. That is the fundamental policy question.

Senator MURRAY—I would like to clarify this. You accept that investment offshore benefits Australia because of the revenue flow back to Australia? One of the great virtues of our investment system is how much offshore investment it has encouraged from Australian super funds and so on.

Mr Regan—Yes, there is no dispute about that, Senator. Just to put this in some context, under the current law, if you have an asset that is predominantly financed by non-recourse debt—and by that I mean more than 50 per cent financed by non-recourse debt—then you trigger section 51AD. If section 51AD applies, you are basically denied all deductions—that is, all capital allowance deductions and interest deductions.

What division 250 will do is relax the 50 per cent test a little bit for nonresidents to build some tolerance into it. It will relax it to a greater extent where the asset is in Australia. But it also does not deny deductions as such. Strictly speaking, it denies capital allowance deductions but keeps the arrangement as a loan. The effect of that is to spread the deductions over the period of the arrangement rather than over the period of the asset. The difference between the two is that if 51AD applies it makes the project uneconomic, whereas division 250 does not do that. Division 250 is a substantial improvement on the current law in this area. Having said that—

Senator MURRAY—The witnesses have made it clear that the law change is highly desirable. But the issue that has been put to us is one of discrimination. The last question that I want to ask you with respect to this is: is this one of those areas in which you can have progressive change over time? By that I mean, can you loosen it up a bit, watch how it works and, if it works well, loosen it up a little more and slowly close the gap between the two? If you maintained the policy that you have outlined in your explanatory memorandum to the bill, you would not be closing the door on the sector; you would be saying, 'We'll keep a watching brief and we can close this gap over time and reduce the discrimination if we see the policy working well.'

Mr Regan—Yes. There is no doubt about that. There are some other issues around that that could give some justification to looking at moving this threshold.

CHAIR—I missed that last bit.

Mr Regan—There are some other issues—in particular, the review of the foreign income attribution rules by the board of tax—around that that give some justification for reviewing this threshold, depending on the outcomes of those reviews.

CHAIR—And conversely, the changes could be left as they are and then the matter could be reviewed on the basis of the 55 per cent as opposed to removing the distinction and working backwards. It could be done either way, couldn't it?

Mr Regan—Yes.

Senator HURLEY—Just to clarify, as I understood it you said that the loan deductions would still be allowed. If I had it right, when you were talking about the difference between the 55 and the 80 per cent, you were saying that the loan deductions are still allowed but not the capital deduction. Is that right?

Mr Regan—No. What division 250 does is disallow the capital allowance deductions and treat the arrangement as a loan. The effect of that is to spread the capital allowance deductions over a longer period of time.

Senator HURLEY—Would you be able to tell me what kind of difference that would make in assessing an investment? Would it be a significant—

Mr Regan—It would depend on the circumstances of the investment. Potentially, it is significant. But the fundamental difference between division 250 and section 51AD, which is the provision which applies in these circumstances under the current law, is that an arrangement which is caught by 51AD is uneconomic, whereas an arrangement which is caught by division 250 will still be viable.

Senator HURLEY—Was there any kind of benchmark for setting it at the 55 and 80?

Mr Regan—The position that we started from was to replicate the test in the current law, which is a 50 per cent test. As a result of representations received during the consultation process, the government decided to increase those thresholds to 80 per cent in the case of residents and 55 per cent in the case of nonresidents.

Senator HURLEY—So the 55 was just on the basis of a slight relaxation of the existing—

Mr Regan—Yes, in essence it was to build a little bit of tolerance into the test so that you would not trigger it by a marginal breach of the 50 per cent test.

Senator WEBBER—I have some sympathy for the chair's argument about the capacity to review and change over time, but it has taken us a long time to get to this point, hasn't it—or am I getting all my TLABs confused?

Mr Regan—Yes, the project has been ongoing for quite some time.

CHAIR—I think that was a reference to ACCI's view about schedule 8, as opposed to schedule 1.

Mr Cicchini—ACCI was commenting on schedule 1 and I was dealing with the property trusts and stapled entities.

CHAIR—Do I have them around the wrong way?

Mr Cicchini—Yes.

Mr Cooke—My only point is that, in a five-year process—and I completely respect the chair's position—it can take quite some time for these things to work their way through the system. The board of tax review, while relevant in and of itself, has already slipped in its own time lines as well.

CHAIR—That was not actually the chair's position; I was putting that as an option—the work forward or the work back.

Senator MURRAY—The point I was trying to establish—which I think Treasury did make clear—was that this is not the end of things. Correct me if I am wrong, Mr Regan, but it is obvious from Treasury's response that this is an ongoing assessment. That is what I wanted to be sure of—that there was not a final position.

Mr Regan—As I said before, there are some other processes happening which may cause this test to be reviewed—in particular, the board of tax review of the foreign income attribution rules. Depending on what they conclude, a consequence of that might be a modification to this test.

Senator WEBBER—When do we think all of that is going to take place?

Mr Regan—The board of tax is expected to provide a report to the government on its review of the foreign income attribution rules later this year. It would be up to the government as to when it releases it.

Senator WEBBER—Absolutely. I was more interested in your process than the government's. If we accept the legislation is it stands and do not make any recommendations for changes, does Treasury have a view of how long it would take for us to see the formal

impact of this, particularly looking at some of the adverse things that the Property Council of Australia said may occur?

CHAIR—Are we talking about schedule 1 or schedule 8, or both?

Senator WEBBER—Schedule 1.

Mr Regan—The nature of the projects which come within the scope of schedule 1 is that they tend to be very large long-term projects, so it is difficult to answer your question.

Senator WEBBER—But if they are large long-term projects it would seem to me that it would be much harder for any rolling change to wash through a long-term investment—or am I misunderstanding the market?

CHAIR—That may be determined by the board of taxation, I suspect, in relation to the speed of change potentially.

Senator WEBBER—I just want to get the implications of this policy.

Mr Regan—If a change were to be made, the likelihood is that the change would apply to projects entered into after some future date, although that obviously would be a matter for government.

Senator BERNARDI—In your submission you said that you warmly welcome these changes—in schedule 1 in particular. I want to encapsulate because, in listening to these proceedings, it could be that you are opposed to the proposal. It does not give you everything you want but it is a step forward. From your perspective, am I right in saying that?

Mr Cooke—Unquestionably. Overall, we think division 250 is good public policy reform, particularly as it relates to facilitating greater private sector involvement in funding what has traditionally been public infrastructure in a broader public policy sense. So we are wholly supportive and would want this bill to proceed. When it gets to the particulars of how it operates in the foreign context, however—which is where we clearly raised what we see as a less than optimal outcome—we struggle to understand the public policy rationale behind that discrimination.

Senator BERNARDI—But, irrespective of whether you struggle to understand it, as it is taking a step in the right direction you would support that and you would support further review if you are unable to obtain your best possible policy position?

Mr Cooke—So that I may be clear and hopefully answer exactly what you are saying, nothing I am saying should be taken as an indication that we would want this bill to be delayed. As has been indicated, this has been a very long process. We recognise that it is unlikely to be reconsidered in the next five years. We also recognise the timing in the parliamentary cycle means that, from our perspective, it has in fact a higher imperative to be dealt with expeditiously than might otherwise be the case. Therefore, to be frank, I would take the loss on this particular point to get the bill through—that is, on a utilitarian approach to evaluating this bill, the greater good will be served by its passage than by its delay.

Senator BERNARDI—But there is actually no loss, is there? It is all gain, isn't it? It is just that you are not quite getting what you want.

Mr Cooke—My reading of it—and I am happy to be corrected—is that what we are asking for is not prejudicial to government from a revenue perspective. Our contention would be that that which facilitates greater investment by Australians in an offshore context will in fact be a revenue generator, which is why we see our interests here as being aligned to that of the government's.

Senator BERNARDI—Thank you for that, Mr Cooke. Mr Regan, do you have any comment about the revenue implications of what Mr Cooke said?

Mr Regan—The revenue implications of the changes relating to division 250 have tended to be unquantifiable.

Senator BERNARDI—It is a mystery wrapped in a riddle.

Mr Cooke—I would just like to reinforce for the committee that, overall, the change that we are proposing to schedule 8 is incredibly important to us to avoid unintended consequences within our own sector. With that, I thank you very much for your time.

CHAIR—I am just having a look at the cherry, Mr Cooke, and I think you have had six nibbles at it—so I think the point has been well made. I will not ask Treasury to respond to that. I thank you all most sincerely for your assistance to the committee. It is a very involved hearing and I do thank you for your assistance.

Proceedings suspended from 9.54 am to 10.05 am

McMAHON, Mr Paul Denis, Manager, Capital Gains Tax Unit, Department of the Treasury

MURRAY, Mr Michael, Chief Executive Officer, Gwydir Valley Irrigators Association/New South Wales Irrigators Council

Evidence was taken via teleconference—

CHAIR—I welcome you to the committee. Mr Murray, have you appeared before a Senate committee before?

Mr Murray—Yes, a couple of years ago.

CHAIR—Are you aware of the normal caution given by chairs in relation to these sorts of hearings?

Mr Murray—Yes.

CHAIR—I am very grateful for that! Mr Murray, would you like to make an opening statement?

Mr Murray—Yes, if I can. Good morning, Chair and Senators. Thanks very much for the opportunity. I will just give a very quick snapshot of how we got to this point. In New South Wales, we have been moving between the old Water Act 1912 and the new Water Management Act 2000. As part of that process, many of the surface water irrigation licences were transferred to new ones in 2004. When that occurred, it was simply a matter of having your old licence of so many megalitres replaced with a new licence of so many megalitres. I think that in virtually all cases—if not all—it was exactly the same amount of water. There were no payments involved or anything else. I am not in any way a tax or accounting expert but, based on my limited knowledge, I think rollover was granted to those licences using subdivisions 124 to 140.

However, the transfer of groundwater licences from the 1912 act to the Water Management Act 2000 also coincided with a state and federal government program designed to reign in the amount of groundwater entitlements. In many of the major irrigation aquifers in New South Wales—and there are six aquifers covered by this program—on average, people have seen their licences reduced by about half. Although there is no set linear formula, people's new entitlements were based on what their previous entitlements were, what their previous history of use was and what was considered the sustainable yield of the new aquifer. In some cases, people may have ended up with exactly the same amount of water. In other cases, they could have ended up with entitlements of as little as 11 per cent of what they previously had if they had a very low history of use.

Because the cuts were so major, the Commonwealth and state governments and irrigators jointly put up at that stage $165 million as financial assistance for the program. That was made up of $110 million in cash shared equally by the state and federal governments and $55 million of an in-kind contribution by the irrigators. Of that $110 million in cash, $100 million was to go out to irrigators, another $9 million was to go out to various community structural adjustment programs and $1 million was for administration. On 8 June this year, Mr Turnbull, the Minister for the Environment and Water Resources, and the Assistant Treasurer, Mr

Dutton, announced that the Commonwealth would increase its contribution by $25 million, making the total payment to irrigators up to $125 million. They also announced that they intended to introduce these changes to the taxation law to allow the carryover.

The problem in a nutshell was that under the existing law, as soon as payments were bought into the equation, a draft tax ruling confirmed that the payment would not be considered as income under ordinary losses or a bounty or a subsidy; instead, it would be treated as capital. If payments were involved it was then going to be dealt with as a C2 capital gains tax event. In doing that it was going to trigger potential capital gains payments far in excess of what the actual payments would be. So at that stage, with $100 million on the table and after the various capital gains tax discounts which people may have been able to avail themselves of being taken into account, it was estimated that we could be looking at a total capital gains tax liability in the order of $130 million.

The law said that the capital gains tax should be worked out on the value of the old licences on the date they were extinguished as though they were not going to be subject to extinguishment. To a layman that did not seem very right and certainly did not seem very fair, but none of the advice that we had been given indicated that the tax office was not interpreting the law correctly; it was just that it was an unforeseen result. So the Gwydir Valley Irrigators Association, other member groups and the peak body, the New South Wales Irrigators Council, have been lobbying Treasury extensively and have worked closely with a number of professional advisers, including more recently, KPMG. We are quite satisfied, to the best of our understanding of these amendments being considered today, that there is a fair result both from a taxation point of view and from an irrigator liability point of view.

CHAIR—Mr Murray, may I just interrupt you briefly. Effectively these amendments clarify your concerns about the draft ruling; is that right?

Mr Murray—I guess they do more than clarify; they actually rectify an anomaly in that they now provide for a partial roll-over where payments are involved.

CHAIR—I take it there is an outstanding issue, which you have referred to in your correspondence. Would you like to move on to that, because I know the committee has some questions of clarification.

Mr Murray—My outstanding concern has to do with the trigger date for the capital gains tax event. The date varies for the valleys but the first date these changes came in was 1 October 2006. That is when the old licences were extinguished and the new licences issued. The irrigators still have not received a letter of offer from the New South Wales government saying, 'In recognition of the changes to your licence we are prepared to provide you with an ex gratia payment of X dollars.' So the licences have been extinguished, and people have lost their water access but have not received any money—in fact, they have not even received a formal letter of offer. That is considered to be weeks away, but already it has been subject to quite a few delays.

Given that this is a two-part process, we would argue that the transaction date should be the date that the irrigator accepts the letter of offer—when they receive it—rather than the date that the licences were extinguished, because that completes the transaction. The advantage for irrigators is that it would bring them into line with those who qualify for the enhanced small

business CGT discount, and it would also bring everyone in this program into line. The situation at the moment is that five of the six valleys had their licences extinguished in the last financial year but the licences for the Lachlan Valley have not yet been extinguished and, again, they are probably either weeks or months away from being extinguished and the new ones issued. So the Lachlan Valley will qualify for the enhanced CGT provisions but the other five valleys will not.

CHAIR—Mr Murray, the licences will be extinguished on 1 October and 1 November; is that right?

Mr Murray—No. Most of the valleys were extinguished on either 1 October or 1 November 2006, so that has already occurred.

CHAIR—It is just that this letter says 2007.

Mr Murray—My apologies for that.

CHAIR—I was a bit confused, I have to say, but that starts to explain things.

Mr Murray—Yes, you are dead right—my apologies.

CHAIR—When did those enhanced CGT small business concessions commence?

Mr Murray—My understanding is that they were released—and I assume they commenced—on 1 July this financial year.

CHAIR—The world has opened up with the clarification of 2006 and 2007, which completely changes the dynamics. I am now clear about where the concerns lie. When do you expect to receive these formal offers from the New South Wales government and what has been the reason for the delay? Do you know?

Mr Murray—There have been numerous delays. The fault lies both with the federal government and the state government. Currently, they are being held up by the state government. I have not been given a formal clarification as to what the delays are. Informally, I understand that they are concerned that in some of the valleys there are some outstanding legal challenges to the various cutbacks. There is some concern that, if they make these payments now, there may be a further liability incurred by the state government sometime down the track. I am told that they are trying to work out an administrative solution to this problem. It is possible that letters of offer may go out in the next week or two, but we have heard that story before.

CHAIR—Can I just clarify this advice in relation to when the event is triggered. When you refer to 'advice to date' in your letter, I take it that is your independent legal and accounting advice?

Mr Murray—That is independent advice and also informal advice that we have received from discussions with Treasury and the ATO. It certainly has not been advice provided in writing.

CHAIR—Have you received a ruling from that or is that an indicative position from Treasury and the ATO?

Mr Murray—That would only be an indicative position gained, as I said, informally from discussions with various people from those organisations. The only draft ruling on this matter

that has been provided to date was requested by the New South Wales then Department of Natural Resources. I think it arrived around about February. That was the ruling that highlighted the difficulties associated with the legislation as it currently stands. It is from that ruling that we have then worked with various people to try to get these amendments through.

CHAIR—That is right. That ruling led to these amendments. That matter has been clarified and we are just left with your final concern.

Senator HURLEY—In your submission, at one stage you say:

The … industry strongly argues that the C2 transaction date should be the day the Letter of Offer is accepted by the entitlement holder …

Then, a bit later you say:

… occurring when the Letter of Offer is received.

Can I just clarify that they are one and the same to you?

Mr Murray—Yes, they would be one and the same. It probably should be when the letter is actually accepted by the entitlement holder. I guess that is when the offer is finalised.

Senator HURLEY—Yes. Thank you for that.

CHAIR—I think we might go straight to you, Mr McMahon. Have you appeared before a Senate committee before?

Mr McMahon—It has been some time—probably in the nature of five or six years.

CHAIR—I think you remember the normal advice given by chairs to witnesses, don't you?

Mr McMahon—I do not explicitly remember that, no.

CHAIR—These are public proceedings, but the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind you that, in giving evidence to the committee, you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If you object to answering a question, you should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, you may request that the answer be given in camera. Such a request may, of course, also be made at any other time. That is the general caution. Would you like to make an opening statement? I think we should cut to the chase in relation to this matter and look at the final concerns raised by the Gwydir irrigators.

Mr McMahon—In general, the taxing point for CGT is when there is a change in ownership of the particular CGT asset. A change in ownership includes when an asset comes to an end. As Michael Murray has pointed out, the CGT event under focus is C2. The time of C2 is, if there is no contract—I understand this is the case with these bore licences—when the asset ends; or, if there is a contract, when the contract is entered into that results in the asset ending. As Mr Murray has pointed out, most of the bore licences were extinguished and the new access licences were issued late in the 2006 calendar year, but there are a few licences

relating to valleys such as the lower Lachlan that are going to occur later. This means that any capital gain that is made from a bore licence that was extinguished late in the 2006 calendar year is typically also made in the 2006-07 income year. The timing of the cash payments or the acceptance of the letter of offer of the cash payments is unrelated to the timing of the CGT event. The delay in making the cash payments is really only a delay in the payment of some of the proceeds for the ending of the licence—the other proceeds being the new access licences were received at the time that the bore licences ended.

Irrigators in the lower Lachlan may be able to access the enhanced CGT small business concessions, which apply from the 2007-08 income year. They may be able to access those concessions but that difference in treatment arises from the timing of the ending of their bore licences—which, according to the irrigators council submission, occurred recently, presumably after 1 July 2007. The fact that they were offered their cash payment in the same year as those whose licences ended in late 2006 does not change the timing of the CGT event that led to the cash payment. If the legislation were amended in accordance with the wishes of the irrigators council, it would create a precedent for taxpayers in similar circumstances to seek a change in the timing of the CGT event so that they too could benefit where more generous tax arrangements were not available at the time that the event occurred. More generally, amending the legislation would not only represent a change in the timing of the CGT event C2 but also bring into question the timing of CGT events more generally. A more general change in the timing of the CGT events would be complex to legislate and difficult to comply with and administer—especially where the capital proceeds of a CGT event were spread over a number of years.

CHAIR—Thank you, Mr McMahon. You have raised some pretty serious issues. The law as it stands is that the change of ownership is the trigger point, is it?

Mr McMahon—Typically it is the change of ownership. You may be aware there are something like 52 CGT events. The main ones taxpayers deal with are when you sell an asset or when something ends, like these licences, and the ending of a licence is considered to be a change in ownership. Essentially the asset has come to an end.

CHAIR—So you are telling the committee that to change this we would be setting a precedent and effectively overturning the currently accepted rules in relation to the timing of C2 obligations?

Mr McMahon—It would also, as I mentioned, bring into question the timing of CGT events more generally.

CHAIR—Thank you, Mc McMahon. Mr Murray, thank you for your detailed correspondence to the committee and for your quite open and frank discussions with us this morning; it makes our job substantially easier. I can only imagine the difficulties that your members have gone through over the last two years. The committee is very grateful for your assistance. I thank you most sincerely.

Proceedings suspended from 10.26 am to 10.50 am

BERMAN, Ms Tricia, General Manager, Innovation Policy Branch, Department of Industry, Tourism and Resources

DAVIS, Mr Graeme, Principal Adviser, Business Tax Division, Department of the Treasury

MONK, Ms Deborah Jane, Director, Innovation and Industry Policy, Medicines Australia

PULLAR, Mr David, Policy Analyst, Sanofi-Aventis

Evidence from Ms Berman and Mr Davis was taken via teleconference—

CHAIR—Welcome. Did you hear my discussing with Mr McMahon the normal words of wisdom from chairs in relation to these proceedings?

Ms Monk—I certainly did.

CHAIR—The committee is looking at schedule 11 of the Tax Laws Amendment (2007 Measures No. 5) Bill 2007. Would you like to make an opening statement, Ms Monk?

Ms Monk—Yes. Thank you for inviting us to appear before the committee today. Briefly, Medicines Australia is a peak industry body—an association representing the innovative prescription medicines industry in Australia. We have some 48 member companies. Mr Pullar works for sanofi-aventis, which is one of our member companies.

Overall, the pharmaceutical industry supports the changes that are proposed to be made to the R&D tax concession to allow increased participation by local subsidiaries of multinational enterprises. The changes recognise that R&D can generate new jobs, skills and opportunities, irrespective of where the intellectual property underpinning that R&D is held or where the funding comes from. These are changes that the pharmaceutical industry has been proposing for some years, and they demonstrate that the government is committed to encouraging greater R&D investment in Australia.

Medicines Australia member companies employ about 15,000 staff and have a turnover of about $7.8 billion. This represents about 1.3 per cent of the global pharmaceuticals market. We export medicines valued at about $3.4 billion. Our exports are greater than those of the wine industry. Statistics recently released by the ABS indicate that we might be about to overtake the automobile industry. We are very substantial exporters of elaborately transformed manufactured goods.

The industry spends about half a billion dollars each year on R&D in Australia. Pharmaceuticals generate significant benefits to the Australian economy through skills development, introduction of new technologies to Australia and development of local capability and critical mass. Overall, the benefits of pharmaceutical R&D are more than 100 times greater than its costs. For every one dollar invested in health and medical research in Australia there is a $5 economic spin-off. Investment in research and development saves both lives and money. The benefits linked to R&D include increases in life expectancy, whilst new medicines replacing surgical interventions have led to savings of over $600 million per year.

R&D in our global economy is driven by a number of factors. While Australia has many strengths as a location for pharmaceuticals R&D, we must compete with other countries that can offer large resident populations, low-cost activity, rapidly advancing technological skills and other countries that can offer the quality of R&D that is comparable to Australia's, at lower cost and with access in many cases to incentives and concessions that drive location decisions from company headquarters—in particular, China and India are increasingly attractive as investment locations for our industry. We have seen an amazing growth in China in recent years of some 16 to 18 per cent in the pharmaceuticals market.

Expanding access to the R&D tax concession in Australia will provide some incentive to locate more global R&D investment in Australia. The effectiveness of incentives for the industry has been demonstrated under previous government programs, such as the factor F program, the PIIP and also the pharmaceuticals partnership program which is still going on. These programs were also shown to have created benefits for Australia, irrespective of where the IP was owned and where the funding was provided from.

Whilst we appreciate the policy initiative of changing the eligibility for the premium 175 tax concession, we do have some outstanding concerns with how it will be implemented and interpreted. Specifically, R&D conducted in Australia is required to be related to a core activity of systematic, investigative and experimental activities. The assessment of eligibility of R&D projects will need to appreciate the global nature of our industry and the R&D conducted by our industry. For example, the Australian component of a clinical trials program may be only part of the whole project but will still involve systematic, investigative and experimental activities in Australia. We are keen to work closely with the government to ensure that the interpretive guidelines of core R&D activities needed to be eligible for the tax concession take account of the global reality of our business.

Further, the legislation involves the process of establishing a claim history that will deem the last three years of activity to be 90 per cent, 80 per cent and 70 per cent of the first claim year if the company has already had some activity in Australia in the last 10 years. While administratively simple in taking this approach, this deemed claim history may disadvantage companies coming off a low R&D base; that is, where the actual R&D in previous years is less than the deemed amounts. The proposed amended legislation should allow an eligible entity to use the actual historical spend in R&D where this information is readily available to the company as an alternative to the formula-based deemed method. This could be achieved by granting the eligible entity the option to use either an actual historical spend method or to elect to use the 90-80-70 per cent transitional rule method. It should be a case of electing to use the option that best suits an entity's circumstances.

We also query the requirement that the performance of R&D activities by the Australian entity on foreign owned R&D must be covered by a written agreement between the Australian entity and the foreign company and no other parties. While it is appropriate that the company has an internal agreement to cover foreign owned R&D, we are concerned that this could be used to exclude R&D covered by another multiparty agreement. For example, an Australian subsidiary could be undertaking R&D as part of an agreement between itself, its parent company and other companies. The existence of this type of agreement should not cause the activity in Australia to become ineligible for the tax concession.

Finally, we do commend this initiative. The success of it will depend on appropriate implementation and interpretation, including the industry research and development board guidelines. We are keen to provide assistance to make sure that this occurs and that the changes maximise the incentive to companies to undertake R&D in Australia. I regret that we did not make a formal submission to this committee, senators. However, I have brought with me a letter that we provided to Treasury when we were invited to review the exposure draft of the R&D tax concession part of the bill; if that would be of interest and use to you.

CHAIR—Would you like to table that, please, Ms Monk?

Ms Monk—Yes. That concludes my opening comments. Thank you senators.

CHAIR—Do you have multiple copies of that document?

Ms Monk—No, sorry, I only brought one copy.

CHAIR—I will not delay proceedings. Are you requesting specific action from the committee or are you requesting endorsement of the need to continue implementation discussions with Treasury? What exactly are you seeking from us?

Ms Monk—Most of our concerns, as I have tried to highlight, are around the interpretation and implementation of the legislation once it is in place. We certainly do want to see the legislation passed, but that will necessarily flow on to some interpretative guidelines through the IR&D Board. In the past, as a result of interpretative guidelines, companies have been excluded from being able to access the tax concession, and we obviously would like to overcome those hurdles to maximise the ability of our member companies to access a tax concession.

Mr Pullar—The only one where there would be the need for a legislative change is the deeming of the base, which is only a transitional period. It is the first three years, so it is not a crucial issue. Our members will be able to participate in a concession anyway, but it is something that we would like to be considered.

Ms Monk—As I said, it means that if those companies that have a low base make a big step-up of investment they are disadvantaged because the base will be calculated on 90 per cent, 80 per cent or 70 per cent of that next year of a big step-up of investment.

Mr Pullar—Any increase in R&D over about 20 per cent on your base will just be ignored. Given that the intent of this is to encourage increases in Australian R&D, it would seem counterintuitive to have a mechanism which actively discourages that. The legislation provides that, if you have done no R&D in Australia in the previous 10 years, you can have a zero base, but then anyone else has to have that 70, 80, 90. So there is a gap where a company may have had a bit of R&D, did not do anything in Australia for a number of years or was tracking at quite a low level but is now increasing it substantially.

CHAIR—I presume those who have had some involvement would have had access to PIIP.

Ms Monk—It is only a very small number of companies that have access to P3, the current program. Only seven of our member companies access that program and obviously the industry is much larger than that. I do not have the number of PIIP companies with me, but it was in the order of eight to 10, from memory.

Senator HURLEY—How many members do you have? Do you represent most of the pharmaceutical industry?

Ms Monk—In the prescription medicines area and in the innovative companies area, there are very few players of any significance that are not part of Medicines Australia at the moment. We do not represent the interests of the generic medicines industry; there is another association that represents those companies.

Senator HURLEY—How do you define 'innovative medicines'?

Ms Monk—Companies that are researching and developing new medicines.

Senator HURLEY—How many of those are there in Australia?

Ms Monk—Of Australian owned companies?

Senator HURLEY—Yes.

Ms Monk—There are only a very few Australian owned companies. CSL is obviously a very significant one, but most of our member companies are subsidiaries of multinational enterprises.

Senator BERNARDI—Is this an extension to existing legislation?

Ms Monk—It is a change to the eligibility of accessing the premium 175 per cent tax concession.

Senator BERNARDI—So it is something that you support, albeit there is a question of clarification that you would be seeking?

Ms Monk—Yes. We want to see our member companies access this tax concession because we see it is a potential incentive for greater investment in Australia. But it is the way the legislation is interpreted. Even if changes to the IP ownership part are fixed, if the interpretation of other parts of 'eligibility' are not corrected then they still will not be able to access the tax concession and the incentive will not be there.

Senator BERNARDI—Can you give us an indication of the quantum of investment in R&D? You said $500 million per annum.

Ms Monk—Yes.

Senator BERNARDI—Is that undertaken by Australian owned companies or across your entire member base?

Ms Monk—That is across our entire membership.

Senator BERNARDI—And what percentage of that would you guess is from overseas owned entities?

Ms Monk—I would say a high percentage would be generated from—

Mr Pullar—There is a distinction here. What is being included in the tax concession is not an issue of company ownership; it is largely an issue of internal company structure. Currently the R&D tax concession is open to subsidiaries of global companies. Unfortunately, a lot of R&D is part of global R&D programs and is funded by head office, and that has been typically ruled ineligible. A lot of the R&D in Australia is being performed by foreign owned

companies. In many cases the R&D is managed in Australia and undertaken in Australia and some of that is eligible for the concession currently.

Senator BERNARDI—Would you hazard a guess as to the increase in the level of R&D expenditure in Australia through this extension and if there were a clarification of the position?

Ms Monk—I could not hazard a guess, but my overall concern is that it will not be a very large incentive and that we will not see as big a rise in R&D as we would wish. So, the better it is interpreted to allow companies to access it, obviously the more incentive there is and you will get the greater investment.

Senator BERNARDI—But you think, once there were clarification, the extension of this concession would be a very positive step forward for the inflow of R&D funds into Australia?

Ms Monk—Yes, we expect it to be.

Senator BERNARDI—I will come back to this hazard a guess—$500 million extra? I know you are speculating.

Ms Monk—If we doubled our R&D investment, that would be an absolutely outstanding result. Under the Pharmaceuticals Industry Action Agenda, the 10-year plan was that we would double Australia's share of the pharmaceuticals industry over 10 years, and that is a very broad interpretation.

Senator BERNARDI—Finally, in your opening remarks you made some reference to the flow-on effects of R&D in Australia. You said that every dollar invested turns into $5 in output and your export quantums and things. Are those statistics internal measures from your industry or are they done by an external body?

Ms Monk—The comment I made about a $5 benefit for every dollar spent actually came from a statement by the Hon. Mr Abbott in 2005.

Senator BERNARDI—It must be true.

Ms Monk—The other statistics would be derived from ABS data or our own member surveys. For example, the export figure would be based on ABS data.

Senator BERNARDI—So they would stand up to scrutiny?

Ms Monk—Yes, I believe so.

Mr Pullar—On that topic, there are some studies that have been done of previous industry incentive programs, PIIP and P3, which have attempted to quantify. The actual spillover benefit is not even captured by the company performing the R&D. That just accrues to the economy more generally. That tends to be in the order of 50c or 60c for every dollar. So a large percentage of the benefit is actually not captured by the companies performing the R&D; it just benefits the Australian industry in its entirety, which is part of the rationale behind these changes and which was behind those sorts of industry support programs in the past.

Ms Monk—Obviously it is not just our industry that will benefit from these changes to the 175 per cent tax concession. We are one of many industries.

CHAIR—Ms Monk, yours is an industry that I think is quite unreasonably subject to negative commentary on occasions. My understanding is that we are actually in a city that provides a lot of small lab research that has been commissioned by some of these large pharmaceutical companies as well. My understanding is that your industry employs a number of people in a number of labs for small R&D initial—

Ms Monk—Basic research.

CHAIR—Yes, the basic research. Out of interest, what number of people are associated with the industry in that basic R&D?

Ms Monk—I am sorry, I do not have that figure. I could try and find it for you and provide it to the committee if it would be of use.

CHAIR—It is not relevant to this; it was just a matter of interest. Am I right that Adelaide is one of those important centres for that small lab engagement?

Ms Monk—I believe it is, yes—as well as Melbourne, Brisbane and Sydney.

Mr Pullar—I think Adelaide has one of the only dedicated phase 1 labs, which are first-time in human clinical trial facilities. It does have a number of small biotech companies which are engaged in collaborations with larger companies, where the global company will fund some of the activities of that smaller local company.

Senator WEBBER—Ms Monk, in your opening statement you said that you support the legislation but you want to refine it even further. You thought your members should be allowed to use the option that best suits the entity's circumstances. Can you explain a bit more to me what happens if they cannot do that?

Ms Monk—That is particularly around this transitional issue of how you determine the base. As the legislation has been drafted, if you are a company that has done some R&D activity in Australia over the last number of years but you have not been claiming the tax concession, when this comes into play and in the first year that you choose to apply for the tax concession, say you spend $100 million in that first year that you are claiming, your base will be determined on 90 per cent of that $100 million for one year, 80 per cent for the second year and 70 per cent for the third year. That will be the way the base will be calculated. Say, for example, your expenditure in the three previous years was only $25 million per annum: your base year will be inflated by the deeming process. So the comparison between your base calculation and your actual expenditure in the year you are claiming for will obviously be a smaller amount.

Mr Pullar—The concern is that, because it is paid on additional R&D relative to that base, if that base is inflated higher than it has actually been, then those companies will receive less of an incentive than they might otherwise have and will be disadvantaged and lack some of that incentive to participate in the program and increase their R&D.

Ms Monk—So, whilst the government obviously wants to provide an attractive incentive for companies to make a big step-up in R&D investment, this would tend to minimise that incentive to make that big step-up.

Mr Pullar—They would really only be able to claim the concession on the first part of that step-up, so the incentive to perform the rest of the step-up would be diminished.

Ms Monk—Yes.

CHAIR—Have you had any discussions with Treasury or industry in relation to some of your move-forward concerns?

Ms Monk—We certainly did make our submission when we saw the draft legislation, and prior to that we did have a meeting with the department of industry when the legislation was being drafted. So we put forward some of our concerns and ideas on how we wanted to see the legislation appear.

Mr Pullar—On the interpretive matter the department of industry have been quite supportive and have expressed that they are open to engaging with us on those interpretive guidelines. That is in terms of the eligibility of R&D activities based on where they are located. The issue of the base is something that has come up only in the draft and then in the final legislation, so we raised that with them through the letter.

CHAIR—We might cross to Ms Berman and Mr Davis. Have you appeared before Senate committees before?

Mr Davis—I have.

Ms Berman—Yes, I have.

CHAIR—That is very good news. So you are aware of the normal opening statement that chairs make in these circumstances?

Mr Davis—Indeed.

CHAIR—We have had the benefit of oral evidence this morning from the witnesses from Medicines Australia. Would you like to comment on the matters that have been raised by Ms Monk and Mr Pullar on those two separate issues? Perhaps you could take the implementation first then the base question second.

Mr Davis—We certainly note the perspectives on the interpretive guidelines. I do not really want to go into interpretation and how that will be implemented; that is someone else's business, in one sense. We recognise that there is, as there always is in a complex piece of legislation, interpretation to make it work, and we are well aware of those issues. I think I should explain a few things around the transitional claims history. That transition is only available in the first year—that is, that will be available in this financial year, or the first financial year after 1 July. The reason we have chosen to go with a transitional history of that ilk was that this issue was raised with us as part of the initial consultation on how to implement the government's policy intent on this. The issue that was raised with us was twofold: one was that it would be very difficult for most companies to go back and build a three-year history but the second part of that was that it would be even harder to have that as a verifiable history. The administrative difficulties with doing that caused us to want to move to something that could work for everybody.

In terms of the incentive effects of that, I am somewhat confused by the argument I just heard that it would cause companies to not want to increase their R&D activities. Certainly, after the first year of implementation I cannot see how that works at all. In effect, they are given a transitional history that applies off the first year of spending then they have the same incentive to increase after that first year as they will at any time in the operation of this bill or

act. I can understand the desire to make available to companies that have been ramping up their activities their actual histories. The complexity in getting those histories out and verifying them would make that—I think the word 'nightmare' was mentioned by a few people—impossible for many. In order to find a way through that, we went with transitional histories.

Ms Berman—I concur with my colleague Graeme. We got very strong advice from industry in the forums we held in early June not to ask for a three-year history. In fact, firms were saying it would be in their interests to find that they had no R&D in the previous years. There was no incentive to be looking for it because the smaller it was, the better the opportunity when the program began. That was perhaps the largest of all the requests from those forums, and we took that very seriously. We came back and looked at the data that we had on people accessing the tax concession, P3 and so on and that is how the 90-80-70 formula was developed. It removes a large compliance cost from companies. It is equitable and extremely positive for some people who may have had no increase in recent years, so it cuts both ways. But it is probably a useful tool to help everybody to start the first year with least disruption and cost to them.

CHAIR—When you were talking about that feedback from industry, was that whole of industry or just the pharmaceutical industry?

Ms Berman—It was whole of industry. There were about 60 representatives from industry who attended those forums. We held them in Sydney, Brisbane and Melbourne, and other people contacted us by email and telephone. Medicines Australia came in and spoke to us. We were very receptive to people's views and we wanted to make this as low-cost as possible for those people wanting to engage immediately because the government's policy is: have more activity happening in Australia. That is what the incentive is all about, and we believe this achieves that with minimal costs to the industry concerned, noting that they were not able to access the tax concession at all previous to this.

Senator WEBBER—I want to follow up on that recent remark: you held forums in Sydney, Brisbane and Melbourne. What other efforts—I am from Perth—did you go to to consult with industry that is not in Sydney, Melbourne or Brisbane?

Ms Berman—AusIndustry has a list of liaison tax registration groups. We also spoke to the AusIndustry officers in each state. We went to peak bodies and groups like Invest Australia. It is a bit difficult because the people we want to talk to are probably people who have not normally been customers of the department or of AusIndustry. But this came from the industry statement. Our minister went and spoke to every state and territory and he brought this back from the discussions he had there. I believe we went to all of the interested groups who had asked for assistance in this way. I think Treasury did this too. Did you have lists of people that you contacted, Graeme?

Mr Davis—Yes—primarily those who were identified by Trisha's people. We contacted them and also went out with the draft legislation and the explanatory memorandum for comment.

Senator WEBBER—When you say you went out, where did you go?

Mr Davis—It was a confidential consultation. People were invited to be involved in that from the lists of people who had attended the initial consultations and all the lists of contacts that the department had available.

Ms Berman—There was another avenue that we used. Most frequently, large firms tend to use an accountant or some similar group to assist them in preparing their tax registration data. Those people were all invited to attend the various forums. They speak to each other in different states as well, so I think advice got out there to everybody. I certainly had phone calls from all across Australia, following the forums.

Senator WEBBER—I guess I am seeking a bit more reassurance. We are saying that this is about allowing new people to access something—people who have not accessed it before.

Ms Berman—Yes.

Senator WEBBER—I am looking for a bit more reassurance that we did actually go out there and do that. I am from Western Australia and we are particularly sensitive and parochial.

CHAIR—Very.

Senator WEBBER—I am fascinated to know about the efforts. You say you talked to accountants. We have them in Perth too.

Ms Berman—Yes. For example, three or four large accountancy firms tend to do the major number of registrations. They certainly contacted head offices and they sent representatives, and they in turn invited other people to forums or suggested that they contact us. We can certainly make available to you the list of people who were contacted. We would be happy to provide that if that would help.

Senator WEBBER—It certainly would. I have just one more question, regarding the issues that have been raised by Medicines Australia. Is that the only industry group that has expressed some concern with the legislation as it stands now, after this consultation process? Is everyone else happy?

Mr Davis—The definition of the word 'happy' is always a challenge.

Senator WEBBER—Not more so than in my business.

Mr Davis—Yes. I can understand that. You would expect that there would be a number of people who thought they might be able to do better. I have not been knocked down in the rush of complaints. That might be a nice way to put it.

Senator WEBBER—Thank you.

Senator MURRAY—Mr Davies, did you hear the evidence of Ms Monk?

Mr Davis—I did indeed.

Senator MURRAY—I want to ask you briefly about her comment with respect to written agreements. She said that the definition of agreement for the new concession would include a written company policy and that IP resulting from the R&D would be directly owned by the foreign company. As I understand the proposal from the government, what you propose is effectively an integrity measure, because if it were not done like that there would be risks. Is that an accurate understanding by me?

Mr Davis—I think that is an accurate understanding by you, yes.

Senator MURRAY—If Medicines Australia had a valid point, is there a process by which a particular company in a particular arrangement could apply for their arrangement to be brought into this scheme—in other words, by exception rather than by changing the tax law?

Mr Davis—I think we are getting into the realms of exactly how that is interpreted in its operation.

Senator MURRAY—Are you saying to me that there is room for interpretation—in other words, it may be subject to future consideration?

Mr Davis—As with any of these complex bits of law, there is interpretation required in order to make it work.

Senator MURRAY—My view is that your integrity measure is correct and should not be changed, but I can see that there may be circumstances where, for an exceptional case, consideration might need to be made. I want to know if there is a process for that. That is not a policy question; that is factual question.

Mr Davis—I am trying to think about a process. It would be about getting an interpretation or a ruling from the Tax Office about whether something met that requirement.

Senator MURRAY—My question is: are they are able to do it?

Mr Davis—Are they able to do it?

Senator MURRAY—Are they able to make that interpretation under the law?

Mr Davis—They will have to interpret the law as it is there.

Senator MURRAY—That to me means that there is no interpretation. If there is no written agreement to comply with the law then they may not take an alternative circumstance into account.

Mr Davis—I am not sure what alternative circumstance you have in mind, Senator.

Senator MURRAY—It is not mine, Mr Davis. Medicines Australia—and they can clarify this—have said that there may be circumstances where a written agreement will not just be between two parties that fall within the provisions of the legislation before us. I am saying to you that I think what you have done is right, but I am wondering whether there are any circumstances whereby that could ever be adjusted for an individual circumstance. My understanding of your answer so far is that factually there is none and the law is as it stands.

Mr Davis—The law is as it stands. It will require an interpretation from the tax office of exactly what that means in particular circumstances.

Senator MURRAY—I think Senator Bernardi said earlier that that was a mystery wrapped up in a riddle, but thank you for your answer.

CHAIR—As there are no further questions, Ms Monk and Mr Pullar, thank you for your attendance, and thank you also, Ms Berman and Mr Davis.

[11.31 am]

BROWN, Mr Geoffrey David, Executive Director, Screen Producers Association of Australia; and Australian Screen Council

BURNETT, Mr Ewan, Member, Screen Producers Association of Australia

CAMPBELL, Mr Robert Bernard, Member, Screen Producers Association of Australia

SHEEHAN, Mr Vincent, Feature Film Councillor, Screen Producers Association of Australia

CHAIR—Welcome. We will now turn to schedule 10. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that, in the giving of evidence, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness shall state the ground upon which the objection has been taken and the committee will determine whether it will insist on an answer, having regard to the ground on which it was claimed. If the committee determines to insist on an answer, the witness may request that the answer be given in camera. Such a request may also be made at any other time. Mr Brown, or anyone else, I now invite you to make an opening statement.

Mr Brown—I wish to clarify that I represent the Screen Producers Association of Australia as its executive director, and Bob Campbell is its recently elected vice-president and Managing Director of Screentime. Ewan Burnett is a very senior producer in the industry and the Managing Director of Burberry Productions, and Vincent Sheehan is a very senior film producer in the industry, representing Porchlight Films. As you pointed out, I also represent the Australian Screen Council, who have endorsed these submissions under the heading of SPAA here today. The Australian Screen Council represent the collective of the Australian Writers Guild, the Australian Screen Directors Association, the MEAA and SPAA. They have delegated me to represent their interests in this and they are saying that the written submissions that have been put forward represent their positions.

Briefly, we have put forward to you a written submission expressing our concerns. Some of those concerns are technical and go to the operation of the bill. We would like the opportunity to address those today. We have a major concern regarding the issue of who should gain access to the producer offset. I think we have outlined our case pretty fully in the submission, but I would like to ask the committee if it could indulge me and allow Bob Campbell, as a senior producer, to have a say rather than me as a talking head on how it affects his business and how he sees it from a producer's point of view.

CHAIR—Is this in relation to that specific item.

Mr Brown—Yes.

Mr Campbell—Thank you for the opportunity, on behalf of the independent production companies, as represented by the Screen Producers Association, to appear before the Senate

Standing Committee on Economics. In a joint press release on 8 May 2007, ministers Coonan and Brandis, in announcing 'a comprehensive package of measures to significantly boost support for the Australian film and television industry', went on to say:

> It provides a real opportunity for producers to retain substantial equity in their productions and build stable and sustainable production companies, and should therefore increase private investor interest in the industry ...

The independent television production companies and the Screen Producers Association industry body support the legislation in an overall sense and the objectives as stated in the joint media release. Testimony to that support, prior to the draft legislation and subsequent press releases, is that we have, in the interim, been working with the Film Finance Corporation to ensure that proper practice is implemented and the outcomes suggested by the minister are achieved in the period before the Australian Screen Authority is established. However, we are opposed to broadcaster access to the producer offset as we believe that would lead to unintended consequences compared to the policy objectives of division 376—that is, to encourage production of Australian films, miniseries, television drama and television series. This for us is an argument about balance and competition. The networks have huge market power with absolute barriers to entry enshrined in legislation. If the networks have access to the producer offset then that power, we say, will be further reinforced. There will be no balance in the system. It is interesting to note that the networks can be producers but of course the producers cannot be networks.

Against a background of declining numbers of productions, declining hours of production and declining expenditure on drama production, access by the broadcasters to the producer offset will: firstly, result in the networks receiving public funding in order to meet the obligations imposed upon them to spend their own funds in meeting their licence obligations under the Broadcasting Services Act; and, secondly, will see the producer offset, which is designed to stimulate production, result in a transfer of production from the independent television production companies to in-house productions as they will get a 20 per cent discount on the cost of that production, thereby adding to their already buoyant bottom lines that are the envy of all world broadcasters.

By way of contrast, use of the production offset in the hands of the independent television production companies will: firstly, ensure the imbalance between the networks and the independent television production companies is kept in check; secondly, mean that there is negotiation with the networks that sets at arms-length all the terms of trade, including budgets, overheads and ancillary rights; and, thirdly, ensure that all the money allocated will go exactly where it is intended and more production will result, thus fulfilling the objective of 'providing real opportunity for producers to retain substantial equity in their productions and build stable and sustainable production companies'. We say it is a market balance check. Without this market check the producer offset will simply be a discount on the cost of production to the broadcasters.

In the hands of the networks, the producer offset will see the diminution of the high-end miniseries and telemovies as it will be 20 per cent cheaper for the networks to produce long-running drama series in-house. Gone will be the award-winning high-end productions such as *Sea Patrol*, *Jessica*, *Joanne Lees: Murder in the Outback* and *Mary Bryant*. These are the

productions that have built our significant reputation overseas. As the balance moves in-house, this trend towards the diminution of top-end drama will continue as the networks will not be able to access FFC funding for these high-end productions—and, in any event, will have no need as they are making their quotas at a 20 per cent lower cost than was previously the case. The broadcasters have a huge revenue base that is guaranteed and enshrined in legislation. They expense all production, including Australia production, as an operating expense—that is, it is 100 per cent tax deductible against this legislatively mandated revenue and profit base. If they have access to the producer offset then they will enjoy a further 20 per cent taxation break. We say that this does not sit comfortably with the stated objective of building stable and sustainable production companies and increasing privacy equity interest in the industry.

There are several points made in the FreeTV submission that SPAA wishes to repudiate. Firstly, the executive summary says that concerns that the offset will result in broadcasters choosing to commission in-house over independent productions are unfounded. We refute this. One of the networks currently produces all of its drama in-house.

An analogy is that Mirvac have a block of land worth $100 million. They want to develop the land at a cost of $200 million. If they go outside, they will spend $200 million. If it is done in house it will cost a net $160 million after the rebate. What do you think will happen? In fact, in this analogy it is worse because they are the only company allowed under legislation to buy the land.

Secondly, it is said in the executive summary of FreeTV that in-house production makes a significant contribution to the overall health of the broader production sector of which independent producers are a very small part. However small we may be against the strength of the networks, the independent production companies have over the last five years, according to the AFC survey, made between 71 and 82 per cent of the total number of Australian dramas, at that time employing thousands of people.

Thirdly, networks have never accessed 10B and 10BA and the producer offset is designed to replace both 10B and 10BA. So why should the networks have the eligibility for the producer rebate in an environment in which they have never accessed what was in its place before?

Fourthly, we understand that Richard Harris's position as outlined in the FreeTV submission will be refuted at 2pm in the submission from the South Australian Film Corporation.

Therefore, in summary, we say this legislation will be good for the film industry, about which my colleague will speak in a moment. But in its current form it will have, due to the unintended consequences outlined previously, a major detrimental effect on independent television production companies. In its current form it will be a significant disservice by the government on these companies that it is designed to foster into 'stable and sustainable production companies'.

There are a number of potential solutions that taken together may provide a way for this otherwise welcome legislation to proceed in an equitable form. Firstly, for example, the broadcasters are only eligible for the production offset if it is production that is over and

above the statutory requirement for adult drama, children's drama and documentary under the Australian content standards. Secondly, if the networks claim domestic production as a tax deduction under section 51(1), they are ineligible for the producer offset.

Thirdly, the networks and the independent television production companies undertake, by way of a statutory declaration to the regulator, that the networks have not had direct or indirect access to the producer offset. It seems to us that between the announcement by the minister on 9 May, of the package to boost support for the Australian film and television industry, and the drafting of the legislation the opportunity has been lost to 'provide producers a real opportunity to retain substantial equity in their productions and build stable and sustainable production companies'. We say this intent could not have been clearer. We ask you to restore that intent.

In conclusion, I would now like to read extracts from a letter from Ronald Walker, the Chairman of Fairfax Media.

CHAIR—Mr Campbell, I have received a letter from Mr Walker which I am going to distribute to colleagues now. It will be tabled accordingly. How long is this?

Mr Campbell—I would like to read three paragraphs of it and have it read into the *Hansard*. It is very short. It will take a matter of minutes.

CHAIR—Just a couple of paras.

Mr Campbell—It says:

Fairfax Media strongly supports proposals to strengthen the Australian television and film industry, and independent production.

At the same time we note that the proposed production incentives, as presently structured, could be accessed by and therefore directly benefit the commercial television networks. By virtue of the protections established by the Government to limit the number of commercial television networks, the networks are already in a very powerful commercial position with respect to independent television program producers and distributors.

We believe your hearings are therefore a prime opportunity for the Committee to carefully assess the impact of these proposals on the relationship between independent producers and the television networks with a view to ensuring that independent program production is not adversely affected by the proposed ability of the networks to participate in the proposed scheme—

CHAIR—Sorry, Mr Campbell, but is this a copy of the letter to me?

Mr Campbell—Yes, it is. The purpose of this was to get it into the *Hansard*.

CHAIR—That letter is going to be tabled anyway. When it comes back I will be seeking my colleagues' consent to that letter being taken as a formal submission.

Mr Campbell—Thank you.

CHAIR—I presume that Mr Campbell has pretty well summarised the issues for you, Mr Sheehan, and you, Mr Burnett?

Mr Burnett—I have one additional point to make.

CHAIR—I want to leave time for questions from committee members, so if you have a couple of other points to clarify—

Mr Burnett—They will be short. The definition of children's animation in the current draft bill stipulates that children's animation should be a series of commercial half-hour episodes. This goes completely against industry practice and industry trends. There are many programs currently in development being financed that are commercial 15-minute programs. Those programs would fall over under this definition. The Film Finance Corporation allows the financing of 15-minute episodes. This would effectively go against the trend with digital media. The notion of 13, 26 or 52 episodes per series is changing under the program stripping that is occurring in broadcast digital media internationally, so we request that the definition of an animated series be amended to episodes of commercial 15 minutes or more, with no fewer than 12 episodes per series.

CHAIR—Has this been circulated?

Mr Burnett—It is within the SPAA submission as well.

CHAIR—Okay.

Mr Brown—It is a technical issue. We think it is critical and the feedback from our membership is that, if it is not corrected, the dollar threshold to qualify for the offset would effectively disqualify 85 per cent of Australian animation. All it requires is an amendment saying that it can be a quarter of an hour for the purposes of a series. I think that under the old 10BA arrangements this was allowed, so somewhere in the translation from the old 10BA to the new bill we have missed out on this. We believe that it was very much the intent of government to have animation embraced in this package. It is an area where Australia excels and we are competitive on the international stage. We believe it is a technical issue that can be corrected quite easily by a simple amendment to the bill saying that, for the purposes of animation, that two quarter hours will be regarded as a half hour—

Mr Burnett—Or that a series can be made up of quarter hours. That is the most critical issue. The reference within the bill is schedule 1, item 1, paragraph 376—

Mr Brown—On page 11 of the SPAA submission.

CHAIR—Right.

Mr Burnett—It is critical to the animation industry in this country that that be redefined. Otherwise, literally four series will fall over in the next couple of months, including one that I am developing.

Mr Brown—The cost structures of animation are such that this producer offset was seen as a real benefit to animation producers in this country. To be denied it would go against the spirit and intent, we believe, of what was originally proposed. Vincent?

Mr Sheehan—I am speaking on behalf of the feature film sector—

CHAIR—Hang on, Mr Brown. With the greatest respect, I actually run these hearings. Mr Sheehan, I want to leave plenty of time available for questions from colleagues, so if you could just make this reasonably short.

Mr Sheehan—I will be very brief. The key item that the feature film sector wanted to address is that of the bona fide distribution agreement that producers need to have to qualify for the rebate. Under the current drafting, we are very concerned that this disadvantages the

independent sector, simply because, now foreign owned studios and integrated distribution and exhibition companies that are highly capitalised can write their own distribution papers to qualify, the independent sector, under a standard distribution agreement that has been used for the last 20 years, would not automatically qualify. Essentially, we are looking for that technical issue to be redrafted so that the independent sector is not disadvantaged compared to the larger international foreign owned companies. That is the key point.

There are two other smaller points. One is that 10.130 refers to the Australian commercial agreement. We believe that limiting it to just Australian distribution agreements again disadvantages the independent sector, because we are looking to open up our businesses and grow internationally. This demonstrates that we are not looking out for any kind of protection, because it actually allows foreign countries to use their paper as well, but we want to be in a position where we can play in the international field also.

The final point is with regard to the discretional powers of authority and ensure that the intention of the larger vertically integrated studios and foreign companies is to produce Australian films in Australia and that the 15 per centers, which is a very common practice around the world—where films are taken to foreign locations to access rebates—cannot automatically slip in here and use what is essentially for Australian independent film production. We want to make sure that the authority is in a position to protect them.

Senator HURLEY—We have received several submissions which set out quite clearly the view that the broadcasters are in a privileged position by virtue of the fact that they have their licences from the government and this gives them an advantage in the Australian context. I would like to put that aside for just a moment, because on one level it could seem to outsiders that, whatever opportunities there are within an industry, if you can improve those opportunities that is good. So in a sense it does not matter whether production is done within a broadcasting company or by an independent company. But it seems to me that you are also making some argument that there is some inherent virtue in having a lot of independent companies within Australia. Could you elaborate, if I have that right and whether that is so?

Mr Campbell—I think there is virtue in having choice in anything. A viable group of independent production companies will give vent to creativity with a range of projects and the opportunities that that provides to give diversity and choice to the Australian viewer. There is no mortgage on creativity; we are not arguing that point at all. Of course, the networks have every right to do production in house or with the independent production companies. That is not our argument. Our argument is: this producer offset was designed, as we said earlier, 'to provide a real opportunity for producers to retain substantial equity in their productions and build stable and sustainable production companies.' It does not say 'networks to retain substantial equity in their productions' but 'producers'; and we say that is the independent production community The networks are stable and sustainable, beyond anyone's wildest dreams. This is about the independent television production companies.

As a result of this well-intended legislation—if it is amended as we suggest it should be—these companies will become more viable, they will be able to retain more equity in their productions, their balance sheets will strengthen and, in the long term, they will be attractive to private investors. That is one of the key tenets of what this is about. The networks already have private investors on their share register—many of them foreign, which is somewhat of

an aside. In our view, this is not about reinforcing already massively strong companies' balance sheets. This is about balance and opportunity for small to medium sized businesses in growing and strengthening their balance sheets, retaining equity in their creativity, and their copyright.

Mr Burnett—I would like to make an additional point. There is potential, with broadcasters having this subsidy, effectively tax money funding their statutory obligation, for the commissioning process, the creation of the intellectual property, to become a lot more localised to Sydney. It is a Sydney-centric broadcast industry already. There is a vibrant industry in the independent production industry in all states. I am producing a program in Queensland at the moment. I am Melbourne based. There are very strong producers in Western Australia and South Australia. If the commissioning and intellectual property is centred in Sydney then we restrict the diversity of the stories that are being told in this country.

Senator HURLEY—So one of the key differences for you between this and the old system is that it improves the equity and improves the level of investment, and you think this is significantly threatened by the fact that there will be another large entity—a group of companies out there—sucking in that.

Mr Burnett—Yes.

Senator HURLEY—Because they are your market, essentially.

Mr Campbell—They are not a large group of companies. They are a very small group of companies protected by legislation in an enshrined oligopoly.

Mr Burnett—I add to that that I made a submission in 1988 to the review of the Australian content standard, at which time the networks were going through some financial difficulties as a result of Bond, Skase and others. At that stage, the broadcasters announced that they would lower their licence fees to get through the rough financial period. The Australian Broadcasting Tribunal expressed on record a concern that that would set a new benchmark for low licence fees, and the broadcasters responded on record that it was not a new benchmark; it was just to get them through a rough period. In dollar terms, licence fees have not increased substantially beyond that level set in 1988 or 1989. In real dollar terms, that represents a 40 to 50 per cent decrease in the licence fees that independent producers are paid for programs. We are paid around 25 per cent of the cost of production and the profitability, or the marginality, of independent producers has increased and the viability of independent production companies has decreased over the last 20 years because of that. This new incentive was seen as a wonderful opportunity to grow business in this country, and it has been undermined by this error.

Senator HURLEY—You were talking about alternatives. One of them is that the offset only be applied where production by the broadcasters is greater than the mandatory requirement. There was a second one, I think, where there was a tax deduction only when it was greater.

Mr Campbell—I think the wording we used was that if the networks claimed domestic production as a tax deduction under section 51(1), they would be ineligible for the producer offset.

Senator HURLEY—Right.

CHAIR—There were two issues. There was that one and there was also the over and above the statutory local production requirements.

Mr Campbell—Yes.

Senator HURLEY—Given your argument about the effect, your rationale behind this right is that if broadcasters produce above their mandatory requirement, that is just a bonus for the industry.

Mr Brown—The real position for us is that the broadcaster should not get access, but we understand that under tax law you cannot discriminate on that basis. So we have looked at it creatively. We looked to the intent of what the proposal was. We have confined our position now to broadcaster access to their minimum requirement for Australian programming under the Australian content standard. The networks want to produce 100 hours in addition to that. Let us say that the current requirement is about 110 hours a year; they want to do another 100 hours. We think they should have access to the rebate for those purposes.

If they want to be tomorrow's HBO, we would encourage them to be. It is in respect of the minimum obligation that we find the inconsistency lies. We have a Broadcasting Services Act that says, 'That's your requirement with your licence,' and over here we have a tax bill which says, 'In order to achieve that, we'll give you a 20 per cent subsidy.' We just think there is inconsistency here in the public policy positions. We think that the position we have put has integrity.

If I can just go back briefly: right from the beginning, when this package was being put together, SPAA worked very closely with the government and with our former minister, Senator Rod Kemp. Throughout the process, that dialogue was more or less exclusively with the independent production sector. The remedies that were being looked for were remedies for the independent production sector, in the knowledge that 10BA and 10B would be repealed at some stage, and in any case they were not working for the industry.

This is where we think the thing has been skewed, because we just saw—and the language and the rhetoric confirm this—that the proposal in the package was principally about building an Australian independent sector, getting the industry off the teat of direct subsidy through the FFC. That is what it was about—building our businesses so we would not be reliant on government direct subsidy but we would also do more maverick production, do broader forms of entertainment and be able to capitalise our base so we can compete in the global market.

Senator HURLEY—And that is premised on your perception that the people who buy your product, the broadcasters, would not bother—after they had done their mandatory Australian content and got their own subsidies for it—to buy your content. Is that right?

Mr Brown—Nothing excludes them from buying it after they have met their minimum obligations, but we would see a business model emerging whereby they might be wanting to access the rebate and build bigger production businesses for themselves. That would be fine. That would create more production activity in Australia. It is in respect of that minimum obligation that we have the issue. We have been flexible in the way we have approached this. We do note that networks like Seven have well-established production facilities.

Senator HURLEY—Do Seven buy any independent productions?

Mr Burnett—Yes.

Senator HURLEY—They do at the moment. And you would say that the new regime would encourage them to do further in-house production rather than buy independent producers' product?

Mr Brown—Yes.

Mr Campbell—Yes.

Senator BERNARDI—I found your submission very interesting. You attached an appendix from the Australian Screen Council.

Mr Campbell—No. That was not our submission; that was FreeTV's submission.

Senator BERNARDI—No. It was in the SPAA submission. The submissions which we received from the Australian Screen Council and the Writers Guild shared exactly the same content, exactly the same paragraphs and were signed by the same people. I do not think it behoves us as a Senate committee to have to wade through that and then see an appendix to your submission as well. I just make that point, because weight of paper does not necessarily strengthen your argument.

Mr Brown—We understand that. But the point we were trying to make was that sometimes we have been portrayed as pursuing our own narrow self-interest as producers and businesspeople. The impression we want to create with this committee is that we are representing not only the interested producers but the whole industry community.

Senator BERNARDI—I take that point but I also make my point because I do not think that represented the case particularly well, given that the content was virtually the same—word for word in some of the paragraphs. I just make that point to you for future reference.

Mr Brown—I understand.

Senator BERNARDI—How you define 'independent'? How is it defined in your industry?

Mr Brown—There are a couple of tests. Bob and Ewan can give you a rough one, but there is an accepted test that is enshrined in the Broadcasting Services Act, under the Australian content standard, which defines an independent producer as a company that has no relationship with a company that holds a broadcast licence, a free-to-air commercial licence, or—I think it goes on to describe a subscription television channel operator.

Senator BERNARDI—So a major movie studio is classified as an independent?

Mr Brown—Yes, if it does not have a relationship with a broadcast licence holder or a subscription pay TV operator.

Senator BERNARDI—Okay. And I guess a relationship is defined by a percentage of shareholding in it, or something like that?

Mr Brown—It is.

Senator BERNARDI—Are there any independent production houses—a number of which have been mentioned—that do have shareholdings, whether or not they be minor?

Mr Brown—As we speak, yes, there would be one, and it is not listed. It is Crawfords, which is owned by Bruce Gordon through WIN TV. That is the only company at the moment that is in that category.

Senator BERNARDI—So that would not be defined as an independent producer?

Mr Brown—It is an issue for us, yes. On the one hand Crawfords, an old established production company in this country, has been gobbled up by WIN. We still regard it as independent. But if it supplies programs through Crawfords back to WIN it effectively compromises its independent status.

Senator BERNARDI—In your submission—and this point has been touched on by Mr Burnett—you say that the licence fees paid to Australian independent producers for adult and children's drama does not cover the cost of production. You referred to 25 per cent.

Mr Burnett—Twenty-five to 30 per cent. The FFC set a minimum of 30 per cent a couple of years ago of licence fees for miniseries and children's programs. The rest we have to raise out of foreign presales, distribution advances and equity money.

Senator BERNARDI—Explain this to me: if I owned a television network and it was going to cost me $100,000 an hour for programming—that is just a figure I have made up—and I could go to you and buy it for $25,000 or $30,000 an hour, why would I do it myself?

Mr Burnett—Because then you own the intellectual property in perpetuity—you have all exploitation rights on that program as a broadcaster for the rest of time. One of the issues we have had to confront as an independent industry for a few years is that broadcasters have sought to represent licence fees as part equity investments and have sought participation in profit share disproportionate to the level of their equity or licence fees. There has been a progressive erosion of producers' rights from broadcasters who have a lot of weight at a negotiating table.

Senator BERNARDI—The international success of your product would probably be determined by having a fair run in Australia, I guess.

Mr Campbell—That is correct. That is the first question asked: how has the show performed at home?

Mr Burnett—That is right. And a broadcaster will put an enormous amount of promotion and publicity behind a project that they substantially or majority own to ensure success, whereas the Australian Broadcasting Authority had to install provisions in their regulations to require the broadcasters to promote and publicise independent programs that they did not have substantial ownership of.

CHAIR—Senator Bernardi, I am afraid there has been a bit of time slippage, which was going to be entirely predictable with this matter, so we will have to go to questions from Senator Murray.

Senator BERNARDI—Thank you, Chair; that is fine.

CHAIR—If there is some time we will come back to you if you have further questions.

Senator MURRAY—In the interests of time I will just ask one question. Mr Burnett, on this business with the animation series definition, what you said seemed to make sense to me.

Essentially my understanding is that you want continuity with the past to ensure that present systems of production are able to capitalise on this tax concession.

Mr Burnett—That is certainly true.

Senator MURRAY—My question is: why is it necessary for the tax law itself to put in a definition? What worries me about that is that I assume your industry, like any other, changes formats and systems over time. Wouldn't it be better for tax legislation simply to indicate that here is a tax concession and to separately provide—either through regulation or some other instrument—for the current practice and change it as the industry changes? It worries me that what is being proposed is rigid and that what you are proposing is also rigid. I would prefer to see a more flexible arrangement.

Mr Burnett—I understand your point, Senator. I think the draft bill defined animation in that way to restrict the offset availability to programs that are bona fide series rather than someone making a small animation in their backyard shed.

Senator MURRAY—Yes, but your point is that series vary in terms of their time frame. For instance, the legislation talks about a half-hour time frame; you talk about a 15-minute time frame. I am no expert, but why not have a 10-minute one, or whatever? My simple question to you is: should the committee be recommending to the tax office that they can arrive at the same outcome through a more flexible definition mechanism?

Mr Burnett—I believe we would welcome such a recommendation. The reality is that different aged kids have a different concentration span, and there is a big market for 11-, 12-, 15-minute programs. There is a market for five-minute interstitial programming. Professional producers like us and our colleagues are making those programs, and there is a very viable business in making them, so we would welcome that recommendation.

Senator MURRAY—What I am suggesting does not stop the policy-making authority from determining particular types of production techniques receiving the tax concession but it is far more flexible than this legislative device.

Mr Brown—Part of the problem we have had with the draft is that it deals in traditional sorts of forms of distribution and broadcast. It talks about film in the old sense; it talks about broadcasting in the old sense. We perfectly understand why it is in there but we take your point entirely: we think there should be some flexibility by regulation to deal with the changing landscape, the media. Theatrical release is no longer the be-all and end-all of film. In five years time it might be just a trailer house and the principal means of release might be broadband; it might be pay per view; it might be DVD. We take your point entirely: by regulation would the way to go.

Senator MURRAY—To close, because we are short of time—we are in a short reporting frame, Chair, on this bill?

CHAIR—Next week.

Senator MURRAY—If you are able to put precise proposals to us in response to my suggestion that is not altering the policy intent of the government but providing greater flexibility in the mechanism they use to define, then that would help us.

CHAIR—Mr Flavel, you are listening to this, aren't you?

Mr Flavel—Yes.

CHAIR—With some interest, I imagine.

Mr Flavel—Yes. I will respond to that point when we come on later this afternoon.

CHAIR—I was just making sure that you were in the loop.

Mr Flavel—Certainly.

CHAIR—Very quickly, on that point, Mr Burnett: I take it that the bill reflects your desire to have some protection for series but what you are saying to the committee is that, while it has met that intent which you wanted, it is now too restrictive.

Mr Burnett—It wasn't, I believe, a representation we made to government about the duration of programs; it came in the drafting from government to ensure certain levels of expenditure on production budgets that things below a certain level—effectively, the cottage industry programming; let us face it: a lot of people with a computer these days can make animation on their home computer—should not be eligible for the incentive. So I believe the drafting came from government rather than our side.

Mr Brown—We think it was the intent of government to include these sort of programs, but in the drafting it is just not there.

Senator BERNARDI—To summarise: if two 15-minute series or features were treated the same as half an hour, that would satisfy your requirements.

Mr Brown—Yes.

Mr Burnett—But it should not restrict the broadcaster to playing those 15 minuters back to back.

Senator BERNARDI—As cumulative.

Mr Burnett—They can be stand-alone.

Senator BERNARDI—My understanding is that typically there would be an hour or half an hour's worth of production that would be chopped up into 10- or 15-minute sections.

Mr Burnett—A lot of programs are being made as 10- or 11-minuters, separate episodes, for a younger audience. Senator Murray's point is very valid.

Senator BERNARDI—So if they are 10-minute episodes we should be able to bring three of them together and say that that is half an hour; that in order to justify a half-hour series you need half an hour's worth of material.

Mr Brown—Yes, that would be the simple amendment.

CHAIR—Have the animation issues been discussed with the department?

Mr Brown—Yes.

CHAIR—So the matters you have put to us have been put to the department?

Mr Brown—They are in the process of being put to the department, yes. We only saw the draft last Thursday week, but we are discussing it with the department.

CHAIR—But this has been raised with the department?

Mr Brown—Yes it has—to the best of my knowledge.

CHAIR—Thank you all for your appearance today.

[12.16 pm]

FLYNN, Ms Julie, Chief Executive Officer, Free TV Australia

HOLMES, Mr John Dickonson, Head of Drama, Seven Network (Free TV)

HORSBURGH, Ms Jo, Head of Drama, Nine Network (Free TV)

ROONEY, Ms Jo, Drama Executive, Nine Network (Free TV)

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

Ms Flynn—On behalf of our industry, thank you for the opportunity to address the committee and to speak to our submission on the film production offsets package. We represent the 48 commercial free-to-air television licensees in Australia. Free TV congratulates the government on this package, which we are confident will encourage increased production of Australia content by making production more cost effective. Free TV strongly supports the application of the producer offset equally across all sources of production of Australian programming. If the package is to achieve its stated aim of stimulating and supporting all forms of Australian production, it is important that all producers are affected equally.

Concerns that the offset will result in broadcasters choosing to commission in-house productions over independent productions are unfounded. We went through a similar exercise before my time when SPAA went to the High Court over the fact that under CER New Zealand programs were allowed to count as production for the Australian content standard. SPAA argued most vigorously that all that would happen was that the broadcasters would replace Australian production with cheap New Zealand content. In the six or seven years since that court case, that has never happened. I think the only productions that we have seen from New Zealand have been the film *Once Were Warriors* and a couple of documentaries—none of which, as I understand it, have counted to the drama quota. We have seen an exercise in crying wolf on these things in the past.

By way of background, according to the official ACMA figures for 2004-05, which are the last figures available—I gather that the figures for 2005-06 are coming out at the end of this week—commercial free-to-air broadcasters spent over $113 million on drama production, which was up 26 per cent over five years. We broadcast over 500 hours of first release Australia drama and 96 hours of first release children's drama.

There is, and has been for a number of years, a healthy balance between in-house and external drama production—and we will talk to that in a minute. There is nothing in this legislation that will change that balance. Broadcasters will always make production programming decisions based on new and creative concepts which appeal to audiences, regardless of where they come from.

It is also important to remember that there are already significant incentives for broadcasters to commission independent productions. Funding through the FFC, for instance, is limited to independent producers. Under the Australian content standard point system for adult drama, a higher number of points are awarded to independent productions with a licence

fee over a set amount. I am sure you will have many questions and that is why my colleagues are here today to answer them. Thank you.

CHAIR—Thank you. Would anyone else like to make a contribution?

Ms Horsburgh—Thank you for the opportunity to speak to this. I would like to immediately address some of the concerns that continue to be raised by SPAA and to, hopefully, provide some comfort on some of these issues. I want to address the concept that if we were to access rebates high-end production would disappear. It is a fundamentally unsound perception. Speaking from Nine's point of view, high-end drama is in fact more cost effective for us to make than longer running series, and this is because of the point system. For instance, *Sea Patrol*, as a miniseries, carries greater points than a long-running series like *McLeod's* and therefore becomes more cost effective for us to make. Consequently, high-end drama is a way of branding the network.

CHAIR—What is the difference with the high-end drama?

Ms Horsburgh—High-end drama is something that actually has a big budget. *Sea Patrol* has a big budget because of the fact that it is set on the ocean and the Navy are involved.

Ms Flynn—Both of Channel 9's major dramas which are on at the moment, *Sea Patrol* and *McLeod's*, are independently produced.

Ms Horsburgh—Yes, they are, and that is not going to change because that is the way we can brand our network—by doing high-end drama, drama that looks good and is quality. From our perception, Nine is a producer. When we operate as a producer, we are not doing that in lieu of dealing with independent producers. For instance, in the eight productions that we currently have going, seven of them are with independent producers and only one is what you might call in house, and that is with an independent producer. I would also like to define 'in house' from our perspective. Our model of in house is working with an independent producer. It is purely a business model that enables an independent producer to be able to make their creative project, and all the crew are taken from the freelance community. In that sense, it is no different than if we were one of the larger production houses. Whether it is Southern Star, Beyond or Fremantle Media, they all access their crew, production people, creatives, writers, directors—everybody—from the community at large. In that sense, in this instance, we are no different; we are exactly the same. It is a flexible model for us to use.

Ms Flynn—I would like to make the point that all Channel 10's production is outsourced through independent production houses, Channel 9's major productions at the moment are independently produced and Channel 7 has a mix—and I am sure John can speak to this in a minute. In fact, I noted that even SPAA quoted that the figure at the present time was somewhere between 78 and 81 per cent for independent productions. There is no suggestion that networks are suddenly going to want to reinvent the infrastructure to bring all this stuff back in house. It does not make any sense. John, do you want to talk about the Seven model?

Mr Holmes—I think it is all cultural. We have a slightly different culture at Channel 7. We have in the past been much more involved in in-house drama. We have always outsourced, if that is the correct expression, telemovies or miniseries—that high end that Jo was talking about. All our children's drama is totally independently produced. We have had a lot of success with our own in-house drama, but earlier Mr Burnett talked of a fear that we would in

fact turn our backs on independent producers and their ideas. This is not true. Simply, the idea is the thing. If it is a good idea, we are going to grab it no matter where it comes from. Whether it an independent or an in-house production, we would make it.

CHAIR—At the various networks, what is the extent of the in-house production infrastructure—cameras and sets and paid staff?

Ms Horsburgh—Channel 9's model is different from Channel 7's. Our model is that we operate purely as a production company. We have an independent producer. We set up a business deal with them and they go ahead and hire all the head creators—the writers, the designers, the directors—and everybody else, such as the grips, gaffers, crew and DIPs. Nobody works for Channel 9. They all now work for the production. But it is in house in the sense that we are operating as the executive producer, in effect. Everyone is hired for the run of the series, exactly as you would be hired if you were working for Southern Star and Southern Star was making something for a network. They would go out and source all your creative people and crew from the freelance community. There is no difference.

CHAIR—Who are your contractual arrangements with? Who do those staff have contractual relationships with?

Ms Horsburgh—Their contractual arrangements are with the producer and with the project. In the case we were referring to it is called Canal Road. Everyone is contracted to that project, which is no different than if they were contracted to work on *Police Rescue*.

CHAIR—And then you have a contractual arrangement with the producer of—

Ms Horsburgh—We have hired the independent producer as if we were any other independent production house. We hire that producer because we feel that producer is bringing the right creative energy and creative vision for that show.

CHAIR—So are you effectively providing a lump sum for the supply of the product as opposed to individual contractual arrangements with gaffers and cameraman and actors and whatever?

Ms Rooney—We would have a budget and we would set up a company. That budget goes into that company as cash flow and everyone is paid from that.

Senator BERNARDI—Ms Flynn, what business is FreeTV in? Where are the revenues derived from?

Ms Flynn—They are derived from advertising.

Senator BERNARDI—So you are in the business of selling advertising spots?

Ms Flynn—That is right. That is our business.

Senator BERNARDI—What then is the attraction—and there must be an attraction—about producing in house? You retain the royalties or the ongoing stream of income.

Ms Flynn—Let us not forget that the history of drama in Australia was largely built on the back of television. Television gave everybody their first start, whether it was through the ABC, Channel 7 or Channel 9, which were the original stations. It was not an accident that 20 years later we saw a flourishing film industry emerge in Australia. We have been the backbone of drama; we continue to be the backbone of drama. Film gets all the attention,

because they are the sexy part of the industry and can roll out the top-flight international stars and all the rest of it. But broadcasting—television—is what has kept the audiovisual production industry in Australia alive for over 50 years, and we are very proud of the history that we have.

Traditionally, in-house production was the main form of production but Ten moved away from that model back in the early 1990s and they have shown no sign of wanting to go back to that model after having been in receivership and then emerging from it and going through a fairly difficult time to re-establish themselves. Channel 7, which has a long history of making fantastic Australian dramas, is the only network that has kept the in-house tradition alive and flourishing. We heard a lot from SPAA about how we are a highly protected oligopoly et cetera. But I would point out that this highly protected oligopoly paid over $251 million in licence fees to consolidated revenue on top of our normal taxes in 2004-05—we are waiting to see the next set of figures, which will probably be higher—and we continue to do so. Over the last 10 years we have contributed over $2 billion in licence fees to consolidated revenue on top of our normal taxes. The Australian content standard is not about protecting the independent production industry. The Australian content standard is very specific and I am happy to table it for the committee. It says:

> The object of this standard is to promote the role of commercial television broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control.

So there is no argument. Now there is an incentive that was put into the last review which says that you get more points if you have an independent production that has a certain set fee. That has not changed; nothing in this legislation will change that.

Senator BERNARDI—I accept that. My question was meant to reflect on what SPAA told us. I asked them directly what the incentive is for a television network to produce in house rather than pay 30 per cent of the production cost as a licence. They said that it was about external sales, revenues and 100 per cent licensing ownership, I guess.

Ms Horsburgh—From Nine's point of view, what you are looking for is basically a flexible business model, if you like. So we are looking for a mix of what I call 'high end' and what I call 'middle-range budgets', and we have only just now entered into this situation with Canal Road. That is giving us a way of approaching drama production that enables us to make the best idea that comes through the door, whether it is in house or from—

Senator BERNARDI—You do not care where you get it from.

Ms Horsburgh—Neither does the audience.

Senator BERNARDI—If it is a good idea it is going to help with the ratings.

Ms Horsburgh—Yes, we are absolutely ratings driven. If it does not rate, it tanks.

Senator BERNARDI—If you are going to buy drama from an independent product house and you know that they are getting a 20 per cent tax rebate, which effectively reduces their costs, is there a risk that it is a buyers' market? From the licensing perspective, you can say, 'Well, hang on a second, we are going to pay you less.'

Ms Horsburgh—No.

Ms Rooney—No. The licence fee remains the same; it will not be reduced. If it is an FFC project it is set. If it is ACMA it is set at a point—I think it is about $340,000 per hour—

Ms Horsburgh—For independent production.

Ms Rooney—For independent production—to qualify for three points.

Senator BERNARDI—What were they referring to as 30 per cent or 25 per cent of the cost of actual production from a licensing fee.

Ms Rooney—I do not know. On a miniseries, if the licence fee is $400,000 and to go to the FFC the production budget is $800,000, that is 50 per cent. That is in the case of some productions. It does vary depending on the production.

Senator BERNARDI—We might have to seek some clarification on that matter. Ms Flynn, you said that $113 million was spent on production last year by the major networks.

Ms Flynn—In 2004-05.

Senator BERNARDI—In-house production.

Ms Flynn—No, all over, on Australian drama—that is what we spent on Australian drama.

Senator BERNARDI—Buying it or licensing it.

Ms Flynn—Yes, buying it or licensing it.

Senator BERNARDI—How much in dollar terms was produced in house?

Ms Flynn—The figures quoted by SPAA were that 78 to 81 per cent of it was independently produced.

Senator BERNARDI—So we are talking about $25 million at most. Even at that level, why should the taxpayers give free-to-air TV a $5 million break?

Ms Flynn—The taxpayers have given through 10B and 10BA, which, unlike what was claimed here, has never been accessed. I understand that is incorrect.

Ms Rooney—My understanding is that Channel 9 accessed 10BA through the Macquarie Film Fund and through the Macquarie Nine Film and Television Fund for a slate of productions in the early nineties and for some series of *McLeod's Daughters*.

Ms Horsburgh—That is correct.

Ms Flynn—The point being, however, that we pay our taxes like everybody else. We are a licensed business and we pay more than our taxes; we pay our super tax on top of our taxes and we are entitled to access tax deductions in the same way anybody else does. We are producers in this business. So the argument that, somehow or another, it is illegitimate does not stand up to any scrutiny.

Senator HURLEY—Just to continue on the issue of accessing subsidies before the 10B: it is not set up in a way which assists broadcasters doing in-house productions to use it—is that right?

Ms Flynn—I think we heard SPAA say that it was clumsy and it was not working for the production industry at large, and we would agree with that. That is why the 20 per cent rebate

is an advance on where we were before. But we are no different from the independent producers in relation to that.

Senator HURLEY—It was not accessed by broadcasters previously because it was simply too difficult?

Ms Flynn—That is my understanding of it.

Senator HURLEY—Perhaps, Mr Holmes, if Channel 7—

CHAIR—I think we heard evidence that it was accessed, but it is the extent of the access I think you are talking about, Senator Hurley.

Senator HURLEY—Yes.

Ms Rooney—And it did not attract the investors that they were hoping to attract.

Ms Horsburgh—That was the point I mentioned: when it was floated, we did not get the investors in; therefore, it became unviable.

Senator HURLEY—Was that also Channel 7's experience?

Mr Holmes—Channel 7 has not actually accessed funds from the government for production for many years. The last was the miniseries, made in Queensland by Liberty Productions, entitled *Through My Eyes*. We do not usually go the subsidy route; we usually fund all our productions 100 per cent and have additional money coming from a distributor attached to the project.

Senator HURLEY—There was also some comment that the broadcasters, as a large business entity, would then access a tax deduction for the expense of production and would then also have access to the producer offset.

Ms Flynn—I do not think our position would be any different from Southern Star or any of the other production houses in that respect, would it?

Ms Horsburgh—We are just talking about production costs.

Ms Rooney—I guess that when you have the rebate it would negate the 20 per cent production costs that you have claimed. I am not quite sure, because I am not into the tax system or into the business, but I imagine it will not in any way be a double dipping because normally the tax law does not allow that.

Senator HURLEY—Let us turn to the two compromises which have been suggested, one of which is that you would be able to access the producer offset above your mandatory requirements.

Ms Flynn—All I am saying is it is still another way of ensuring that we cannot access it, because people do do more than they are mandated but not everyone does more than they are mandated. We are surprised by this argument. We were involved in the discussions—we might not have been involved in discussions with SPAA—but there is nothing in the announcement from the government which says, 'This is for independent producers.' We are completely surprised by the nature of this discussion that, all of a sudden, something is turned around into this big thing about nasty broadcasters, when we understood it was always about

production and, as I said, we are the main underwriters of production in Australia. So I do not think that any of the compromises are genuine compromises.

Senator HURLEY—So the government's stated intention, which is to increase outside investment in the industry plus equity in production, would—certainly under Channel 9's model and possibly for some productions in Channel 7—still be a worthy aim under any new system because you do it under a separate model. Is that right? Do you get any outside equity involved in your productions? You said that you stream all the budget through one organisation. Is there any outside equity involved?

Ms Horsburgh—In the in-house one?

Senator HURLEY—Yes.

Ms Horsburgh—No, not in this one. I cannot really speak for the past. I was not involved at the time, so I do not know what the situation was. The fact of the matter is that every deal is unique. There is no particular 'this deal' or 'that deal' and you either get A or B; every deal is unique, as I understand it. I think Senator Bernardi was trying to get to that earlier on when talking about the back-ends and what have you. I do not think there is a particular model on that. I think that each deal is different and it depends on the deal that is done with the particular independent producer at the time. That is my understanding.

Senator HURLEY—Under mandatory requirements, broadcasters have to have a certain amount of Australian content in their productions.

Ms Flynn—Yes.

Senator HURLEY—So you are producing that anyway—and maybe a little bit above that?

Ms Flynn—Yes.

Senator HURLEY—What difference will this producer offset make? Will it just make it cheaper, basically?

Ms Horsburgh—The hope is that it will mean that you can make more hours—so, for example, you can make a longer-running series because you know that you will have that rebate going back into production. It also might enable you to explore greater diversity in development with an opportunity, knowing that there may be some financial model that you can use to get that up and made. There is always a search for the dollar when trying to get these projects made.

Senator HURLEY—So you are saying that that saving will go towards better production rather than the bottom line of the broadcaster?

Ms Horsburgh—Yes; it goes to production cost.

CHAIR—Better production or more production?

Ms Rooney—Both.

Ms Horsburgh—And, because you have a guaranteed amount coming into production, that hopefully means that you can make more drama.

Senator HURLEY—I will just play the devil's advocate here.

Ms Horsburgh—Sure.

Senator HURLEY—Channel 9 might decide that they are going to get a 20 per cent producer offset in the next few years so they will drop their budget for in-house drama by 10 per cent.

Ms Horsburgh—Drop their budget for in-house drama?

Senator HURLEY—Yes.

Ms Horsburgh—That would be difficult due to the fact that budgets are tied to the points system. If we drop below a certain budget, we basically shoot ourselves in the foot because we do not get the amount of points. They are our compliance points, so we lose our licence if we do not meet that. So it is not logical for us. That is where the mixture comes in. Obviously we have to meet compliance but we are trying to meet compliance in a diverse range of Australian drama. We are hoping that we can do your great big *Sea Patrol*s, which have a different kind of process.

Senator HURLEY—Mr Holmes, is that your experience as well?

Mr Holmes—I agree with Jo, but there is another way of looking at this, and that is that Australian drama production works pretty well in this country. Certainly that has been our experience at Seven. Putting aside the independent or the in-house production, if Aussie drama works we want more of it. We are now making a lot more than we are required to make. The only reason we are doing that is that viewers tip into it and obviously that is good for our ratings. If there is something that can encourage the Seven Network to make more drama, then it has to be a plus. It is not going to turn us away from those independents; we will still be looking, as I said in my first comment, to the idea. The more ideas we can get through the door, the more programs we will make—and any break is going to help.

CHAIR—Obviously you are all meeting the statutory requirements, but is the programming designed to do that and nothing else or are you in excess of the statutory requirements?

Mr Holmes—We are quite above it. But I go back to my last comment: you can make cheap product—but you have to bury its somewhere and therefore it is a complete waste of money—or you can make quality product. I do not mean that you have to put millions of dollars into it. In Australia we make very good programming at a very reasonable rate. That goes back to our history of making serials. We do a lot with our dollar in television. But I think we need to encourage the middle band—the series television. We started one last night and we are shooting a pilot as we speak—and we still have two very successful shows on air. But we do not stop there; we want more—again, because it is working for us. We will try and grab any idea that comes through and make it.

CHAIR—What is precluding any of the broadcasters at the moment from putting more locally produced programs on?

Ms Flynn—We are not saying that the legislation as it currently exists prevents that.

CHAIR—That is not the question. What is stopping you at the moment from putting more Australian programs on—whether it is high end or whatever? Is it cost?

Mr Holmes—It is the savage costs of drama production.

Ms Flynn—Costs.

Ms Horsburgh—How do you finance it?

CHAIR—I presume the argument from SPAA and others is that you will effectively renegotiate. If a production is worth X at the moment, then you will be paying X minus 20 per cent and that will be the end of the matter—you are meeting your statutory requirements, so there is no incentive to reinvest those savings in further production.

Ms Flynn—You still have to meet your points.

Ms Horsburgh—Yes, we still have to meet our points. As to the concept that we are just going to take 20 per cent, it is done on a project-by-project basis and how the rebate is used is something that is negotiated with the independent producer. Their level of equity is also part of those negotiations, and they are not shy in debating these deals. But what we are looking for is a flexible business process in dealing with independent producers. Again, as I said, all our productions are with independent producers.

CHAIR—Ms Flynn, there was an aside between you and Ms Horsburgh about the points. Can you elaborate on that?

Ms Flynn—Under the Australian content standards there is an incentive: if you have an independent production with a licence fee of $300,000—it says $300,000 here, but it has gone up since this was released—

Ms Rooney—It is $340,000.

Ms Flynn—then you get three points. But any other drama gets only 2.5 points. So if you have a set amount of points that you have to meet and there is an incentive for an independent production, then you are still going to have to meet the points requirement for the spend on the licence fee to get the three points.

Ms Horsburgh—You have to make more hours.

Ms Rooney—Seven has to make more hours of television to get the same amount of points as independent productions.

Ms Flynn—Because of their in-house—

Senator BERNARDI—If XYZ Production Pty Ltd comes to you with an idea for a drama or a series or something like that, and you say that you would like to see a pilot or whatever the case might be, do you then fund it in its entirety to be produced into a series, or do you give them an advance licence fee? How does it work? Do they have to go and raise money independently?

Ms Horsburgh—Every project is different. In the case of *Sea Patrol*, where the FFC is involved, we gave development money to the McElroys to develop the scripts and the concepts. The McElroys attempted to find overseas money. When that did not work, they were able to access the FFC miniseries guidelines. But they had to have a domestic buyer—which was us. We helped with the DG and we did about $1 million worth of development.

Senator BERNARDI—What was your development money? If it is commercial-in-confidence I do not need to know.

Ms Horsburgh—Across the series it was about $1 million.

CHAIR—You put $1 million into development of the series. You then became the buyer of right in it, but by any external measure it is still not related to a broadcaster, even though you had sunk $1 million into it to start with.

Ms Horsburgh—That is development. Networks sink $1 million in, in development.

CHAIR—But it is still an independent production even though you have funded that to $1 million?

Ms Rooney—We never get development money back unless it is—

Ms Horsburgh—We would cash flow about 80 per cent of that budget into the production and then get it back in various forms.

CHAIR—It just strikes me as unusual that you can fund 80 per cent of the initial development and it still be deemed an independent production. Thank you; you have clarified that for me and I appreciated it.

Senator WEBBER—I was trying to understand before—you have completely confused me now—about the point system.

Ms Flynn—I am having difficulty seeing you because of the window. The sun is coming in behind. I am sorry.

Senator WEBBER—It is not often I end up with a halo—in fact, this would have to be the one and only time!

CHAIR—We think you are an angel!

Senator WEBBER—You have not heard the question yet! I think all of us in this room are atypical television watchers in that we are hardly ever home so we do not get to watch anything. If I do not like reality television how much Australian content and what proportion of your Australian content is out there? It seems to me that there is not much independent production of reality television, unless I have completely misunderstood what is going on.

Ms Flynn—Southern Star produces *Big Brother*. Most of it is independently produced.

Senator WEBBER—Most of it is independently produced?

Ms Horsburgh—Yes. That is not drama; that is a separate thing.

Senator WEBBER—But it is Australian content?

Ms Flynn—It is Australian content that does not count to the drama points.

Senator WEBBER—Right. I am very easily confused.

Ms Flynn—It is very complex. In total, in relation to Australia, 70 per cent of broadcasters' costs go to Australian content production. That amounted to $800 million last time we looked at these figures. That consists of news, current affairs, reality TV, drama, and sport of all the various types. But 70 per cent of our production costs are for local content.

We also have a 55 per cent quota rule, which means that 55 per cent of the hours that you broadcast must be Australian content. Then the drama subquota sits in underneath that. So for the Australian content standard, which I am happy to give you a copy of and to table—

Senator WEBBER—Will I understand it?

Ms Flynn—As someone who came into this without any prior knowledge in 2001, I would suggest that you would probably need to take time to sit down and go through it. It is quite complex and complicated, and it is very black-letter regulation.

Senator WEBBER—Senator Bernardi seems to understand it so perhaps I will talk to him.

Ms Flynn—I can provide those statistics for you on the actual spend but I seem to have lost track of them in this folder. Our broadcasting financial results should be out shortly from ACMA. We have to account for all of this to ACMA, so it is not that we are dreaming up the figures; these are the figures that we are licensed to provide to ACMA each year.

CHAIR—I have some very good news for you, Senator Webber. I actually have a copy of the *Broadcasting Services (Australian Content) Standard 2005*, which I am happy for you to chew over, over lunch.

Ms Horsburgh—I would like to make one comment on a concern by SPAA about the possibility that production will become Sydney-centric. One of the important issues to point out is that, for instance, at Network Nine we do not have one project in Sydney. They are in Queensland, Melbourne, WA—everywhere but poor Sydney. We are concerned because we do not have a production in Sydney. We feel that we need to do something about that because we do not feel that we are representing Sydney.

We go where the project takes us and also where the business deal enables us to produce it. Obviously, *Sea Patrol* worked for Queensland because the producers there got assistance from the PFTC and things like that. We go where the business takes us to enable us to make the drama. So we are not focused on Sydney. We are basically following the project.

CHAIR—It is a bit of horses for courses, presumably.

Ms Horsburgh—Yes.

CHAIR—You could not shoot *Sea Patrol* on Lake Wendouree in Ballarat, could you?

Ms Horsburgh—But we thought about it!

Ms Flynn—I am sure the senator would think that is a very good idea.

CHAIR—Particularly at the moment, because it is dry.

Ms Flynn—Could I also say on that point that Channel 10 does all its children's production out of Queensland, and *Big Brother* of course has been produced up until now out of Queensland. So there is a very diverse slate of productions of Australian content and drama across all networks. I am not sure where Channel 7—

Mr Holmes—We are just based in Melbourne and Sydney, mainly because our programs are studio based and that is where our drama studios are.

CHAIR—We have now had completely equal time, for those who are keeping account of it.

Ms Horsburgh—Thank you very much.

CHAIR—Ms Horsburgh, Ms Flynn, Mr Holmes and Ms Rooney, thank you most sincerely for your attendance. It has been a very interesting hour and a half and will only get more interesting, I suspect, so thank you very much.

[12.56 pm]

FLAVEL, Mr Matthew James, Manager, Industry Tax Policy Unit, Department of the Treasury

McDONNELL, Ms Catherine Mary, Head of Business and Legal Affairs, Fox Studios Australia; Fox Filmed Entertainment Australia Pty Ltd; and Bazmark Film II Pty Ltd

HOUSTON, Ms Louise Margaret, Tax Manager, Warner Bros Entertainment Australia Pty Ltd

WELLS, Mr Philip John, Consultant, Warner Bros Australia

Evidence from Mr Flavel was taken via teleconference—

CHAIR—Welcome. Were you present before when I gave the normal introduction to the conduct of these hearings?

Mr Wells—No.

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

Mr Wells, I understand that you have request to make of the committee.

Mr Wells—Yes. We would like to have our evidence presented in camera, if we could, please. There are some sensitivities around commercial-in-confidence matters.

CHAIR—On that basis, I am comfortable with that, but I will ask my colleagues whether they are prepared to consent to that course of action. There being no objection, we will agree to that. We will hang up the phone to our witness in Canberra and now move to in camera.

Evidence was then taken in camera but later resumed in public—

Proceedings suspended from 12.58 pm to 1.19 pm

CHAIR—We will now resume the public hearing. Who would like to make an opening statement?

Mr Wells—Ms Houston is going to talk tax.

CHAIR—Talk tax to us, Ms Houston.

Ms Houston—Thank you, Mr Chairman. Can I give my apologies to you and the senators for how tedious, boring and dry this next little bit is going to be. It relates to how much we

can include of the decline in value and loss on sale of capital assets used in film production. The proposed subsections dealing with this are designed to ensure that the real economic cost of using a capital asset in a production is taken into account in working out the tax offset. The provisions adopt the capital allowances provisions of the Income Tax Act and include in qualifying expenditure the decline in value of the asset, which is the depreciation, and any balancing adjustment—meaning any gain or loss on sale. However, we have identified a situation where, if a production company is part of a tax consolidated group, we will not be able to take into account the effect of economic cost of using the asset.

CHAIR—I am sorry to interrupt you. Do we have Canberra online?

Mr Flavel—Yes, we are here.

Ms Houston—The key issue we are concerned about is where a tax consolidated group has, at some stage in its history, elected to run a low-value pool for dealing with record-keeping requirements of assets that cost less than $1,000. Such an election would have been made for administrative convenience only, as it simplifies record keeping for low-value assets; it has no other tax advantages. Such an election is irrevocable and applies to all members of the tax consolidated group. We believe the intention is that subsection (7) will not allow us to include the balancing adjustment of assets included in the low-value pool as qualifying production expenditure. If this is the case, then a decision made years ago for administrative convenience by one company in a consolidated group may impact on the qualifying expenditure for a production company that did not even exist at the time that the election was made.

We believe the reason suggested for not including the balancing adjustment for items in the low-value pool is that it was thought that it was not possible to identify the decline in value, how much the asset was sold for and what the balancing adjustment might be. This is because when you are actually using the low-value pool for income tax purposes you do not need to do those things. However, we think that if we are both able and willing to perform the necessary calculations, separately to the calculations that we do for income tax return purposes and all the other conditions for claiming the balancing adjustment are met, we should be allowed to treat that balancing adjustment as qualifying production expenditure. We think that this is fair, given the nature of tax consolidated groups and the irrevocable nature of the election to go into the low-value pool. It was clear at the time of introducing the tax consolidation regime that the preference was that corporate groups enter the regime.

We think it would be unfortunate to have unintended consequences on film production offsets, under division 376, that are designed to encourage film production in Australia. We just want to be on a level playing field with all other productions, as though the election some time ago had not been made. We feel that this could be effectively resolved by including a provision in division 376 that, for calculating the amount of qualifying expenditure for film production purposes only, the production company's membership of a consolidated group may be ignored. That is one idea, although there probably are a couple of other technical possibilities for handling the matter. I am very happy to take questions on that, if you have any.

CHAIR—That proposal might provide some equity in relation to film production, but would it not set a precedent in relation to a wider interpretation of the relevant portions of the tax act?

Ms Houston—I think if it is limited just to division 376, which obviously is an incentive provision, that matter can be handled. We are not suggesting that we touch division 40 at all. In fact, we would be very willing to continue doing all the calculations we are doing currently under division 40; it is just that, for division 376 purposes only, we want the ability to do the extra calculations to be able to show that we have made a balancing in adjustment and to include it. I think I understand what you are saying. I think that it could be limited, as long as it is clear that it is for tax offset calculation purposes only.

CHAIR—The Treasury officials perhaps can take on notice that I will be asking for some commentary in relation to that aspect of Ms Houston's evidence. Ms McDonnell, would you like to raise any further matters?

Ms McDonnell—We support and reiterate the submission that Ms Houston has just made because we are in a similar position and have similar views in relation to that issue.

CHAIR—So you have nothing further to add?

Ms McDonnell—No. I think it was eloquently put by Ms Houston.

CHAIR—Yes, it was put very eloquently. Colleagues, do you have any questions?

Senator WEBBER—I am happy to wait and see what Treasury have to say about it. Thank you for raising the issue though.

CHAIR—I will wait for Treasury's comments as well. We were happy to accommodate your request for the in camera part of your evidence. We thank you most sincerely for your attendance today.

Proceedings suspended from 1.27 pm to 2.04 pm

HARRIS, Mr Richard Miles, Chief Executive Officer, South Australian Film Corporation

FLAVEL, Mr Matthew James, Manager, Industry Tax Policy Unit, Department of the Treasury

CHAIR—We will resume these hearings. We are still discussing schedule 10. I welcome Mr Richard Harris, the CEO of the South Australian Film Corporation. Mr Harris, have you appeared before parliamentary committees before?

Mr Harris—Yes.

CHAIR—So you are aware of the normal discussion the chair has with witnesses about proceedings?

Mr Harris—Yes.

CHAIR—Mr Harris, if you would like to make an opening statement then please do so.

Mr Harris—Thank you for the opportunity to appear today. The SAFC is the South Australian government's lead agency for the development and growth of the screen industries in South Australia. It invests in the development and production of feature films, documentaries, television programs, animations and digital interactive projects. Following the announcement of the film package in the May budget, the SAFC consulted with key industry members in South Australia to gauge their responses to the new proposals. The views of the industry were then communicated to the South Australian Premier, Mike Rann, who subsequently wrote to Minister Brandis. The Premier's letter noted that the South Australian production sector, and consequently the South Australian government, were broadly supportive of the new package but outlined some particular concerns regarding some of the details contained within it. The letter highlighted four key areas: the threshold for feature films set at $1 million of QAPE, or qualifying Australian production expenditure, which was seen as problematic; the QAPE threshold for documentary, which was set at $500,000, was also too high; the certification process was flawed because it required financing to be in place prior to application for certification; and, finally, the emphasis on the guaranteed theatrical distribution for feature films was inflexible and did not take into account the new realities and digital exhibition pathways for feature films in the new digital landscape.

The letter included an attachment from the production sector in relation to those issues that DCITA had indicated it wished to get some direction on. Key recommendations of the submissions were as follows: firstly, that only independent producers as defined under the Australian content standards should be eligible for the rebate; secondly, that QAPE thresholds should be lower for all forms of production; and, thirdly, that QAPE should include both freight and insurances, including completion bonds, as these are all bona fide costs of doing business in the film sector. The recently announced changes to the film package address a number of the issues that were raised in the Premier's letter, in particular the thresholds for documentary and TV drama and the changes to the certification process which now mean that bona fide development expenses will be allowed. These have been accepted. These are not minor changes and the SAFC welcomes them. The SAFC also welcomes the fact that there is

now clarity about how the Australian content test is going to be administered in the future. The SAFC is very comfortable with a 10BA style test for Australian content.

However the SAFC is still concerned that the threshold for feature films remains at $1 million. This threshold would have excluded films like, for example, *The Castle* and possibly films like *Kenny* and *2:37*—a South Australian film which was selected for Cannes in 2006. These films might have just fallen short of the proposed threshold. There are also concerns about the short film animation QAPE threshold, which has remained at the original level. While the SAFC welcomes the inclusion of freight as a qualifying expense, it maintains that insurance should also be included. Finally the SAFC remains of the view that the new offset announced by the minister should only be available to bona fide independent producers. In this regard the SAFC wishes to express its support for the submission of the Australian Screen Council. On this last matter I wish to make some specific comments as it appears that some of my comments in the media have been used by FreeTV as part of their submission to this committee. While I do not resile from the comments, which I believe are included in an appendix, I wish to make it clear that I believe there are compelling reasons for broadcasters to either be excluded from gaining access to the production offset or, if they are not excluded entirely, the programs that are being made as part of their statutory obligations should be. My view is that if broadcasters gain access to the offset then they will effectively be receiving a government subsidy to meet their content obligations. This is why I believe that there is some merit in the idea of only allowing broadcasters to claim the rebate when the program does not count towards their content obligations, particularly their sub quota obligations in regard to drama, documentary and children's programming.

However, it is my view that, whether or not the broadcasters are able to access the rebate, the major concern remains. That is the extent to which broadcasters dealing with independents in the future will be able to use their market power to coerce producers to hand over their rebate as part of their commercial dealings. In other words, the rebate, which was supposed to be about building equity and sustaining businesses, could be lost. If this is the result, the introduction of an offset for TV production could well end up being a pyrrhic victory for the independent sector. Ultimately, I guess this is probably an issue more for the ACCC and the Trade Practices Act; however, I am pleased to see that the minister has clearly identified it as an issue to monitor over time. That is my opening statement. I am happy to take any questions.

CHAIR—Thanks, Mr Harris. You made some comments recently on *The Media Report* on Radio National. You said:

I don't think they are going to suddenly change their business models, the way that they produce programs, because they suddenly can get access to 20%.

The interviewer said:

So they won't be moving towards going back to doing more in-house?

You said:

I doubt that that would be the case, that they don't suddenly look at this 20% and suddenly decide to shift their entire business model on the basis of that; I just don't think it's enough. And it's also

important to bear in mind that organisations like the one I currently work for, the South Australian Film Corporation, will be continuing to have the same sort of guidelines.

Is it still your position that you do not think that there will be a sudden shift to in-house, as indicated in the ABC report?

Mr Harris—No, I don't. My view is that I am not convinced that that would be enough for them to change their model. I guess the question is: in five years time, if they did, what would be the view of government? Would that be the actual outcome that government was looking for? My view is that it would not be a great outcome. My view is also that it is an unlikely outcome, but I think it would be something that the government would be concerned about if it was an outcome.

CHAIR—The argument from screen producers and others has been premised on their belief that there will be a significant shift away from the independent sector back to in-house. You obviously disagree with that. On what basis do you believe that broadcasters should be excluded? If the fundamental premise of the counterargument is one that you do not agree with, on what basis do you think that broadcasters should be excluded?

Mr Harris—I think, as I have outlined, that there is an in-principle argument that is about the extent to which a broadcaster that has a privileged access to a public resource is then able to use a government subsidy to fund the obligations that they have in order to use that public resource. From an in-principle point of view, that does seem to be an anomaly. It is a little bit like a double-dip, as far as I am concerned. I think that there is enough of an argument, beyond the fact of whether they would actually bring everything in-house or externally produce, to warrant a look at what the broadcasters are actually doing and what they should be allowed to access in order to do that.

CHAIR—What access are you referring to?

Mr Harris—Access to the rebate. If they were able to access the rebate, they would essentially be getting two parts of a government offering. They would be getting the rebate and they would also be getting privileged access to what is really one of the last protected markets in the country.

CHAIR—What privileged access?

Mr Harris—The broadcasters get privileged access to spectrum. No-one else is allowed to have it; they have to get licences. It is one of the few remaining purely protected markets. In order to get access to that privileged spectrum, the quid pro quo is to do Australian content. For me, that is the equation. They are then saying, 'We will do that, but we also want to get the government subsidy to assist us to do that.'

CHAIR—Thank you for clarifying your position on that.

Senator MURRAY—There is an additional leg to that argument that an economist would throw in, but I do not know if the reality will fit the theory. What the economist will say is that, where a restricted facility is provided, those who benefit from that are able then to charge or achieve monopoly rents—in other words, excessive profits.

Mr Harris—Yes.

Senator MURRAY—In return for receiving those excessive profits, the government has laid on what are essentially customer service obligations. Is it your view that those who are licensed do in fact generate far higher profits than if it were an open and competitive industry and, because they get those higher profits, they therefore do not warrant further subsidy? Is that accurate?

Mr Harris—Pretty clearly that would be my position. Absolutely. The problem you have is that Australian content is the expensive end. If you wish to buy American content you can buy it much cheaper than the Australian content, so they are the obligations that you put on those stations in order to maintain that monopoly.

Senator WEBBER—Thank you for your earlier explanation. I am finding this issue more and more complicated the more I listen, although that has helped me to clarify a number of points. If we accept what has been put to us by the independents as the worst-case scenario, with your knowledge of the industry—bearing in mind that we seem to deal with tax bills every second month at the moment; there is always a tax law amendment bill somewhere—if we promise to keep this under review, how long would it take for us to see those adverse outcomes, so that then perhaps we could review it and rectify the situation?

Mr Harris—It would be hard to tell. I think FreeTV this morning referred to Project Blue Sky and the New Zealand decision. There was some concern about how that would pan out. It is now 10 years down the track and there has been very little impact from that. I would imagine that if the government turned around in three to five years and found that there was clear evidence that broadcasters were bringing production in-house, that would be enough to consider it. That is the sort of time frame. How quickly those broadcasters are looking at using this offset and changing those strategies will probably take something of that order. Whether they bring stuff in-house or they continue to externally commission, my concern is more about the pressure that they are going to be using with those independent producers. The intention was for this offset to provide some additional equity for those producers. Whether they will be able to hold onto that to build their businesses is a very different question. The minister has indicated that that is something that they want to keep a view on. I think that that is an important thing to monitor—again, within three years—to see the extent to which they have been able to build those businesses on that.

CHAIR—I think there is de facto acknowledgement from FreeTV that, effectively, equity probably would not remain with the independent producers. They were indicating that if the costs were reduced then they would be looking to commission more local content production. I would presume that the only way that costs could be reduced would be if the equity of the independents were reduced accordingly. There seemed to be a de facto acknowledgement of that.

As you said in your interview on the ABC, it is a huge shift in the business model for Channel 9 and Channel 10 to reverse what has been a corporate decision of some time to not have these in-house productions. So it would be pretty obvious, I imagine, if those two were starting to move in-house. It would probably be a little more difficult to ascertain with Channel 7, but with the other two I imagine it would be pretty obvious pretty quickly, wouldn't it?

Mr Harris—I would have thought so.

Senator BERNARDI—What is the fear? Is it about job losses within the industry? If there was greater production in-house by the major networks, wouldn't it see a transfer of skills from one particular employer to another?

Mr Harris—The overall industry view is not about job losses. As you can imagine, if the quantum is increasing or staying the same, there are the same levels of employment whether you are working for an in-house or an external commissioned program. I think the issue is more an in-principle one about a sustainable, independent sector which exists outside of the broadcasters and is able to create programs, sell them to broadcasters here and overseas, and the extent to which they are able to build their businesses and not be merely outsourced service providers in a very limited way. The idea—and one of the things the industry grabbed onto with this proposal—was very focused around these businesses and the ability to maintain ongoing production. Clearly, the broadcasters in Australia will for the foreseeable future be the key drivers, but the future is one in which the role of the broadcasters is declining. The ways of being able to get projects out to the world through the internet and other means are increasing. The capacity for an independent sector to build for this future using these rebates—they are talking now to the broadcasters, but in the future who knows who they are going to be talking to, who they are going to be doing business with—was what the industry was looking towards when they were talking to the government. You can see that the broadcasters' audience is fragmenting and advertising is disappearing to the internet and to a whole range of other areas where you are getting programming from. Within the context of all that, it is more about how you build an industry based around not just employment but intellectual property and licensing. My concern is that the broadcaster—and I am not sure what mechanisms you put in to deal with it—are going to be saying: 'Here's that 20 per cent. We are going to swap it for exactly what we wanted before but we also want that 20 per cent.' That is just the market power that they continue to have.

Senator BERNARDI—I asked before about whether—adding this figure now—a billion-dollar movie house or a TV house that is not a broadcaster is classified as an independent, and the answer is: yes, it is. It kind of says that it is not the little guy versus the powerful oligarchs, or whatever was presented before. There are these very powerful, independent operators that exert a lot of influence in distribution, not just through broadcasting. Do you then extend this to who owns broadband capacity? If one company controls broadband, are they then a broadcaster—they are not under the definition—if movies and content are going to be downloaded from the internet like they are now? You can get *Desperate Housewives*—I don't watch it, but you can—from the internet.

Mr Harris—The question is: if a Google Australia decided to get involved in production, is that an independent because it does not own a broadcaster, despite the fact that it has probably got more resources than Channel 9?

Senator BERNARDI—Or Warner Brothers or any of these movie houses.

Mr Harris—Or Village Roadshow or someone like that. Absolutely. I think that the idea of what constitutes an independent is clearly one which is constantly prone to pressure and is a grey area. I think an important principle is the capacity of companies which are outside those

kinds of vertically integrated structures to maintain and create a future for themselves. Someone could create a Kennedy Miller—which ended up making *Happy Feet*—that is a production company that can get into the business of production and continue to develop a critical mass of production. The previous system was too focused probably on a film-by-film kind of production model, which is why most of the broadcasters did not use 10BA and 10B—the question you asked before. Those tax measures were very much project by project, whereas this new system is a business rebate system and it is about investing in your business. My hope for the rebate system is that in five years time we have created one or two Kennedy Millers or whoever they might be—those sorts of companies that are in the ongoing business of production, not necessarily having to be tied to having a vertically integrated structure. That was the hope of the new system.

Senator BERNARDI—Given that you are hoping to build a sustainable industry, or hoping this will support a sustainable industry that is going to continue to roll out content, is there a risk? And given the almost insatiable demand for content via the internet, pay TV and free to air, is there a risk that we are going to see a decline in the quality of Australian production, because of the pressures to continue to pump it out?

Mr Harris—There is always a pressure for us to do it. I hope you don't mind my language, but if they are going to be making crap I would prefer that we made some of that crap as well. Overall, there is going to be ongoing pressure for broadcasters and others to bring costs down, but funnily enough, just when I thought we had almost seen the end of the quality Australian production, a *Sea Patrol* comes along where the production costs are actually higher than any other production in Australian history. So you suddenly see a production where the broadcaster is clearly putting a ring around it and saying, 'We are the home of quality production.' I think there are pressures going both ways.

Senator BERNARDI—*Sea Patrol* is an interesting point, because it is an independent production, isn't it?

Mr Harris—Yes.

Senator BERNARDI—And yet we were told earlier that 80 per cent of the development costs were met by a television network.

Mr Harris—I am not sure I can really comment on those development costs. They did seem rather high—

Senator BERNARDI—It is a high-quality production.

Mr Harris—If it is a high quality production, I would like to know where all those costs go. Eighty per cent of the development costs, certainly—how much they are putting into the production costs I do not know either. A chunk of those production costs are actually being put in by the Film Finance Corporation, and I am not sure what international sales have been like.

Senator BERNARDI—Do you see that it is very hard to reconcile that and say, 'That is an independent production,' when the only reason it is actually going is because it was funded by a broadcasting network, whether it is 80 per cent or what. A million dollars is a lot of money for development. It is hard to say, 'Oh, yes, it is independent'.

Mr Harris—That is right. In some ways it does look like a dependent producer rather than an independent producer. But it is a model where, even in the UK—where they have independent producers—the broadcaster will come in, for the production budget, with somewhere close to 100 per cent. But they also have regulations which say the sorts of rights that that producer must control or can control and then take to sell to the rest of the world. Australia is in a very difficult position because, as we heard in the 1990s when all of the broadcasters were going broke, the licence fees were dropped very low and they have essentially not increased since that time. So the contribution of the broadcasters to the budget has stayed relatively static.

Senator BERNARDI—It was not only broadcasters that were going broke in the 1990s, though. Circumstances were pretty tough.

Mr Harris—Sure, but that is what happened. The licence fees were brought very low, and since that time the licence fees have stayed low. The producers have been expected to meet the gap and effectively deficit finance in the hope that they will make international sales to cover that.

Senator BERNARDI—Is it true that it is 25 per cent or 30 per cent? That is what we were told earlier. The licensing fee for a domestic free-to-air TV program will pay 30 per cent of their production—

Mr Harris—Something like that. There is a big gap for the producer to somehow fill. The idea, we thought, when we heard that there was going to be something like a TV rebate or an offset, was that that 20 per cent would help to fill that gap. The question is the extent to which that actually turns out to be a reality or not. That is the thing I am concerned about.

CHAIR—Mr Harris, we have this conundrum, haven't we? In its broadest sense this offset has been designed not only to provide some equity but to expand independent—

Mr Harris—Yes, to increase production.

CHAIR—Yes, and not necessarily tied to the role or otherwise of the broadcasters. They are part of it but, from what evidence you have given us, the hope is that this will expand into international markets et cetera. There may well be some broadcast exposure in that—I am sure there probably is—but, for the sake of the argument, we are talking about the domestic side. Is there a risk of getting too tied up with the relationship with the broadcasters and the potential for them to bastardise, for want of a better word, the system with the offset and of not having enough focus on the potential for the growth of the industry?

Mr Harris—Of the industry overall?

CHAIR—Yes.

Mr Harris—My view is that probably overall, and even with the broadcasters overall, this will increase the pie and that the independents will probably have an increase overall as well. The real question is this. I would certainly have no problem if the broadcasters were taken out. But as to if they were included, I think that a lot of the changes that actually went through, the ones I mentioned before, have actually outweighed the problem of the broadcasters, in my view. The real problem with the broadcasters is how you manage to

continue to support the independents who are continuing to deal with the broadcasters to actually have something that allows them to not be so dependent on the broadcasters.

CHAIR—Which ostensibly this is designed to do?

Mr Harris—One would hope so.

CHAIR—As there are no further questions, I would say I have found that very interesting. It was, dare I say, an independent assessment of the issues—and without any offsets too, Mr Harris, which is even better news. I thank you most sincerely. That was very interesting.

[2.31 pm]

CAMERON, Mr James David Alan, Chief General Manager, Arts and Sport, Department of Communications, Information Technology and the Arts

YOUNG, Mr Peter, General Manager, Film and Digital Content Branch, Department of Communications, Information Technology and the Arts

FLAVEL, Mr Matthew James, Manager, Industry Tax Policy Unit, Department of the Treasury

Evidence was taken via teleconference

CHAIR—Welcome. I do not know whether, before we have questions, you want to make any opening comments or you want to address some of the matters that have been raised over the last couple of hours. To a certain extent I am in your hands.

Mr Flavel—Chair, we would be happy just to take questions. We have listened to all of the discussion so far, and obviously there has been some quite fruitful discussion. It may be more useful if you were to open it up to questions.

CHAIR—Okay, Mr Flavel. We will have questions.

Senator HURLEY—Could I get right to the heart of it and ask about the possible compromises. It is suggested by some of the independent operators that if the broadcasters are to be eased out in some way, one way—the first way they mentioned—would be that the producer offset only apply to that part of their production which is greater than the mandatory requirement. Secondly, I think their suggestion was that there would be no tax deduction where there was an offset or no offset where there was a tax deduction. Could you comment on those two possibilities, please.

Mr Cameron—Yes. With your indulgence I might give a few contextual comments, about some of the support measures that exist and the impact of the rebate, and then go to those specific compromise measures. As a general point I think it is worth noting that there are already a number of mechanisms by which the government supports the independent production sector in specific ways. One of those was discussed in a little bit of detail earlier today by the free-to-air broadcasters, which is the fact that the quota points system which is administered by the Australian Communications and Media Authority for commercial television broadcasters incorporates different points levels for independent, as opposed to in-house, productions, thus making it more attractive to broadcasters to engage in independent production in order to meet their quota.

In addition to that, the Australian Broadcasting Corporation and SBS, which are not themselves subject to any particular regulated Australian content rules, do receive funding from the government which is specifically provided for the purposes of developing independently produced drama and documentary programming. SBS Independent gets $10 million a year and the Australian Broadcasting Corporation receives a similar amount of money which is devoted to independent production.

The pay television drama channels are obliged to spend an amount equivalent to 10 per cent of their revenue on new Australian drama programming on an annual basis, although there are some rolling arrangements to take into account the variation over time. With the pay television broadcasting arrangements, there aren't any specific measures to promote independent production there. But, as a general rule, pay television channels have limited in-house production capability.

In relation to the broadcasting operators, depending on the type of operator, they have either regulatory or funding arrangements which encourage them to maintain a level of production which is independently sourced. In addition, I think it was mentioned earlier by Mr Harris that a number of the state and Commonwealth film agencies have funding guidelines which indicate that they will not co-invest in projects which are in-house produced. The FFC is a particular example of that. We would expect that those arrangements would move into the new environment and sit alongside the producer offset. For example, where an independent production was in receipt of the rebate but acquired additional funding to go ahead, the producers would be able to seek co-investment by the new merged screen agency in the future; whereas broadcasters of in-house productions, while they may be able to access the rebate, would not have available to them that additional source of financing. I think, again, that provides the mechanism for independent productions to gain a level of subsidy over and above that available for in-house productions.

More generally, I think it is also worth noting that the producer offset mechanism is designed to promote a range of outcomes, one of which is an expansion in the level of Australian production activity. The second is that, by creating a mechanism which provides a certain and clear source of government support, it provides a mechanism by which producers are able to go to the market and source increased levels of private investment with the hope that the end product of their productions is more clearly focused on audience interests and audience outcomes via the marketplace. Finally, as a number of people have mentioned, it is designed to enable independent producers, in particular, to take advantage of the capacity to retain a level of equity where they are able to do so and where they can negotiate in the context of a broader financing arrangement.

In relation to the two compromises that have been suggested by the Screen Producers Association and some other submitters, I think the key consideration there—and, again it was mentioned by Mr Harris—is that there is some concern that broadcasters should not be able to meet their quotas via productions that have received a level of subsidy. I think it is worth noting that broadcasters have historically met their quotas via productions that have received, either directly or indirectly, a level of subsidy from the government via the 10B or 10BA tax measures that are to be replaced by this producer offset, although it is noteworthy that, more generally, they have not been highly used by any sectors of the production sector.

Productions have also been in receipt of direct financing from the Film Finance Corporation or the other Australian film agencies and often from state film agencies. So we already have a situation where programs that are produced in order to meet the Australian broadcast quotas are in receipt of a level of subsidy. Arguably, a compromise arrangement that broadcasters should not be able to receive the produced offset for in-house productions until they have met that quota would not actually change that situation because, to the extent that

independently produced programs are made to meet that quota, they will still be in receipt of the rebate and potentially in receipt of direct financing from the screen agency. So there would still be a level of ongoing subsidy for programs produced which are used by broadcasters to meet their quota.

There are some practical implementation issues that I think are worth noting in relation to putting in place that compromise mechanism that is proposed. One is that the compromise mechanism appears to be focused specifically on the commercial free-to-air broadcasters. I mentioned before that the national broadcasters have no specific regulatory obligations in relation to Australian content, and the pay TV broadcasters have a different set of obligations, which are based on their spend on new production. This compromise mechanism appears to be directed specifically at the commercial free-to-air broadcasters. The commercial free-to-air broadcaster quota arrangement counts points for programs when they are broadcast, and often that will be a significant period of time after they have been produced. In fact, those points systems are based on both annual and three-yearly calculations of the points.

It seems to me that there is potential for quite a complex set of rules to be put in place to reconcile when a program, once it has been completed, has subsequently been used to meet the points system and—to the extent that that is a significant period after the program has been completed, and it would otherwise have been able to access the rebate—the cost of money, if I can use that term, of awaiting that points system. That would have a potentially substantial impact on the value of the offset, given that the broadcaster would have to wait for a period of time.

In relation to the second compromise, I wonder whether Mr Flavel from the Treasury has a comment in relation to the tax deductibility issue.

Mr Flavel—Yes. Regardless of the way in which it is done—and I think that the tax deductibility type arrangement is just a way of doing it—it does not negate the policy considerations, which Mr Cameron has outlined previously. I am not really sure I understand the intent. It seems to be suggesting that if something were not able to be deducted under the tax law then it would somehow be eligible for a rebate. That struck me as being a little strange, I must say, given that the tax law does not make any judgements other than whether an expense has been legitimately incurred in the pursuit of business.

CHAIR—Which compromise was that?

Senator HURLEY—They had two compromises and they both went to the double dipping thing—that big corporations, the broadcasters, could claim a tax deduction for their in-house production as expenses and also get the producer offset. They were saying that they should not be allowed to double dip in that way.

CHAIR—Thank you.

Mr Flavel—I think we have covered off on that one. On a technical note, they did mention deductible, and I think they mean deductible under the general deductibility provisions. I think they mentioned section 51, which is the old Income Tax Act. It is now section 8.1, which is about the general deductibility provision.

Senator HURLEY—I presume that in the case of the tax deductibility—the problem that Mr Cameron referred to of not knowing at the time of filling in the tax return whether that particular production was going to be used—the mandatory requirement would also come into play.

Mr Flavel—That would be right.

Senator HURLEY—And if it were so, you might have to have a retrospective tax claim going back three years.

Mr Flavel—Also, the producer offset requires the film or production to be completed before the amount of the offset can be paid. The general provisions in the income tax law work on a financial year or an income year basis. Even within an individual production, regardless of where it was used, you start to introduce a huge range of complexity. For instance, some things would ordinarily be deductible at the end of an income year but the production has not finished and, therefore, may or may not qualify for a tax offset, which may or may not be eligible depending on where that production is used. It seems to be introducing a massive layer of complexity and still leaves the policy considerations open in any case.

Senator HURLEY—Okay. I think it was Mr Richard Harris that encapsulated the intent of the new system by saying that a large part of it was to encourage the development of a production house or a production business as opposed to the old 10BA system, which was on a production-by-production basis. Would you agree with that synopsis of the way in which the subsidies are being used under the system we are looking at?

Mr Cameron—I think that broadly the answer is yes. The intent of the offset mechanism is to provide the capacity, subject to the producer's wider financial negotiations and sourcing of money, to use that offset amount to effectively retain a level of equity in the production itself, and then, assuming the production is a commercially successful one, hopefully gather a source of income over time from the sale and other distribution of that program. In turn, this will hopefully enable them to engage in future activities and retain a high level of equity over time. Clearly that depends on producers being able to engage in a slate of productions, being able to manage those commercial arrangements and being able to develop a set of program ideas that gather private and other finance sources and which are commercially successful. In a sense, what it does is put the ball in the court of the producers. It provides them with a mechanism on which to build those capacities, but will place some expectation on their part that they can put the surrounding arrangements in place. I would make the point, however, that that is clearly one of the underlying policy objectives which sit behind this mechanism. But it is one of a number that I alluded to earlier, which also include a general expansion of production and a desire for or hope that these arrangements will result in a greater level of audience responsiveness from the production sector.

Senator HURLEY—Yes. In one sense, it does reinforce the point of the independent producers. The major broadcasters do not need assistance with setting up any kind of production house because they are all in place and they are required to have a certain level of production. I presume they want to be sensitive to audience movements. It seems to me, from hearing the evidence, that the biggest problem there is that it is very hard to define—and I

think Senator Bernardi went into this—what an independent production house is. I presume that would give you some difficulty as well.

Mr Cameron—Commercial or television broadcasters have varying levels of in-house production capability. My understanding is that Channel 10, for example, has virtually no in-house production capability, nor does SBS. All of their drama programming is sourced from the independent sector. The ABC has reasonably extensive capability, but is increasingly—particularly with the recent funding initiatives from the government in relation to independent production that I alluded to before—focusing on independent production.

Channel 9 has undertaken a lower level of in-house production over recent times than it has historically, and Channel 7 retains a level of in-house production capability. I think Mr Harris alluded to some of the commercial factors which might represent a practical constraint on broadcasters from substantially changing their current business models even with the availability of this rebate, which, as I noted before, is replacing other mechanisms which, while they may not have been substantially used by the broadcasters, have been available to them and have been used on occasion.

You made a comment about the difficulties associated with defining 'independent producers'. The Australian Communications and Media Authority have defined independent producers for the purposes of the distinction they make in the points system for their Australian production quota arrangements, and I think the proposal from SPAA is that these legislative arrangements adopt that definition. I would not like to comment in detail on those definitions. Obviously if they were to be implemented in law then we would need to look carefully at them. But I think the comments you were alluding to from Senator Bernardi do go to the fact that even where productions are made by independent producers, and particularly in television, for them to proceed they rely in almost all cases on what one might call an anchor client or an anchor customer being a broadcaster who, at the start, is prepared to put their money behind the production. That often is at the earliest stages of development, as was mentioned in relation to *Sea Patrol*. So, even where there is a strong independent production activity, the level of investment in development and making the program almost invariably depends on them having effectively presold the idea to a broadcaster.

Senator HURLEY—I guess that also goes to support the independent producers' line, because they are concerned that if this legislation does facilitate the big houses bringing their production in house then they will be left without a market. I realise that is mostly a policy decision, but do you think there is anything in the way that the laws are set up that will mitigate that?

Mr Cameron—I would refer you to the background commentary I made at the start, which is that there are already a number of mechanisms the government has in place which either encourage or otherwise support independent production through the arrangements in the points system and through the funding for the national broadcasters. Also—and I think this is quite important—the film agencies do not have a practice of providing additional support for in-house productions but do so for independent productions. So in that sense there is almost invariably a higher level of subsidy available, and there will continue to be a higher level of subsidy available to independently produced programming versus in-house production. Those sorts of factors will impact and influence the willingness of broadcasters to bring production

in house; to invest the associated money required—whether it be for capital or staffing and skill requirements—for that; and also to take on the inevitable risk involved in moving from acquiring a program for a broadcast licence fee which represents something less than 100 per cent of the cost of the program to making the bulk, if not the total, of the investment in that program and seeking to recover that from their commercial activities. There is a transfer of risk there that I presume would also be taken into account.

Senator MURRAY—Let's have some short answers. I have two questions. Mr Flavel, I think you heard my discussion with Mr Burnett on the issue of animated series definitions. I do not quarrel with the policy; I just quarrel with the specificity because, as you might recall, they were suggesting that defining animated series in half-hour segments did not meet current practice. They were looking for a still defined definition of two 15-minute segments. I suggested that even that would not take into account how the future might evolve and that it might be better simply to have the policy laid down in tax law but the specifics laid down in regulation. What is your reaction to that issue?

Mr Flavel—A conundrum we face in any part of tax law or law generally is how much to have in the law versus the regulations. Interestingly, where regulations are used, there is often a criticism that it has been put into a subordinate instrument rather than into the legislation itself.

Senator MURRAY—You are obviously familiar with my role in the Scrutiny of Bills Committee.

Mr Flavel—Very much so. And I am reflecting on comments we have had on the opposite side of the argument over recent years. I want to make the comment that one of the objectives or the sub-objectives was to simplify the arrangements. Previously, there were the two tax acts—the 1936 act and the 1997 act. Film assistance was provided for in relation to international productions in the 1997 act and in relation to divisions 10B and 10BA in the 1936 act. As part of this exercise we have now got everything in the one place, which provides some simplicity. In conjunction with that, the law lays out very clearly all the rules for eligibility. We would regard it as being some sort of premium for certainty that the offset is something that occurs after the event—that is, you incur the expenditure; you make the eligible production; you submit your tax return; and you get either 20 per cent or 40 per cent, depending on what sort of production. We see quite a strong benefit in having as much as possible clearly laid out in the legislation—in the one place, so to speak.

Senator MURRAY—I am happy to accept that. The problem is that the practitioners say that your proposed definition does not fit the current practice and, therefore, negates the intention of the tax concession. The question to you is: is there a better way to design the legislation both to meet your objectives, which are valid and good, and their needs, which are to have a practical, flexible definition that accounts for the way in which they develop their material?

Mr Flavel—There are two issues here. Firstly, are the thresholds and the criteria as spelt out in the bill appropriate? That is one issue that has been raised this morning. Secondly, there is the related question: to what extent will they remain appropriate through time? Again, because of the desire for certainty, we consider that it is better that, if there is a need to adjust

those to reflect changes in policy—it is not so much the industry practice but the policy intent and the policy consistency—then nothing precludes a legislative amendment being made to reflect those.

Senator MURRAY—I cannot ask you on behalf of the committee until such time as we report—and the committee may or may not agree with me—so I ask you on my behalf to go away and think about this issue. I have no quarrels with your intent or your overall policy. I just think the execution leaves something to be desired. My request is for you to go away and think about it.

Mr Flavel—Obviously I will do that. One issue would be: what things would remain in the legislation itself versus regulation? It is a division that lays out a whole range of eligibility criteria. For instance, a threshold for short film animation is one aspect, but there are a range of eligibility criteria there and that raises the threshold issue of how much should be in the law more generally versus how much should be left to regulation.

Senator MURRAY—I do not mind much if you decide that you just want to change the black-letter law. The problem is that black-letter law as it is expressed does not meet industry practice and it will negate your policy intention if the evidence of witnesses is accurate. That is why I ask you to have a look at it from that perspective.

I will now move to my second question. The witness who appeared before us in camera allowed for a specific element of their in-camera evidence to be put to you on the record. They said that the way in which the legislation is presently expressed makes it difficult for them to capitalise on the tax concession because they conduct a cash accounting method instead of an accrual accounting method, and their contractual constructions are difficult. So they asked that, with respect to the items in the explanatory memorandum, paragraph 10.231 should be drafted as follows: 'Before 1 July 2007 to the extent that such expenditure is paid after 1 July 2007'.

It is not my intention to try and recap their evidence, because I do not think that is proper. I will merely put it to you baldly as I have and ask whether you could take it on notice and let the committee know your view.

Mr Flavel—I will, but could I just make one comment in relation to that issue. The bill as it currently stands provides that the offset is paid on economic activity broadly defined, which occurs after 1 July 2007. Without wanting to go into great detail, you could think about arrangements where, for example, a film is already in production and the bulk of the costs were to be paid in a cash sense after 1 July 2007 or, alternatively, where commitments or liabilities had been entered into before that date—in other words, accrued or, on a tax law basis, incurred. I think the legislation strikes a reasonable middle ground between those two extremes and says that, as long as the economic activity has occurred after 1 July 2007, that amount should be eligible for the tax offset.

Senator MURRAY—The difficulty is that there is a major film which is widely supported by all political parties, but the government, particularly in this case, is affected by this and that is why this matter is put to you on notice.

CHAIR—I have one question, which I think I floated earlier on in relation to some evidence given by Ms Houston. It came out in camera in relation to the real economic cost

question. Her view, as stated in her submission, is that this matter 'would be effectively resolved by including a provision in division 376 that for the purpose of calculating the amount of qualifying production expenditure for film production offset services only that the production company's membership of a consolidated group may be ignored'. I asked Ms Houston whether that would potentially have wider implications if that were adopted outside the particular aspect that we are talking about at the moment. Have you a view on that, Mr Flavel?

Mr Flavel—Yes. We consider that it would have some precedent effects. In effect, when something goes into a low-value pool—that is, less than $1,000—it loses its character and the pool itself at an aggregate level is written off. The argument that is being put is that assets should be able to be pulled out of that pool so that any decline in value or balancing adjustment should be recognised for the purposes of the producer offset. It seems to go against the grain of the reductions in compliance costs that are associated with having low-value pools to in effect be putting something but then maintaining a separate record for it for the purposes of an offset.

The other comment I make is that a balancing adjustment, in particular when an asset is disposed of, can go one of two ways. The balancing adjustment can be in your favour or it can be out of your favour, so to speak—for example, where you sell an asset for more than its written-down value. It is not clear to me that, under the suggested amendment, there would not be a bias or an implied incentive to only pull those assets out when they may be advantageous and not to pull them out when they might not be in your favour. That is more at the micro level, but at the macro level we do have some concerns about the perceived inconsistency between keeping separate records for these things and the intention of having low-value pools in the first place.

CHAIR—That is why I raised the question—I did have some concern about precedent and potential in relation in this matter.

Mr Flavel—Just for the record, I want to point out that we are talking about very low-value assets here, so the written-down value and then getting 20 or 40 per cent on that is—

CHAIR—That is you again, Mr Flavel, isn't it?

Mr Flavel—Yes, it is. We are talking about very small amounts, probably no more, for argument's sake, than $100 or $200. Again, that raises issues of administrative costs. It is not just the costs to the taxpayer, of course; there has to be a determination of qualifying expenditure made. So it creates compliance cost at the government end as well, and I do wonder whether the benefits, given the small amounts involved, outweigh some of those costs.

CHAIR—So I put it to you that there are some real risks in making an assumption that this can be confined to section 376-125—that there is the potential for a precedent being created outside those sections.

Mr Flavel—Yes, either directly or indirectly.

CHAIR—Thank you.

Senator WEBBER—Whilst I do not want to go into the detail again of whether or not some of the adverse impacts may or may not take place, can you advise whether this particular section of this bill is the end of a review process or whether this is just the beginning of reform and review and we will keep examining it, particularly in light of some of the evidence we have had about the impact it may have on the independent producers?

Mr Cameron—In effect, the answer to that is 'both'. This set of amendments is the outcome of a comprehensive review of the film support arrangements, which was conducted last year and was considered by government, and the outcome of that process was announced in the budget context. So, in that sense, it is the end of a significant review exercise. Since the budget announcement, the government has been consulting with industry stakeholders in relation to these matters, and the issues that have been the subject of quite a bit of discussion today have also been the subject of many discussions with government.

A few weeks ago, the minister announced some adjustments to the thresholds and other arrangements following on from that consultation process. At that time he noted that the government would continue to keep an eye on the operation of the scheme and, in particular, on whether there was any evidence that broadcasters or other distributors were misusing the arrangements in a way that was inconsistent with the government's underlying policy intention. He flagged a preparedness to act if there was any evidence of that occurring. So I think it is fair to say that obviously the government will continue to review how the new scheme operates. If it were not operating in a way that is consistent with the original intention, clearly it would be open for the government to act.

CHAIR—Thank you most sincerely, gentlemen. That finishes our discussion on schedule 10.

Proceedings suspended from 3.11 pm to 3.24 pm

STEVEN, Mr Tony, Chief Executive Officer, Council of Small Business Organisations of Australia Ltd

LIN, Ms Cheryl, Policy Analyst, Department of the Treasury

ROGERS, Mr Scott, Senior Adviser, Competition and Consumer Policy Division, Department of the Treasury

Evidence was taken via teleconference—

CHAIR—Welcome. Have you appeared before a committee before, Mr Steven?

Mr Steven—I have, but it was a year or so ago.

CHAIR—Do you remember the chair discussing with you the giving of evidence in camera and other bits and pieces, including parliamentary privilege?

Mr Steven—I recall that, yes.

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

Mr Steven—The Council of Small Business Organisations of Australia supports the proposed legislation on secondary boycotts, specifically to assist small business to overcome problems in defending themselves from big business boycotting suppliers. Due to disagreements, small businesses may be affected as third parties.

Definitions of the nature of these disagreements are not necessarily needed here because of the fact that the agreement between the boycotting parties is the element that would need to be tested. Section 45E—unions agreeing to boycotts and affecting small businesses—is the other end of this concern for small business. The ACCC should be able to take up a case on behalf of small business because of the capacity issue. Small businesses are often too small and too under-resourced to assist themselves. Time and effort inhibits small businesses, plus they often have a lack of expertise in this area to defend themselves. Small businesses can be caught between other well resourced organisations and, due to their lack of financial capacity, should not be expected to prepare and present the same level of professionalism that big businesses and unions may be able to, and I have here a comment that says 'unless they currently have an expertise due to the sector they are operating in'. Resources are still the issue, not necessarily expertise. The ACCC representative actions would also remove barriers that small businesses face when fighting for their legal rights, and courts would be presented with a more efficient process. Small businesses, as I have said before, often do not have the resources. In the regulatory impact statement that I have read, options 1, 2 and 3—that is, no action, education or mediation—still leave the problem of a lack of resources; so option 4, being the legislative amendments in this bill, means that the ACCC can help. Education of small business about what the ACCC could do on their behalf is vital.

Senator HURLEY—You are saying that it is very difficult—and clearly this is the case—for small business to run any kind of court case but particularly so with a complicated issue like this. We have another submission that suggests that, rather than taking these issues through the Federal Court, which is not only difficult but also expensive, it should be possible to allow private parties to address matters under the Trade Practices Act by having access to

the Federal Magistrates Court. Might that solve your problem without necessarily having your case run by the ACCC? As you also point out in your submission, the ACCC can require quite a lot of effort from the small business that they are representing.

Mr Steven—Even if it is still run through the Federal Magistrates Court, there is still the resource problem that occurs for small business. They would need to be engaging lawyers to represent them, or at least advise them, to be able to get through, as you say, the complexity of this legislation. Small business would be much better represented by the ACCC. If the objection is because of the cost, I understand from the reading that I have conducted this morning that we are looking at 12 or so complaints before this legislation. I imagine that after an education campaign that could be a bit more. I think it would also act as a deterrent and may affect the number of cases that are brought to the ACCC.

Senator HURLEY—Are you saying you have 12 cases under the secondary boycott provisions?

Mr Steven—That could not be run by the ACCC, because they did not have the provisions. I think I read that in the regulatory impact statement.

Senator HURLEY—But you are not personally aware of those cases? Have they been brought by your members? Have you been involved in any cases that would come under the secondary boycott provisions?

Mr Steven—No, we have not.

Senator HURLEY—So are you not aware of any current or recent cases?

Mr Steven—Just to explain, the Council of Small Business is a peak body. My members are the associations, some 24 of them with just over 80 divisions around the country. If there were a case to be brought through an association, it would be brought at my members' level, not my level, so my staff and I would not be personally aware of the situation.

Senator HURLEY—If you are not aware of any—

Mr Steven—Let me explain. If a pharmacy had an issue, they would go to the Pharmacy Guild, not COSBOA.

Senator HURLEY—I appreciate that, but I am trying to get to the scale of the problem and you are saying that you are not aware of any instances. We have had a number of representations from individuals and bodies who are very concerned about the possible consequences of this for individuals and for consumer affairs issues. Changing this legislation is not an inconsequential step, so I am trying to get to the scale of the problem.

Mr Steven—I cannot help you with the number of instances. I can only suggest that you consult the ACCC.

CHAIR—In some respects, the cases may well not have been brought because there had not previously been the opportunity for small business to access the ACCC. Therefore, you could potentially see a far greater usage of the provisions that are there.

Mr Steven—That is what I alluded to in my earlier discussion. That is correct.

CHAIR—I thought that the submission that Senator Hurley referred to before in relation to the Federal Magistrates Court was completely devoid of any sense of reality about how courts

operate. Even in the Federal Magistrates Court, those with the resources would be able to engage senior counsel, QCs and junior counsel, and they would have the knowledge. I put it to you that that expertise and those financial resources would, in many cases, not be available to small business.

Mr Steven—This is the point that we made clearly in our letter to the inquiry recently. It is the matter of resources and expertise that has an impact here. That is the main underpinning point of our submission to you today.

Senator MURRAY—Have you had the opportunity to read the submission by Professor Zumbo?

Mr Steven—No, I have not.

Senator MURRAY—It is a two-page submission and it has been referred to by both Senator Hurley and the chair. I would like to suggest to you a different way of looking at this. You could look at Professor Zumbo's suggestion as an alternative to what the government is proposing or you could look at it as being in addition to it. He is raising the issue, which has been raised elsewhere, of making sure that all avenues of access to justice are available. He is essentially arguing that, at present, there are constraints on private parties in pursuing trade practices matters because they can only pursue them through the Federal Court and that to be able to pursue them through the Federal Magistrates Court is a sensible additional measure for access to justice.

I am not really going to ask you to explore that issue now with me. Would you mind taking this on notice? It is only a two-page submission. Would you mind reading that submission and giving us a view as to whether access to the Federal Magistrates Court—in addition to what is proposed in this bill, which you support—is desirable for your members?

Mr Steven—I would gladly take on that role. I will feed back some information to you. I am happy to consider it as an addition to the proposed legislation. My only concern would be with how it was regulated in terms of making sure that the ACCC avenue remained open to small businesses no matter what happens.

Senator MURRAY—The issue of representative action is a separate one to the issue of which courts that you go through.

Mr Steven—So one would not affect the other?

Senator MURRAY—That is what I would like you to advise the committee on.

CHAIR—We would probably need that by Thursday afternoon at the latest.

Senator MURRAY—Is that all right, Mr Steven?

Mr Steven—Yes, it is.

Senator MURRAY—Thank you very much.

CHAIR—In all fairness, I should indicate to you that I do not view Professor Zumbo's submission in the same way that Senator Murray does. I do not think that it is an add-on. My reading of it is that it is not an add-on but that in fact he does not believe that the ACCC option is appropriate and believes that it should instead fall under the jurisdiction of the Federal Magistrates Court. Senator Murray and I probably have a different view about the

interpretation of that. I do not think that it is an add-on; I think that it is an alternative to this bill.

Senator MURRAY—That is why I want your opinion, Mr Steven.

Mr Steven—I am happy to give you that opinion. But once again I reiterate that the reason why my submission supports the legislation is that there is a resources problem, and a court would still require resources.

Senator MURRAY—Yes. I simply restate to you that the issue of representative action is one about allowing the ACCC to take action on behalf of small business. The next question is: which courts can it take action to? The legislation at present only allows action through the Federal Court. I do not know if that is an essential restriction. I do not know whether or not the argument should be that access should be to any court. That is really what I want your opinion about, because that is the issue raised by Professor Zumbo.

Mr Steven—I will take that on board and give you my considered opinion after consulting with members.

CHAIR—On my reading, I do not think that Professor Zumbo believes that the ACCC should be able to access the Federal Magistrates Court with these matters. He is suggesting that it be done in a private capacity. But Senator Murray might have a different view of that. Perhaps you need to read that submission and form your own view in relation to it.

Mr Steven—Thank you. Will do.

CHAIR—Thank you most sincerely for your organisation's contribution to this inquiry. I will hear back from you in my capacity as chair by Thursday afternoon in relation to this matter. I will then circulate that to colleagues.

Proceedings suspended from 3.39 pm to 3.56 pm

BOWTELL, Ms Cath, Senior Industrial Officer, Australian Council of Trade Unions

BURROW, Ms Sharan, President, Australian Council of Trade Unions

LIN, Ms Cheryl, Policy Analyst, Department of the Treasury

ROGERS, Mr Scott, Senior Adviser, Competition and Consumer Policy Division, Department of the Treasury

Evidence was taken via teleconference—

CHAIR—Welcome. Ms Burrow, I believe that you have appeared before parliamentary committees previously.

Ms Burrow—I have, indeed.

CHAIR—You have heard chairs give a reminder to witnesses about parliamentary privilege and contempt and other bits and pieces.

Ms Bowtell—Yes, we have.

CHAIR—I will assume that you have that knowledge. Would you like to make an opening statement?

Ms Bowtell—Yes. As Ms Burrow has had to step outside for one moment, perhaps I can take you to the second paragraph of our submission just to make clear that the ACTU does not oppose representative action per se. Our fundamental opposition to this bill is not the idea that there could be representative action by the ACCC regarding the protection of consumers. Our opposition to this bill rests on our opposition to the underlying legislation that it seeks to extend, which is to section 45C through to section 45E of the Trade Practices Act. Given our opposition to those sections of the Trade Practices Act, we also oppose any extended avenue for enforcement of those provisions. That completes our opening statement.

CHAIR—Do you wish to make any further comments?

Ms Bowtell—No. We are happy now to answer questions.

Senator HURLEY—You list in your submission a number of provisions under the Workplace Relations Amendment Act that ensure industrial action that harms a third party will not continue. You say that the provisions in other acts of parliament are sufficient and there is no need to safeguard small business or deal with secondary boycotts in this way.

Ms Burrow—We think it is unnecessary exactly for those reasons. However, we also point out that it is a misnomer to say that this bill is about small business; nowhere does it refer to small business. So potentially, right across the business spectrum, you could have representative actions that are funded by the taxpayer.

Senator HURLEY—Are you aware of problems with secondary boycotts undertaken by trade unions? What kinds of incidents have there been in the last few years?

Ms Bowtell—In the last couple of weeks, a recent prosecution of the CEPU was upheld on appeal in the Federal Court; that case involved the engagement of contractors at a power station. However, the issue is not whether there are problems in relation to boycott activity; it is whether industrial action is best dealt with by industrial relations legislation regimes or

through competition law. Our view is that industrial relations legislation is the appropriate way to deal with activity by workers and unions that is designed to protect their employment arrangements and, in particular, that the Australian Industrial Relations Commission is the regulator with the expertise to deal with actions by workers and their unions.

That is where we see, in particular, the expertise of the commission around dispute resolution and bringing parties together. Remember, in industrial relations the parties have an ongoing relationship. The commission is very cognisant of that when it deals with parties. That is quite different to perhaps commercial parties, who do not always have an ongoing relationship.

Senator HURLEY—Is there any particular problem that small businesses would have as opposed to larger businesses in accessing the industrial relations provisions that you describe?

Ms Bowtell—No. The industrial relations jurisdiction has been pretty user-friendly for participants. Usually it is a jurisdiction where there is no need to have lawyers. Unrepresented parties are welcome. Its staff act in an informal manner and it is designed to deal with matters in good conscience and on the merits of the arguments; it is not bound by the rules of evidence. It is a tribunal that historically has been accessible to unrepresented employees and employers.

Ms Burrow—It goes to a fundamental question: what evidence does the government have about detriment to small business—

CHAIR—Sorry to interrupt. The line is breaking up and the committee is finding it very hard to hear you, so could you please pick up the receiver and identify yourselves when you are speaking.

Ms Burrow—The question we are asking is: what evidence does the government have that would suggest that small business has been negatively impacted on by secondary boycott action that would require such a bill?

Senator HURLEY—Are you aware, from the trade union point of view, of any evidence that small businesses are being unduly impacted on by this sort of activity compared to large businesses?

Ms Burrow—We have no evidence, and we are curious to know what the government's evidence is, because it has not been laid down in any parliamentary debate or report. So this bill appears to have just emerged out of the ether, and we are very concerned, as unnecessary as we believe it is, that it does not simply go to the question of small business: it would seem to cover the spectrum of business.

Senator HURLEY—Were you consulted at all in the drafting of this bill?

Ms Burrow—No.

Senator HURLEY—What about afterwards?

Ms Burrow—No.

Senator BERNARDI—The substance of your submission really goes to the fact that you think that this bill is unnecessary, based on existing legislation. Is that correct—that you oppose the existing legislation?

Ms Bowtell—Yes, the substance of our submission is that because we oppose sections 45D through to 45E of the Trade Practices Act we also oppose an extended mechanism for enforcement of those laws.

Senator BERNARDI—Given that sections 45D and 45E are already in existence, what is wrong with the fact that the ACCC are able to pursue damages on behalf of those people when you acknowledge that there is a role for represented actions? Why is it okay for the unions to pursue represented actions but not for the ACCC to get compensation on behalf of those people who have been disadvantaged?

Ms Bowtell—We say that there is a role for representative actions to pursue legitimate legal rights. If we think that the legal right that is being pursued is illegitimate then we also think that representative actions are illegitimate. I think that answers the question.

Senator BERNARDI—But do you take my point? We have an existing set of rules and laws in place. You may not support them, but this is merely extending the opportunity to redress an imbalance in the fact that someone is financially harmed through these illegal boycotts. You do not see that—

Ms Bowtell—I understand the logic of your argument. The logic of our argument is that if an action is made illegal that we think should not be illegal or should be dealt with not through the provisions of competition law but through the provisions of industrial law, we cannot support extending the enforcement of that law through alternative enforcement mechanisms.

Senator BERNARDI—Okay. I accept that, and that is on the record. But, apart from your opposition to 45D and 45E of the Trade Practices Act, if we took that away there would be no problem with this proposed legislation, would there?

Ms Bowtell—The penalty provisions of the Trade Practices Act are extremely onerous for organisations such as trade unions. To have both those extreme penalty provisions and common-law action for damages provides a double jeopardy for trade unions that might unwittingly get themselves involved in boycott activity.

Senator BERNARDI—I would suggest that secondary boycotts pose a great deal of inconvenience and do potential damage to businesses and to our economy. This is simply an area ensuring that there is some representative action taken by the government, if necessary, on behalf of those disadvantaged.

Ms Burrow—You have to look at this section of rights in context. We could throw it back to you and say, 'What rights do people have to legitimate industrial action?' Those rights are in fact prescribed, curtailed, constrained, managed—whatever adjectives you want to use—by another set of legislation. You can be acting within the framework of that legislation and be picked up by a third party representative right, through the Trade Practices Act. It does seem to us that that is a fairly curious thing for a government to want to do unless they are not at all concerned about illegitimate industrial activity.

Senator BERNARDI—I am not sure that anyone is trying to stop legitimate industrial activity. The purpose of this legislation and similar legislation is to stop it where it is not legitimate.

Ms Bowtell—I think the difference is that we have a different view about what is legitimate action by unions in terms of protecting the working arrangements of their members and what the Trade Practices Act currently provides. For example, it is a matter of authority of the courts that workers have a legitimate interest in the conditions upon which contract labour might be employed in the business that employs them. That is something that unions have long held that they have a legitimate interest in because it is the price upon which competitive labour is employed. That is the exact issue with—

Senator MURRAY—Ms Bowtell, I cannot hear you. Would you pick up the phone, please?

Ms Bowtell—Sorry, Senator Murray. I think we are getting into the realm of debating the merits of the Trade Practices Act, rather than the bill, which is not what we are here to do. The point I was trying to make is that there are areas where we would say unions are acting legitimately in the protection of their members' interests and where the industrial relations system has held that it is legitimate. For example, I was talking about the terms and conditions upon which contractors might be employed, which has been held to be a matter pertaining to the employment relationship of employees and therefore something legitimately within the industrial realm but which within competition law might be seen to be illegitimate. Our view is that within industrial law it is quite appropriate for unions to have a view about the terms and conditions upon which contract labour might be employed by their employer, but it appears that that is not appropriate within trade practices law.

Senator BERNARDI—If we just accept that we have some philosophical differences about this, are you prepared to acknowledge the fact that, where someone has been seriously and economically disadvantaged via a secondary boycott, they should be entitled to some level of compensation either through their own actions or, in the instance of this legislation, under the auspices of the ACCC? In the interests of fairness, do you think that that is an equitable solution for the people who have been the most disadvantaged?

Ms Bowtell—If we put aside entirely our total opposition to these provisions and said, 'If someone is harmed by someone else's actions, should they be entitled to sue?', we would say that in some cases it is quite common for governments not to allow that to happen—for example, in the personal injury area. I do not know that there is a right or wrong answer to that. You have to look at the other competing interests at all times.

Senator MURRAY—Ms Bowtell, you have mentioned both in your submission and in your evidence the definition of small business. Is it your view that if this bill were to proceed it should be explicit in the legislation that small businesses are the only ones entitled under this legislation? If your answer to that were yes, would the definition of a small business that you would choose be the ABS definition, which is 20 employees or under, except for manufacturing, which is 100 employees or under?

Ms Burrow—That is really a matter for senators to determine. We do not believe that this is necessary. It seems to us vexatious to claim that there is either significant damage or impact to small business. In addition to that, were that even to be true, there are in fact provisions already for small business to gain redress, along with all sorts of other businesses. If you must go down this route, it is up to you to define small business. We are simply pointing out that it

would be astonishing for a government to use taxpayers' money for businesses of all sizes—in some cases, multimillion dollar businesses—to seek redress from workers who might be engaged in legitimate industrial activity.

Senator MURRAY—Does that mean the answer to my first part was, yes, you do want it defined specifically for small business but that it is up to the government or senators to decide what that definition should be?

Ms Burrow—We do not want this bill to proceed at all, but we think there is irony in having the misleading title of 'consumer protection law' for something that purports to be about small business but does not stop anywhere on the spectrum between small business and big business and for which taxpayers would ultimately be footing the bill. It is not just ironic; it is a pretty shocking thought.

Senator MURRAY—I have a second question. I do not know if you are both aware, but we have had a lot of submissions from what I suppose you would loosely describe as consumer or issue activists. In other words, they are not involved with employment matters; they are involved with issues that matter to consumers. One of the questions we face, I suppose, is whether the legislation should be specific as to what it does not apply to as opposed to what it does apply to. Let me give you an example. If, for instance, right-to-lifers or people protesting against the fur trade were to be caught up in these representative actions, you would expect that they should be excluded on the grounds that that is normal citizen/consumer boycott activity which should be allowed under freedom of association and freedom of speech. My question to you is: do you think that this legislation, if it were to be passed, should include a specific statement as to what it does not apply to?

Ms Burrow—We think that is absolutely the responsibility of a parliament. This is a democracy. It would seem appalling that this would somehow take punitive action and perhaps even preclude, given the seriousness of the penalties, political opposition. We have a history in a range of these areas. The asbestos campaigns right up to and including the campaigns about James Hardie had a political campaign aspect that could well fit into this environment. The committee's and the union's FairWear campaign to pursue an end to sweat shops would be potentially caught up along with those other community activists you talk about. Increasingly, as we come into a new world where we are looking at climate change there will be a lot of protest about practices that are seen to be damaging our environment—inefficient energy use or whatever your imagination may stretch to. It is absolutely the role of lawmakers—the parliamentarians in our midst—to see that freedom of speech, political protest and the chance to generate a decent future for our kids, are not penalised by a government-funded—taxpayer-funded—legislative entitlement for anybody to pursue damages irrespective of their roles in otherwise harmful activities within our communities.

CHAIR—A cynic would say that your comment that you do not oppose representative action but do not believe in it in relation to 45D and 45E matters, is convenient. I presume that you would disagree with that?

Ms Burrow—Of course we would disagree with that. You have a whole range of issues that we would be very nervous about including what happens with regard to antidiscrimination provisions in a range of legislation. There are questions around the impact

on business generally of the intersection of legislation and the issues we were just talking about with Senator Murray. I do not think it is a matter of whether you see our position as cynical; I think it is a matter of us challenging you to determine the genuine basis for putting forward this legislation. Where is the evidence and why would you put—

CHAIR—With the greatest respect, you are not challenging the committee.

Ms Burrow—We are challenging the committee.

CHAIR—You have no entitlement to do that; you do not ask questions of the committee.

Ms Burrow—I would have thought it was your responsibility to put forward—

CHAIR—Can I put a matter to you—it is something out of the second reading speech—and ask you for your comment? It says:

It is important that we provide a strong disincentive for those people who would target, intimidate and bully small business by applying a secondary boycott to that business.

What is your view on that section of the second reading speech?

Ms Burrow—I am sorry if it is challenging the committee; let me challenge the government: where is the evidence? Where is the evidence for this view? I do not think anyone sets out to bully or intimidate when they have a legitimate claim to either genuine industrial activity or genuine political protest. Surely you would look at some of our past practices now and thank those community activists for standing up in protest against such things as chemicals, unfair and discriminatory practices, or enslaving people in labour. Surely no parliament in a democracy would want to restrict the capacity to do that as we evolve into a better future.

Senator BERNARDI—You asked for some evidence. In 2003 the ACCC instituted legal proceedings in the Federal Court against the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; the Australian Workers Union; and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union. It successfully alleged that the unions had contravened section 45D. If you are asking for evidence, there is some. So it does happen. Boycotts do have an impact on people by preventing or hindering supply and the acquisition of goods and services between that person and the target of the boycott. There is evidence. And surely the people who suffer from that should be entitled to appropriate compensation from the same person or entity which has brought this action, which is the ACCC. I do not expect you to agree with it but you asked for some evidence and there is some.

Ms Burrow—But the ACCC already prosecutes breaches.

Senator BERNARDI—That is right, and this is an extension of that to enable them to claim compensation on behalf of those who have been wronged.

Ms Bowtell—You are asking us to agree with a proposition that we cannot agree to. You have put it to us a couple of times and we do not agree with it. You would like us to agree with it—

Senator BERNARDI—You have also asked for some evidence and there is clearly evidence, and I think we need to get that on the record.

Ms Bowtell—There have been prosecutions of unions just as there have been prosecutions of companies under the Trade Practices Act. Some have been successful, some have not. You only have to go to the Federal Court to find out what there has and has not been.

Senator BERNARDI—The evidence is now on the record.

CHAIR—Ms Bowtell, I want to take up that very point that Senator Bernardi has raised, where action has been taken against big business. Why would you be opposed to small business obtaining access to protection from big business through the ACCC, as indicated to the committee by COSBOA, the peak organisation for small business?

Ms Bowtell—I have not had the opportunity to read the COSBOA submission. It was not available on the website when I recently looked. I did notice there was one.

CHAIR—COSBOA put to the committee that there are two issues: protection against inappropriate activity of the trade union movement or individual trade unions, and protection for small business against the behaviour of big business. On that basis, why would the ACTU be protecting big business as opposed to protecting the interests of small business by opposing this legislation?

Ms Bowtell—Our submission is made on behalf of our affiliates; it is not made on behalf of big business. So if big business have chosen not to make a submission, that is—

CHAIR—That was not my question. COSBOA have put to the committee that they are supportive of the bill for two reasons. The first one is that it provides them with protection against big business and the second one is that it provides them with protection against trade union activity. Why would you be supporting big business over small business by opposing this legislation?

Ms Bowtell—Our submission does not support big business over small business. As Ms Burrow has pointed out, the bill itself says nothing about the size of the business on behalf of whom the ACCC might take representative action. Presumably it could be used the other way. It could be used by big business against small business. So I do not think that the bill does anything one way or another. Our submission goes to our view, which I think I have expressed a couple of times, that the underpinning legislation inappropriately regulates behaviour of workers and their unions. We also cannot support its extension of extending the enforcement regime available.

CHAIR—But COSBOA have put it clearly that they believe this legislation will protect small business against the actions of big business.

Ms Bowtell—Without having read the COSBOA submission, it is clear that the bill itself does not support small business against big business. It says nothing about the size of—

CHAIR—It does.

Ms Bowtell—The explanatory memorandum and the speeches on the second reading talk a lot about small business, but the bill itself says nothing about the size of the business of either the perpetrator of the boycott or the victim of the boycott.

CHAIR—I will put it to you this way: this bill seeks to provide some assistance through the ACCC, both in a knowledge sense and in a financial sense, for those who do not have the

financial resources or the knowledge resources to take action themselves. Clearly, that would be small business, and big business will always have those financial resources and, in the main, that knowledge. So of course this bill is directed to protecting the interests of small business. I put to you that you only have a representative action when the parties you represent do not have either the financial resources or the knowledge base. So it is implicit in this bill that it is about protecting small business. You are hardly likely to have a representative action on behalf of small business when they have both the resources and the knowledge base to take proceedings themselves. That is the very reason for the bill.

Ms Bowtell—They are certainly the stated reasons for the bill, but I think it is also quite clear, as we have said before, that there is nothing in the bill that limits the size of the business on whose behalf the ACCC could take representative action. This point was made in the Senate in 2003, and I think in 2002, and it has been made a number of other times when a similar form to this bill has been put forward. There is nothing in the bill that would prevent the ACCC taking action on behalf of a large business.

CHAIR—You put it to the committee that the penalties under 45D and 45E are very significant.

Ms Bowtell—Yes.

CHAIR—If the damage is significant, why shouldn't the penalties be equally so? I will give you an example. If a small business operator loses their business I assume you would view that as being significant damage?

Ms Bowtell—Without knowing the circumstances, I am happy to go along with that.

CHAIR—I think it speaks for itself. If the damage is significant, why shouldn't the penalties be equally so?

Ms Bowtell—We have not said anything at all about the appropriateness of the penalties. What we have said is that they are significant and they act as a deterrent. If the aim of the bill is to change behaviour, our submission says that we think that the penalties themselves are a significant deterrent and that extending the enforcement regime is not necessary to change behaviour because the penalties themselves are a significant deterrent. That is the reason we make that point in our submission. If that is not clear, I hope I have clarified that.

CHAIR—I think you made the comment that this has come out of the ether.

Ms Bowtell—It was Ms Burrow who made that comment. Some of the submissions assume that the bill has been revived because of the proposed consumer boycott in relation to sheep exports. I am not sure whether that is it but, other than that, we can see no reason why this bill has been revived at this time.

CHAIR—You say 'out of the ether.' What this bill seeks to address has actually been in the mix for quite a number of years.

Ms Bowtell—As we noted in our submission, the recommendation that the ACCC have extended powers for representative action came out of a Law Reform Commission report in the nineties, and that report does not consider the implications for the industrial relations framework. I went back and looked at that report in preparing our submission and I found the section on representative action is quite short and does not consider what we think is the

complex matter of the parallel regulatory regime in the industrial relations arena. It is a very broad recommendation that goes to a whole range of consumer protection issues without looking specifically at 45D through to E of the act.

CHAIR—I want to take you to page 3 of your submission. Are you seriously suggesting to the committee that a small business operator, or anyone else for that matter, will have sufficient knowledge of sections 496, 436, 438 and 433 to take appropriate action through the AIRC?

Ms Bowtell—We think that the current workplace relations regime is incredibly complex and difficult and we have said so on a number of occasions. However, as I said before, it is true that the procedures in the commission are informal and are certainly much simpler, I think, for a small business to negotiate than trade practices legislation. That is certainly an avenue that would be open; it would be more cost effective and it would provide a quicker remedy for a small business—to use the industrial relations regime—if they thought that they were a third party harmed by trade union activities. They would have a remedy very quickly—within 48 hours in most cases. They would be able to get on with running their business without having expended very much money.

CHAIR—If they had a union backing them or they had a big business corporate affairs division backing them, that may well be right. I put it to you that a small business operator is most certainly not going to have the ability to do so.

Ms Bowtell—I do not know whether they would have the ability to do so or not. We agree that the industrial relations regime is very complicated for businesses to comply with because it is now incredibly complex, not so much in the industrial action area but in the system of wage setting. There is no certainty as to what wages people must pay. There is no certainty as to what conditions people should pay—to what is and is not in awards. These things have all become very confused since 2005. But in relation to the capacity to find a quick, cheap and effective remedy to industrial action, the industrial relations regime is a much more effective avenue for anybody than corporations or consumer protection legislation.

CHAIR—So on the one hand you are saying it is incredibly complex and on the other hand you are saying it is easier to access.

Ms Bowtell—I am saying that it is easier than the consumer protection legislation. I am saying that it is a regime that is designed to be accessed by parties without lawyers and in a quick and cost-effective manner. You are not exposed to orders for costs in the industrial relations tribunal. You can represent yourself if you so wish. Most hearings are conducted very informally. The emphasis is on conciliation and discussions rather than formal hearings. That environment is a much more appropriate one for dealing with these matters.

CHAIR—How often are people representing themselves?

Ms Bowtell—In the industrial relations commission?

CHAIR—Yes.

Ms Bowtell—There are a lot of unrepresented actions for unfair dismissal. There would be fewer for bargaining and bargaining disputes, although employers of certainly medium-sized businesses will represent themselves in those matters.

CHAIR—The individual representation is limited to the unfair dismissal part.

Ms Bowtell—No; in bargaining and bargaining type disputes, certainly medium-sized businesses will represent themselves.

CHAIR—What about small business?

Ms Bowtell—It depends on your definition. If you use the government's industrial relations definition—under 100—a large number of them would represent themselves. For those under 20 or under 15, I think there would be fewer who would represent themselves. I do not have the commission statistics on representation before me but that would be my guess. For those under 20 you would get a few—they might be represented by an accountant or a local solicitor. For those over 20 and up to 100, an internal staff member would regularly represent employers in the commission.

CHAIR—I notice that you believe that sections 45D and 45E should be repealed.

Ms Bowtell—Yes.

CHAIR—Have you put that position to the government?

Ms Bowtell—Not, I think, since 1996, when we opposed the transfer of those boycott provisions out of the Workplace Relations Act and into the Trade Practices Act. That would probably be the last time that we have had the opportunity to put that position to government. That is my guess.

CHAIR—Have you put that position to the opposition?

Ms Bowtell—It is in the ACTU policy that was passed by our congress again in October last year. I am not aware that it has been specifically put to the opposition, though I note that the opposition today has announced that it will retain the secondary boycott provisions of the Trade Practices Act.

CHAIR—Have you put it specifically to them that you want it removed?

Ms Bowtell—I am not aware that the matter of our wanting it removed has been discussed directly with them. The ACTU have had consultations with the opposition about its industrial relations policy and we have advanced all of the positions in our policy—some more vigorously than others—but I am not aware of any recent representations to them to remove those provisions from the Trade Practices Act. They have today announced that that is not what they intend to do anyway.

Ms Burrow—And we have made it clear today, Senator, that we do not support everything in Labor's IR statement. That would be one of the elements we will continue to campaign against, whoever is in government.

CHAIR—So if there were a change of government at the next election, do I take it you would be pursuing your views in relation to sections 45D and 45E?

Ms Burrow—This will remain our policy whoever is in government. Just as the Howard government has not seen fit to accept our views, Labor have made it clear today that they do not support removal of these provisions either. But we will continue to retain that principled view.

CHAIR—So you would continue to pursue that with the alternative government, were it to be elected?

Ms Burrow—We have not made it a priority in our campaign, but it is clearly a view we hold, and to the extent that we do not shift our principles, irrespective of who is in government, it will remain there.

CHAIR—If it is not a priority then why are you opposing this legislation which will protect small business?

Ms Burrow—We are saying that this legislation is unnecessary and could be used to constrain legitimate industrial and political rights. You have got to balance the democratic rights in our society against the interests of all parties—that is what being a law-maker entails. I do not envy you that position. But we cannot see that future generations will forgive you if some of the issues raised by Senator Murray, some of the issues we have raised, mean that people cannot operate to protect their legitimate rights or to protect society from damaging environmental or other practices.

CHAIR—Just so we are absolutely clear on this: if there is a change of government you will be pursuing the repeal of sections 45D and 45E with the incoming government?

Ms Burrow—We will always retain a principled position that this does not belong in the Trade Practices Act. We believe that there is a balance in terms of rights and it is better dealt with in the industrial relations system. That is our view. You have seen today that the Labor Party have a different view. I have no reason to think they will necessarily change their mind on that subject, just as the current government has not. But if you are asking whether we will retain a principled position about this, given practices around the world, the answer is yes, we will.

CHAIR—So you say they will not necessarily change their mind but you think they may.

Ms Burrow—I am not saying that at all. You are saying that, Senator.

CHAIR—No, you said they will not necessarily change their mind, so, obviously, the extension of that is that they may.

Ms Burrow—This is ridiculous. Senator, you would have to ask the Labor Party. We are not the Labor Party. We are the trade union movement. We will always stand up for the rights of working Australians.

CHAIR—I think we are running out of time to debate that.

Senator WEBBER—If I may ask a question, Chair—

CHAIR—I think I am finished but I think Senator Murray had a quick question.

Senator MURRAY—No.

CHAIR—All right. Senator Webber.

Senator WEBBER—Thank you, Chair—and as the sole representative in the room of the Labor Party, perhaps you could ask me that rather than asking Ms Burrow. She has got her constituency. I am elected to represent mine. Sometimes they come into conflict.

CHAIR—I am just trying to think when.

Senator MURRAY—Now.

Senator WEBBER—Yes, right now, it would seem. Today, I would hazard a guess, there has been a little bit of conflict.

Senator BERNARDI—So are you supporting this?

Senator WEBBER—Senator Bernardi, I have been incredibly patient this afternoon and I would like to ask one question.

CHAIR—Please go ahead, Senator Webber.

Senator WEBBER—Thank you. Earlier, there was a proposition put to us that one of the reasons this bill is such a good bill is that it allows the ACCC to take action, because otherwise any action that needs to be taken is through the courts and that is prohibitively expensive, particularly for small business. I was wondering whether the ACTU had a general comment about that policy, about the need for us to find cheaper ways for people to get legal remedies.

Ms Bowtell—Yes, and I think that was why our submission started with the statement—which seems to have caused some problem—that we believe there is a role for representative actions. The ACTU have campaigned for the capacity for representative actions in, for example, the areas of equal opportunity and antidiscrimination, where the risk of costs often prevents parties who have been discriminated against or sexually harassed from taking claims. So of course we think that access to justice is a very important public policy, and it is one that the ACTU are happy to contribute to in a positive way.

Our priorities for representative actions are perhaps not the same ones as some other people may have. Ours tend to be around where workers feel that they are unable to get access to remedies because of the cost of prosecution of cases. In particular, for example, we pointed out that the termination-of-employment provisions, which are supposedly an alternative to unfair dismissal, are in fact cost prohibitive for most employees because initiating a claim would expose the worker to around $30,000 worth of costs, which, when compensation is capped at six months salary, is not a viable proposition for most workers.

CHAIR—If there are no further questions, Ms Bowtell and Ms Burrow, we thank you very much for your time with the committee this afternoon. You are excused.

We will now return to Treasury. Mr Rogers, you heard the evidence from COSBOA and the ACTU. Do you wish to make an opening statement or comment on the evidence that you have heard today or do you just wish to take questions?

Mr Rogers—I will make a brief opening statement. The Trade Practices Amendment (Small Business Protection) Bill 2007 was introduced into parliament on 15 August 2007. It amends section 87 of the Trade Practices Act 1974 to enable the Australian Competition and Consumer Commission to bring representative actions on behalf of persons who have suffered or are likely to suffer loss or damage as a result of breaches of the secondary boycott provisions of the act.

The bill contains three items, and all the items of the bill commence on the day on which the bill receives royal assent. The first item amends paragraph 87(1A)(b) to remove the limitation in that paragraph on the Federal Court making orders in relation to contraventions

of sections 45D and 45E of the TPA. The effect of this change is to enable the ACCC to seek orders from the Federal Court on behalf of persons who have suffered or are likely to suffer loss or damage as I outlined.

The second item of the bill deals with paragraph 87(1B)(a) of the act, which sets out the conditions that the ACCC must satisfy in order to take a representative action. In particular, that paragraph of the Trade Practices Act currently provides that the ACCC may make an application on behalf of persons who have suffered loss or damage or are likely to do so as a result of a contravention of any provisions of part IV and others of the Trade Practices Act other than the secondary boycott provisions in sections 45D and 45E. Item 2 of the bill amends this paragraph to remove the limitation in relation to sections 45D and 45E. This amendment is necessary to enable the ACCC to bring representative actions to enable the Federal Court to make the orders under item 1.

The final item of the bill deals with the application of the act to make it clear that the ACCC may only bring representative actions for contraventions of 45D and 45E in relation to conduct that occurred on or after the commencement of the bill. It is a simple provision dealing with retrospectivity. I am happy to take any questions that the committee may have.

Senator MURRAY—Section 45D prohibits two or more persons from acting in concert to hinder or prevent the supply or acquisition of goods or services by a person or company. We have had a number of submissions from people whom I would broadly describe as consumer or citizen activists. They are concerned that this legislation will affect their freedom of association, freedom of democratic process, freedom of protest and freedom of speech. I want to give you a specific example and see how you react to it. Imagine an abortion clinic, which is a small business, with right to lifers protesting outside and acting in concert to hinder or prevent the supply or acquisition of services by that small business. Let me put my prejudices on the record. I think they should have the right to protest—in the same way as I think people who are for abortion should have the right to protest. That is their right. That is a specific example where, in theory, they could fall into this legislation already, because section 45D already exists, but, in theory, the ACCC could take representative action in that case. What comment do you have with respect to that scenario?

Mr Rogers—To an extent, you have already outlined the answer by saying that 45D already exists. So the substantive offence or right of action is already part of the Trade Practices Act. This bill makes no change to section 45D at all. The elements of that provision are as set out in the TPA and will continue to be so. To the extent that there is any right of action rising in relation to enforcement action by the ACCC—or, indeed, a representative action should the bill proceed—the bill essentially makes no difference to whether that right of action has accrued or not.

Senator MURRAY—Because there is obviously some fear and concern among that sector of the community whom I would broadly describe as citizen activists, would it be a useful legislative device to put a note to the bill—and you know what I mean by a note; it does not have legislative effect but it is a common device to express a strong legislative view—to say that it does not cover areas of association or speech in the context that we are discussing? Or would that raise too many problems?

Mr Rogers—I assume that you mean a note to section 45D.

Senator MURRAY—Yes.

CHAIR—This is probably a policy matter, Senator Murray.

Senator MURRAY—It is a policy matter. What I am really saying is that if there is no evidence so far that section 45D has ever been used against citizen activists, and there is simply that fear out there, you would not wish to apply black-letter law, so the next device that legislators use is a note. But that is something we can consider, isn't it?

Mr Rogers—Amending the substantive provision under section 45D or, in fact, any of the other secondary boycott provisions from 45D through to 45E would be a matter for the government to consider.

Senator MURRAY—Without getting into the policy mechanism—because it is really an issue for the committee—what I am really after is to establish, from you, whether a note of that sort would do any damage to the intent of 45D, which is more in the commercial area than in the citizen activist area.

Mr Rogers—I think 45D would cover any situation where the target is damaged by the result of the boycott. Again, it would be a matter for the government if they wanted to circumscribe the circumstances in which 45D apply. As you are well aware, that has been done under 45DD in relation to, I think, consumer protection and environmental matters. It is a matter for the government to decide to what extent particular matters are exempt from the substantive provisions and to what extent they are not exempt.

Senator BERNARDI—Following up on what Senator Murray said, there is a very significant difference between protesting and expressing some disquiet if we go to protesters outside an abortion clinic—or outside any business that they do not like—actually physically preventing people or a third party from doing business with that business itself. There is nothing to prevent protests and there is nothing to prevent people expressing their personal viewpoint, is there?

Mr Rogers—I think it would be stretching it to say that a protest reached a level of conduct required to actually amount to a boycott.

Senator BERNARDI—But if they prevent people from accessing a particular business then that could be called a boycott. Is that right?

Mr Rogers—That is right. Under the wording of the provision, one of the elements is that the supply or acquisition of goods be hindered or prevented, as in case law in relation to those words.

Senator MURRAY—So a protester against the mulesing of sheep will be as safe as a protester outside an abortion clinic?

CHAIR—There is an element of the hypothetical in this.

Senator MURRAY—This announcement was made at the Pastoralists and Graziers Association's annual general meeting in WA, which I attended. It was remarked on that its specific purpose was to address protests against mulesing. So I am drawing the analogy that if

it does not apply to right-to-lifers outside an abortion clinic how can it apply to people who protest against mulesing outside a sheep business?

Mr Rogers—It is a matter for the ACCC to enforce 45D as it is drafted at present. I am unwilling to comment on particular hypothetical circumstances. Certainly the provisions have been enforced in the past by the ACCC on a number of occasions, as to the substantive 45D and 45E and other secondary boycott provisions. The commission's record on that is reasonably clear.

Senator BERNARDI—The focus of this is this. We have received a number of submissions from people who—and I will not be as generous as Senator Murray—are animal rights activists. There is the claim that this bill stifles free speech, prevents consumers from making informed choices, insults the intelligence of the average consumer and provides protection to industries that are unethical. That is from one submission. That is not the intention of this bill, am I right?

Mr Rogers—The bill makes no change to the underlying offences or the rights of action.

Senator WEBBER—I want to pursue not that specific issue but this. My general concern is about what we assume is often in the Trade Practices Act but for which we discover, when things get to places like the High Court, the intent is not quite so. We can have the best EM and second reading speech in the world but then we get knocked over by black-letter law because it is not actually in the bill. I particularly want to relate those comments to the fact that has been raised, that the definition of a small business is not actually in the bill, yet we are told this is going to protect small business. Is there a reason why it is not in the bill? For instance, it was everyone's view that section 46 did a certain thing until the Boral case came along and we discovered it did not. The intent of the EM and the intent of the second reading speech, when that section was introduced, was overridden by the High Court.

Mr Rogers—And you are asking for a comment?

Senator WEBBER—I am asking: was any consideration given to putting a definition of small business into the bill, given the history of interpretation of the Trade Practices Act by the High Court?

Mr Rogers—You are correct in that there is no mention of that in the bill at the moment nor is there any mention of small business in relation to the ACCC's act as to how to bring representative actions at present. But I think it is as previous evidence alluded.

The nature of representative actions—I cannot speak for the ACCC here—is that they are brought on behalf of disparate or underresourced litigants where there are efficiencies or other reasons for the action being brought by one person or, in this case, one regulator. It will vary from case to case, given the particular circumstances of each case, as to whether a representative action is appropriate. But the common thread would be efficiencies because of the number and nature of the parties involved.

Senator WEBBER—I have two further issues that I want to raise quickly, which go to chapter 1, regulation impact statement, of the EM. Section 1.2, which is about the ACCC, states:

On average, the ACCC received around 12 complaints ...

which is a pretty vague concept. Can you either advise me or take on notice whether any of those complaints were acted on?

Mr Rogers—I could probably take on notice the number of complaints.

Senator WEBBER—'Around 12' is very odd to put in an EM.

Mr Rogers—I think that is an average figure over the period of a year, which is outlined there. But certainly the ACCC, to our knowledge and to its own knowledge, has taken 12 actions since 1996. I should hasten to add that this is in relation to 45D and 45E and not in relation to 87 representative actions generally. In relation to 45D, 45E and the other secondary boycott provisions, the ACCC has brought 12 actions since 1996, since they formed part of the Trade Practices Act. Most of those I think have been completed, although perhaps one or two are still on foot.

Senator WEBBER—My only other question, which will probably have to be taken on notice, continues from that point in the EM. It states:

There may be more businesses, affected by unlawful secondary boycotts, who do not lodge their complaints with the ACCC.

I am looking for some evidence for that statement.

Mr Rogers—I am not sure that we can provide evidence on that. If the nature of the complaint is that it was something that would be brought up as a representative action, which currently is excluded, the point being made there is that those complaints would not have been brought forward to the ACCC. With any breach of the law, there will be people who are not aware of their rights or who themselves do not consider that their case is of sufficient merit for them to bring an action. That is not a question I can answer.

CHAIR—Indeed, evidence given by the chair of COSBOA is that many businesses would not do so because they lack both the knowledge and the financial resources to take action.

Senator WEBBER—We could make statements like that about any legislative reform.

Mr Rogers—Yes.

CHAIR—Thank you for making yourself available today; you are excused. That ends the committee's inquiry into the provisions of the Bills.

[4.59 pm]

DI MARCO, Miss Katrina, Assistant Manager, Legislation and Timor Section, Department of Industry, Tourism and Resources

PEGLER, Mr Robert John, General Manager, Offshore Resources Branch, Department of Industry, Tourism and Resources

Evidence was taken via teleconference—

CHAIR—I now turn to the provisions of the Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2007. I welcome the witnesses. Have you appeared before parliamentary committees previously?

Mr Pegler—I have.

Miss Di Marco—I have not.

CHAIR—That is a pity, Ms Di Marco. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind you that, in giving evidence to the committee, you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

If a witness objects to answering a question, the witness shall 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 on which the objection is claimed. If the committee determines that it will insist on an answer, a witness may request that the answer be given in camera. Such a request may also be made at any other time. Do either of you wish to make an opening statement?

Mr Pegler—We do not need to make an opening statement. As the department that was responsible for the preparation of the bill we are fairly much across it. It is primarily technical amendments only.

Senator WEBBER—I am seeking reassurance and some discussion around the operation of occupational health and safety in the offshore petroleum industry under this legislation. My understanding is that under the old regime we had a number of acts that looked after occupational health and safety in the offshore industry and there was an interface between them. This legislation basically says that it will override all of them and take precedence. I am therefore looking for some reassurance that there will be no gaps or no weakening of occupational health and safety and maritime safety under this bill compared with the previous regime.

Mr Pegler—I guess you are referring to the amendment to section 348 and also the broadening of that in terms of the broader role of the National Offshore Petroleum Safety Authority, NOPSA.

Senator WEBBER—Yes.

Mr Pegler—The specific amendment is purely a technical correction to amend a drafting error in the act as it stands. Basically, we are ensuring that NOPSA has the responsibility for pursuing all of the occupational health and safety issues that relate both to facilities and to the operation of and activities on those facilities. It ensures that they do have that interface in place—that they can pursue those—and that their specific role is triggered and operates whenever there is any occupational health and safety issue or potential occupational health and safety issue in terms of the activities of the workforce.

Senator WEBBER—Are you saying that NOPSA will take over in relation to all activities, including maritime safety? Where the old Navigation Act had some coverage, NOPSA is going to do the whole thing?

Miss Di Marco—The boundary for the NOPSA regime is the definition of a facility. Do you have an offshore petroleum bill in front of you?

Senator WEBBER—No, I do not—but I am from Western Australia, if that helps.

Miss Di Marco—That is no problem. The Offshore Petroleum Act disapplies the Navigation Act to the extent that the NOPSA regime takes over when it comes to facilities, so the boundary is where a facility is. Where a facility stops and starts is where NOPSA starts its work. When something is not a facility, the Navigation Act applies.

Mr Pegler—The Navigation Act will continue to apply for maritime activities. NOPSA will apply on the facilities that are in place in terms of being permanent structures that do not move.

Miss Di Marco—Or as it is defined under—

Senator WEBBER—It is not just a permanent structure that does not move, though, is it?

Miss Di Marco—It can apply to vessels as well if they are caught within the definition of a facility.

Mr Pegler—Yes.

Senator WEBBER—Absolutely—and that seems to be causing some of the concern.

Mr Pegler—If a vessel is a production facility, such as an FPSO—a floating offshore production ship—then it would apply but it would not apply to transport vessels such as oil or gas tankers.

Senator WEBBER—So there will be no gaps and no weakening in coverage or enforcement under this new regime?

Mr Pegler—If anything we will see a strengthening of the regime because it will mean that a full safety case, a full evaluation and a full audit will apply to all vessels that are captured by NOPSA.

Senator WEBBER—So when cases are bought to my attention about offshore facilities no longer being evacuated when there is a cyclone and when workers are being made to stay out there because people do not want to shut down production until the last possible moment and when no-one is querying the safety of the facility—they are just saying that, if they have an accident while they are in lockdown, they are not going to be able to be evacuated—I should not be concerned about that being allowed to happen under the current NOPSA regime?

Mr Pegler—I think everyone is always concerned for the safety of workers. I am not aware of any cases where evacuations have not occurred purely because it was not deemed necessary. There have been situations where, logistically, it has not been simple or easy or even possible to get helicopters to facilities or to have helicopters available. There are also provisions within the safety case relating to the assessment of that risk. It then becomes an issue between the offshore safety authority and the company involved in how that risk is assessed in the first place.

Senator WEBBER—Under this regime, who is ultimately responsible for the assessment of that risk?

Mr Pegler—If it relates to facilities, it would be NOPSA.

Senator WEBBER—And there is absolutely no change in the way NOPSA operates? I know I am labouring this point but there is a great deal of apprehension about this amongst people who work in the offshore industry. I have to say that I would not do it. I would not be stuck out on an offshore platform for a long time—although there are probably some people who think it would be a good idea for me to do that.

CHAIR—Not me!

Senator WEBBER—Of course not you, Chair. So there has been no change and no weakening at all?

Mr Pegler—In terms of the amendment that has been made, there is no change. It has been made explicit what NOPSA can and is required to do. One reading of the original clause would suggest that NOPSA may have been operating outside its ambit. Its ambit was not clearly spelt out in terms of the way the original clause was drafted. Another reading would suggest that NOPSA could have been assuming powers that it does not have for things beyond occupational health and safety: for instance, if somebody were painting graffiti on a facility, NOPSA would have to intervene in a normal policing role. Clearly that was never the intent. So it is making it quite explicit that NOPSA has full and complete authority to pursue the occupational health and safety issues.

CHAIR—Mr Pegler and Miss Di Marco, thank you for your evidence today. That concludes our inquiry into the provisions of the Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2007 and completes the committee's inquiries for today. I thank my colleagues most sincerely for facilitating the conduct of the inquiry to date. I thank Stephanie Holden, Lauren McDougall, Dr Richard Grant and Mr Andrew Bomm from the secretariat in Canberra. I also thank Hansard and Broadcasting most sincerely. It has been a difficult day for everyone. Stephanie and Lauren and Hansard have done a marvellous job to have this coordinated and up to date.

Committee adjourned at 5.10 pm