COMMONWEALTH OF AUSTRALIA

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Privacy Amendment (Private Sector) Bill 2000

WEDNESDAY, 24 MAY 2000

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 24 May 2000

Members: Mr Andrews *(Chair)*, Mr Billson, Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Murphy, Ms Roxon, Mr St Clair and Mrs Danna Vale

Members in attendance: Mr Andrews, Ms Julie Bishop and Mr Cadman

Terms of reference for the inquiry:

Provisions of the Privacy Amendment (Private Sector) Bill 2000.

WITNESSES

Committee met at 9.39 a.m.

FORD, Mr Peter Malcolm, First Assistant Secretary, Information and Security Law Division, Attorney-General's Department

MACKEY, Ms Gabrielle Mary, Acting Principal Legal Officer, Information Law Branch, Information and Security Law Division, Attorney-General's Department

CHAIR—Welcome to this first public hearing of the committee's inquiry into the provisions of the Privacy Amendment (Private Sector) Bill 2000. On behalf of the House of Representatives Standing Committee on Legal and Constitutional Affairs, I welcome all the witnesses and members of the public who may attend this hearing. This bill was introduced into the parliament on the 12 April. It was referred to this committee for inquiry by the Attorney-General who has asked that we present our report to parliament by the 19 June.

The purpose of the bill is to amend the current Privacy Act and to set up a national framework for the collection and use of private information by the private sector organisations. The bill proposes to implement the national principles for the fair handling of personal information. Those principles were developed by the Privacy Commissioner who will appear later this morning following consultation with business and other interests.

Our first witnesses this morning have had a major role in the development of the bill, namely the Attorney-General's Department. I welcome Mr Ford and Ms Mackey. I should advise that the committee does not require the witnesses to give evidence under oath but the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have not received a submission from the department. We have received some background material. Do you wish to make a brief opening statement?

Mr Ford—Very briefly, Mr Chairman, I might just outline some fundamental points on which the legislation was developed. Firstly, it is a co-regulatory scheme, as the Attorney-General has made clear, and the legislation is premised on this foundation that industry is encouraged to develop codes that will be in accordance with the national privacy principles or provide at least an equivalent level of protection. Secondly, it is intended to be light touch legislation, not heavy-handed regulation, and in that vein it sets benchmarks which are, of course, the national privacy principles and these have been developed from internationally recognised principles and adapted to suit Australian needs.

Thirdly, there is the principle underlying the legislation that good privacy is good business and that there is not, generally speaking, an antagonism between good privacy protection and good business. There are, of course, some areas where there will be clashes of interest and the legislation recognises this either in exemptions or in other ways to resolve competing societal interests. Finally, it is legislation which establishes a scheme of complaints based mediation with the Privacy Commissioner at the centre of that scheme. Thank you.

CHAIR—There are differences between what is proposed in this bill for the private sector compared to the public sector. Do you think those differences are significant and is it possible that some confusion might arise from the differences?

Mr Ford—Generally speaking, I do not think they are that significant. There are some new concepts introduced such as anonymity, and so on, and it was necessary to make some adjustments to deal with issues like direct marketing. But, in essence, the protections in terms of use and disclosure of information, collection of information, and so on, are consistent across the board.

CHAIR—Another concern raised was that where there are industry approved codes that will lead to different interpretations in different sectors of the economy or sectors of the community, and therefore there will not be necessarily a clear, uniform approach. Would you like to comment on that?

Mr Ford—Yes. In the absence of the Office of Privacy Commissioner that would be a real concern. But one of the things we can expect, I think, is that with that kind of statutory position there will be brought to the whole exercise a consistency of approach and a comprehensive approach and strategies, and so on. I would expect that over time any inconsistencies would be ironed out in that way.

CHAIR—Through the Office of the Privacy Commissioner?

Mr Ford—Yes.

CHAIR—What states or territories have privacy legislation? Is it possible to briefly outline whether their legislation is more extensive than what is proposed here? I know these are value judgments but is there any that protects privacy more than is proposed in the Commonwealth legislation?

Mr Ford—Ms Mackey will address those.

Ms Mackey—There are only two states and territories that currently have privacy legislation. The first is the ACT, which actually has taken on board the Commonwealth Privacy Act, applied it to their own situation and modified it in its application to the ACT. It is essentially the same in terms of its application to its public sector. The New South Wales government has also passed privacy legislation for its public sector jurisdiction. There is no jurisdiction that has privacy legislation affecting the private sector. There are only the two states and territories that have it for the public sectors.

CHAIR—We were just discussing which is the best way to approach this. I think what we might do, given the exemptions are key aspects of the legislation, is to have a look at each of the exemptions. Can we start then with the small business exemption? I understand that the exemption level in monetary terms was originally set at $1 million rather than $3 million. Is that correct and why was the change from $1 million to $3 million?

Mr Ford—Yes, it was $1 million in the key provisions that were released by the Attorney-General in December 1999. I think, on reflection, it was just considered that that was setting the

barrier at too low a level. I guess it really comes down to value judgments in this area but I am unable to recall any specific things. Do you want to add to that?

Ms Mackey—The elements of the small business exemption were negotiated with the Department of Employment, Workplace Relations and Small Business. I suppose the rationale for wanting changes of that nature is probably within their knowledge rather than ours.

CHAIR—Do you know, or is this in the knowledge of the other department, what is the likely number of businesses that would fall below the $3 million threshold and what proportion of the business sector that would involve?

Mr Ford—It would be quite a high number. Clearly, it would be the majority of businesses simply because the majority of businesses are small businesses but at this stage I cannot give you a figure.

Ms Mackey—I think also that that the other department would have those figures. Certainly we have been led to believe that the majority of businesses in Australia would fall within that category of small business, although in some other instances, they are defined in different ways in some of which the number of employees is also taken into consideration. That was considered to be not a suitable way of classifying small business in this instance because the number of employees was really irrelevant. What was more important was what sort of personal information they are handling and what they do with it. That is why the employee number was not included in the criteria in this instance.

Mr CADMAN—I would have thought that the matter negotiated was the style and manner of the provisions rather than the scale because, to my knowledge, $3 million is not set by any other agency. I would like to know whether in fact this is a new definition.

Mr Ford—I think, Mr Cadman, there are different definitions in different legislation.

Mr CADMAN—Perhaps you could have a look at them. Could you provide a list and let me know where you stand on it?

Mr Ford—Certainly.

Ms JULIE BISHOP—Could I take up that issue. How does the definition of small business in terms of this $3 million threshold tie in with the provisions on related bodies corporate? You are talking about small business: what about related entities?

Mr Ford—Perhaps the starting point to address that question is in the definition of small business. If you note subsection (3) of section 6D, it says:

A **small business operator** is an individual, body corporate, partnership, unincorporated association or trust that:

(a) carries on one or more small businesses; and

(b) does not carry on a business that is not a small business.

So it is that paragraph (b) which I think addresses the concern that you may have that one of the reasons for choosing a monetary limit for defining small business is that it does lend itself to this kind of provision which enables us to ensure that the small business exemption is not taken advantage of in an inappropriate manner.

Ms JULIE BISHOP—I am actually looking at the application of the $3 million threshold. Is it collectively applied?

Ms Mackey—It would operate for each business.

Mr Ford—Yes.

Ms Mackey—Each individual entity would have a $3 million threshold.

Ms JULIE BISHOP— So you could have a situation where a series of entities under the $3 million threshold but within the same umbrella group could operate and would all be exempt?

Mr CADMAN—I think you rely on the new tax system, the ANT system, for the definition and grouping. As I understand what you have said, that would mean that the total sum of any elements would become one entity and that entity would have the $3 million in position, is that right? The grouping process is in for this legislation.

Mr Ford—Yes.

Ms Mackey—It depends on how the entities are structured. If they are separate businesses in an umbrella organisation and they are all part of the one and it is a massive conglomerate then I suspect they would not fall within a definition of small business.

Mr CADMAN—If you rely on the goods and services tax act, what you are saying is not accurate. If they are grouped, they are considered as one entity—

Mr Ford—Yes, because the relationship—

Ms JULIE BISHOP—With $3 million applying to the one entity?

Mr CADMAN—That is right.

Mr Ford—Yes, because the related concept is to deal with a different matter of disclosing information within a group where there is a relationship between different entities within that group. So it is really dealing with a different subject than the definition of small business.

Mr CADMAN—My notes indicate that the calculation of annual turnover relies on the same calculations as the new tax system—the goods and services tax. Could we have some certainty on that, please?

Mr Ford—Yes, would you like me to take that on notice?

Mr CADMAN—Yes.

Ms JULIE BISHOP—I guess where I am coming from though is in terms of people trying to take advantage, if you like, of the exemption. There is a fear, a misconception perhaps, out there that small business being exempt will lead to some form of abuse or non-compliance. I am wondering if there is any scope for that within the definition of small business and related entities?

Mr Ford—I do not think there is, because I come back to the point I was making before: the definition in subsection (3) is intended to remove that possibility and I think it does achieve that intention.

Ms JULIE BISHOP—So the circumstances in which small business will be brought within the bill are outlined?

Mr Ford—Could I perhaps make my answer a little clearer by giving you an example. If a company is clearly over the threshold of $3 million and would wish to restructure itself in such a way as to avoid the effect of this act by splitting up $3 million, somewhere you would expect that it would be carrying on a business with a turnover of more than $3 million, otherwise it would be a huge task to restructure the whole thing to make it into less than $3 million packets. So the way subsection (3) works there is to say that, in those circumstances, that company is not a small business; even those parts of it that operate under the $3 million threshold are part of the larger group for the purposes of this act.

Ms JULIE BISHOP—Have you got any concerns that there might be a group of people whose privacy will be left unprotected, given that businesses falling under the $3 million threshold will employ people and will possibly hold extensive personal information?

Mr Ford—There are a couple of aspects to that question. One is that it brings in the employee records exemption. The government has decided that this is a matter better dealt with in workplace relations legislation. In relation to small businesses that hold personal information of people other than their employees, then that is correct, that would not be covered by this legislation. However, there may be an incentive, nevertheless, for those companies to become part of an industry code. We would certainly encourage that on the basis, as I said before, that several surveys that have been taken out both in Australia and elsewhere have indicated that good privacy is good business.

Ms JULIE BISHOP—Incentives in the general sense, not in the specific?

Mr Ford—Yes.

CHAIR—Just on that, Mr Ford, I do not know whether you have had an opportunity to read the submission from the Privacy Commissioner but, in it, he points out that the small business exemption may exclude many Internet based businesses. He goes on to indicate that, given the turnover and that much of the information economy is built around small business, it is likely that many would be exempted under the small business category. He also makes the point, which I would be interested in your advice about, that if you use the GST or the new tax system

formula there is a possibility that large businesses who are input taxed may, in effect, come under the $3 million threshold and therefore be exempt as well.

Mr Ford—On the first question, the Internet based businesses, yes, I agree that the factual statement there is correct, that they would be outside it. But, for the reasons I gave in my previous answer, that is not the whole story; I think they can be encouraged to come within. In addition, there are international moves which would encourage such companies to observe internationally accepted privacy principles. But I acknowledge the point and I agree with it—factually it is correct. On the second matter, the formula one, we are considering that point. I do not think we are in a position to give you an answer at the moment. We could, if you wished, add that to the list of things.

CHAIR—If you could and, whilst you are at it, the Privacy Commissioner also says it is unclear how this applies to non-profit organisations and whether or not they are classified under the small business exemption, and to community organisations as well. We would appreciate some advice on that.

Mr Ford—We will give better advice. Just as an immediate reaction, they are organisations covered by the terms of the legislation if they fall within it on the other indicia.

CHAIR—It does seem, on the base of the discussion we have had so far, that the way in which the exemption is meant to operate has some degree of uncertainty about it. The last thing you want in this area in particular is some uncertainty, particularly for small business, about whether or not you fall within these provisions. Surely it ought to be clear if you are operating a business, without having to engage lawyers—not that there is anything wrong with engaging lawyers—

Ms JULIE BISHOP—Certainly not.

CHAIR—whether or not you fall within the exemptions?

Mr Ford—Yes, I acknowledge the point. It is something we have striven to observe. The problem, as in much legislation, is to try to reconcile that with other tests or other considerations like the exemptions that are thought appropriate for policy reasons and then to build into that the other considerations relating to health and so on so that small businesses which do provide health services may nevertheless be caught under those provisions. In other words, I suppose what I am putting to you in answer to your question is that we acknowledge the point. We do try to achieve simplicity but sometimes, in order to meet all the policy objectives, the legislation may end up more detailed than we would have wished.

CHAIR—I understand that the key provisions of the bill released in December of last year indicated that the definition of a small business excluded organisations holding sensitive information, not just health information. Can you explain why those changes have been made?

Ms Mackey—Those matters were negotiated with the Department of Employment, Workplace Relations and Small Business. This was the preferred method of bringing business in and then putting in the exceptions that would protect those that were at greatest risk of privacy invasions.

CHAIR—Is it fair to say that, so far as the small business exemptions are concerned, we ought to be talking to the Department of Employment, Workplace Relations and Small Business?

Ms Mackey—I think that would be more appropriate, Mr Chairman.

Ms JULIE BISHOP—We have been speaking about specific organisations that might fall within small businesses. Can you tell me how this would apply to your common old garden debt collector business that comes within the $3 million threshold?

Ms Mackey—I would expect that, if they were in the process of dealing with personal information as their business, they would fall within the exception in clause 6D(4), (c) and (d)—that is, they are either disclosing personal information or they are receiving personal information and deriving some sort of benefit, service or advantage in the process of doing that.

Ms JULIE BISHOP—So you would imagine that they would not be exempt, that they would fall within the—

Ms Mackey—They would be brought back within this. They may fall under that $3 million threshold but the exception to this exemption, for the various provisions set out there, would bring them back in within the scheme. I think the same is also relevant in relation to the Internet businesses that were referred to earlier. If they are using personal information in certain ways and deriving benefits from the way they use personal information they too would potentially be brought back in with the scope of the legislation.

Ms JULIE BISHOP—Just moving on a little but in the same vein: one of the other exemptions is the media exemption. I am interested in the definition of journalism and whether that would cover someone who set up an Internet web site and described it as a news service and whether or not it was a news service is a matter of perhaps personal opinion.

Mr Ford—The mere fact that it is on the Internet does not mean that it is not journalism. I would think that, if they set up a news site on the Internet and claim it to be journalism, then on my understanding it would be journalism. But if someone were to do that in an incidental way when they are really carrying on some other activity then I think you could say that they were not really engaging in journalism.

Ms JULIE BISHOP—What if it is just a gossip page?

Mr Ford—I think it is a borderline situation.

Ms JULIE BISHOP—Where do we draw the line with what is a news service?

Mr Ford—Yes.

Ms Mackey—It does come back to the definition of journalism that is in the bill. That does include material having the character of news, current affairs, information or documentary and material consisting of commentary or opinion on or analysis of news, current affairs, information or documentary, so it is a wide definition.

CHAIR—There is not much left out of that, is there?

Mr Ford—No.

Ms Mackey—I cannot think of who would be—

CHAIR—Who wouldn't be exempt?

Ms JULIE BISHOP—Who wouldn't be exempt.

Mr Ford—No, it is a wide definition, certainly.

CHAIR—So any organisation that, as Ms Bishop says, establishes an Internet site and calls it something news—

Ms JULIE BISHOP—Or calls themself a journalist.

CHAIR—or calls themself a journalist, then that would be covered, so any private organisation, any commercial organisation, any—

Mr CADMAN—It could be the pigeon fanciers newsletter.

CHAIR—It could be the XYZ corporation news service.

Ms JULIE BISHOP—I am thinking of Matt Drudge and that genre.

Mr CADMAN—Yes, absolutely.

Mr Ford—Matt Drudge came to mind when you mentioned your example and, on the face of it, yes, it would come within the terms of the definition.

Ms JULIE BISHOP—His report probably would, considering the subject matter of his reports, as I understand it, about political figures and public figures and the like, but what if it were just gossip or speculation about private citizens?

CHAIR—Why wouldn't CrimeNet, or whatever the equivalent of that is, be a news service for the purposes of this bill? CrimeNet is an Internet site and I understand that it publishes details of criminal convictions that have been recorded against a whole variety of people.

Ms Mackey—Certainly, some of the activities of CrimeNet that we have looked at probably would fall within the definition, but if you have to pay for a service that they provide you, then it may take it outside of that, given that in some instances they are acting like a private investigator.

CHAIR—That highlights the point. If they are well intentioned, whatever one's views about it might be, public spirited citizens who establish such an Internet site and do not ask anybody for payment because they believe that information about criminals and paedophiles and the like

ought to be out there in the public arena for the public good, then presumably they are quite within the definitions of probably both journalism and media organisation.

Ms Mackey—If they were freely publishing it, then that is probably the case. There may be other legislation that would impact on what they can do.

CHAIR—I will leave aside the people involved in CrimeNet. I am trying to make a hypothetical point. You could have an individual who has a CrimeNet type web site operating and then you could have that same individual through some other corporate structure having a private investigation business. To take up your point, it seemed to me that they would still be exempt under the bill.

Mr Ford—You would have to look at all the circumstances, I think. If they were doing other things as well, I think you would be quite entitled to draw the conclusion that they are not really engaging in journalism, their business is collecting information and disclosing it for profit for another purpose.

CHAIR—But if they have different corporate structures for each of these enterprises, surely you are not saying that this bill entitles the courts to look behind the corporate veil?

Mr Ford—No.

Ms Mackey—Once again, it comes under what they are doing because of the exceptions to the exemption. If you had another entity like a small business that was actually engaging in activities that derive a benefit from dealing with personal information, then they would be brought back in the scheme.

CHAIR—It seems to me it would be very simple to establish, if you wished to, two organisations with two corporate structures which are separate from one another. You could even have different directors and a totally different corporate structure, so that one is entirely within the definitions of media organisation and journalism, even though they may be doing something else through the other organisation. Then it seems to me they would be exempt.

Ms Mackey—It is also important to remember the way the exemptions operate. The small business exemption is an exemption at organisational level. If you are categorised as a small business you are out completely or, if you engage in some of the activities that come within the exceptions to the exemption, then your whole organisation is brought back within the legislation. In respect of the journalism and the media exemption, it is only for those particular activities; it is not an exemption at the organisational level, it is for those particular acts and practices that you are engaging in. You may engage in other activities that do not fall within that definition of journalism and they will be subject to the legislation.

CHAIR—I understand that, but if you draw a parameter around what you are doing which falls within the definition of journalism and media organisation, you are okay?

Ms Mackey—If it does fall within that definition, then you would be able to take advantage of it.

Mr Ford—The problem here is that it is in one of those areas where it is necessary to balance two competing interests, one being privacy and one being the freedom of the media, of course. If you try to restrict the definition of journalism too much the other way, you can get into the situation where the law is saying what is legitimate journalism and what is not, and you can limit where people are going in that. I think the situation is not quite as severe as might be implied in the questions. We can call in provisions like the purposive interpretation and so on in the Acts Interpretation Act to try and get at any organisation which is misusing this exemption to spread people's personal information in a way that is quite incompatible with the privacy principles.

CHAIR—But if it is on the Internet, what else can they do that is more public to spread information? Let me take an example, again referred to by the Privacy Commissioner: the gardening competition on the *Lock Stock and Barrel* web site which collects personal information about politicians, including photographs of them and their house and garden, their address, opinions about their sexuality, their personal history and information about their families. While this information has been collected under the guise of being a gardening competition, it could be interpreted as an attempt to pressure politicians to not criticise gun ownership through fear of having personal and family information disclosed to the world at large. That would be claimed by the people involved to be the activity of journalism or a media organisation. Presumably, that is okay under the bill.

Mr Ford—It is too early to say it is okay. I think that interpretation could be challenged as a device to get around restrictions on what people can do in terms of other people's personal information. I am not saying that it is all—

CHAIR—If you say that, Mr Ford, can you point to where in the bill you could challenge it?

Mr Ford—My starting point would be that that is an unacceptable kind of practice in terms of the information privacy principles that are embodied in this bill. In dealing with any claim that the people who do that are able to take advantage of the journalism exemption, I would address that myself in terms of what the purpose is of that exemption. Is it to allow people to say anything at all or is it—

CHAIR—But why is that any different, really, to whatever Sydney paper it was that published a photograph of former Senator Woods and his wife at the time of that incident? Why is that any different to this organisation *Lock Stock and Barrel* publishing photographs that they have got of politicians on their web site? I do not really see, as a matter of principle, where the difference lies.

Mr Ford—I concede the point. If there is no difference, it merely illustrates the problem in that, in protecting people's privacy, it must at the same time preserve the freedom of the press, even though you may not like a particular example of what is reported in the newspapers.

CHAIR—Was there any consideration given to any more narrow definition of media organisation or journalism?

Mr Ford—The consideration that was given did cover a range of possibilities, yes.

Ms JULIE BISHOP—My concern is not with the legitimate press and I would be upholding the freedom of the press as vehemently as anyone. My concern is in the definition of journalism the use of the word 'information' and the practice of collecting information—what does that mean? Perhaps that could be interpreted in a specific way, but I just envisage scenarios such as *Lock Stock and Barrel* or the one the Privacy Commissioner referred to, where individuals who have no legitimate basis for doing so, collect information—because all it has to be is material having the character of information, or material being information; that can be anything—and disseminate it on the Internet. Then private citizen A seeks to have it stopped and get some redress. This is not specifically this area, but defamation laws are woefully inadequate to deal with that. They cannot get any redress under the Privacy Act either if that individual, who I would suggest is doing something illegitimate in the principled sense of the word, sets about doing that.

Mr Ford—Yes, I understand the point and we did wrestle with these same problems. You could come up with a range of solutions, I agree. What I could say in answer to your question is that it seems to us that what the media is handling is not information or data in a broad sense—I think you were making the same point—which is really what the principles are getting at, but information in a very narrow sense about a particular person's activities or something like that. It may be that in choosing the words to define journalism, you can come up with a range of options which might draw the—

Ms JULIE BISHOP—Shouldn't there be a public interest component or something?

Mr Ford—That would be one—

Ms JULIE BISHOP—I am just thinking off the top of my head, but it just seems that there is news and current affairs but then information stands alone. I think that opens up all sorts of problems. Again, media organisations have been in existence for some time, they have their own codes of conduct, there are other statutory obligations on people subject to the ABA requirements, et cetera. My concern is with individuals who do not have any history of practice of self-regulatory incentive.

Mr Ford—The public interest test is one test, but the problem that some would see with that is: who is to be the judge of what is in the public interest?

Ms JULIE BISHOP—I would rather be judging public interest than judging what is information.

CHAIR—I understand the New Zealand Privacy Act restricts the definition of news medium to an agency 'whose business, or part of whose business, consists of a news activity'. The provisions drafted for the Victorian legislation restrict the exemption to an organisation 'whose business, or whose principal business, consists of a news activity'. The explanatory memorandum said that the definition was framed in that way to exclude organisations with a marketing or public relations department otherwise not involved in 'news activity'. Was consideration given to the New Zealand provisions or the draft Victorian provisions?

Mr Ford—Yes, consideration was given to those provisions and other relevant provisions. There were also submissions dealing with this sort of issue that we gave consideration to as well from news organisations and so on.

CHAIR—Can you tell me what factors weighed in the minds of the department in seeking a balance to choose a definition that is extremely broad rather than one which is somewhat narrower, as in New Zealand, for example?

Mr Ford—I probably cannot add much in substance to what I have already said. Consideration was given to these precedents and some views that were put to us by people making submissions in the course of the public consultation process and this is where the line was finally drawn.

CHAIR—Did media organisations make submissions?

Ms Mackey—Yes.

Mr Ford—Yes.

CHAIR—Were their submissions in line with the definitions chosen?

Mr Ford—Just on memory, I am not sure if there were written submissions, but they were certainly consulted. My understanding is that the form of the legislation is in accord with pretty much their acceptance.

CHAIR—It is acceptable to them.

Mr Ford—It is acceptable to them, yes.

CHAIR—I would be surprised if it wasn't.

Mr CADMAN—I wonder if I could run through a few things. Could you set up a chart for us which identifies the difference between IPPs and NPPs?

Mr Ford—Yes, we can.

Mr CADMAN—I know they are readily available, but if you could put them side by side matching principle to principle that would be a really useful comparison. One of the things we need to be able to do is to give an assurance that there are not dual standards for government and for the private sector. If one is tougher than the other, we need to be able to explain why.

Mr Ford—Certainly.

Mr CADMAN—That would be really helpful. I appreciate that. Your information paper provided on the Privacy Act has got Helen Daniels name on it. An attachment to that on each paragraph indicating which clauses of the bill that relates to would be good. It will help us then with cross-referencing on principles.

Mr Ford—Yes, certainly.

Mr CADMAN—If I could start on definitions. I noticed that you are gathering in unincorporated bodies. That is a bit inventive. I just do not know how you do that. What powers do you rely on to incorporate individuals and trusts, for instance?

Mr Ford—The external affairs power is one of the fundamental powers in this area.

Mr CADMAN—I thought that may be the case because normally it is not the Commonwealth's role to go outside the corporation, is it?

Mr Ford—No. Privacy is a right in the International Covenant on Civil and Political Rights.

Mr CADMAN—That is where you gather in things that are unincorporated—associations, partnerships, trusts or the individual?

Mr Ford—That is right.

Mr CADMAN—In community terms that would extend the Commonwealth's powers in the area of activity, both public and private, which probably would amount to an additional two-thirds of the community. Privacy, as we could define it, without relying on the foreign affairs powers, would perhaps apply to corporations. People affected by that process might comprise a third of the community. If you add in the Commonwealth's own privacy provisions it may be up to a half. But at the moment if you do not go into the external affairs powers we could only legislate for about half the community?

Mr Ford—Yes.

Mr CADMAN—That is pushing back that barrier. I just need to make sure that I understand the way it works. In the notes it talks about 'the collection and disclosure of personal information by partnerships. The rule will apply where one partnership dissolves and another partnership forms immediately afterwards, has at least one partner in common with the first partnership and carries on the same or similar business as the first partnership.' That sounds like a phoenix partnership.

Ms Mackey—That provision is to enable the transfer of the personal information from the old partnership to the new partnership without infringing any rules.

Mr CADMAN—And the same would happen in the corporation? Phoenix corporations happen too.

Ms Mackey—I am not aware—

Mr CADMAN—They go bust and then resurrect with similar or the same directors—just out of the ashes springs a new corporation.

Mr Ford—In the corporation area, because the corporation continues there was not seen to be a need for an equivalent provision. I am not sure fully—

Mr CADMAN—If it is not relevant in corporations, why is it relevant in partnerships?

Mr Ford—Because they can be so fluid. People can move in and out of them. You need some mechanism to ensure that the protection continues.

Mr CADMAN—There are some pretty inventive people out there in corporations, too. Referring to the health provisions, I noticed that you are seeking to get a balance between research and the need for private information under strict controls to be used for research purposes, like statistical information on age groups and the sorts of problems or diseases or whatever, they may have. That information is pretty helpful for researchers and for medical diagnosis, but I would have thought that all that information is protected under the Health Insurance Act. That is the source of all information on health. Are they not already covered? If they are not, I would be shocked.

Mr Ford—Certainly there are some confidentiality provisions and there were consultations with health, of course, in the development of these proposals but, from recollection, the protections there were not considered to measure up to what we were proposing here so we were proposing to improve upon them.

Mr CADMAN—That is very interesting. I go back to hearings probably 10 years ago with the Health Insurance Commission where the assurance was given that they were rock solid and the ultimate in security. I think we ought to dig out those transcripts and see whether some of the same people are still around.

Mr Ford—Again, my memory might be faulty but I think there may be areas where there was great protection, but we are not displacing that.

Mr CADMAN—Could you just have a look at that—

Mr Ford—Sure.

Mr CADMAN—I really would like to know what the protections are currently for medical information collected by organisations such as the Health Insurance Commission; what access do researchers have to that information; and what additional protection will these proposals give individuals.

Mr Ford—Sorry, Mr Cadman could we just add to that before we move on?

Ms Mackey—There are current guidelines in relation to the National Health and Medical Research Council that do regulate activities—

Mr CADMAN—They do not hold the information; they use it.

Ms Mackey—They are just guidelines on how the information should be used.

Mr CADMAN—Okay.

Mr Ford—And there is provision in the bill for guidelines to be issued by the Privacy Commissioner specifically relating to health.

Mr CADMAN—All right. Thank you.

Ms JULIE BISHOP—I just want to raise the issue of foreign corporations and overseas organisations. I note that the bill does draw the distinction between the Australian and foreign organisations, and in one of your fact sheets it says that where a foreign company collects information about Australians in Australia and then moves that information overseas the company will have to apply to safeguards set out in the bill. Say we have a company in the Bahamas: how is it intended to regulate, police, enforce compliance?

Mr Ford—There are real problems if it has only got a presence in the Bahamas. If it has a presence in Australia then there may be ways of getting at it and of enforcing compliance. If there is no presence in Australia and yet it is collecting over the Internet and so on, there may be real problems. That is an issue which is being looked at by an OECD committee.

Ms JULIE BISHOP—I appreciate it is not just an Australian issue.

Mr Ford—No. And we are kind of struggling with that sort of thing now—resolving disputes on line and the kind of transporter flows where there is no presence in a country. But at the national level, if there is no presence in the country, then there is probably no way of enforcing your—

Ms JULIE BISHOP—Presence in the sense of Corporations Law definitions for foreign—

Mr Ford—In a physical sense, yes. Even though it is a foreign corporation if it has got some physical presence here or some financial presence or something like that—

Mr CADMAN—Can antitrust provision fix that up?**Mr Ford**—No, because it is a problem with the limits of national law. If information has been collected over the Internet by a body which has no presence in Australia, then we are in real difficulty as to how we can enforce our laws. We are looking to international bodies to assist in that way now.

Ms JULIE BISHOP—It is hard to know sometimes where entities are—

Mr Ford—Exactly.

Ms JULIE BISHOP—if they are operating only in cyberspace.

Mr Ford—Yes.

Ms Mackey—There is also quite complex legal questions in terms of where the actual collection takes place. Is it taking place in here or is it actually taking place at the other end

when it is received at the other end? There are quite complex issues that certainly could not be dealt with in this legislation.

Mr Ford—At the international level one of the ideas that is being talked about is online resolution of disputes about privacy protection and how this might be brought to fruition but it is very early days yet.

CHAIR—When you say it cannot be dealt with in this legislation, why cannot the Commonwealth, for example, deem that certain information be received in Australia?

Mr Ford—You would still need some way of proving it.

CHAIR—But leaving aside evidentiary questions—

Mr Ford—But you would also need to get hold of the person whom you want to fix with the responsibility. If they have no presence here, how do you get at them? That is the issue I think. What is done in the bill, I think, is to use a range of mechanisms to say that if there is any link with Australia then you are bound by this law—

Ms JULIE BISHOP—Is it good enough that the information collected be about Australian citizens? Is that a link?

Mr Ford—It is a link conceptually but the problem still remains of how you then get hold of them.

Ms Mackey—If they commit a breach with that information the Privacy Commissioner does not have the jurisdiction to go and investigate an organisation in another country.

Ms JULIE BISHOP—I raise this because the statement in your fact sheet is that the company—the company being the foreign company who has swooped in, got information and gone offshore again—will have to apply the safeguards set out in the bill.

Mr Ford—I am looking for that fact sheet but I thought—

Ms JULIE BISHOP—Does 12 April help or they all 12 April?

Mr Ford—I have got it. I think it was intended to be read against the background that the company would have either some physical presence here or there would be some other way of getting hold of them.

Ms JULIE BISHOP—It goes without saying that it does not take into account companies that are operating entirely over the Internet?

Mr Ford—Entirely overseas, no.

Ms JULIE BISHOP—Entirely over the Internet without physical presence?

Mr Ford—Yes, I beg your pardon. That is right.

CHAIR—But presumably, Mr Ford, if that information then flows back to Australia, anybody dealing with it in Australia is caught?

Mr Ford—Yes. It may be that over time we can develop international principles and mechanisms that will give protection to people in this area as well but that has not been done yet.

CHAIR—Just on that, because obviously this is a growing area, can you inform us what is being done in terms of international responses? Are there any proposals for bilateral or other agreements with other nations?

Mr Ford—Yes, there is an OECD working party called the Working Party on Information, Security and Privacy, which I chair. It had been chaired by Mr Raeburn from the department but he has now retired and I have just recently been elected to chair that. We are really embarking on two areas of work: one in information security and the other in privacy protection. Some of the proposals in the privacy area relate to things, as I said before, like the online resolution of disputes, what we can do in terms of international principles and exchange of information and how things work together in jurisdictions where there are completely different approaches to privacy protection such as in the United States compared to the European Union, for example. There is work going on also in The Hague conference on private international law. The OECD and the The Hague conference, for example, are to hold a joint conference to pool resources on this. At a bilateral level there are more activities both in terms of Australia and other countries and between other countries and the European Union, for example. They would be the main ones.

CHAIR—This is a leading question, so treat it as such. Presumably you would say that this is a first attempt to deal with this on a national level in Australia and there may well be other moves and other proposals that come along in the future as these sorts of discussions occur internationally?

Mr Ford—I think that is right. I think it would be taken into account, of course, in the review of this legislation years down the track.

CHAIR—Can I come back to the health and medical records that Mr Cadman was asking you about earlier, and two matters that have been raised in the submissions? Firstly, in the submission from the Australian Medical Association it says that the effect of this bill would be to overturn the decision of the High Court in Breen v. Williams, which was the decision about the ownership of medical records. It held, in effect, that copyright attaches to the notes made by medical practitioners in the course of their professional practice. To quote from the AMA submission, it says:

> The AMA submits that the legal question of whether or not the proposed Bill is sufficient to override the rights attaching to copyright owners, such as controlling access to their work, be clarified before the passage of the Bill.

Has consideration been given to that issue?

Ms Mackey—I suppose in the copyright instance, not in particular, but in terms of the access rights that are provided to personal health information.

CHAIR—From a public policy point of view, the High Court found that copyright in the notes was, if you like, a legal device which meant that the control of access to those notes made by medical practitioners was retained by the medical practitioner. I am not so interested in the technical issue of copyright so much but whether or not the effect of this bill is to, in practice, overturn Breen v. Williams?

Ms Mackey—I would think that is the case. It is not changing the fact that the ownership of those records will still reside with the organisation that holds them, be it a private medical practitioner or a larger organisation. The ownership of those records will still reside, but it is basically saying that that is not the only interest that is involved here and that is what copyright is about, where interests lay. This is acknowledging that there are different interests at play here and that the person whose information is contained in those records also has an interest in what is in them. It is basically saying that those people do have a right, not an unqualified right but an up-front right, which is then subject to limitations set out in the Principle to access those.

CHAIR—What the AMA submits is that there are different sorts of medical records. They submit there are notes which are taken by a doctor which are really an aide memoire, if you like, for that medical practitioner when dealing with the patient, and that is quite different to a considered medical opinion which has been given. They use the example that this could be damaging to the therapeutic relationship if seen by the patient, for example. I will quote from their submission where it says:

Clinically accurate terms such as "habitual abortion" to describe recurrent miscarriage have the capacity to cause unnecessary distress if read without explanation.

Ms Mackey—I suppose that the medical profession has to do as the public sector had to do when this legislation came in and there was access to records held by the public sector. They have to realise that consideration will have to be given to how you record things, knowing that the information that you record may be subject to access rights.

Mr CADMAN—Can I give you an example that recently occurred near me. A group practice broke up and one doctor decided to stay separate to the main group which was relocating. The group claimed ownership of medical records. However, the doctor separating could not gain access to the records of her patients. So we have patients whose records were up the street in a clinic that they did not want to attend and their doctor could not gain access to their medical records. I am not even using this as a benchmark, I am using it to further my comprehension. Can you tell me how it might work in practice.

Ms Mackey—If this bill was in operation, then I suspect that the individuals concerned would be able to approach the medical practice to get a copy of their own records. Depending on what was in those records and whether any of the exceptions to the right to access applied, they certainly would be able to get probably some of those medical records and then they would be free to take them and use them however they wished.

Mr CADMAN—As it currently stands, as I am told, it depends on whether the doctor was in a contracted arrangement with the clinic or whether the doctor was part of a group of individuals who were sharing a common service.

Ms Mackey—In terms of an organisation breaking apart, who gets ownership and who gets control of the records of that business are, I think, different issues. Certainly in that scenario the doctor who left the practice would not have any rights under this legislation to access those records through this legislation. The rights attach to the individual whose—

Mr CADMAN—The individual having rights to their own medical records?

Ms Mackey—Yes.

CHAIR—The AMA submit that the definition of health information be amended to include the words 'information or a considered therapeutic opinion'. Do you have any comments on that?

Mr Ford—The term 'health information' was something that we thought about over an extended period and I know there were submissions of this kind. In the end, I think the final reason was to try and keep things as simple as we could, that people understand generally what is meant by health information, rather than using technical terms. I would need to check, but I think that is the reason.

CHAIR—They also suggest that the definition should be amended so as to exclude information concerning an individual that is prepared for or on behalf of third parties.

Ms Mackey—That is a very wide exclusion and I think that is more appropriately dealt with in terms of looking at access rights to that information and the exemptions to the right of access, which is done in the appropriate national privacy principle. It sets out a number of situations in which a person could not get access to that information and includes, for example, if there are legal proceedings in process or if there was a report for a compensation proceedings and then they may not be able to get access to those records. So that issue is more appropriately dealt with in terms of the exemptions to the ability to get those records, rather than defining what the records are in the first place.

Ms JULIE BISHOP—So they are getting at legal proceedings and insurance claims there?

CHAIR—Yes. They also say that genetic information collected through DNA sampling for legal proceedings would not be health information.

Ms Mackey—DNA information would certainly fall within that definition of health information; it is a category of health information. This legislation is not intending to deal with all the issues that arise from genetic testing and the implications of that area.

Mr CADMAN—There are criminal aspects too with DNA testing. Okay, I am sorry, keep going.

Ms Mackey—We are just saying that this bill is not intended to be the definitive bill on what is going to happen to genetic information, but it does provide a baseline that it would be considered health information within the context of this bill.

CHAIR—But, given that in proposed subsection 6(1)(c) the bill makes reference to other personal information about an individual collected in connection with a donation or intended donation, et cetera, of body parts, organs or body substances, is not the interpretation open that, by making that specific reference but not making any specific reference to genetic information, it is not in fact covered by these provisions?

Ms Mackey—Certainly the intention is that it is covered by these provisions, by the definition of health information.

CHAIR—I understand what the intention is but, if I were a judge looking at this, wouldn't it be a plausible argument to put to me that, by reason of the fact that the drafters of the bill and the legislature decided to include subsection (c) with those specific provisions which goes beyond the general terms of the proceeding provisions, that genetic information is in fact not covered.

Ms Mackey—I certainly think it is intended to be covered. I do not know that that particular provision was put in there to cover that particular instance.

CHAIR—It does not matter when it comes to a court. If I stood up in court and said, 'But, your Honour, this is what was intended,' that is not going to get us very far at all. It is a question then for the court of interpreting what is there. I am asking: by the fact of exclusion, is that creating a problem?

Ms Mackey—It is certainly considered to be personal information. It is information about an identifiable individual. So it would fall within the overall definition of personal information at the outset. You probably do not have to get to this level because if you look at the definition of personal information which is currently in the private sector—

Ms JULIE BISHOP—It could not get much more personal in definition, could it?

Ms Mackey—Yes, so it would fall within that broad definition of personal information before you even get to what is health information.

CHAIR—Secondly, can I take you to comments made by the Community and Health Services Complaints Commissioner of the ACT. On page 84, he states:

> Unfortunately the proposals contained in the Bill will not lead to effective privacy protection in the health industry. Nor will they lead to consistency. Therefore, I cannot yet recommend such a course of action. Indeed, in the ACT, the Bill will undermine the existing legislation to the extent that it may even have similar effect to the rescinding of Territory legislation by the Commonwealth, since it would become effectively unworkable.

Can you respond to that?

Ms Mackey—I probably should have mentioned when I referred to the privacy legislation in answer to an earlier question that the ACT does have specific legislation in relation to personal health information.

Ms JULIE BISHOP—Is it inconsistent with this bill?

Ms Mackey—I am not sure to what extent it is inconsistent or in what ways. I am not familiar enough with the contents of that bill to be able to answer that question at this point. Certainly there are going to be overlaps in relation to what this bill covers and what that legislation covers.

Mr Ford—As I recall it, the problem with the ACT legislation is that it does give quite extensive rights of access. Here we are setting in place a scheme to apply across Australia. The issue then becomes: how do we deal with the ACT? Is it a higher level of access, is it the same or is it inconsistent? So there are some uncertainties there.

Ms JULIE BISHOP—Does it cast doubt on the constitutional validity?

Mr Ford—Not on the constitutional validity but on the interaction between the ACT legislation and this bill.

CHAIR—Presumably, if enacted, this bill will have the effect of overriding the ACT legislation if there is any inconsistency.

Mr Ford—Yes, if there is any inconsistency. It is that question that is perhaps not as clear as it might be.

CHAIR—Mr Patterson is coming to speak to us this afternoon, so we will have his concerns addressed in more detail. Can I ask, on notice, that you have a look at his submission. If there is an argument to say that he has misread the effect of the bill then I would like to hear it from the department. Equally, I would like some more detailed response to the concerns which have been raised by the AMA about the bill as well. Dr Hacker and Ms Blomberg are here this afternoon and no doubt they will outline their concerns in more detail.

Mr Ford—Mr Chair, do you want a response in writing at a later date?

CHAIR—I think it would be useful to have it in writing. We have not got to the Privacy Commissioner yet who no doubt will be eloquent in addressing his concerns, but I would like to have some response to the concerns which have been foreshadowed in the submission from the Privacy Commissioner as well.

Mr CADMAN—Mr Chairman, I still have a few things to ask, if that is all right.

CHAIR—I am not winding up, Mr Cadman.

Mr CADMAN—You are just summarising and this is where we are up to. Thank you. I am really pleased that those individual things on health have been displayed. In your summary, under the heading ‘Application to the media’, you use the term ‘code adjudicators’ in the second

paragraph. If that does not mean thought police or a new bunch of regulators out there looking into everybody's privacy to see whether they are acting privately, what does it mean?

Mr Ford—I have not picked up the exact reference, but I think the reference would be to the fact that there are intended to be codes in different industries and adjudicators to deal with complaints made within industries.

Mr CADMAN—Would that mean within the Privacy Commission or where? Would it be in the corporation?

Mr Ford—No. It could be set up by an industry body. Sometimes they have kinds of industry ombudsmen or industry code adjudication.

Ms JULIE BISHOP—In the case of the media, do you mean the Press Council?

Mr Ford—I suppose. It is up to industries as to how they do this. I have not caught up with the reference you made, I am sorry. Was this from the facts sheet, Mr Cadman?

Mr CADMAN—This is not a facts sheet. This is in the summary of the bill prepared by Helen Daniels. It is on page 4 of 7 pages and is in the second paragraph under the heading 'Application to the media'. It states:

> For example, as part of the process of approving a code the Privacy Commissioner will have to be satisfied that code adjudicators will be required to have due regard to such issues.

I have looked in the bill for any definition and I cannot find it there.

Ms Mackey—I think that actually relates to the fact that the Privacy Commissioner, when exercising his functions, has to take into consideration a range of public interests in performing his functions. That obligation is actually set out in section 29 of the Privacy Act, as it currently stands. The idea is that if an industry opts to set up a code and that code includes a complaint-handling body, there would need to be something within that code that would say that, when they are looking at complaints, that body would also be taking into account competing public interests involved in looking at that complaint.

Ms JULIE BISHOP—They would have to be approved privacy code adjudicators, though, would they not?

Ms Mackey—That is right. This is contemplated in the act of looking at that draft code and whether or not to approve that code.

Mr CADMAN—Is that covered by the NPP or the IPP?

Ms Mackey—The mechanism for setting up a code is covered in this bill. It is basically saying that an organisation can opt to develop a code within their industry or even within an individual organisation if they chose to and, for that code to become effective as a standard, it needs to be approved by the Privacy Commissioner. That is the process that has to be gone through in order for that code to have any effect in relation to this bill. The standards to be

contained in that code are to be the same as, equivalent to or better than the national privacy principles in this legislation.

Mr CADMAN—Is it a bit like a safety officer in an organisation, is it?

Mr Ford—I guess an analogy would be something like—although it is not a complete analogy—the Banking Ombudsman or something of that kind. I am sorry, I may have mislead you before by referring to the Press Council. It is not that issue at all when I look here. It is that the code adjudicators, the persons in an industry who are given some kind of role in dealing with complaints, would be expected to take into account these issues that are dealt with in those paragraphs relating to the role of the media and public interest in journalism and so on.

Mr CADMAN—So that would be someone like the federation of broadcasters. Would they have somebody allocated?

Mr Ford—It could be that kind of—

Ms Mackey—It has been included in that particular fact sheet, I suppose, just because we were talking about media in that instance, but it is actually intended to be far broader than that. The requirement for the commissioner to take it into consideration is actually covered in clause 18BB of the bill, subsection 3, which is on page 36 of the bill. It is basically saying that the Privacy Commissioner gets before him codes to approve. If the code sets out procedures for making and dealing with complaints, then the commissioner must be satisfied. And if you go down to C—

Mr CADMAN—I am sorry, could you just point that out again. Is it on page 36?

Ms Mackey—Page 36 of the bill.

Mr CADMAN—Yes, 18BB, I see, and which section?

Ms Mackey—We are down at 3 and C, right at the bottom of the page. They have to be satisfied that the code provides that, in performing the functions and exercising powers under that code, the adjudicator would have regard for protection of important human rights and social interests that compete with privacy, including the general desirability of the free flow of information.

Mr CADMAN—You have left it for the people involved to determine what an adjudicator is?

Ms Mackey—They are the adjudicator but they have to take into consideration these other competing interests when they are looking at a complaint.

Mr CADMAN—So the commissioner is the adjudicator?

Mr Ford—No. The answer to your question is yes, it is left to industry bodies to determine who their adjudicator should be.

Mr CADMAN—Okay, and how they set that up?

Mr Ford—Yes.

Mr CADMAN—You have given them some broad outline of what their role may be, but you do not get beyond that.

Mr Ford—That is correct.

Mr CADMAN—We have covered the small business stuff fairly successfully. But in our list of the types of activity that would be exempt from the legislation, I am at a loss to know what would be exempt. On page 5 of your summary, you say, 'A small business will be exempt unless it does this: provides a health service or discloses personal information to another individual'. Wow, for goodness sake, every small business in the whole nation would run the risk or would possibly disclose.

Mr Ford—There is a bit more, though, Mr Cadman. It says, 'for benefit, service or advantage'. So it is running a business of disclosing information. It is not just doing it—

Mr CADMAN—Would that include recommendations of quality of service? For instance, if I were to say to Mr Andrews, 'You ought to go down to Lowe's. They have got great footballers advertising their stuff and their material is excellent'.

Mr Ford—No, it is where you are doing it as a business for a benefit in return for money, that sort of thing.

Mr CADMAN—Okay, I recommend a secretarial service to you run by Mrs Bishop.

Mr Ford—No, not unless you are doing it as a business.

Mr CADMAN—So I have to get a fee for the process?

Mr Ford—Yes, or benefit.

Mr CADMAN—It says, 'Collecting personal information' or 'a contracted service provider for a Commonwealth contract; or is prescribed by the regulation'. So that leaves the regulations open?

Ms Mackey—The regulation making power is meant to be a safety net. It applies if there is a particular organisation, an industry, acts or particular activities that come to the attention of the government or the Privacy Commissioner when this legislation is in operation that is not caught by these provisions. So the organisation is not covered by the operation of the act. And if it is considered that the activities that they are engaging in ought to be covered, then there is that power to bring them within the scope of the legislation by regulation.

Mr CADMAN—One of the most relevant types of information is the exact addresses and telephone numbers; that information is what everybody wants. One of the best agencies for

knowing that are service deliverers, that are constantly on the job: new connections for the water board or electricity commission, mail, milk, bread or newspaper delivery services. Many of those people are not in the information exchange business, but a disclosure of information about where individuals live from an organisation like your local newspaper agent could be an absolute invasion of my privacy. How is that covered?

Ms Mackey—It depends on the context in which they are disclosing it. If they are actually disclosing it and they are receiving a benefit, service or advantage through that—for example, if your local newsagent sells their mailing list of all the people whom they deliver newspapers to then that would be caught by this legislation. They would be brought within it, even though they may be a small business in terms of their monetary threshold.

Mr CADMAN—Okay, so fine. They are not in the business of trading in that sort of information, but if they disclose the information for a benefit, for a service or for an advantage in any way they are caught by this?

Ms Mackey—They are brought back in.

Mr CADMAN—Right. Thank you.

Ms JULIE BISHOP—But if they just do it once, they are not in the business of it, but every now and again they habitually, once a year—

Ms Mackey—It depends on what the purpose is for them disclosing it. If they engage a contractor to deliver their papers and they needed to give them the addresses of the people to deliver the papers that would be acceptable because it is for the service that you are expecting. It is within your reasonable expectation that that would happen. But if they are actually selling their mailing lists or providing their mailing list for some other advantage to their business, then once they have done it once they are brought back within this legislation.

Ms JULIE BISHOP—So if someone is terribly interested in finding out where a high profile person lives and the newsagent knows and they just divulge the information once to a person in exchange for a benefit, does the high profile person have any recourse?

Mr CADMAN—What if they are a low profile person and just do not pay their bills?

Ms JULIE BISHOP—That will do.

Mr Ford—I would think they would be covered. I was just taking advantage to check what the actual terms of the bill say, but just on a literal application there it does not say anything about systematically doing it.

Ms JULIE BISHOP—So there is no sense of carrying on a business?

Mr Ford—No.

Ms Mackey—The exemption for small businesses is really intended to cover their activities in the course of their business that are legitimate. It would be reasonably expected by the

customer, in respect of the personal information that they hand over, if it is within the course of the business. If it is quite a legitimate act that they are carrying out, then that would be okay. But it is when they go beyond that and they disclose that information to someone and it is not for a legitimate part of their business, that would be an unacceptable disclosure. If they are receiving a benefit, service or advantage then they might be caught by this legislation.

Ms JULIE BISHOP—Benefit can be defined in weird and wonderful and mysterious ways, can't it?

Mr Ford—Yes. I think it would need to be some commercial benefit—if it is not monetary then some other advantage of a commercial nature.

CHAIR—Personal benefit?

Mr Ford—Yes, it could be. I mean it is a fairly broad term, but I think in this context you would understand it in a commercial sense.

Ms Mackey—It was intended to be broad simply because, if you just tied it to exchanges of money, then there would potentially be lots of information traded for things other than money just to avoid the legislation.

Ms JULIE BISHOP—The opportunity to carry the Olympic torch, just to pick an example.

Ms Mackey—I am sorry I do not know—where is the personal information involved?

Ms JULIE BISHOP—I am saying that could be the benefit that they received. I am just trying to come to terms with what would be considered a benefit in the context of passing on personal information.

Mr Ford—I would think that could be a benefit. Other examples might be things like frequent flyer points or something. But I would think something that is of that character which carries all kinds of recognition in society at large would be a benefit.

Mr CADMAN—Okay. I am banking with one of the well-known banks and I know the manager. He comes into my paper shop regularly and he says we are trying to find Bill Jones. No money, no benefit, but I find great difficulty in holding back that information from my bank manager. How do those sorts of circumstances—

Mr Ford—You are not covered by this.

Mr CADMAN—No.

Mr Ford—Whether you are covered by other legislation, I am not sure, but you are not covered by this.

Mr CADMAN—Okay. I think the most difficult thing in privacy is just finding out who let the stuff go. Suddenly you get mail from somebody you have never heard of and you say, 'I wonder who gave them my name?'

Political parties: why should they be exempt? What are the arguments? I am just trying to stretch my imagination.

Mr Ford—This again is an area where, as with the media, there are competing interests. One of them is the functioning of the democratic system, and the activities of political parties are recognised in international documents as something for which it is appropriate to make some exemption. It is just a question of balancing these competing interests.

Ms JULIE BISHOP—Does it cover independent candidates?

Mr Ford—Not as such, no. It does relate to certain acts which independents may engage in, but it does not cover independents in the same way as it covers political parties per se.

Ms JULIE BISHOP—Any reason why not?

Mr Ford—I think it is just the judgment made as to where to draw the line in protecting political processes.

CHAIR—It is not in our interest, I suppose, to be pushing the cause of independents, you could say. But if we as elected representatives have certain benefits by way of exemption under this legislation and somebody goes to the trouble of nominating and paying the fee applicable to stand for election again any of us—or at any election, for that matter—as an independent, why shouldn't those benefits flow to that person as well?

Mr Ford—In the terms of the exemption in 7C(1) on page 24, they would gain the benefit of the exemption.

CHAIR—Can you tell me how that is the case?

Mr Ford—The example you gave was nominating to stand against an elected representative who may be a member of a political party.

CHAIR—Yes. It says:

> An act done, or practice engaged in, by an organisation ... consisting of a member of a Parliament, or a counsellor (however described) of a local government authority, is exempt ...

That does not include candidates. In fact, it does not include the candidate, it would seem to me, of a registered political party who does not happen at that stage to be the office holder.

Mr Ford—No, I am sorry, you are right. I was focusing too quickly on those provisions under (a), (b) and (c).

CHAIR—So if you are an elected member of parliament, these exemptions apply, but if you are a candidate, whether an independent or from a registered political party that does not hold the seat, then you do not have the advantage of these exemptions?

Mr Ford—Yes.

CHAIR—For consistency, if we are going to have this provision, why wouldn't we extend it to candidates who have nominated for election according to the due process under the electoral laws? Surely if the rationale, as you advanced, is the furtherance of democracy, then doesn't democracy entail, hopefully, a number of people seeking election?

Mr Ford—I cannot give you further details, I am sorry.

Mr CADMAN—I would have thought (2)(b) covers it—7C(2)(b)—which covers 'an election under electoral law, a referendum and participation in another aspect of the political process'.

Ms JULIE BISHOP—But there is a definition of those 'by an organisation'. And 'organisation' is defined as the political representative.

Mr CADMAN—Yes—'consisting of a member of a Parliament or a councillor'. Okay.

Mr Ford—Those provisions are dependent on subsection (1).

Mr CADMAN—Yes—candidate.

Ms JULIE BISHOP—Could I also inquire as to what, in 7C(1)(c), is meant by 'the participation by the political representative in another aspect of the political process'? I assume that means other than those set out under (2), so what is 'another aspect of the political process'?

Mr CADMAN—Anything you would like to think of.

Mr Ford—I think it is things that are related in some way. It is fairly broad. It was the intention to make it broad. But beyond that I cannot explain it.

Mr CADMAN—What is the practical impact of these exemptions? Could you outline how they might apply to you?

Mr Ford—The explanatory memorandum at page 70 sets it out in such a way that practices done by certain persons—which includes a member of parliament—which are in any way connected to an election under an electoral law are covered. I am not sure if that answered your question.

Mr CADMAN—What is the practical implication? Is it the voting intention of somebody or other?

Mr Ford—It is more things like lists, information collected about people in the neighbourhood by political parties.

Mr CADMAN—That means that if I can gain lists from anybody under the sun—

Mr Ford—Political parties can. Political parties are exempt from this.

Ms JULIE BISHOP—So Julie Citizen would not be able to access information about me held by a political party?

Mr Ford—That is right.

Ms JULIE BISHOP—I would have no remedy if the information they hold was wrong?

Mr Ford—No.

Mr CADMAN—And you would not be able to tell them to remove your name from the list?

Mr Ford—No. You are just outside the act.

CHAIR—If a citizen has a right as a matter of principle to have information held by other organisations—say a business organisation—corrected, why should the citizen not have the right to have information held by a political party corrected?

Mr Ford—All I can say is, going back to the statement I made at the outset, that this is like the media exemption—it is the balancing of interests.

CHAIR—My question is narrower than that. I was not asking should the citizen not have the right to have the information collected. I am asking a more specific question. If information is collected by political parties, which it is, then why shouldn't any of my constituents, for example, be able to come to me about that? Let us say I send a letter to a constituent based on certain information—their interest in some issue, the environment or something like that. It appears to that constituent that I have somehow misjudged the constituent's views or some factual matter relating to that constituent. Why should that constituent not be able to say to me, as a matter of law beyond any ethical considerations, that 'I would like your database about me corrected'?

Mr Ford—I understand the point. It gets into an area of political policy. I do not think I can take it further than I have.

Ms Mackey—However, if a constituent were to come to you and ask you that question, simply because you are not within the legislation does not mean you cannot actually do it, say, on a voluntary basis.

CHAIR—That is why I said as a matter of law rather than a matter of ethics or common morality or whatever you would want to call it.

Ms JULIE BISHOP—Or chances of getting re-elected.

Mr CADMAN—I guess if a political party was overtly ignorant of somebody's stated preference, the way in which they wish to be treated, then the repercussion is that that person will vote against him or campaign against the organisation? Is that right? I do not know that that is completely satisfactory.

Ms JULIE BISHOP—They are political considerations. I am concerned with the statutory regime that we are setting out here. What if a political party went into the business of selling its database?

Mr Ford—As a registered political party it is not covered.

CHAIR—Full stop?

Mr Ford—Full stop.

Mr CADMAN—Or any information contained in it for that matter. Turning to the section on contracts and government contracts, if there are not privacy provisions in that area already under some other law extending down to the private sector and subcontracting and contracting out and so on, I would be amazed.

Ms Mackey—At the moment it is handled by contract. There is not a statutory—

Mr CADMAN—It is not covered by the Privacy Act?

Ms Mackey—The Privacy Act imposes obligations on the government agency. If they have to pass that information for the provision of a service, they need to put appropriate protections in place for the protection of that personal information.

Mr CADMAN—I thought there was a broader reaching process than that—that is, any agency that dealt with the Commonwealth had imposed on them the same privacy provisions as a department. Is that wrong?

Mr Ford—There was a bill introduced to give that kind of protection in the outsourcing environment but it was overtaken by this legislation. From memory, it was in the parliament at the time of the last election but it had not passed by that stage. It was specifically intended to provide protection to people whose information is handled by outsourced contractors.

Mr CADMAN—I would really like somebody—I am talking to our secretariat as much as I am to you—to give me some pretty definite information about the protection of private information that may go out to a data processing company for mailing purposes, for information purposes, for the printing of cheques or anything else that the Commonwealth does. I think that is really valuable.

Mr Ford—Yes. At the moment it is covered by contract. Agencies require outsourcing providers to whom they outsource things to give the same level—

Mr CADMAN—So if somebody slips up and hits the delete button on that clause, she goes ahead without it.

Mr Ford—Yes, but the real problem is that a contract is not a very good instrument to give protection to the third party.

Mr CADMAN—Exactly what I mean.

Mr Ford—This legislation will give that kind of protection that the contract is unable to fully give.

Mr CADMAN—I am staggered by that revelation, I would have to say. Having been through the hearings of the Privacy Act previously, it was my appreciation that these areas were covered and covered in a very substantial way.

Mr Ford—Yes. In practical terms, I am not sure what difference it has made in not being covered. The Privacy Commissioner—

Mr CADMAN—I just hope there have been no breaches but, on the other hand, we do not want a breach to ever occur.

Mr Ford—No. It is certainly an area where there is a gap.

Mr CADMAN—On health, social security, tax information—there are 101 areas of confidential information held by the Commonwealth that should never be breached.

Ms Mackey—The current situation is that the agencies would be required to include privacy protection clauses in their contracts. If a contractor did breach that then there would be a remedy available under the contract. If they fail to put those in their contract then, certainly, the Privacy Commissioner would be very interested in that and that would be actually a breach of the agency's obligations in not having done so. Where the gap is, at the moment, is that an individual does not have a right against the contractor and this legislation will provide that.

Mr Ford—The other point I should make is that it is not simply a contract when you come to look at it from the point of view of the private sector body to whom the job has been outsourced. By the operation of the Crimes Act they are required to give the same protection to information which they have derived from a Commonwealth authority as if they were a Commonwealth officer.

Mr CADMAN—So the Crimes Act may be a catch-all?

Mr Ford—Yes. But the point about privacy protection is that to give an effective, practical way of a person seeking remedies, you do not want to rely on the Crimes Act or even a contract.

Mr CADMAN—Information about individuals would also apply to the details of private organisations contracting the substance of the contract itself as well as the people factors that may change hands because of the nature of the contract. If a number of us were contending for a

particular contract, the details that I supplied about me as a contractor and the information that I used in writing that tender document would also be protected?

Mr Ford—It is personal information, yes.

Ms Mackey—That is already protected under the Privacy Act if it is handed to a government agency. Is that what you mean?

Mr CADMAN—Yes. Already protected?

Mr Ford—That is already covered by the Privacy Act.

Mr CADMAN—This just goes to the information being used by the subcontracting or outsource group or agency or organisation. It is just the stuff they use. Is that right?

Mr Ford—If it is information about the contractor themselves or the subcontractor that you are concerned about.

Mr CADMAN—You say that is already covered.

Mr Ford—Yes.

Mr CADMAN—I accept that. Having accepted that, then this legislation only applies to information they themselves have made available to them and actually use?

Mr Ford—Yes.

Ms Mackey—It also covers information that a contractor or a subcontractor would collect in order to fulfil the terms of the contract. So they do not have to necessarily have been supplied information from an agency—

Mr CADMAN—So if they were acting for the Commonwealth as an agent to do some sort of task, that information is also covered?

Mr Ford—That is right.

Ms Mackey—Yes.

Mr CADMAN—So it is not just information provided from the Commonwealth; it is information that they gain whilst acting on behalf of the Commonwealth.

Mr Ford—As an agent of the Commonwealth.

Ms Mackey—Yes. They may collect it as well as receiving it directly from the agency. They will be covered by this legislation for whichever way they hold it.

Mr Ford—The rationale being that they are simply standing in the shoes of the Commonwealth in doing a particular job and acting as the Commonwealth's agent.

Mr CADMAN—So if they were giving publicity to a public education program, any lists they gained or information they gained about individuals, organisations, whatever, would be confidentially held by that organisation, would it?

Ms Mackey—If it is in relation to a contract with a Commonwealth agency, then it would be covered.

Mr Ford—Yes.

Mr CADMAN—I think that is about it, Mr Chairman. I think I have covered the areas that I would like information on.

CHAIR—Mr Ford and Ms Mackey, there are some other questions but we are running out of time. What I propose to do if it is suitable to you is to give them to you in a written form. I will have the secretariat do that, either now or have them communicated to you. There are particularly some questions about enforcement which we would like some advice about as well. So, rather than prolonging the time now given that we have a tight program for the day, we might conclude at this stage but indicate that there will be some further questions coming to you which we would appreciate answers to as well. I thank you for coming along this morning and sharing your expertise about the bill with us.

Proceedings suspended from 11.23 a.m. to 11.37 a.m.

COWPER, Ms Christine, Director, Policy Section, Office of the Federal Privacy Commissioner

CROMPTON, Mr Malcolm Woodhouse, Federal Privacy Commissioner, Office of the Federal Privacy Commissioner

PILGRIM, Mr Timothy Hugh, Deputy Federal Privacy Commissioner, Office of the Federal Privacy Commissioner

CHAIR—Welcome. I draw your attention to the nature of the proceedings which I outlined when the Attorney-General's witnesses were here. We are in receipt of your submission to the committee on this inquiry. I invite you to make some opening comments.

Mr Crompton—Thank you. I start with the fact that privacy is a fundamental human right. All of us should have the right to control what any organisation knows about us, be it a company, a political party, a government or a website operator. At some stage in our lives, most of us are going to want to exercise that right. Privacy is something that you often do not value until you have lost it, which is why it is actually an elusive issue for us to chase. More than that, our privacy means different things to each of us. But let me give a few examples that I think do mean something to most of us to help us think the issue through.

My first example is a phone call that we received on our 1300 hotline only about a week ago from a woman in a small township who found the medical records of a whole lot of the people that she knew in that township on the local tip. None of us would like to have our medical records on the local tip. Privacy legislation is clearly needed to cover that kind of situation. Secondly, while I was in the USA last month the nation there learned that without knowing it, or even being warned of it, what you did on the Internet could damage your credit rating even if you were not borrowing.

Let me give a couple of other examples. Huge databases about us are being built, and at the moment we have no way of knowing what is in them about us. I do not have a problem per se—and let me put this on the record—with big databases being collected and with the fact that they can help us get enormously improved services, if that is what we want. But we should have some right of access to what is in those databases.

Finally, and this is very sad, there is evidence which we have put into the submission that people will protect their privacy even at the expense of their medical health, if necessary. I do not think that is appropriate either. Appropriate privacy legislation can help people have more confidence in the world around them.

Our privacy is being challenged now more than ever before by the information economy. The challenge is being recognised the world over, as you can see from some of the surveys that we have identified in our submission. We can provide more evidence if you would like it. In particular, I would suggest there is overwhelming evidence that lack of privacy is the issue that

is holding back customer participation in the information economy wherever we are engaging it. Interestingly enough, European countries have been concerned about this issue for many years. It culminated in a key directive that was issued in 1995, namely the EU directive 95/46/EC. This is how important and how alive the issue is.

The last thing that happened before I went home last night was that the US Federal Trade Commission released its recommendations to Congress on Congress action to protect consumer privacy online in the USA. This has been a heated issue in the USA for some years now. What happened only 24 hours ago was that the US Federal Trade Commission announced that 'self-regulation alone has not adequately protected consumer online privacy'. More than that, it called for legislation 'to supplement self-regulatory efforts and guarantee basic consumer protections'. I would like to table the announcement by the Federal Trade Commission, please. I have a copy here. The full statements are accessible from the web. It is quite a momentous shift in the approach in the USA. These are the regulators that have been strenuously seeking to make self-regulation work over the last three years and have now concluded that self-regulation is not enough. I would suggest that, combined with recent initiatives by the US President—for example, a further announcement that he made on the 1 May about the protection of personal information held by financial institutions—that privacy may well become a presidential election issue.

The legislation before the parliament here in Australia responds to these developments. I believe the legislation before the committee has a number of key questions that need to be addressed. I suggest that they include the following questions. Does this legislation achieve an appropriate balance between privacy and other equally important considerations, including freedom of choice, and us having for ourselves an efficient and effective society from the perspective of each of us as individuals? This concerns the government that we have, the police forces that we have, the businesses with whom we deal and the doctors who look after us.

I think a second question is: what is the best framework for giving us the privacy protection that we deserve? Should it be an integrated regime, as is proposed in this legislation, or should we be moving towards, say, sector by sector legislation, which is what has actually happened in the USA? Another question that I would pose is: is the coverage of the legislation appropriate? Another question I would suggest is: is the legislation going to be effective; is it enforceable? There are a number of questions along those lines.

As for me, I believe the basic principles, as spelt out in the national privacy principles, are fundamentally sound. I believe the legislation supporting the national privacy principles before the parliament at present is based on a sound framework but that some of the exemptions do need refinement. I consider very strongly that an integrated framework is essential. The difficulty of obeying the law in America increases by the truckload of parliamentary legislation coming forward over there that is not necessarily the best solution.

I would suggest that, in the light of what I have said, the legislation is most timely. However, I would also suggest that the rate of change that is happening in the information economy makes the review of this legislation, as proposed by the Attorney-General, absolutely essential. Without taking anything back from the legislation that is before the parliament, the only thing we can be sure of is that this legislation is not yet fully correct. But we do not know where that is. No human being knows where that is. The world is moving so fast that we need to keep a

constant eye on how we regulate the information economy, and I welcome the review by the Attorney.

Finally, I would like to make a personal statement about our commitment to administering the new private sector provisions of the bill. We will do so in line with the clearly expressed intentions of the bill, but there are two elements of the bill that I mention in particular. The first is the requirement that I exercise my powers in a balanced way. There is already section 29 in the act. It is slightly modified by the bill that is before the parliament. It requires me to take a balanced approach.

The second element is the expectation that I develop the practical application of this scheme in close consultation with all relevant stakeholders. This touches so many human values. The only way we can do this well for the people of Australia is if we are well in contact with them. And again, both of these are in line with the strategic plan that we have developed for the office and which were attached as Attachment 3 to our submission.

In conclusion, I would suggest that if parliament adopts the changes to the bill along the lines we have suggested in our submission then I think Australia will have a privacy regime that will give all Australians the protection they deserve of their personal information. The legislation will give us the confidence that we need to make the best use of the information economy, and it will also achieve this result in a way that is sufficiently flexible to respond to the rapidly changing information economy, and it will do it without stifling innovation. I look forward to your questions. Thank you.

CHAIR—Thank you, Mr Crompton. I wonder whether the best way to approach this would be to work through your submission, particularly where there are matters which you have some suggestions to make in relation to the bill. That might be the easiest way for us to proceed in some sort of organised manner.

Could we start then with ‘Major issues’ and your subheading ‘Political exemption’ on page 4 of your submission. There seems to be two points that you are possibly making, one is questioning whether or not there should be such an exemption in the first place, and secondly, if there is such an exemption, then questioning whether or not individuals should have the right to correct records that are held about them. Would you like to elaborate on that?

Mr Crompton—Perhaps I could phrase it slightly differently. Coming back to the question of balance, I think it is very hard to make an extreme statement that there should not be a political exemption. However, the question that I would like to address is: what is the problem that is before the parliament that needs to be resolved by a political exemption? I say that because once we have a clearer idea of what the problem is then we can probably come up with a more targeted exemption. Unfortunately, I have not been able to understand what the problem is, so at the moment I do not know that an exemption has been justified.

I would also suggest that this is a classic case of where parliaments are doing business for the people of Australia as they see fit. This is a balance question for the parliament to decide. You will hear me and you may form your own opinion, but at the moment we have not had evidence as to what the problem is. Unfortunately, the exemption as currently drafted does have some pretty horrific side effects that I can only conclude are unintended consequences. They include

the kinds of questions that were asked earlier about the fact that if information is held by a business, I can seek to see what the business holds about me under this legislation, but not by a political party. If that information is wrong and it is held by a business I can seek correction of some sort, but not by a political party. And in the modern functioning society, I do believe we need a better balance than that.

CHAIR—If there was to be some provision along the lines of allowing people to seek to correct information then presumably there has to be some mechanism for them to obtain a copy of the information held about them. If you were to make public the information that political parties held that in itself would be a breach of privacy of all those people. It might simply be some interests that constituents have that are collected from time to time in surveys and the like. Presumably you would want some mechanism that if an individual felt aggrieved for whatever reason, that individual could seek to see the information that is held and, if necessary, have it corrected. Would that be the sort of mechanism that you would have in mind?

Mr Crompton—Very much so. Thinking of analogies might help us think it through. Is there a difference between the information held on a number of people in any large commercial database and information held on people in a set of records held by a political party? In each instance what is being talked about under this kind of legislation is that whoever I am as an individual I am able to find out the information held about me in that database. It is nothing about the rights of access to information held about others. That is what this legislation is about—it is about my own access. That is a different question from some of the questions under the electoral roll where part of keeping the electoral roll honest is that I can see some basic information held about other people—that is not the question that we are addressing here, though.

CHAIR—So it would have to be information beyond that held on the electoral roll because that is a public document and that serves a purpose by being public.

Ms JULIE BISHOP—You can buy it.

CHAIR—You can buy it, that is right, or you can go and inspect it, or whatever, and that being publicly available is said to have a public benefit. So it would have to be something beyond that. The nature of the information is likely to be something related to the interests of an individual, whether they are a self-funded retiree or a pensioner, or they are interested in the environment, or they own a small business or something like that. That is the nature of the information that is probably to be kept. In fact it is probably less likely to be sensitive commercial information that a debt collecting agency, or a debt assessing agency, might have on individuals. So if there were a process that enabled a person to ask what information was kept and have a copy of it and have it corrected if they thought it was wrong, would that be appropriate?

Mr Crompton—In terms of the issue that I raised in my submission, yes, that would be one way of correcting the current exemption.

Ms JULIE BISHOP—But it must come down to a balancing act between information that I collect from the electoral roll, and then say I add to that information that I gleaned from the constituent by way of communication with me, so they write to me about health issues.

Mr CADMAN—You are a political party, are you?

Ms JULIE BISHOP—Yes, I am a member of parliament actually.

Mr CADMAN—No, but you are talking as a political party?

Ms JULIE BISHOP—I am talking as a member of parliament.

Mr CADMAN—I think we have got special provisions.

Mr Crompton—There are two parts to the political exemption. The first one is absolute and complete; it simply defines organisations as not including political parties. So the legislation does not touch political parties at all, which is why Peter Ford gave the answer earlier that a political party can traffic in any information it holds anyway that it wants—because it is a political party—including selling it to a private sector business database company. As we discovered during the earlier evidence, the exemption that relates to members of parliament, councillors on local councils and so forth, is a bit narrower because it is getting closer to information relating to the political process being exempted. As we have said, maybe candidates are not similarly covered. The political party exemption is therefore much broader and so we could perhaps have a discussion about, first of all, the political parties and the political representatives. But I think we probably should retreat for a moment in both of those circumstances to ask ourselves some fundamental questions as to why I, as an ordinary citizen, should have different rights or lack of rights of access, correction, those kinds of things, with regard to information held about me by anything political, compared with those held by any other organisation in the country. Until we have an answer to that question, that is really my sticking point.

Ms JULIE BISHOP—Other than media organisations?

Mr Crompton—Sorry, I was addressing the political exemption at the moment. Yes, the bill would exempt a number of other organisations—media, small business and so forth.

Ms JULIE BISHOP—When you put it in the context of the other exemptions, it is not so extraordinary.

Mr Crompton—Yes.

CHAIR—What I am trying to get at, Mr Crompton, is the nub of your objection. Is it an in principle one to political parties collecting the information and therefore being exempted, or is it that there is a lack of mechanism to have collected information corrected?

Mr Crompton—As I have said in the submission, I believe that if we are to have a community that fully respects the principles of privacy in the political institutions that support them, then the political institutions themselves should adopt, wherever possible, the principles and practices that they seek to require of others. So, at that philosophical level, that is my first answer.

CHAIR—But that does not take us beyond Ms Bishop's point in saying that this bill contains exemptions for a whole range of small business, health records, certain employee records, et cetera.

Ms JULIE BISHOP—People who are not brought to account at any time in their existence, as opposed to political parties who, at the end of the day, are brought to account, in one means or another, for their conduct.

Mr Crompton—As we go through the rest of the submission, we are also suggesting that those other exemptions could be more finely targeted as well. In particular, with the small business exemption the effort is already to try and make sure that the only small businesses that are exempt, by and large, are those small businesses that are unlikely to be doing anything particularly gross with people's personal information. So, yes, there are other exemptions but, yes, I would suggest that those exemptions should be more finely targeted as well.

CHAIR—Your general proposition would be that, where there are exemptions, they should be as narrow as possible?

Mr Crompton—Yes. Let us define the objective, what the problem is, and then address that problem as narrowly as we can. Because of the nature of the political process, I am suggesting that we need to give particularly careful thought as to the strength of the reasons why the political process should be exempt. But in the end, very seriously, this is for parliament to decide, it really is, and each nation has come to its own balance of decisions on a whole range of factors. I am just trying to make sure that we think this one through extremely carefully, especially if, in our modern society, we do want to be able to lead our private lives, and then parliament leading by example would be a superb, excellent example.

CHAIR—Can I ask you a question that I asked the Attorney-General's Department, and that is: if there is an exemption in this area, then why shouldn't the exemption also apply to duly nominated candidates for political office?

Mr Crompton—Peter Ford probably gave the answer to that when he said that it had been negotiated at the political level. Therefore, I am not party to that. Maybe the problem was defining what a candidate was. I do not know whether, in other words, there was a definitional problem, but if you can resolve that definitional problem then it would seem appropriate that both candidates and already elected representatives should have the same treatment.

CHAIR—According to the Australian Electoral Commission laws, you are a candidate when you have nominated according to the due process—

Ms JULIE BISHOP—The writs have been issued and you have nominated.

CHAIR—Yes, you have nominated as a candidate. I suppose it reduces the likelihood of breaches of privacy because most elections are conducted over a short period of weeks in any event, so the practical outcome may not really be that great.

Ms JULIE BISHOP—When you look at the numbers of candidates that end up standing for upper houses around the country, you are extending the exemption to quite a broad group if you are just looking at, say, Senate candidates, upper house candidates.

CHAIR—I think we understand your submission about political parties, so can we move on to the media exemption. Mr Crompton, you raised as suggested options those that I put to the Attorney-General's Department, namely, the provisions of the New Zealand Privacy Act and the provisions drafted for Victoria. Do you wish to elucidate any further on them?

Mr Crompton—I probably do not have a lot more to say. We do have, clearly, a need for a society where freedom of the press is a vital element of it. What we are all trying to do is struggle towards a mechanism that delivers that, but puts the boundary in the right place. I am suggesting the Victorian legislation and New Zealand legislation are probably closer to the mark than the bill as currently drafted. Certainly the addition of the word 'information' in the current definitions appears to make it very difficult to find out where the boundaries are.

CHAIR—Even the New Zealand definition of news medium being an agency whose business or part of whose business consists of news activities is reasonably wide, it would seem to me. If you were a community organisation, part of the activities of which was to disseminate news about your activities—I could think of a range: the Red Cross or Greenpeace or the Australian Conservation Foundation or any other similar sort of non-government organisation—it would seem to me that you could claim that part of your activity, part of your business, was news activity. Do you have any comment on that interpretation?

Mr Crompton—I think Gabrielle Mackey very clearly pointed out the difference between something like the small business exemption, which exempted an organisation, and the media exemption, which actually exempts particular activities of particular kinds of organisations. So it is actually trying to narrow at two levels. First of all, you have got to be a media organisation of some sort and then, second of all, the only thing dealt with is the news activities, or the media activities, or the journalistic activities, within that organisation. It appears as though the New Zealand legislation on what is a media organisation is a bit narrower. It is possibly arguable on that. But then, underneath that, the definition of what is news activity is narrower than the Australian definition. So at both levels of the funnel as we try to get down to exactly what the exemption is doing, it seems as though New Zealand's is a bit narrower than ours. But I would suggest that the Victorian definition is just that much narrower again, because it has the word 'principal'.

CHAIR—Principal business.

Mr Crompton—Yes.

CHAIR—But on the other hand, to take my example of the community organisations, you could hardly claim that the principal business of Red Cross or Greenpeace is news. To take some sort of organisation that has a small 'p' political presence such as the Australian Conservation Foundation or Greenpeace or someone like that as a hypothetical, I would have thought you would be hard pushed to say that the principal business activity is news.

Mr Crompton—Which is, I think, one of the advantages of having the word 'principal' in there. It would make it just that much clearer that, because the principal business of Red Cross was not media activity, therefore it would not be covered by the exemption.

CHAIR—So they would not be exempt?

Mr Crompton—Yes.

Ms JULIE BISHOP—Conversely, what about extremist organisations whose principal activity is terrorism but who put out press releases all the time? Their activity is not media, although their activity is to influence and intimidate and the like. Where would they fit into the scheme of things if their press releases contained personal information?

Mr Crompton—I would suspect that at the moment we would be hard pressed. I would have thought one of the questions is that they could possibly structure themselves in such a way so that there was the media wing, and therefore the media wing would be primarily a media activity collecting and disseminating information for a journalistic purpose. It is very difficult.

CHAIR—Mr Crompton, I note the New Zealand act was passed in 1993. Are you aware if there was any case law or any equivalent decision to yours in New Zealand—I am not sure how it is enforced in New Zealand—about the meaning or the interpretation of this definition?

Mr Crompton—I am not personally. That does not mean to say that there is not something. I would prefer to take that question on notice, unless anybody with me knows the answer.

CHAIR—If you could. Given that six or seven years have passed, presumably, since this came into operation in New Zealand, it may well be that someone—a court or a privacy commissioner or a similar body—has had to interpret what those words mean. That may be of some assistance to us.

Ms Cowper—I am not sure, but we will have a look at the actual case law. But there was a review of the New Zealand act and one of the findings of the review was that the exemption, as it was phrased originally, should remain.

Ms JULIE BISHOP—When was that review?

Ms Cowper—I am not sure of the exact date; I think it was 1998.

Mr Pilgrim—Yes, it was 1998.

CHAIR—Can you give us a full citation to the review so that we can obtain a copy of it, please?

Ms Cowper—Sure.

CHAIR—Thank you.

Mr Crompton—We can probably get you a physical copy and I am certain that there is also a copy on their web site. So we have all got very easy access to it once we have got a full citation.

CHAIR—Thank you. As there is nothing else on the media exemption—and I think we understand the propositions being put to us—we will move to the small business exemption. I have a general question: where there is privacy legislation in other jurisdictions, do they have exemptions for small business?

Mr Crompton—My most accurate answer to that is that I am not aware that they do. As far as I know, the standards that most people apply to themselves such as the OECD 1980 guidelines or the EU directive do not have exemptions like that.

Mr Pilgrim—To add to that, there is no similar exemption in the New Zealand act, the Canadian act, which has recently been passed to cover the private sector, or the act in the United Kingdom. They are three that I am sure of.

CHAIR—Right. You say in your submission that the exemption is complex and it may exclude many Internet based businesses. You have some concerns about the way in which a formula works to calculate turnover and, therefore, what is defined as a small business and you are uncertain about how it applies to non-profit organisations. Can you just elaborate for the record on those matters?

Mr Crompton—I must admit that you asked me so many questions there; I need to take them one by one.

CHAIR—It is on page 9 of your submission.

Mr Crompton—On the first point about the exemption being complex, even if we can resolve some of the questions that were being discussed in evidence earlier today, one of the points of having this legislation as enunciated has been to give individuals the trust and confidence that they need to make use of the information economy. So if this kind of exemption simply makes it confusing to know whether my information is going to be protected in this instance or not, regardless of the technicalities of that, the confidence may not be there. One of the things about web sites, of course, is that they can be fairly pretty and run by a two-bob operator or they can be pretty boring and run by a very large organisation. What you see on your computer screen does not always tell you a great deal about the quality of the operation or the size of the operation behind that screen. So people may well respond to the confusion by not acting. That is what that ‘exemption is complex’ point was making.

CHAIR—Your argument also seems to be that, if e-commerce, for example, is going to flourish, then consumers need confidence in the system and, in effect, in what is behind the image on the screen. That will only result if they have confidence about the way in which personal information is handled.

Mr Crompton—Any amount of the survey evidence that is available would suggest that most people who are already using the information economy are concerned about what is going to happen to their personal information. For example, there is already survey evidence that a

very large number of people when consciously asked for information over the Internet do not tell the truth. I ran a little survey in a speech that I gave a couple of weeks ago, asking people to stick up their hands about various questions such as: do they use the Internet; have they purchased over the Internet? All the hands went up. Then I asked: have you always told the truth on the Internet?' And not a single hand went up. We are all doing that kind of privacy defensive behaviour. That is where we are being overtly asked for our information.

One of the things that is happening on the Internet at the moment, and particularly in places in America where a lot of this is leading edge, is that information is being collected from people by stealth. You do not even know that the information is being collected.

Ms JULIE BISHOP—The use of cookies.

Mr Crompton—The use of cookies is just one of many examples. But basically, if you like, the word is out. People are now not certain as to what is happening to their personal information on the Internet. Some very concrete action is needed to regain that confidence. Transactions on the Internet are not growing at the same rate as browsing because people do not have the confidence. There will be a great range of reasons but one of them is demonstrably that they are not confident in the use of their personal information.

Mr CADMAN—Have they been able to separate the privacy factors from the security factors on things like giving credit card numbers and so on?

Mr Crompton—Yes, they do separate that out. For a lot of people security mingles in their mind with privacy and in the national privacy principles security is one of the privacy principles. Security is about making sure that you have delivered the information to the person you wanted to deliver it to—that nobody else is getting it and the information is delivered accurately—those kinds of things. Privacy is about having delivered securely to the other end, to exactly whoever you wanted that information to go, and that that person then does the right thing by that information, including letting you inspect it, letting you get it corrected and making sure that that person does not on-sell the information without permission and so forth.

Mr CADMAN—You quoted a number of polls. You have been able to separate security and privacy—

Mr Crompton—Yes, in a number of those polls there are both privacy and security questions.

Mr CADMAN—You only quote privacy?

Mr Crompton—Yes.

Mr CADMAN—Could we have the complete file?

Mr Crompton—Yes. The URLs that are in the evidence that we have given you will take you out to the surveys and they can be searched from there. I would be very happy to help do that, but there is in fact an incredible amount of information that has been provided behind the submission.

Ms JULIE BISHOP—How concerned are people then about the collection of information. Rather than just providing information to one, two or three suppliers, it is the collection of it so that a sophisticated analyst could put together a dossier on your private habits, your spending habits, your movements, your whereabouts—all those sorts of things. Is the actual compilation of the dossier an acute concern?

Mr Crompton—It is very hard to answer a question like that. But just to get to Australian evidence, one of the polls that I have given you there is a Roy Morgan poll which shows that more than half of the population is concerned about the impact on their privacy of information technologies. That is a vague question, but it got a clear answer.

Ms JULIE BISHOP—However they use a credit card or various cards, or whenever they give out information, there is the big brother concern that somewhere along the line it will be fed into a point and there could be quite a profile of someone?

Mr Crompton—Yes, correct. When things like the DoubleClick example happened in America it showed that enormous amounts of data have been collected. They actually are getting to the point where they cannot build machines big enough to store the data that they have collected. We are talking about terabytes of information. I cannot remember what the power of 10 is to a terabyte, but it is a fairly large number—

Ms JULIE BISHOP—Big.

Mr Crompton—The information is there. They are struggling now with how you explore that information in order to be able to use it. They are beginning to do it. When DoubleClick was making the point that it was beginning to join up the information it had already collected—just by people's behaviour with banner ads on the Internet—with information that they had brought up from another company, Abacus, that is when DoubleClick found itself in an enormous amount of trouble. Its share value dropped $US2,000 million in one day when it was announced—not that they had done anything, but an FTC investigation was going to be started. There are serious concerns happening in other countries about this issue and it does backwash into this country.

More than half of Australian on-line purchasing last Christmas was done at overseas entities. Whether it is dot.com or dot.com.au, it no longer tells you a great deal about whom you are dealing with. It gets back to the complexity question that we started before—people will resolve the problem by not doing.

CHAIR—That is the broader issue if you like, Mr Crompton, of all of this, which we are not going to solve with this bill. Can I work backwards from your suggestion, because I am not sure how we solve some of these problems, even if we were to adopt your proposal. You say that if the exemption is retained—and presumably you would give me the same answer that you gave me earlier about whether or not the exemption should be retained, and that is a matter of judgment as to whether that should be the case, so unless that answer is different, I will assume that that is your first answer—then you support the approach. Returning to the approach outlined in the key provisions document released by the Attorney-General's Department in December last year, modified to incorporate the concept of the small business operator and the

Attorney-General's Department prescription of power. Apart from the value of the turnover, where there other variations in the key provisions document from what we have in the bill?

Mr Crompton—I am working from memory for a moment and people are looking around in the background to pull out the actual wording of the previous form. But, for example, I think the proposal was that, as opposed to just health information, it was sensitive information that was something that removed you from the small business exemption. If you look at the definition of sensitive information, it is a great range of other issues, but also includes health information. So the fact that you are not exempt if you are holding sensitive information and that it is down to the $1 million threshold are the two main reasons why I feel that the previous version is preferable.

CHAIR—Section 6D of the bill says that 'A business is a small business if its annual turnover is $3,000,000 or less'. Then 6D(4) says these bodies are not small business operators if they have an annual turnover beyond the $3 million, and such a body provides a health service, discloses personal information, provides a benefit or is a contracted service provider for the Commonwealth. So I may have missed something, but I do not see in the bill the sensitive information.

Mr Crompton—I am terribly sorry. In the key provisions document in December of last year, where now the test point is whether it is health that you are dealing with, the test point was a wider test point of sensitive information rather than just health information. Unfortunately, we are dealing roughly in triple negatives here. What this subsection (4) does is add back into the coverage of the bill certain forms of small business. So what I was looking to was an add back that was a bigger add back, namely, not just organisations that provided a health service and had health information but in fact a small business that had sensitive information and is therefore a wider add back.

In the key provisions bill it was actually a much simpler description. 'A small business organisation means an organisation that does not hold any sensitive information'—that is all it said in what was released in December last year. Now the equivalent in the bill is saying where 'it provides a health service to another individual and holds any health information except an employee record'. So I am suggesting to you that a much smaller number of small businesses would have been exempt under the proposals that came out in December of last year because of the wording of that part of the provisions last year.

Ms JULIE BISHOP—So if it had included sensitive information, as with health information, some of the categories of sensitive information are such things as criminal record. An individual's criminal record can be quite public; it might be sensitive but it is public.

CHAIR—Why shouldn't a small business operator be entitled to have information about a person that involves public criminal record? Or membership of a trade union; it could be an employee.

Mr Crompton—That is a good question. The difference is that the legislation provides some protections around the fact that the small business has that information. It is not saying that small business cannot have it, it is just saying that small business has got a few more things that it has to go through in order to have that information. For example, with trade union

membership, they would have to make sure that they have got the permission of the individual to hold that information. The individual would have a right to inspect the record of trade union membership as held by the small business.

Ms JULIE BISHOP—What if it was public information? The aim is to reduce the compliance burden on small business where it is not actually addressing any mischief. If you added sensitive information, as defined in the act, you could have small businesses subjected to the increased compliance burden of this act merely by virtue of the fact that they hold public information that anybody would have known about an individual.

Mr Crompton—That is where we are getting to the matter of balance on the whole of the legislation. But there are two forms of record a small business might hold, one of them is employee records and one is non-employee records.

Ms JULIE BISHOP—I am not talking about employee records.

Mr Crompton—I would have thought that we would want to be fairly careful about the holdings a small business had of sensitive information that was not an employee record.

Ms JULIE BISHOP—Take a contractor you deal with, or customers and various people that you are dealing with, suppose they have a criminal record for fraud and everybody knows about it and you have it on your file so that people who are dealing with this customer who has a string of fraud convictions are aware of it, even though it is public information, they would then be caught within that. It seems like a pretty reasonable thing to do, to have that on file somewhere, and then that small business would be caught by the provisions of this and then have the compliance burden added to their business costs.

Mr Crompton—It is a matter of balance because by the same token probably the only thing we know for certain about CrimeNet is that it has got errors in it, including claims of criminal—

Ms JULIE BISHOP—But would not an organisation like CrimeNet be subject to this because they do it for benefit.

Mr Crompton—Maybe I have used a bad example. What I am saying is that as soon as you have collected that kind of information, or any information, almost certainly you are going to have errors in the information that you are holding. One of the obligations on holding personal information is that the person knows he has given consent to its collection and knows that it has been collected.

Ms JULIE BISHOP—CrimeNet is in the business of collecting information for passing on for benefit—

Mr Crompton—It is almost certainly already not a small business, by the way.

Ms JULIE BISHOP—It depends if you can actually get on to it. That is the difficulty.

CHAIR—Hypothetically, suppose I am a business operating over the Internet. When you go to my Internet site it asks: which language would you like to proceed in—English, Vietnamese,

Greek, Italian or Hindi? You then click on the language you choose and proceed through that Internet site. That has then provided information of a racial or ethnic origin to the Internet business operator, undoubtedly. There might be some people who have a second language who just want to practise their Italian on the Internet, but in 99 per cent of cases they will be people who are of that ethnic background.

Mr Crompton—In circumstances like that the solution is going to be something like the page on the web that is asking that question simply giving you a notice. There are two ways of doing it. Supposing you click on English or Italian and there is no record back at base that that is what you did, then no personal information has been collected. But if you actually want to customise your interaction with that website for future visits, then obviously some record is needed back at base that you did want it in Italian. Under those circumstances I would have thought there would be an appropriate notice on the page which says, 'We will be recording the language that you want to deal with us in. Please feel free not to proceed if you do not wish to divulge that information.' But the person has to be given some mechanism by which they can say, 'Yes, I do want to proceed,' or, 'No, I do not want to proceed,' and yes, the information will be collected.

Ms JULIE BISHOP—If you take that to an extreme, you could have a whole series of requests for consent that would take you 55 minutes to get in past the first page. People just do not operate like that in terms of trying to get onto the Net and do whatever business they want to do. They are not going to sit there and say, 'Now, am I going to let them know that I am speaking in Mandarin?'

Mr Crompton—You have touched on a sensitive point because I really think that if we have privacy legislation that is too detailed or in other ways slows people down, it will not help them lead their lives, it will become an obstruction in their lives in exactly the way that you are talking about. One of the things that I believe we, as the Office of the Privacy Commissioner, will have to do is work with both business and individuals to resolve that problem so an adequate notice and process is in place so that consumers feel as though they are in control but are actually able to do it in a way that works for them.

Mr CADMAN—So what have you envisaged? Where you are doing an Internet survey, you are providing customer information, you want to buy product or you want to respond to a survey—it is an interactive site—do you envisage it will say, 'This information will be held by XYZ company'?

Mr Crompton—Yes, some sort of privacy notice would need to be given.

Mr CADMAN—'This information may be passed on to other suppliers'?

Mr Crompton—If that is what is going to happen to the information, most definitely.

Mr CADMAN—Is that the sort of notice you have in mind?

Mr Crompton—Yes.

Mr CADMAN—To return to Ms Bishop's question, perhaps you would have to go through 50 screens of ticks, but an alternative might be that there is a first screen which says, 'We are about to collect a lot of personal information on you. Do you wish to proceed, or do you wish to be able to give a more detailed answer?' So for the person who does want to say yes to language but no to country of birth, and yes to age but not birth date or any of those sorts of things, maybe the business answer is going to have to be that people have some choices as to how much detail they want to check off for themselves. One of the things that happens at the moment is that too often people are presented with a one size fits all approach: you either have to present all of this information or you do not get the product—there is no choice in between. Maybe that is not even business smart, let alone appropriate in terms of the privacy legislation. I do think that probably what you have suggested is manageable.

Ms JULIE BISHOP—On the other side of things, of course, from the providers' point of view, they need some credibility checks that they are dealing with a legitimate consumer too, don't they? We come back to the balance point. When you go from one link to another and you get off a web page and then you go out somewhere else, there is always that little question that comes up: you are now leaving the Australian Parliament House site and you are off out into the Internet, are you happy to proceed?

Mr Crompton—In fact, the Australian Parliament House site is exemplary in doing that. There are an awful lot of sites that do not do that. Particularly where banner ads are cross-linking in all sorts of ways, it becomes extremely difficult to tell whom you are dealing with, especially if the page has been formatted in various sorts of frames so it appears as though you are still dealing with the original organisation but, in fact, stuff that is being presented in the middle of the page has come out of another organisation. It becomes very unclear who you are dealing with. At some stage, that will have to get clearer.

Ms JULIE BISHOP—A best practice module. I think on all government web sites—US, UK, Australia—you see that you are now leaving and you are going somewhere else. But you are right, it is not uniform.

Mr Crompton—Mr Pilgrim would like to add to the answers.

Mr Pilgrim—It is in relation in particular to the issue of sensitive information. Its philosophic antecedents, if you like, are from overseas directives, EU directives, et cetera. The point that is important to remember about it is that, because of the particularly sensitive nature of the information that is being collected, be it racial, political opinion, religious or philosophical beliefs, there has always been in regard to the national principle that deals with it—that is NPP10—a need to get consent before collecting it. That is to ensure that the individual knows that that very sensitive information is being collected so that they have a right to check to see what use it is being put to. And it is that use that that information is being put to which is why it is so strongly protected under its own individual principle.

Ms JULIE BISHOP—It raises all sorts of interesting issues. Say I am a small business, I send out all these glossy newsletters and people write back to me and say, 'I don't like your glossy newsletter; why don't you use recycled paper?' and I think, 'Oh, this person is an environmentalist or concerned about green issues or something,' so I make a note. I am collecting information about their philosophical beliefs?

Mr Pilgrim—Potentially, yes.

Mr CADMAN—You are speculating on it.

Ms JULIE BISHOP—But is my conclusion from something you have said to me sensitive information?

Mr Pilgrim—Your opinion is considered to be information if you write it down or record it.

CHAIR—So 'philosophical beliefs' just about covers the field, doesn't it?

Mr Pilgrim—It could be interpreted as being very wide, but I would stress that the right of recourse is that if an organisation is going to make important decisions about a service they provide to someone on the basis of those philosophical beliefs or any of the other areas that come under sensitive information, it is even more important therefore that the individual knows that that decision has been based on those sorts of areas.

Ms JULIE BISHOP—Surely my example could not be sensitive information. If somebody writes to me and says to me, 'I do not like you using glossy paper. You should use recycled paper,' and I conclude from that they are an environmentalist so I will not send them my latest brochure on woodchipping or something—

Mr Pilgrim—If you write down that your opinion of that person's philosophical beliefs is that they are an environmentalist, then you are writing down, by the definition, sensitive information because you may then decide on that basis not to provide them a service or to withhold a service of some sort on the basis of their philosophical belief.

Ms JULIE BISHOP—So, therefore, Julie Small Business will then bring myself within the act because I do things like write down, 'This person is an environmentalist?'

Mr Pilgrim—If you are collecting sensitive information, then my interpretation would be yes, you would be covered by the act if the act did include sensitive information as one of the drawing in mechanisms. That is correct.

Mr Crompton—What you have picked on is one of the many words that are in the bill that are very difficult to interpret. We have got 'as reasonable', 'if necessary' as well as 'philosophical' and other words in the bill that are not then given technical meaning in the bill.

Ms JULIE BISHOP—Yes. 'Sensitive'.

Mr Crompton—'Sensitive' at least does give a list but then some of the words underneath 'sensitive' are like that. It would seem to me that we are probably going to have to learn together as a community where to draw the borderline on what is philosophical and what is not. If that means that, because it does actually become an issue, I start issuing some guidelines or some statements of how I think it should be interpreted then perhaps we will have to do that. This, in that sense, is setting up some framework law where an appointed arbitrator, if you like—me in this instance—will have to draw the line on some of those questions. Rather than

come up with 10,000 pages of legislation which closely define the word ‘philosophical’ and everything else, we have to—

Ms JULIE BISHOP—They have been trying to do that for centuries.

Mr Crompton—Indeed. Instead they have come up with a simpler piece of legislation where the trade-off is that you are asking a decision maker to draw the line. It seems as though most privacy legislation around the world is taking that kind of broader approach. It is probably again one of the reasons why a law such as this needs to be kept under review to see if the decisions that I am making make sense and if the framework of the law itself makes sense. But what we are doing with this kind of legislation is changing the balance somewhat between the individual’s rights and the rights of organisations. But that is all that it is doing. It is moving the balance around and we now have to see if it is going to work.

CHAIR—Can I try to understand what the practical implication of this would be? I will take an example referred to in your submission, Mr Crompton, and that is the CrimeNet type of example, just so it can help me to see where this leads us. If we were to assume that the act drew CrimeNet into the privacy regulation, what would be the effect in practical terms on the activity of that organisation? I am only picking it out because it is easier to follow a real example than a hypothetical one.

Mr Crompton—I would have to say that we are still thinking the CrimeNet issue through. One of the things is that somebody would have a much clearer ability to complain to CrimeNet under this act that the record was not correct somewhere. The CrimeNet under those circumstances would have to pass some tests relating to security, relating to access and correction and other things like that. The question that is a harder question is to what extent CrimeNet would have to seek prior permission to be holding a person’s criminal record, especially because what it is claiming to do is quoting from a newspaper. CrimeNet is very carefully positioning itself, as I understand, to be saying, ‘We are gathering up newspaper records. This is all public information,’ so the way you get the answer back is to say that Ms X or Mr X was quoted in XYZ newspaper of three weeks ago or two years ago as having been convicted of whatever.

CHAIR—Yes. It may not be a good example because it has got some peculiar circumstances.

Mr Crompton—But my preliminary conclusion is that they probably are dealing in sensitive personal information and therefore, as they collect it, they need to get the consent of the individuals about whom they are collecting it.

CHAIR—Even if it is a matter of public record otherwise?

Mr Crompton—I would have to say that I am still trying to think that through.

CHAIR—I am not here advocating the cause of CrimeNet, but just to try and tease out the issue: why couldn’t they equally go to court records and search them? They are public documents. I can go to the Prothonotary’s Office at the Supreme Court or the County Court Registrar’s office and search records of convictions if I want to spend the time doing it, just as

business journalists can go to the records of the civil courts and look at the affidavits filed in commercial cases.

Mr Crompton—My colleagues are about to actually give a technical answer because I can hear a technical answer forming in their minds, but let me get philosophical for a moment. Arguably, that is why you need a media exemption so that media can go to a court record and find out from the court record what is in the record and publish it, no questions asked, but when the CrimeNet issue first hit the airwaves a couple of weeks ago we were getting hotline phone calls that would make you weep to take them. We heard from a woman who said, 'My children and I have left our husband. He is in jail. We are building a new life. We want to leave that past life behind us. The father is not to be in contact with the family anymore but, within 24 hours of CrimeNet getting going, relatives were ringing up and saying, "Did you know your husband was on CrimeNet?"'

We had a phone call from a person who said, 'This web site condemns me to a life of crime. It is so easy to find out about my criminal record that I will never be able to get a job again.' Society is beginning to be asked to make a judgment on whether newspapers carrying this information is satisfactory but very rapid universal retrieval is unsatisfactory. I think you will find this issue is being grappled with all over the world. I am sorry to have to give you another philosophical answer but I am wondering if my colleagues can you give a more—

CHAIR—I do not have any objection to philosophical answers, Mr Crompton. Sometimes even parliaments have to address philosophical issues, but we will have a technical answer as well.

Ms Cowper—I will have a go at a technical answer. The definition of personal information is simply that it is information about an identifiable individual. Where the generally available publication concept comes into the Privacy Act and into this bill is in the definition of record. So generally how the information privacy principles work is they place obligations on agencies that are collecting information. The principles work a bit differently but the collection principles say: if you are collecting information for inclusion in a record or a generally available publication you need to apply these rules to how you do it. Although the information is there on the public record, the bill and the act say there are still disciplines that you need to apply in how you collect it—in the IPPs there are different rules about what you can do with information. I am sorry, I am confusing the issue here now. Basically, the concept of generally available publication, as I said, does not mean that there are not disciplines around it for the act and for the bill. I will stop there and you can ask me questions.

CHAIR—I understand what you are saying, but it does raise another question, which I suppose we discussed earlier. If you can categorise yourself as a media organisation then it seems to me you do not have to worry about these provisions?

Ms Cowper—Yes, we agree with that.

CHAIR—That seems to be a fundamental challenge in this area because how do you balance the freedom of the press as against what we are talking about now?

Mr Crompton—I honestly think that we are only going to find out by experience on some of these things, regardless of any of the options that have been put before the committee already, or will be put before the committee. I think this is one of the important reasons as to why we have this review in only two years time. Arguably it will be premature and possibly, for example, a small business exemption would only have been running for a year before we would conduct that review. But things are moving so quickly and there are so many fine questions like this that I think an earlier review to allow us get a grip on what is actually happening is going to be much more important than continuing to worry about some of the refinements. I do want to get the refinements as right as we can, but we do need to make sure that, regardless of what eventually is decided upon, we fairly quickly are keeping an eye on whether they are having the right effect.

CHAIR—As I understand it, the other important change that you would like to see is to revert to a $1 million threshold if the exemption applies rather than the $3 million threshold?

Mr Crompton—Yes.

CHAIR—For any reason other than $1 million does not exclude as many businesses? Is it any more or less arbitrary than $3 million?

Mr Crompton—It is no more arbitrary than that.

Mr CADMAN—I think it is more consistent with the use in legislation than $3 million, though. That is the only thing I would say about it. Mr Chairman, you make a plea about the complexity of the exemptions for small business and the variation that can occur, given the grunt we have got in some modern database processes, between a very small organisation holding a lot of information and a large one holding very little. I think the chairman's point about publicly held information is a pretty valid area to explore, isn't it?

Mr Crompton—I would have to agree with you that it deserves more exploration.

Mr CADMAN—Because what we tend to do is say that we do not care how much good stuff they know about us, but we do not want them to know the bad stuff, even though it might be publicly available.

Mr Crompton—One person's good stuff is another person's bad stuff as well. It is a very fraught area, I would agree.

Mr CADMAN—I am little intrigued about the compliance cost issue as you raise it on the bottom of page 9. I do not know that you really reach a conclusion that is a practical conclusion on that. I think you present an argument saying that the complex process of defining 'sensitive' will mean that the interpretation of that becomes difficult for small businesses, whereas a simple definition of 'sensitive', just as you had previously, is a better way to do it. Have I got hold of it?

Mr Crompton—The point being made there is that there are elements in the construction of the small business exemption, I think more than one, where the interpretation of what is written down will at some stage be very difficult. For example, the small business operator construction

could mean that at some stage we have to chase through a number of organisations to see where the small business operator definition starts and stops—chasing through the information on each of those organisations to make sure that none of them have an income in excess of $3 million. Another point in the exemption relates to the fact that it is health information providing a health service where part of the definition of health service essentially says, and that is in the mind of the user of the service, that the user of the health service considers it is a health service. There are just a few points in the definition of the small business exemption which could mean that we could be doing a fair amount of investigating to find out whether the small business exemption is claimable.

Mr CADMAN—How does the code adjudicator work with small business, in your opinion?

Mr Crompton—I am not sure that I would see any difference. What is happening is that the construct of the law is such that it is saying that the national privacy principles apply in these areas net of exemptions and that the code adjudicator is the Privacy Commissioner unless certain actions are taken, mainly that an approved code substitutes for the basic national privacy principles or an approved code adjudicator substitutes for me, as the code adjudicator. But the start point is: what is the breadth of coverage of the national privacy principles? Any code adjudicator may well be up against the same kinds of problems as the Privacy Commissioner in undertaking the code adjudication if, in fact, what is happening is that the entity being investigated wants to claim a small business exemption.

Mr CADMAN—What you are describing is something that is feared by small businesses: somebody with an undefined role trying to get a solution in an undefined area. That is a fearful situation, because you do not know whether you are going to be called in, you do not know how much information you need to provide and you do not know how to defend yourself. All of the power rests with the person making the inquiry because they, on some unknown basis, can shift the goal posts all over the place.

Mr Crompton—That is an extremely good point. I would have to say that I would intend, wherever possible with big or small business, with doctors or with any other professional body to use the role that I have in a positive educational way, using the comment that Peter Ford was making before that, generally speaking, good privacy is good business, or good professional ethics. One of the approaches that we take now is very much an alternative dispute resolution approach. When somebody comes to us with a compliant, we will be going to the respondent, whoever the respondent is, and saying, ‘Can we just sort this out?’ That clears up a very large proportion of the complaints that we get.

Often times the respondent will want to solve the problem for themselves, because they know that it is better business to have a happier customer who has possibly got a little more than they might have otherwise got than to have an unhappy customer who has fought with them all the steps of the way to get a minimum resolution. I would be using the legislation, first of all, to turn up to a small business and say, `This is the complaint that I have received. How do you want to address it?’ I would be much happier to celebrate success, a well-resolved complaint, than I would be to condemn failure, something that has been fought every inch of the way. I honesty believe that would clear up a good proportion of the complaints we would receive.

Mr Pilgrim—I should just add to that that our current approach has always been, both under the Commonwealth jurisdiction and under the credit jurisdiction we have, that we would like to see the individual who has the complaint demonstrate that they have tried to resolve it with the respondent, the organisation or the agency prior to coming to us. That is the same sort of process we would like to see happen under the bill, as it is currently formed.

Mr Crompton—In fact in almost all complaints—I think, with the exception of two—over the decade of the operation of this office, the formal operation of the legislation has been that we have used a power under section 41 to set the complaint aside because it has been a conciliated outcome. Most of those resolutions have not even involved money changing hands so much as either an apology if somebody was offended or a correction to a record if the record was wrong or whatever. Up to now this has been a small issue in most circumstances, and if I can keep it that way then I will have succeeded. I will keep it that way because I will help business understand that good privacy is good business. I will keep it that way because I will help both business and consumers be cleverer in the way that they deal with the issues when they come up. We have a track record of a decade already of where it has worked fairly well in that way, and I will be doing my level best to keep it that way.

Mr CADMAN—Enforcement in other areas, however, has been progressively changed. Your very fine principles have been changed, say, in human rights areas to mean that failure to come to a conclusion now finds you in the Federal Court. What assurances do you think there are that would prevent this other area of interest in the interaction going the same way: why wouldn't it?

Mr Crompton—The legislation does provide for the fact that, if I do make a determination and the determination needs enforcement, I can get enforcement through the Federal Court.

Mr CADMAN—No, they are two different areas. Where there is a failure to reach an agreement in the human rights area it is now in the court; it is not a matter for the commissioner so much. You are saying that you can call the pace now.

Mr Crompton—I am sorry, the resolution making process in extremely simplified form is that—Timothy Pilgrim can clarify if I am glossing things over too much—in simple terms when a complaint turns up the first thing that we try and do is to conciliate the answer so that we can set the complaint aside. That has happened in all instances except for two over 10 years. If, however, we need to make a formal determination, then we will make a formal determination under the legislation, section 52, and normally we would expect that determination to be abided by. However, if the determination needs to be enforced, then the only way we can enforce that determination is to go to the Federal Court.

CHAIR—And you are happy with that process applying—

Mr Crompton—There is no other approach, I don't think. I am not a judicial body because of the Brandy decision; I am outside of the judicial process.

CHAIR—I thought what Mr Cadman was getting at is that under the human rights legislation amendments—

Mr CADMAN—In 1999.

CHAIR—if the conciliation is not successful it goes directly to the Federal Court.

Mr Crompton—Yes, they have changed the human rights legislation and, presumably, this legislation could be amended by future parliaments too. What I guess I am trying to do is address what we have in front of us.

CHAIR—My point is that you are happy with the mechanisms that are in the bill so far as this is concerned?

Mr Crompton—I believe we can make them effective, yes.

CHAIR—That sounded like a guarded answer, Mr Crompton. I understood you to be saying—correct me if I am wrong—that you believe the process of conciliation between the parties is the appropriate mechanism to use in this area.

Mr Crompton—I am being as objective as I can about the future dealing with a different sector of the economy that has not been regulated up to now. All I can do is talk about my own approach to the issue and the endeavours that I will put into it but, in fact, there are other parties. I am saying to business that I will help business do business right for as long as they will allow me, but at times I will have to stop business doing business wrong if that is how they force me. It is in that sense their choice, not mine, but my first approach will always be to help business do business right if I can possibly do that with them. But, in that sense, they are some of the other parties to the issue, and all I can do at this stage is to say how I will try and work with them.

Mr CADMAN—That is an interesting approach because, from the business perspective, I think they would react fairly strongly to try to placate any concerns that you have. Do you find the same response from sections of the Public Service?

Mr Crompton—Yes, I do. I think any new piece of legislation takes time to settle down, and I am blessed with having turned up to this job about nine years after this particular legislation was put in place on the federal public sector. I believe that, by and large, we see a federal public sector that understands what is required here and does well in trying to do very much the right thing. Any human organisation makes mistakes. I am not talking about whether or not they are making mistakes; I am talking about their approach and their will to do the right thing. I generally think that the federal agencies are setting out to do the right thing for the right reasons. There is a fairly famous emerging case in Canada of where a ministry fought my equivalent over there down to the wire in a very negative way. I have not seen any behaviour like that of any sort in Australia while I have been doing this job, and I would be very saddened if it ever did happen.

Mr Pilgrim—Could I just add that for some years we have had jurisdiction over the credit providing organisations under part IIIA of the act. My understanding of the history of complaints and issues that have come up there is that they are similar to what we found with the public sector. The organisations are, on the whole, very willing to conciliate an outcome and come to a fairly clear and acceptable understanding for both parties. In fact, the two formal determinations that the organisation has had to resort to were actually in regard to the public

sector. We have never had to issue a private sector organisation under part IIIA with a formal determination. They have been willing to come to conciliated outcomes.

Mr CADMAN—Are you saying that you have had no problems with the private sector coming to you?

Mr Pilgrim—When I say no problems, there have often been protracted discussions and negotiations over outcomes, but they have never had to resort to us using formal powers to have an outcome enforced at all.

Mr CADMAN—And the private sector is the same, is it?

Mr Pilgrim—That is the private sector I was referring to, yes.

Mr CADMAN—And the public sector?

Mr Pilgrim—My understanding is that with at least one of the two formal section 52 determinations that we have issued, that was actually at the request of the agency involved because the agency involved needed to have a more formal directive so that they could pay out an amount of compensation. It was in relation to the financial acts that require payments of acts of grace payments to have formal determinations. They actually asked us to issue a section 52 determination, it was not one that we had to force on to them, for want of a better description.

CHAIR—I suppose the short answer is that no business would really want a determination against them from the Privacy Commissioner on the public record.

Mr Pilgrim—True.

Mr Crompton—I believe that will actually be an extremely significant tool over the next few years. Since I have taken up the position, on the two or three occasions when a data privacy issue has arisen, it has taken off in a media sense like a brushfire, and I do not think that most organisations would appreciate that being done to them. I am not using that as a threat, I am just saying that there are demonstrable, sensitive, community interests and media interests in the issue, and I would be working my level best with every organisation that would let me to resolve the issue in a way that it allows, if it needs to be announced, a satisfactory resolution, rather than an announcement of an upset or a determination or anything antagonistic like that.

Mr CADMAN—How has Telstra been?

Mr Crompton—I am glad to say that I have not had to deal with Telstra since I turned up in the job. I believe that Telstra has at times had to grapple with some extremely difficult issues in reaching the right balance, but I get the impression that Telstra has grappled with the issues and is doing satisfactorily.

Mr CADMAN—But on your comments, Telstra would be a little less likely to respond with alacrity than say, Optus.

Ms Cowper—Telstra is not subject to the Privacy Act. I am sorry I am not sure if you were making a comment about whether they were within our jurisdiction or not.

Mr CADMAN—They are outside it?

Ms Cowper—They have been outside our jurisdiction since the deregulation of the telecommunications industry.

Mr Crompton—Similarly, Australia Post's commercial operations are outside of the privacy legislation. One of the things that we are doing to help people do the right thing is that for many years we have had a thing called the Privacy Contact Officer Network in the federal public sector. That gives us better educated agents within the organisations so that the organisations themselves can address privacy issues from within, and earlier. I believe that has been quite successful. As I have said in our strategic plan, I intend to be developing networking on a similar basis with private entities to give them every opportunity to get across the issues and do the right thing.

CHAIR—Can I move on to a couple of other matters, Mr Crompton, because we are running out of time? Concerning the 'Employee records exemption,' you express the opinion there:

> ... it is unclear how the Workplace Relations Act will address issues in relation to the collection, use, disclosure and correction of, employees' personal information.

You go on to say:

> Even where the potential exists ... it is still not clear that all employees will be in a position to negotiate consistent and fair arrangements for the protection of their personal information.

I take it from this that your preferred position would be that this was under this legislation rather than the Workplace Relations Act?

Mr Crompton—It is another of these very difficult matters of balance. It has been announced government policy for some time that employee records be exempt. There are good reasons for doing that. The questions that we have asked are just how wide is the exemption and how wide will be the effect of the exemption. We have made a couple of suggestions on how it can be narrowed down. If it was covered by the Privacy Act, I would again be taking the same approach of trying to help businesses do the right thing by their employee records. It is a moot point. Again, it is where the parliament is making the decision, as it should do, on where the balance point lies and the best way of regulating on privacy.

CHAIR—If a parliament goes down this track, then I take it that you think it would be desirable that you could issue guidelines and help to interpret the phraseology in the legislation in a way which would be more clear?

Mr Crompton—Yes. If nothing else is done, I believe it would be very helpful if we could have a role in drawing the border line. In a company that I was working with previously, for example, quite appropriately the company would want to offer, say, subsidised loans—in other words, some of its own products would be offered to the employees potentially at advantageous rates. If you think that that is a population that is more trustworthy or otherwise has other merits

that are worth marketing to you, you can see that it makes a lot of sense for the company and makes a lot of sense for the employees. But at what point does that kind of extra relationship move beyond the employment relationship and into a commercial relationship and, hence, when should the employee record information no longer be appropriate in being used for, say, building a credit profile on the employees? I would like to be able to have some way in which we can begin to work with consumers and with business to elucidate on what some of the tricky point examples are and say which way we think they should fall.

CHAIR—I understand that. Can I take you to the health provisions. I raised with the Attorney-General's Department two issues: firstly, the one which the Australian Medical Association raised in their submission about the impact of this bill on the High Court decision in Breen v. Williams; and, secondly, the comments of the Australian Capital Territory Community and Health Services Complaints Commissioner. Do you have any comments about either of those submissions?

Mr Crompton—I am terribly sorry, I am going to give you a philosophical answer to start with again. In relation to private property rights, which is essentially what we are talking about in Breen and Williams, and copyright and so forth, every single property right is actually defined somewhere as having certain rights and not certain other rights. Almost all private property rights have been defined somewhere, either in common law or in law coming out of parliaments or whatever, to spell out what they mean. So the answer given by Gabrielle Mackey is where I would stand. I am not sure that simply because this law would say that individuals with a particular interest in the information—namely, me about my own record—should be able to access it, that is actually changing the fundamental rule, which is that the doctor owns the record. I am not sure that they necessarily conflict.

CHAIR—I understand that, but the practical effect of Breen and Williams is that doctors can, if they wish to, withhold information from their patients. I might be wrong, but I do not think the medical profession fought Breen and William about whether or not there was copyright in medical notes—I am not sure they have any great value on the open market as a piece of property. It was a legal device, if you like, for resolving an issue about access to information held by a medical practitioner. If we address it from that perspective, then it does come up clearly against this proposed legislation.

Mr Crompton—Indeed. What I am suggesting is that this bill, if it becomes law, would modify the ownership rights that the doctor has, yes, because the patient would have some rights of access—not rights of ownership, but rights of access—to the material.

CHAIR—The question I suspect the AMA will put to us—but even if they don't, let me put it to you—is should there be some sort of so-called therapeutic privilege or exception which exists here? For example, to take their example, a description which is quite an accurate medical description which means a certain thing to doctors and other members of the broader health profession could be quite alarming to a person who saw it without explanation as to what that actually means.

Mr Crompton—I would be concerned in that area if it was narrowed like that. I have said a couple of times that I believe that in the end the patient should have a fundamental right of access to their medical record. If we are thinking about the fact that I would like to know what

other people know about me then surely I would particularly want to know what other people know about me and think about me with regard to my health record. But what I have also said is that for exactly the reasons that are put into the AMA submission I do not think it is an acceptable process of access for it simply to be to plop the file on the table and let the patient read. The Royal Australian Society of GPs for example took us through their best practice model for how a patient has access to the information about them so that it is very guided access. In no way, for example, would the RACGP model simply put in front of an individual that kind of statement as you read out before without anybody being present to give an explanation as to what that term meant.

The other thing that I would say is that there is already a fairly significant proportion of the Australian medical community that is subject to privacy principles and they are the people who are helping the Department of Veterans' Affairs look after veterans. That leads to the other comment that was made in the Attorney-General's evidence which is that people may have to improve their process of writing down, recording and transcribing their notes. There could be better practice that needs to be brought out of this but it is pretty clear from the history of the Veterans' Affairs people that it is possible. It is done and it is not causing a problem.

The other thing you might like to ask Mr Patterson when he appears before the committee is what he has actually given a lot of thought to as an appropriate way of recording the visit to the doctor. He calls it SOAP: you record the subjective—what the patient is saying; you record the objective, which is what the doctor observes; you record the A which is the assessment and then the P which is the prognosis. He may be able to elucidate on that far better than I but the point that I am making is that Mr Patterson recognises that the ACT legislation may well have required doctors to be a bit more careful about how they keep their records but that is probably a good thing.

CHAIR—I just want to push this a bit further because I think it is a sensitive area and that trying to achieve a balance can be difficult. What about conditions where there are psychological or psychiatric aspects to it?

Mr Crompton—Let me turn to the national privacy principles so that we have the exact words in front of us. One of the reasons why I recommended to the Attorney that the principles as they had previously been circulated be changed did relate to answering exactly this question. In the case of non-health personal information, one of the reasons that personal information can be withheld from somebody is if that access would pose, and I quote:

a series and imminent threat to the life or health of any individual;

That is page 71 of the bill. In the case of health information though after consulting with the medical profession it has been changed to:

providing access would pose a serious threat to the life or health of any individual.

So in other words the imminence has been taken out of it for the purposes of health information. One of the things that will be interesting to hear through evidence from other people appearing before the committee is that almost certainly the medical profession will say that that change is

not enough. If you ask the medical profession, they would probably think that is still too stringent a test.

When you hear from the health consumers, you will find that they think that test is sloppy. That will be used too frequently to withhold access to health information that health consumers believe should be given. It is an extremely difficult area in which to strike the right balance and what is there essentially reflects the recommendation that I gave the Attorney-General after hearing submissions last year. I am not claiming to be perfect at all, but I am saying that, on the basis of the evidence given, that was the decision that I took.

CHAIR—Yes, I understand that. All I am trying to do today is to tease out the various issues not come to any conclusion about anything at this stage, Mr Crompton.

The other issue was the one raised by the ACT Community Health Services Complaints Commissioner that this will have the effect of nullifying his legislation?

Mr Crompton—I think I am going to take the coward's defence on that one. The Attorney-General's Department, in thinking through the interaction between the existing ACT law and the new bill, are probably more advanced in their thinking than I am at this stage.

Mr CADMAN—I think that is great. I would like to come back to you on some of your comments. I note your comments about childcare and that sort of thing. I have just taken all of those things on board and put them in place alongside the issues that you have raised in a more general sense, thank you.

CHAIR—Mr Crompton, I do not have any other questions either at this stage, but no doubt, when we actually start to consider this rather than just sort of try and tease out what is involved, there may be other issues that arise. If we could communicate with you, if we need to, and ask you any further questions outside this forum, that would be appreciated.

Mr Crompton—We would be very pleased to help. It is a very important piece of legislation that has got obviously a number of challenges in front of us and we all need to think it through with great care. Thank you very much for your time, too.

CHAIR—We thank you for your submission and for discussing it with us this morning.

Proceedings suspended from 1.12 p.m. to 2.01 p.m.

PATTERSON, Mr Kenneth George, ACT Community and Health Services Complaints Commissioner

CHAIR—Welcome, Mr Patterson. I have to advise you that, although the committee does not require you to evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission. Would you like to make some opening comments?

Mr Patterson—Perhaps briefly, just by way of summary. There are four things to point out. One is that it is unlikely that it would be possible to create a voluntary health industry code, because of the nature of the industry. The second thing to point out is that a health industry code, I believe, is necessary. There are a number of tasks that need to be addressed through such a code. We need to deal with issues of the control of management information flow, we need to deal with the quality of information and we need to deal with consistency—that is, the same rules should apply to all health services.

There are a couple of possible approaches to this. One, of course, would be rather difficult, I think, for the government to consider at this stage, and that would be separate legislation in relation to privacy in the health sector. The other would be an amendment to the bill which will enable a code to be created for the health industry. But it would probably have to have a degree of compulsion about it.

To go back to the first point, why do I say a voluntary health industry code will not happen? As I have indicated in my submission, there are just too many providers. There are literally hundreds of thousands of providers of health services, and no one organisation would be in a position to create a code which other organisations that provide health services or keep health records would be prepared to abide by. The other alternative—that is, the possibility of many codes—would lead to even more inconsistency, and it would be very unsatisfactory. Neither service providers nor consumers would know where to go for advice about privacy issues in the health field.

The sorts of things that need to be addressed in a health industry code include a number of things that are not currently covered in the bill or that are covered in a general way in the bill but that need some modification to deal with the problems of the health industry. For example, it is common for people to seek access to information about themselves in the health industry, and the sorts of FOI processes which are not covered in this bill would need to be spelt out in some sense because it is such a common occurrence in this area.

Access to information by members of a treating team is important. A lot of people end up sharing information about patients of health services, and without some clarity as to who has an automatic right to do so, it is difficult to know who can or cannot see the information. The use of unique identifiers is very important so that when information is shared, it is possible to ensure that the information that is passed from one health service provider to another is about the right person.

There also need to be procedures for patient control over access by different health service providers to information, what information and for what period of time. That is not there at the moment. Other issues like those relating to alteration and destruction of records are different in the health industry. It is necessary to be able to add to a record, but it is important never to destroy one for legal reasons.

In the ACT we have introduced some special measures in the ACT health records act relating to such things as what happens when health service providers—which might be something as simple as the local GP—close or transfer their practices. What happens to the records? Similarly, what happens when consumers move from one provider to another? In those cases it is essential that the information is passed on to the current service provider so that it is available for the safe and effective treatment of the patient. Approaches to confidentiality in the bill may be appropriate for many other industries but they are not appropriate for the health industry. For example, the ease with which it is possible to provide information to law enforcement agencies is not satisfactory. I once worked in a drug and alcohol treatment agency and the first thing people did when they walked in the door was tell us about the various laws they had broken. They were only prepared to come to us because they knew that information would not be passed on.

There are some other issues about copyright, quality and peer review systems in the health field, management and funding issues, research, and staff training and education. Personal health information is necessarily shared between many organisations. A single person going into hospital could end up seeing a GP, a specialist, various hospital staff and various follow-up people who will come from the private and public sectors. It is important that the same regime applies to all of the people and organisations that they deal with. It is also particularly important that information is shared. While the bill seems to me to have a focus on industries where normally the organisations that collect information keep it and do not need to pass it on to anyone else, the health industry is quite different by its nature. It is one where it is necessary in the patient's interest to share information. So the object of the exercise is not to prevent information passing around, but to control it and make sure that it goes to the people who should have it. And since it often gets passed on several times, from one person to another to another—something which, incidentally, is not permissible under the bill at the moment, but which has obvious problems—it is really important to make sure the information remains accurate as it moves on.

We need to control the flow of information, rather than stop it. We need to ensure that patients have some measure of control over the flow of information. We need to make sure that the quality of the information is high, that it is accurate, it is not misleading, it is up to date, it does not undermine the credibility of patients and so forth. And it needs to be consistent amongst all the agencies involved.

CHAIR—If we accept your proposition that, firstly, there should be a code and, secondly, there should be in effect a uniform code applying to the health area, is it possible under the terms of this bill for the Privacy Commissioner to bring that about? He has got ability to approve codes, and presumably that means he can not approve individual codes if he thought it was fitting to have something more uniform.

Mr Patterson—I assume that he would be able to not approve codes and therefore prevent the proliferation of codes. However, he could not enforce any particular code. He could not say, 'This is the code and you are going to follow it,' because the codes are by nature voluntary.

CHAIR—There is a provision 18BF that he can make written guidelines about codes. You do not think that goes far enough to bring about the uniformity you think is desirable?

Mr Patterson—The issue remains that individual organisations, which means hundreds of thousands of people—your local GP, your pharmacist, your health insurance company, your hospital, everybody—would all have to agree to be bound by the code. Not even the commissioner could persuade everybody to be bound by it. In the ACT, when we were preparing our own legislation, which covers many of the same issues and which is also very light touch legislation, there were some people—and you met the AMA this morning, obviously—

CHAIR—This afternoon.

Mr Patterson—who were not prepared to accept, on a voluntary basis, the proposals we are putting forward. I would expect that many people would not accept a code, even if one were there, unless they were obliged to do so. It is different for the banking industry, say. You have a group of banks—it is a small group of organisations—where it is in their interests to work together to come up with a code that meets their requirements. They would not be in a position where they could just bow out when it suited them, because they are actually multi-national organisations and that would limit their ability to trade internationally if they withdrew from a proper privacy regime. It is just a completely different sort of an industry.

CHAIR—The question is that, if a uniform national approach is desirable, how do we arrive at that? If you excise from this bill provisions relating to health, then who knows how long it might take to develop something?

Mr Patterson—Exactly.

CHAIR—What is the best course forward?

Mr Patterson—I agree with you that taking it out of this bill would really slow things down. On the other hand, if the bill progresses as it is, it would also limit opportunities to do something better. That is why my proposal was really what I see as a relatively minor amendment to the bill, which means that the code for the health industry is a compulsory code. There are many other parts of the bill already which relate to the health industry. It is just one further step—

Mr CADMAN—Do you mean there would be one covering hospitals, private practice, clinics—a totality?

Mr Patterson—Yes. As I was saying before, the patient moves around so you go through many agencies, either consecutively or even simultaneously. They should all have the same guidelines that they are working to. The ACT Health Records Act does that, so within the ACT there is a single piece of legislation.

Mr CADMAN—It would include all the paramedical and so on.

Mr Patterson—Yes. It includes a fairly broad definition of the health service, which is not dissimilar to the one that is in the bill.

CHAIR—Is the ACT the only territory or state that has that sort of legislation?

Mr Patterson—Yes.

CHAIR—Were there discussions with you or with relevant people in the ACT about adopting that approach with the Attorney-General's Department?

Mr Patterson—When our bill was prepared?

CHAIR—No. When the bill that we are inquiring into was being drafted and considered and there was a statement of proposals last December. I am wondering why the Commonwealth has not adopted the ACT approach.

Mr Patterson—I cannot answer the question. They were aware of it. I can only assume that there was a desire to provide a single piece of legislation without too many changes and that was consistent, in terms of privacy principles, over all industries, which obviously would also be a good thing if it were possible. There are already a number of changes in relation to everything but the health industry. Small organisations are not affected by the bill; they have to have a $300 million turnover. But in relation to health services most services, of course, are quite small and may well have a lower turnover than that, but they are all included in the bill.

CHAIR—You say that the effect of this bill, if enacted, could lead to undermine the ACT legislation. Can you spell out why that might occur?

Mr Patterson—Section 28 of the self-government act defines the relationship between Commonwealth and territory legislation. I am not an expert on this—

CHAIR—It is similar to 109 of the Constitution, I presume.

Mr Patterson—Yes, it has the same sort of effect. The national legislation would tend to replace the local.

CHAIR—Where they are inconsistent.

Mr Patterson—Yes. That is the reason why. It would mean that large chunks of the ACT act would no longer apply. As I indicated, that by itself would not matter because the ACT government's intention was really to act as a bit of a leader, introduce some legislation and see how it worked and, hopefully, have that experience inform further developments that would be national and therefore introduce national consistency. After all, we were introducing a measure of inconsistency between the ACT and the rest of the country when that bill was passed at the same time as we introduced a very consistent regime for all health services so the same system applies to the patient wherever the patient goes. All health service provider agencies know where they stand. The same rules are there. So my impression on the basis of our experience

with that act is that we do need to have something which is consistent within the industry and nationally consistent. If we are going to have that degree of inconsistency, it may be between health information privacy and personal information more generally.

CHAIR—What has been the experience of the operation of the act in the ACT? I presume there were parties that objected to this type of legislation. I suppose we should ask them but from your perspective have there been problem areas or has it settled down? Was the fear of the legislation worse than the reality?

Mr Patterson—I think a number of health service providers were very concerned initially that the legislation would be used by what they call troublemakers: people who would gain access to their records—the issue of access to the records was the concern—in order to use that information against the provider of the service who prepared the record. That has not proved to be the case. In fact, most of the matters that have been brought to my attention—and I have some responsibility for the operation of the act now it has been passed—have been from people who want their doctors to have access to their records. They do not want to have access themselves; they want their doctors to have access. It is surprising how often they do not.

I mentioned earlier the situation that arises when a practice is closed, for example, or a patient moves from one practice to another. There has often been practical difficulties and a reluctance to pass on the information which is needed for continuing good and safe treatment of the patient. So those are a couple of the particular issues we picked up. They are the ones that have been most often referred to me. I do not know how often people have sought access to their records using this legislation. It may well be that people often seek access and there is no problem because it is agreed to on the spot. I certainly do not have much information about people who have been refused access when they have wanted it.

There are a couple of areas where we would like to improve on our legislation as a result of experience. I guess if there was a nationally consistent regime introduced, that is where the improvement should go. For example, we do not really clarify well enough some issues to do with things like staff training, education, quality, peer reviews and research, which are day-to-day issues where people who work in health services talk to each other or share information about patients. That is an area where I think we need further clarity rather than anything draconian—just more clarity as to what is appropriate and acceptable and what is not.

Another area which now requires further work relates to the electronic transfer of records. Already vast amounts of information are passed on or passed between health service providers, sometimes with and sometimes without the knowledge and consent of patients. The technology is now available to share vast amounts of health information much more than in the past and everybody is keen to do this. There are obvious advantages in being able to treat a patient in one place using information gathered in another, perhaps some time before, which tell us what the best treatment should be and how to provide it.

I personally think this is potentially a great thing to happen. However, the more information is shared, the more risk there is that incorrect information will be shared, the more risk there is that there will be accidental or incidental invasions of people's privacy and confidentiality. That is another area where I think we have another step or two to take, and the government's own

initiatives in relation to health information networks and so on, which are currently being considered, will highlight that issue.

CHAIR—The difficulty I see is just a practical difficulty, the time that it might take to develop this. I suppose your answer is that in a sense the parliament delegates to the Privacy Commissioner the power to come up with a code after consultation with those in the health field.

Mr Patterson—Yes. What I would envisage, as a possibility for your consideration, is a very simple amendment which simply allows for the creation of a compulsory code in the health industry by the government on the advice of the commissioner, or words to that effect.

CHAIR—Yes. Would it be by the government or would it be by the commissioner as a disallowable instrument or something like that, so there is parliamentary scrutiny?

Mr Patterson—It would be by the commissioner, but as a disallowable instrument. It would have both advantages and disadvantages. I know there are some people who would say that this is not enough, that there is no guarantee that it will be strong enough. On the other hand, one of the appealing parts of this approach is that it would be much more flexible. As new issues come it would be possible to modify the code relatively quickly.

CHAIR—Is genetic information covered by your legislation in the ACT?

Mr Patterson—It would be, but I must admit we have never had any specific dealings with it and we have not thought through what the consequences would be of that. Our legislation covers personal health information and I think that would probably be included under the definition of personal health information.

Mr CADMAN—Does that include mental health?

Mr Patterson—Yes.

CHAIR—Just on mental health, do you deal with the problems sometimes raised about the sort of so-called therapeutic exemption? How is that dealt with? I am referring to the patient who has got a psychiatric illness.

Mr Patterson—This is a very important issue, and thank you for raising it. There are some people who may suggest to you that there should be some different rule in relation to psychiatric illnesses, that people should not have access to their records, or something like that. I would very strongly oppose that. I think it is yet another form of discrimination against people who are mentally ill. I might add, I do have a long background in mental health services in my own career.

The way the Health Records Act in the ACT deals with it is mirrored to some extent in the proposals in this bill. It works like this. There may be occasions when there is a significant risk of harm to a patient if the patient obtains access to information in a record. So there is an exemption in the Health Records Act which deals with exactly that. So a record keeper not only may, but in the ACT must, refuse to provide information to the patient where there is a

significant risk of harm to a patient. The second exemption is where there is a significant risk of harm to another person which may from time to time relate to some psychiatric conditions where a person with a paranoid illness, for example, might get information from their own record about what somebody else has done and this could have an effect on their behaviour.

Those are two of the three primary exemptions to access in the Health Records Act. I would have thought that if the concern is that somebody may be harmed by having access to the information, that is the way to put it.

There are a couple of other things to say. One is that you cannot define very simply mental illness or psychiatric illness. Most of the matters that have been brought to my attention in my official capacity about psychiatric illness have related to people that have gone to see a GP or physician where there has been some concern that their physical illness has a psychological component. They would not see themselves as psychiatric patients. Perhaps their doctors would not either. You cannot define one person as a psychiatric person and another as not. When a very busy person with a stressful job becomes physically ill, one of the factors is seen as the stress of the job. It is a psychological factor. It is nonsense to suggest you can make this distinction. It would be most inappropriate.

The other thing to say is that people with psychiatric illnesses have much more personal information in their records than anybody else, and protecting their privacy is particularly important. They are also much more likely than other people to have damaging information that may be wrong in their records. And they have the same right as anybody else to make sure it is corrected.

When I worked for the mental health division of the health department in Victoria some years ago, I worked closely with the chief psychiatrist at the time. He regularly dealt with requests from patients for access to their psychiatric records. He was a person I respected a great deal. He had very conservative views about these things but he always provided the whole of the record to every patient as far as I know. The only exception was information given by third parties, perhaps family members, where he felt that there was some risk to those people if the information went on. These were people with serious mental illnesses. They knew they were mentally ill. They were in a psychiatric hospital. So I think there is a lot of rubbish talked about the potential risk of these things. I could go on, but perhaps I had better stop there.

Ms JULIE BISHOP—To clarify one issue there, you were talking about the release of records, but not in circumstances where there is significant prospect of harm. Who makes that judgement? Is it the primary health professional or is it the author of the material?

Mr Patterson—In relation to the health records act, it is made by a person called the record keeper. The records act, however, specifies that the record keeper must seek advice if they require it. If it is your local GP, it will be the local GP who makes that decision in the first instance.

Ms JULIE BISHOP—And in that circumstance, if the person seeking the information were under the care of a psychiatrist, for example, the GP would take advice?

Mr Patterson—I would expect so.

Ms JULIE BISHOP—That is just the scenario.

Mr Patterson—People regularly seek access to their records at, say, the Canberra Hospital, which is just down the road. I know the medical records department there accepts those requests. If they have any doubt, then they will go to the psychiatrist, or whoever the treating doctor is, and ask whether there is anything in the record that is of concern. It is necessary to have some expert advice when those decisions are made where there is any question. That is built into our legislation. It is not be built into your bill at the moment, of course, because that is the sort of detail that really only comes into the code.

Ms JULIE BISHOP—The third party point that you raised has interesting consequences. If information has been supplied by a third party, that is fine as long as the record keeper knows that the information has been supplied by a third party. There could be circumstances where there is information on the file, but the patient knows it could only have come from one source, even though it is not named. What is the obligation on the record keeper to go through the process of determining the source et cetera?

Mr Patterson—There are two points. Information from a third party may still be harmless. So it is only when it is harmful information that you would have to worry. A good record keeper should indicate what information they have obtained from where. For example, ordinary medical training tells people to write down the information they have about a patient in different ways. If it is information that is subjective in nature, they say, 'The patient said it hurts here and here.' If it is objective, they say 'Their blood pressure was 150 over 90.' Information from another source should be named as such.

Once again, to refer back to the ACT legislation, the third exemption in the legislation relates to information given in confidence. The implication of that for training is that if information is given in confidence people should record that that is the fact when they record the information.

Ms JULIE BISHOP—Who makes the judgment as to what has been given in confidence? I give it to you and say to you that I am giving it to you in confidence, even though it has no characteristic about it that should—

Mr Patterson—This is a very important area for record keepers to work on. Training for record keepers is one of the other things that we have to think about. Here is another issue, just to make it even worse. Sometimes people will say, 'I want to tell you this, but I do not want you to tell the patient that I told you.' It may not be true. Anybody who keeps a record of something they have been told in confidence needs to be fairly sure that it is true before they write it down. They should think twice about writing it down at all if it is not necessary for the patient's treatment.

Ms JULIE BISHOP—All judgment calls.

Mr Patterson—It is a judgment call. When freedom of information legislation was introduced in Victoria, I was working in a Victorian hospital and my recollection of what happened at the time is that there was one major change to records. People stopped writing in unnecessary personal comments which were not necessary for the patient's treatment, which

could well have been offensive and might well have undermined the credibility of the patient with other people had they been read by other staff, which they often were.

Ms JULIE BISHOP—You do not see that as a bad change?

Mr Patterson—I see it as a wonderful improvement.

Ms JULIE BISHOP—A gratuitous commentary has been deleted.

Mr Patterson—That was my impression of the major change in practice. Most health records are full of factual information really: these are the symptoms, these are the results of the tests—

Ms JULIE BISHOP—This is what I observed.

Mr Patterson—Yes, this is what I observed, this is my diagnosis, this is the plan for what treatment I am going to offer and this is what I have done. There is not a lot else in most, but there are some people who do drop in the occasional gratuitous comment.

Ms JULIE BISHOP—I have some some old psychiatric records going back to some dim, dark years. It is extraordinary to read them now in terms of the assessments that were made. What do you about existing records under your act?

Mr Patterson—In our act, what we did was that we said that matters of fact people can obtain retrospectively and matters of opinion they can have access to from the time the legislation came into being.

Ms JULIE BISHOP—That would be quite a cut and paste job, wouldn't it?

Mr Patterson—Most records do not require any amendment because they mainly are matters of fact, particularly since matters of fact included a diagnosis and a prognosis which could be argued as opinions but we, in fact, borrowed a definition from the AMA.

Mr CADMAN—How do you handle research?

Mr Patterson—Research is not adequately handled in the ACT legislation. It was really an oversight when it was set up. The intention really was to change nothing and that is why it was missed out. We realised afterwards that it was not adequately covered. I expect that if the ACT legislation has to continue for any reason then we would amend it by adding something along the lines of section 95 of the Privacy Act, which makes it clear that the link is across to the National Health and Medical Research Council. It is their job to make guidelines about research and people who follow those guidelines get their research endorsed by ethics committees.

Mr CADMAN—That is back to front, really. You should be setting the conditions, shouldn't you, if you are the protector of privacy? That is the first time I have heard of a person who wants the information setting the conditions.

Mr Patterson—The National Health and Medical Research Council do not want the information. It is their job to regulate research in this area, as I see it.

Mr CADMAN—Don't they commission research?

Mr Patterson—They certainly fund it.

Mr CADMAN—If I put a proposal to them that required me to get information, and they were the people I appealed to to enable me to do that process then they are both jury and judge, I would have thought.

Mr Patterson—I do not want to express a clear view on this. I was conscious of the fact that we had not dealt with it adequately in the ACT.

Mr CADMAN—You would like to have it included?

Mr Patterson—I imagine that if we did have a code and it covered all of the many things that need special attention in the health field, we would need to include within the code some reference to research and the use of information in research. I still would expect there would be link to the work of the NHMRC because, after all, they are the body with the greatest expertise in the area of medical research. I would not want to leave them out of the loop.

Ms JULIE BISHOP—Could I just take you back to the question on genetic information. If you have answered this, I am sorry. Perhaps you could just comment on the specific inclusion of genetic information in the definition. Do you see that as having any advantage, and do you see there being any problem in the health records act by not specifying it?

Mr Patterson—Once again, I am reluctant to say too much because I have not given it enough thought. It would certainly be an area where you would not just leave it in the definition and assume that, without some further consideration of the special issues, the NPPs would solve the problem. It is yet another area where you need, at the very minimum, a code that spells out what you do with genetic information. You cannot just define it in.

Ms JULIE BISHOP—I think the AMA is suggesting that it be put in, Chair?

CHAIR—Yes.

Mr Patterson—There would be no objection to it being put in.

CHAIR—Thank you, Mr Patterson. Thank you for your submission and thank you for coming along and discussing it with us today. We appreciate it.

[2.43 p.m.]

BAIN, Dr Robert Addison, Secretary General, Australian Medical Association

BLOMBERG, Ms Charlotta, Legal Counsel, Australian Medical Association

HACKER, Dr Sandra, Vice President, Australian Medical Association

CHAIR—Welcome. Do you have anything to add to the capacity in which you are appearing?

Dr Hacker—I am also the chair of the Ethics and Public Health Committee of the AMA.

CHAIR—I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of the submission from the AMA. We thank you for that and for coming along today to discuss the matters with us. Would you care to make some opening comments?

Dr Hacker—I am certainly grateful for the opportunity to appear here. The medical profession, of course, has had, since the Hippocratic oath, a standing and an opinion about privacy and confidentiality. The issues that the legislation affects in relation to health have been of major concern to the AMA over many years and there is a range of policies of the AMA in relation to this. There are a number of points that we wish to address initially and there is a whole range of issues about which we would be happy to comment if you wished.

The primary issue which I think must be resolved before this legislation proceeds is what standing it has in relation to medical information. In 1995, the High Court handed down its decision about Breen v. Williams which was essentially a case about who owned medical records. The High Court decided unanimously that the person generating those records, that is the doctor, had ownership of those records, and in the decision all the judges commented on the issue of the Copyright Act. One of the AMA's concerns, of course, is that there must be some resolution to whether in fact this new privacy legislation supersedes the Copyright Act and what its relation is to the Copyright Act in relation to medical records. So that it currently is an overriding and overarching issue in relation to the entirety of the privacy legislation with respect to medical records.

Putting that somewhat major decision aside and turning to some of the specific concerns that our organisation has in relation to some of the elements of the new proposed legislation, the first of those relates to the common law protection which is currently enjoyed by children, adolescents and persons of diminished decision making capacity. The issue relates to the national privacy principles 2 and 6 and what this does is in fact reduce the privacy protection of those three groups of people.

The relationship to privacy of adolescents was tested in the UK High Court in a decision about what then became called Gillick competence and this new proposed legislation in fact overturns Gillick competence. It allows an adolescent's parents to have access to their medical record and the only protection against that is in fact a somewhat circuitous and, in my humble opinion, somewhat nonsensical protection. National privacy principle 2.4 says that you can disclose information to a parent unless it is contrary to a wish stated before becoming legally incompetent, which might then apply to somebody who was dementing, for instance. But if you are minor you are never legally competent prior to becoming legally incompetent. So in a sense this legislation provides diminished protection for adolescents rather than improving their protection. We believe this needs to be amended so that in fact the Gillick competence standards still apply.

In a general sense this is one of the dilemmas that we find with many of the aspects of the proposed legislation in so far as for a very long time there have been a whole range of protections provided to patients through the medical profession's ethical guidelines rather than legislation. Some of these are being, in a sense, overturned by the proposed privacy legislation. The first of those relates to privacy of children and adolescents, and those with impaired decision making capacity.

The second major concern in relation to overturning a protection currently enjoyed by patients relates to disclosure of information generated for and on behalf of third parties. That relates to national privacy principles 2, 6 and 10. Those sorts of situations apply to a report, for instance, generated for work cover, worker's compensation insurance, for the provision of a licence—for instance, a pilots licence—for reports generated for insurance and, if one puts aside the decisions of Breen v. Williams, for issues such as referrals.

Finally, in relation to national privacy principle 2.1, it relates to the issues of health insurance. What this essentially allows is for someone to look at, to have access to, information generated for someone else. That then requires the practitioner to hand over the report generated for and on behalf of someone else and often paid for by that person, especially if it is an insurance or a Workcover report, which may have a significant impact on the relationship between the doctor and patient. We recognise that there is some possibility of protection via national privacy principle 10.3, but this is somewhat arcane. That principle allows that you 'may' disclose, not that you must disclose. So it allows someone to refuse disclosure, but it is not absolutely clear that that privacy principle actually allows you to disclose. It simply says that you may disclose; it does not say that you do not have to disclose. It is really quite unclear as to the provision that you have to refuse disclosure.

Ms JULIE BISHOP—That was 10.3. So 10.1, on sensitive information, is that 'an organisation must not collect sensitive information ...' and 10.3 is an organisation 'may collect health information if ...'

Dr Hacker—That is right. It says it may collect. It then allows somebody to say, 'You may not collect.' It does not say, 'You must collect.' So the possibility of refusal exists there, but it is clearly not stated there. We have put this before the Attorney-General's Department and they have said that—I am sorry, do you want to add to that, Charlotta?

Ms Blomberg—Yes. The advice that we received from the Attorney-General's Department on this issue was that doctors could not be compelled by national privacy principle 10 to disclose patient information to third parties such as health insurance companies wishing to access medical records because there was not compulsion within the national privacy principle 10. National privacy principle 10.3 says that an organisation may collect. The interpretation that we have had from the Attorney-General's Department is that that will allow a doctor to refuse if their patient has not consented. The point that the AMA would like to make on that is that the effect of that should be made up front and clear in the national privacy principles so that there can be no doubt; so that, if there is a situation of a third party wishing to have access to patient medical records, a doctor is under no compulsion to disclose in the absence of specific patient consent.

Ms JULIE BISHOP—There is nothing in 10.3 that would compel disclosure by a doctor of health information to a third party.

Mr CADMAN—You just want that clarified, don't you?

Ms Blomberg—Yes. The fact that it needs legal interpretation shows that there is a flaw in the drafting. It is not clear and apparent on the face of it. For a regime to be put in place it should be clear and apparent.

CHAIR—Isn't it a matter of legal interpretation that where you use a word such as may it implies may not?

Ms Blomberg—That is very true.

CHAIR—It was when I last studied legal interpretation.

Ms Blomberg—We would reiterate the point that these privacy principles should not always be subject to legal interpretation in every situation. They should be clear and apparent as far as possible.

CHAIR—What would you replace it with?

Dr Hacker—It is not that they ought not to be subject to legal interpretation. They ought, on the face of them, to be clear. That is really the issue. Some of you may recall, because this case came before the Senate, a health insurance company that came to a private psychiatric hospital and looked through the records—this was about eight years ago—without obtaining contemporaneous consent from the patients concerned. That is the sort of activity.

Health insurance companies clearly need diagnostic information, and that is not the concern. The concern is the actual capacity to look at the patient record without contemporaneous consent or without the doctor being able to say: this is not permissible. We recognise that there may be some guidelines drawn up under section 95A which will be in keeping with the current NHMRC guidelines which allow doctors to refuse access. Our concern about this is that this is a very circuitous route for refusing access and that it would provide more protection for patients were the right of refusal to be present within the legislation rather than within some guidelines which may or may not end up being present.

CHAIR—Hasn't the organisation that is seeking to collect the information also got to satisfy subparagraphs (a) to (d)? Doesn't that provide protection? This is on page 76 of the bill.

Ms Blomberg—This is 10.3, paragraphs (a) to (d).

CHAIR—Yes. Why doesn't that offer sufficient protection to the medical profession? Under this, it would seem to me that it is a long stretch of the bow to say an insurance company can come in and collect patient information. It has got to be research relevant to public health or public safety, the compilation or analysis of statistics relevant to public health or public safety, or the management, funding or monitoring of a health service. Do you think the third one lets them in, possibly?

Ms Blomberg—It is the management funding and monitoring of the health service.

Ms JULIE BISHOP—Would a starting point be to word it so that it says, 'An organisation may not collect health information about an individual unless ...'?

Dr Hacker—We believe that is much more likely to provide the sort of protection that we were seeking.

Ms Blomberg—The use of the word 'impracticable' for the organisation to seek the individual's consent is far too wide.

Ms JULIE BISHOP—There has been a considerable debate on what impracticable means.

Ms Blomberg—Yes.

Mr CADMAN—In the medical arena?

Ms JULIE BISHOP—I could not say, but in terms of—

Mr CADMAN—The medical arena might be a bit different from the normal day-to-day stuff in many ways. A person that is semi-conscious, semi-available, in and out of procedures, doctors' advice, medical advice saying 'don't do that'; I think there's a lot of complications with the medical process and what is practical.

CHAIR—Can I take my point a bit further. If the management funding or monitoring of a health service is the problem, one then goes to the definition of 'health service' in clause 17. That doesn't seem to me to include insurers.

Dr Hacker—It is an organisation that is collecting data.

CHAIR—It says:

> **health service** means:
>
> (a) an activity performed in relation to an individual that is intended or claims (expressly or otherwise) by the individual or the person performing it:

(i) to assess, record, maintain or improve the individual's health; or

(ii) to diagnose the individual's illness or disability; or

(iii) to treat the individual's illness or disability or suspected illness or disability; or

(b) the dispensing on prescription of a drug or medicinal preparation by a pharmacist.

That seems to me to be largely related to the activities of the medical practitioner vis-a-vis the individual or the prescription of a drug by the pharmacist. What I am trying to tease out is, if your point is right, where does the health insurance company get a look in the door?

Dr Hacker—In assessing and recording an individual's health. They actually do that and are statutorily required to collect information under the Health Insurance Act and to submit that to government on a three-monthly basis. They are required to collect all sorts of health statistics about the use of health insurance products. There is a whole raft of statistics that they actually have to collect. Some of them have used that in the past to go in and look at patient files rather than simply collect diagnostic information.

CHAIR—Wouldn't the best way to deal with this be to specifically exclude the sort of behaviour that—

Dr Hacker—That would be ideal but that is not a principle insofar as these—

CHAIR—No, but the principle refer has a definition of health service. If this is a problem—I have to think through it a bit more—shouldn't one exclude from the definition of health service those activities which are not appropriate?

Dr Hacker—Provided that does not contradict some of the already present legislative requirements for some of those organisations to actually collect some of that data. It is the degree to which they need to collect it.

CHAIR—You don't mind them collecting statistical analyses. You would have no objection, I presume, to epidemiological type research. It is the identification of the individual patient's information which is the concern.

Dr Hacker—A health insurance company has a contract with the patient. Part of the information that they need to collect are diagnoses about who was in hospital with this. They have access to that information, and rightly so, so that they can do their actuarial stuff and get their number crunching right and pass that on to the government as required. It is the further investigation—that is, the access to the actual record—rather than simply the compilation of data that is the concern.

CHAIR—Yes, I understand.

Ms JULIE BISHOP—When it goes beyond just the statistics?

Dr Hacker—To the material that is required.

Ms JULIE BISHOP—To the material that can identify an individual?

Dr Hacker—The individual subscriber to the health insurance fund is identifiable to them. It must be.

Ms JULIE BISHOP—Any individual?

Dr Hacker—If you have taken out health insurance and you go to the hospital and you have your appendix out, that fund will know that you had your appendix out.

Ms JULIE BISHOP—I meant that the information could identify any other individual.

Dr Hacker—No.

CHAIR—Can't they get this information anyway under their contractual arrangements with their insured?

Dr Hacker—They must have access to some information, yes.

Ms Blomberg—But in those contractual arrangements, the insured consents.

Dr Hacker—Has an obligation of disclosure too.

Ms Blomberg—Absolutely, yes.

CHAIR—So what do they get under this that is more than that?

Ms Blomberg—Through this privacy principle it is paragraph (c) where it is impracticable for the organisation to seek the individual's consent. In the first example there is the obligation under insurance law and also there is the specific consent which is given by the individual. It is possible that that could be circumvented in these situations where the word 'impracticable' is not defined within the legislation. We understand that certainly guidelines will be drawn up as to what constitutes impracticable in the healthy care context.

Ms JULIE BISHOP—Can I ask you about that point. Obtaining a patient's consent is obviously a fairly routine issue for medical practitioners. In other circumstances what is deemed to be sufficient application to get a patient's consent to a specific health service? You come across this all time. Are there guidelines or standards that could be applied.

Dr Hacker—There is a range of expectations about what informed consent is, and there is certainly a growing amount of case law about what is required in relation to informed consent. Part of the difficulty here is that this is not about consent to a medical procedure.

Ms JULIE BISHOP—No, I appreciate that.

Dr Hacker—There is a completely different order of consent to information from the health insurance fund than there is to a doctor who is handing over a prescription for something or other.

Ms JULIE BISHOP—I guess my question was whether there was anything else we could draw upon by way of a parallel. I am just trying to think in draftsman's terms of how you would change subparagraph (c) and define 'impracticable.'

Mr CADMAN—Is it in any way parallel to the disclosure of information for research?

Dr Hacker—I think it is.

Mr CADMAN—I think it is.

Dr Hacker—I think it is because health insurance funds have a contract with the person who has paid over the money and, in that sense, they are much more identifiable than a research subject, as they should be. There is a contract between the two of them in the way that there is not in research.

Mr CADMAN—They do not need to go into the diagnostic tools used by the practitioner or the specialist, what they need to know is the factual information, and that is all a researcher needs to know.

Dr Hacker—Yes, but it depends what sort of research the research is doing. Of course, that is very variable, depending on the project.

Mr CADMAN—Yes, but the privacy protections would be similar in both cases, wouldn't they?

Dr Hacker—We believe that there are real risks about third party access in relation to research without the patient's actual consent.

Mr CADMAN—Absolutely, and that is almost exactly the same as would apply to a patient who is insured because they would tacitly grant access to information because they need to do that. But having given access, given approval, then the conditions placed on research should be similar, I guess, to those placed on insurance.

Dr Hacker—The difficulty is that the information is given to the doctor without the assumption that it will be provided to a whole range of third parties without particular consent.

Mr CADMAN—That's right.

Dr Hacker—That is the critical issue.

Mr CADMAN—So who do we limit it to and how do we do that?

Dr Hacker—It is important that the patient knows who the information is going to go to and gives specific consent for that information to be provided. Also, the doctor must have the right to say, 'You cannot do your research, you cannot have this record.' I work as a psychiatrist, my primary—

Mr CADMAN—So that is the opting out and opting in process you are talking about?

Dr Hacker—Yes, absolutely, and that has got to be safeguarded under the same sorts of principles that are present for the NHMRC guidelines in the public sector. We believe they should be applicable now to the private sector, but also contained within legislation rather than guidelines, or at least alluded to in the legislation, so that they provide absolute protection for patients.

Ms JULIE BISHOP—So the consequence of that would be if the organisation was seeking the information and had determined that it was impractical to get the consent, then the next hurdle would be the doctor. The record keeper would be able to determine whether consent was practicable or not in their judgment.

Dr Hacker—Not only whether consent was practicable but whether it was an acceptable endeavour in the public interest. To have a researcher trawl through my records I do not believe would ever be acceptable.

Mr CADMAN—Absolutely right. I could not agree with you more.

Dr Hacker—I think the doctor has got to be able to say, 'No, you can't.' Politicians and judges come to me and tell me what goes on in their lives, they do not want a third party researcher going in there and having a look at what they have said. It will destroy the privacy of that relationship. That is the sort of thing that we have to safeguard our patients against.

Ms JULIE BISHOP—The doctor-patient confidence.

Dr Hacker—Absolutely.

CHAIR—Can I take up another matter, if you have finished that one? I am just trying to understand your point about the Gillick doctrine, how this act would undermine the proposition that the House of Lords advanced in Gillick's case. As I recall, Gillick's case involved the 14-year-old or 15-year-old daughter of Mrs Gillick and she, the daughter, was provided with information about contraception or something like that from a regional health authority in the UK. Mrs Gillick then took the health authority, ultimately, to the House of Lords about her right to control the flow of that information, if I can put it that way. In national privacy principle 2.1 on page 67 of the bill, it says:

An organisation must not use or disclose personal information about an individual for a purpose ... other than the primary purpose of collection unless:

And then there are some provisions. In 2.4, it says:

Despite subclause 2.1, an organisation that provides a health service to an individual may disclose health information about the individual to a person who is responsible for the individual if:

(a) the individual:

(i) is physically or legally incapable of giving consent to the disclosure, or

(ii) physically cannot communicate consent to the disclosure;

Without going any further, that does not seem to me to be contrary to Gillick.

Dr Hacker—But an adolescent is legally incapable. A person who is under the age of 18 is legally incapable and therefore a person—

Ms Blomberg—Adults are legally competent to give consent. With adolescents, a judgment is made depending on the age, the maturity of the minor patient concerned and their level of understanding of the consequences of the medical treatment that they are requesting. And this is the situation we have at the moment.

CHAIR—But why is legally incapable any different from that?

Dr Hacker—I thought the definition of legally incapable meant that you did not have full capacity in law.

Ms Blomberg—You were not an adult.

CHAIR—What I am saying is, if the common law provisions are those which were laid down in Gillick, why do you say this is departing from Gillick?

Ms Blomberg—Because legal incapability means under the age of 18.

CHAIR—No, but you cannot have it both ways. You cannot say that this is what the law currently is, but then say it means under 18. You could say that it is confusing and there may be some ambiguity about what it does mean, but I do not think you can say both.

Dr Hacker—No, I am sorry. This says that you can disclose health information to a person who is responsible for an individual, who is legally incapable of giving consent. It is my understanding that an adolescent under the age of 18 is legally incapable of giving consent to disclosure because they are under the age of 18.

CHAIR—But my question is, if the Gillick doctrine applies, why does not that doctrine apply to these words 'legally incapable' in this bill?

Dr Hacker—Because they do not appear. There is no reference, if you like—there is no position here about adolescents. This simply says that, if a person is legally incapable of giving consent, their parent can have the information disclosed to them.

Ms JULIE BISHOP—But if you take (a), at the end of (a)(ii), the word 'and' appears. It says:

... may disclose health information about the individual to a person who is responsible for the individual—

the carer

if:

(a) the individual:

(i) ... is legally incapable

And then you move down. It continues:

and

Then you have got (b) and (c). In (c), it says:

the disclosure is not contrary to any wish:

Then (b) has got other hurdles that must be satisfied. So it is not just a situation where you are disclosing—

Mr CADMAN—It has got to be all three things.

Ms JULIE BISHOP—Yes. You are not disclosing to the carer of a legally incapable, however that phrase is construed, but they have got to be legally incapable 'and' the carer is satisfied that (i), (ii) and the disclosure is not contrary to any wish.

Ms Blomberg—But paragraph 7 goes on to say:

... the disclosure is not contrary to any wish:

(i) expressed by the individual before the individual became unable to give or communicate consent;

Ms JULIE BISHOP—I see, that is your point.

Ms Blomberg—Yes.

Ms JULIE BISHOP—You are saying you are always unable to give consent if you are under 18.

Ms Blomberg—Yes, that is right.

CHAIR—Except the explanatory memorandum says that, if there is some question about what 'legal and capable' means:

Equally, while minors are subject to a presumption of legal incapacity—

which is your point—

... it is intended that the capacity of a particular minor to give consent be determined on a case by case basis.

That seems to me to be incorporating the Gillick doctrine.

Ms Blomberg—Yes.

Dr Hacker—Yes.

Ms Blomberg—It does incorporate the Gillick principle and we take the point—it is in the explanatory memorandum. However, it is not in the privacy principles, it is not up-front, it is not clear. It is an example of having to go to secondary materials for an interpretation of some very important principles.

CHAIR—I understand the argument.

Mr CADMAN—How do we get to the situation that we make parents responsible for their kids?

Ms Blomberg—Could you repeat the question?

Mr CADMAN—I do not know what the law Lords were doing on that day. Is that the way it works in medical practice? When does a person stop being a child and becomes an adolescent? Do you use all of those tests of comprehension, maturity and all that sort of thing?

Dr Hacker—That is part of the difficulty of working with adolescent patients. You have to make those sorts of judgments every day.

Mr CADMAN—Yes, pity.

CHAIR—Can I come back then to your first opening point about Breen and Williams? It seems to me that perhaps you are putting Breen v. Williams a little highly. Whilst the High Court did not find that there was a general right to know, I will just quote from the judgment of Justices Dawson and Toohey with whom Chief Justice Brennan concurred, and I think there was some other concurrence:

> The appellant did not submit before this Court that she had a right to know the contents of her medical records independently of her claims arising from proprietorship of the information contained in the records, from contract and from the existence of a fiduciary relationship between herself and the respondent.

And then they went on and discussed the effect of Rogers v.Whitaker in terms of the provision of reasonable care and what judgment that should be based on—not the Bolam test in England but the Australian test. But then they say in the last paragraph of the judgment:

> There is more than one view upon the matter and the choice between those views, if a choice is to be made, is appropriately for the legislature rather than a court.

So it seemed to me on this question of right to know that, whilst, yes, they decided it strictly on property issues of copyright and fiduciary duties et cetera, the High Court was in fact leaving the very issue before us open as to whether or not there is this right to know. So it is not as if this bill, if passed, would necessarily directly overturn Breen v. Williams because that is not a point decided specifically by the court. As they say, it was not the basis upon which it was advanced.

Ms Blomberg—Certainly I take the point with the interpretation of Breen v. Williams, but there were very strong statements by the court regarding copyright and certainly statements—and I cannot recall from which exact judgment it was—about copyright residing in the doctor's notes: the notes that the treating practitioner will prepare during the consultation.

CHAIR—I accept that is what the court said, but they say:

... the appellant did not submit before this court that she had a right to know the contents of her medical records independently of her claims arising from the proprietorship of the information.

As you say, this was a case about who owned the information. The court, in effect, was not deciding whether there was an independent right and said that there was not one. Some of the judges said that it was difficult to find that as a trend in the law, but then said that, if this is to be determined, it is a matter for the legislature rather than the court.

Ms Blomberg—That is entirely correct. The copyright point is that, under the Copyright Act, authors are given certain rights and one of the rights is the right of keeping the work exclusive. National privacy principle 6.1 states that—and I will keep it in the medical context—the organisation holding the information must provide the individual with access. National privacy principle 6.1 is then coming into direct conflict with the right of exclusivity which is in the Copyright Act for authors to keep their work exclusive. The point that we are raising is: is this sufficient in law to override the rights that are granted in the Copyright Act and under international conventions, or is there going to be conflict at a later date that may have to be settled?

Mr CADMAN—You are getting conflicts now if clinics break up, and I have one in my area that broke up because one doctor went out. The clinic is claiming that doctor's notes. Where is your copyright process there? I would have thought that, under your theory, that doctor would have immediate opportunity to taking action against the clinic.

Ms Blomberg—Yes. Unfortunately, it becomes even murkier. There is an argument that, if the legal entity clinic is providing the material on which the notes are written or reduced to material form, they will have a claim to that part.

Mr CADMAN—Where is the patient in all of this?

Ms Blomberg—The patient, as was stated in Breen v. Williams, has no right to know—

Mr CADMAN—Do they have no right to doctor of choice, or the doctor that says they are the copyright owner of the notes?

Dr Hacker—There is an ethical responsibility for duty of care to the patient so that the information that is required to maintain care of that patient be passed to the next practitioner. That is an ethical principle that has been around for a long time.

Mr CADMAN—But it can be ignored.

Dr Hacker—You would ignore it at your medico-legal peril, I would suggest, if you did not hand over information about a patient requiring treatment to the next treating practitioner.

Mr CADMAN—But that would not include notes and other extraneous matter that might insist on further observations, diagnosis and forming of prognosis?

Dr Hacker—I think there is a duty of care which would require you to hand the medical information required to maintain the capacity to treat that patient. That would have to continue.

Mr CADMAN—That is fascinating. It appears to not happen in practice.

Ms JULIE BISHOP—Breen v. Williams was essentially saying that even mere access would constitute a breach of copyright, not copying it or not—

Dr Hacker—Not taking it away, yes.

Ms JULIE BISHOP—Just even looking at it? It might be a breach of confidence, but is it a breach of copyright?

Ms Blomberg—It is one of the rights to keep your work exclusive. As the owner of copyright of a work, it is one of those rights of exclusivity.

Ms JULIE BISHOP—But me just reading it?

Dr Hacker—For instance, I will give a clinical example of this. A patient is sent to me and I write a report and send it back to the doctor. There have been cases where handing that report to the patient to read has been very offensive and has brought actions—health services complaints type actions—against the doctor who has provided the specialist report, for instance.

Ms JULIE BISHOP—On what basis?

Dr Hacker—Because that report was written by them; no consent from the patient was sought for access to that report. The GP, for instance, hands it to the patient without saying to the referring doctor, 'Is that okay?' So many of us would write, 'Not to be handed to the patient without applying for consent.'

Ms JULIE BISHOP—If you did not do that, the publication—and I use the word in the legal context—of the report by the specialist to the GP, you are saying, should in any event attract copyright?

Dr Hacker—That communication belongs to the author of that communication who chooses to send it off to a second person, but it is not a publication in the general domain.

CHAIR—My difficulty with this—if I can be blunt—is that I think you are hiding behind the law of copyright to avoid answering what is the public policy question, and that is: should patients have access to the information in their records?

Dr Hacker—The AMA has no difficulty about patients having access to the information contained in their records, as distinct from their records, and we have significant policy outlining that which is appended, as far as I am aware, to our submission. The AMA has never had any difficulty with patients having access to their health information. We are about to enter electronic health. I am on record on a number of occasions as saying that electronic health records are fine; having access to your information is fine. That is quite different from access to your medical record.

Ms JULIE BISHOP—But it is not really a question of copyright, though. The genesis of all the concern is not really copyright in the sense that you have created a work that you want to retain for profit or for recognition or whatever.

Dr Hacker—If I could just contain this, we just raised this as an interesting legal issue; it is something that needs to be considered. We recognise that these principles are going to go ahead and it is not as though we are attempting to subvert them. We are simply raising this as an issue which may cut across some of them and may need to be decided at some point.

Ms JULIE BISHOP—I believe there is an issue there, but I am wondering whether, by characterising it as a copyright issue, we will lose sight of what we are really talking about.

Ms Blomberg—I do not think that we can ignore the copyright implications because of the Breen and Williams case, so we are raising it as an issue that needs to be addressed and a question that requires an answer at some point.

Ms JULIE BISHOP—Then I would put it back to you: does the AMA say that this is essentially an issue of copyright that they are seeking to protect, or is it something else in terms of the medical—

Dr Hacker—Breen and Williams in our view determined that it was an issue of copyright and we are simply stating that as an issue that has to be resolved because there is a decision in the public arena about it. These principles do not address that. There may be someone who decides that they are contrary to that.

CHAIR—What I think we are uncertain of, Dr Hacker, is whether you are raising it or referring to it because you believe that the decision in Breen and Williams is correct and there should not be any watering down of it, or you believe that the enactment of this legislation would cause some confusion when it is then lined up against the Breen and Williams decision?

Dr Hacker—Both, but primarily the second because the medical profession is out there with an understanding of Breen and Williams, and the privacy principles come along and they are different. One of the issues that I will raise as we proceed is that the medical profession is going to be very confused by a whole range of issues related to the rollout of the national privacy principles and the privacy legislation. This is one of the confusing issues, apart from issues about adolescence, disclosure, the way in which the wording is currently, the hospitals. It is a huge shift in the way in which doctors will deal with privacy issues, simply because there is now going to be a huge legislative framework built around that which is contrary to many of the principles that they have worked with to date, and this is one of them.

Mr CADMAN—They are against codification.

CHAIR—We have only got about 10 minutes that we can spare. I am sorry.

Dr Hacker—That is fine. I was hoping we would be able to get through the four more points that I had. In relation to national privacy principle 6.1(e), the AMA is pleased with the amendment that has excluded access in existing or anticipated legal proceedings between individuals and the collecting agent. It is our view that this, however, needs a very minor amendment to be altered to 'against individuals and any other person'. We believe that the collecting agents are too specific and will not protect doctors against whom fishing expeditions may be proceeded with. There are two issues here: the discovery and disclosure process is well established in courts—

Ms JULIE BISHOP—Covered by legal professional privilege.

Dr Hacker—That is right, and further the subpoena process is available if necessary. We just think that this is a minor amendment which would safeguard further issues. We have some concern about section 7.1, the exemption for employers and journalists. In relation to the exemption for journalists, there is some concern that journalists could disclose health information which they came across, provided it was true, with little concern for a person's public standing. We think that that has some major concerns. The finest example of that was the disclosure of the HIV status of that little girl who was then required to shuffle off to New Zealand and had her whole family's lives changed by that disclosure. I am not sure that that is actually 'in the public interest'.

The issue about employers is one of considerable concern to the AMA in so far as employees under section 7.1 cannot ask for access, they cannot correct imprecise or incorrect information, nor can they append anything to the information contained in an employer's record which relates to their health. We see this as being of considerable concern to people who will not be able to know what is going on in their employment record in relation to health information. The final medical issue that relates to these and which is of particular interest to me is in relation to genetic information. In the AMA's view, there is insufficient protection for genetic information which is collected outside health circumstances: for instance, paternity information and information that was collected under the extraordinary circumstances of the murder in New South Wales.

Ms JULIE BISHOP—In each instance, is it not a matter of consent? We do not have compulsory DNA testing in this country. We do not have a national register.

Dr Hacker—No.

Ms JULIE BISHOP—We do not have a national database. If we were to go down that path, a DNA register for criminal purposes would be subject to its own rules—that it can only be used for the purpose of that investigation and so on—as it is in the UK.

Dr Hacker—But if you have a paternity case, which is DNA information collected outside health, it is nothing to do with your health status.

Ms JULIE BISHOP—It would be subject to the Family Law Act and could only be used for the purposes of determining paternity for the purposes of the Family Law Act.

Dr Hacker—But if it is then moved into your health record, if you send a copy of that off to your health record, it has no protection.

Mr CADMAN—The first time you turn up with a kid to the doctor, they are going to write that in the record.

CHAIR—Why is it not included in the definition of health information?

Dr Hacker—It is not actually collected for the purposes of health. It is the same dilemma that we are currently struggling with about genetic information collected via research. It is not actually collected in relation to your health. It happens to be there.

Ms Blomberg—Health information is defined as 'information or opinion about health or disability'—I will not read the whole thing. If you take the scenario of genetic information collected through DNA sampling for legal proceedings, say, to determine paternity in a family law case, the information would not fall within that current definition. I take the point about the Family Law Court and the purposes for which it can be used. There is no disagreement with that, but this is a different point in that it does not fall within the protections that are afforded by the national privacy principles. Again, we have submitted that the definition could be easily amended just to include a new section (d) which would be 'genetic information collected about an individual'. We would submit that that would be a comprehensive amendment just to ensure that privacy. Certainly, as it is extending to the private sector, we recognise that of course in the public sector there are other controls.

Dr Hacker—Finally, it is clear that this is a very complex piece of legislation. It is also clear that there will be a range of complexities related to the profession that are going to need a great deal of explanation. Appended to our submission were two copies of the New Zealand educational document for doctors. It is our view that there needs to be an adequately funded education campaign for the profession. Given the amount that was required for the GST education for doctors, it is going to be a not inconsiderable amount. I am not actually sure that the amount that is going to be provided for the entire population is going to be sufficient to deal with the medical profession's needs.

We think that it is going to be a major undertaking to educate the profession about how it will fit with the privacy principles. If there is a desire that they work, we believe that an extra $3 million over three years for the entire private sector is probably going to be inadequate, given the amount that is going to be required to obtain compliance for the profession and with all the complexities, some of which we have really had an interesting discussion about today. There are clearly lots of clinical situations where there are going to be. I have already had a range of people writing to me asking 'What if this?' and 'What if that?' So there is going to be a whole range of problems associated with rolling this out as a compliance program.

Mr CADMAN—What about the ACT act?

Ms Blomberg—In relation to the ACT act, the information that we have received from our ACT branch is that patient right of access is used in pursuit of legal proceedings more than gaining information. That is anecdotal—

Ms JULIE BISHOP—Proceedings against the health professionals?

Ms Blomberg—Yes. It is anecdotal information that we have received—

Mr CADMAN—Would you be able to draw out something that is a little more than anecdotal from your members in the ACT because the ACT administration is presenting their act as an framework with a few modifications—an appropriate framework.

Ms Blomberg—It certainly is on our agenda to obtain more information from not just our branch but also the medical defence organisations that cover the doctors in the ACT to ascertain if there have been requests for assistance with complying with the legislation. We are in the process of gathering that information.

Mr CADMAN—Would you let us have that information, if appropriate?

Ms Blomberg—When it is available, yes.

CHAIR—We have run out of time, unfortunately. There is another matter I will put on notice and ask for your written response. It was suggested to us earlier this afternoon that there should be a compulsory privacy code for the entire health field on the basis that there should be a national uniform approach and that that will not occur if it is attempted on a voluntary basis. I would be interested in your considered comments about that suggestion. If you want to explore it in more detail you can look at the transcript of the hearing this afternoon with Mr Patterson. Thank you for your submission and also for coming along and discussing it with us this afternoon.

[3.41 p.m.]

BECKER, Mr Andy, Electoral Commissioner, Australian Electoral Commission

CUNLIFFE, Mr Mark, First Assistant Commissioner, Australian Electoral Commission

DACEY, Mr Paul, Assistant Commissioner, Australian Electoral Commission

CHAIR—Welcome. I should advise you that the committee does not require you to give evidence under oath, but the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament.

We are in receipt of your submission, which we thank you for. I will invite you to make some opening comments if you would like to. Because of the need for members of the committee to catch planes to be elsewhere at other functions tonight, we will need to finish at 4.15 sharp. I do not wish to limit otherwise the time we have to discuss this, but if there are any remaining matters we might put them on notice and ask for some follow-up subsequent to that, but I thought I should alert you at the outset.

Mr Becker—That is fine. In fact, we have not had an opportunity ourselves to get together and review any further ideas and thoughts about this particular submission that we have raised with you, so the opening remarks from me are going to be very short. Suffice it to say that we do have our own concerns and we have expressed some of those in this submission.

CHAIR—Thank you. You have expressed concerns about the provision of enrolment information to political parties and also the way in which parties have used postal voting application forms and procedures. I am wondering if you would like to elaborate on that.

Mr Becker—We have raised these issues with the Joint Standing Committee on Electoral Matters. The general feeling from the committee was that they felt we were overstating the case. But the evidence from the 1998 elections just reaffirmed what we believe to be the problem with political parties flooding the market with postal vote applications, collecting that information and, in many cases, not passing the cards back to us in time for enrolment purposes and all those sorts of things. With postal votes, the same sort of problem.

I think there is another issue, too, which has probably only just come to light in the last few weeks, as far as I am concerned anyway, and that is the ELIAS database that we give out to every member. We have introduced restrictions on that, but we do not require those disks to come back into the AEC. We are looking at reviewing that policy. Notwithstanding the fact that it has got encrypted data on it, which means you have to get a code to get in, we have now found you can download from the Net something which can break into any of those sorts of databases. So if somebody decided to dispose of it in the rubbish bin, it could be found on a tip. It would give full access to the Australian electoral roll that is probably only two or three months out of date.

CHAIR—I will go back a step. The details of who is on the electoral roll is a matter of public record which can be inspected and it is presumably one of the safeguards, if you like, in the democratic system that we have that that information is freely available.

Mr Becker—The information you are getting, though, is considerably more than what is publicly required, like date of birth, gender, that sort of thing.

CHAIR—Is that something which this bill should contemplate in terms of the provisions in it or is that something for the arrangement between the Electoral Commission and those individuals who receive the information from you?

Mr Becker—That is a good question. Perhaps it ought to be in our own act if it is going to have a legislative basis at all. It could be handled administratively. We could say that, before people get their new set of data, we want the one before the one before, if you like, two ago, back in our hands or a very good reason as to why we still have not got that data.

Ms JULIE BISHOP—Unless they have downloaded it.

Mr Becker—That is fine; they do download it onto their PCs anyway. It is the CDs that I am concerned about.

Ms JULIE BISHOP—That would be an administration issue between the commission and the recipients?

Mr Becker—Yes.

CHAIR—You are concerned about the CD being thrown out. You make the point in the submission to the joint standing committee that, in the recent election, 130 electors were disenfranchised. Again, would not that be a matter for the Electoral Act if political parties or individuals do circulate and process the postal voting application forms before handing them on to the AEC that there is an obligation on them to hand them to the AEC by the due date?

Mr Becker—There certainly is an obligation there anyway to do so, but it is not prescriptive, I suppose, if you like. It is forthwith, or something like that, isn't it?

Mr Dacey—It says that 'you should not unduly delay'.

CHAIR—Is there a penalty attaching to failing to do that?

Mr Becker—I do not know.

Mr Dacey—Yes, there is.

Mr Becker—It is probably not significant, though, is it?

Ms JULIE BISHOP—But that is an issue about disenfranchisement not breaches of privacy.

CHAIR—I do not know if there has been any case on this, but if it were a close election and a party was able to show that some other individual or party had effectively disenfranchised more electors than were the difference in the result on the final two-party vote, then surely that would be a matter taken into account by a court of disputed returns?

Mr Becker—Certainly, if it were significant, yes. I agree with you that it is not a privacy issue in terms of the disenfranchising of electors. It is a privacy issue in that the information that is on those certificates coming back to the commission is something that can be gleaned for the member's purposes—that is, that these people are actually in receipt of postal votes.

Ms JULIE BISHOP—What information is available on a postal vote that an electorate office could glean that is not otherwise available? What could they learn from it?

Mr Becker—Nobody else would have access to that data.

Ms JULIE BISHOP—But what specific data would you get?

Mr Becker—The fact that these people are people who use postal votes, for a start. That is useful information if there is a pattern.

Mr Dacey—Daytime telephone number, for instance, is also available with people to provide that information to us.

Ms JULIE BISHOP—Isn't that generally on the electoral roll—no, it is not.

Mr Dacey—No.

CHAIR—The advantage is a timing one mostly, isn't it?

Mr Becker—It is a timing problem.

CHAIR—The question is: why do political parties involve themselves in sending out postal vote application forms which they have returned to them before passing them on to the Electoral Commission? The answer, surely, is that they then know that these people are not voting on the day, who they are and that they can forward or communicate information to them in the interests of that political party in the forthcoming elections.

Ms JULIE BISHOP—You would think that they were trying to facilitate the outcome by ensuring that there is an efficiency in that they collect the postal votes to make sure they know these people have delivered their vote, I would image.

Mr Becker—That is right. Mind you, we have the same problem with enrolment cards. We hand out tens of thousands, probably hundreds of thousands, at election time.

Ms JULIE BISHOP—And at citizenship ceremonies.

Mr Becker—Yes, but we give them to political parties and candidates as well at election time. We do it at citizenship ceremonies, but in most cases our people are there so they are coming directly back to us. But if the card is being completed in the presence of a party worker or a candidate's assistant or what have you, they can glean the information from the card before it comes back to us.

CHAIR—But isn't Ms Bishop's point right? It is not in the interests of a political party for it not to get back to you.

Mr Becker—No, it is not.

CHAIR—If I am trying to influence somebody's vote in my favour, my whole activity has been useless unless they vote.

Mr Dacey—I do not think we are suggesting at all that there is an interest in not getting them back to us. I just think there is always a risk that when cards are coming through a third party there can be delays.

CHAIR—I understand that.

Mr Dacey—The other point, as the commissioner noted, is that we are aware that parties do add to their own version of the roll from this information. Our concern is that, with the exemption provided in this bill, members of the public will not be able to have access to that information. They currently have access to that information we hold, but not that enhanced information that political parties may hold on individuals.

Ms JULIE BISHOP—Could you elaborate on that or on your concerns about the exemption for political parties?

Mr Dacey—I just think there is a form of inequity there, basically, in that members of the public cannot have access to whatever is held on the parties' own version of the roll, to what private information is held, if an individual cannot have access to that. I think they should be able to check their own personal information.

CHAIR—Do you think there should be some mechanism for being able to correct that information?

Mr Dacey—Yes, if it is incorrect, as people do with the electoral roll. They have a right of access to the information we hold on them and they do often check that their information is correct.

Mr Becker—Probably the worry there is that there is no limit to what sort of information you can capture. If a person has got a restraining order or something like that against them, a member could hold that on his or her database; or if they drive a Rolls Royce or a Volkswagen. There is no limit. It ceases to be the roll, really, and it is no longer identifiable as the roll.

Mr CADMAN—But it is my understanding that members of parliament are not permitted to manipulate or change that roll. They can transform it into another process—

Mr Becker—Precisely.

Mr CADMAN—but it then ceases to be your roll.

Mr Becker—It ceases to be our roll—that is what I am saying.

Mr CADMAN—But it is not then presented as a roll either.

Mr Becker—No, but it is also not publicly available either. The point that Mr Dacey was making was that once this goes through you will not be able to get an FOI request on a member's data that is being held which may involve you.

Mr CADMAN—That is the same as for the doctors, because the stuff that is added to those things often is gained through other things; it is not provided by you.

Mr Becker—Yes, I am not saying this is unique, I am just saying that this may fall into that same category and the question is: is that proper?

Mr Cunliffe—It is true, of course, of departmental databases, traditionally. These days people have a right to seek information which is held on themselves and, if it is in error, to require a correction from wherever it has come from. That is something which we and other Commonwealth agencies are used to—being in that situation.

Ms JULIE BISHOP—It is like trying to find the balance between the demands that parliamentarians and governments respond more specifically, more carefully, and in a far more targeted way to their electorate, which is why people would maintain information. You could sit there and go through the newspaper and see who writes letters to the newspaper on particular topics and note that Joe Bloggs in my electorate loves writing about carbon taxes, say. I am then in a position to send to him everything that I can find on carbon taxes. Some would then say that is civic engagement, that is civic involvement, that is exactly what the parliamentary process should be aiming for, that sort of thing, balanced with the concern that parliamentarians or political parties collect information and put together dossiers, to what end.

Mr Cunliffe—It is a balance, undoubtedly, and I do not know that ultimately the balance is one for our commission.

Ms JULIE BISHOP—No.

Mr Cunliffe—Our apprehension arises from the fact that the primary public source of information provided to political parties and members is the role provided by the Australian Electoral Commission legislatively. That is the connection, the link, and the basis for the apprehension.

Mr Becker—Which contains detail beyond what is otherwise publicly available.

Mr CADMAN—You have stringency privacy provisions on you—

Mr Becker—Yes.

Mr CADMAN—and as soon as it goes out of your control there is none.

Mr Cunliffe—Yes. People are able to see what we hold in relation to them, and as long as they accept that we are people of good faith, believe that that is what we have provided to others.

CHAIR—I think we understand the argument.

Mr CADMAN—I do not see how we can develop it much further. I think it is open and shut.

CHAIR—Thank you very much for your submission and for coming along and discussing it with us. I thank all those here today for their attendance and thank those who have recorded the evidence.

Resolved (on motion by **Mr Cadman**):

That, pursuant to the power conferred by paragraph (o) of sessional order 28B, this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 3.58 p.m.