



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

**HOUSE OF
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

Reference: Privacy Amendment (Private Sector) Bill 2000

THURSDAY, 8 JUNE 2000

CANBERRA

CONDITIONS OF DISTRIBUTION

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

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

[PROOF COPY]

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
Thursday, 8 June 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 Vale

Members in attendance: Mr Andrews, Mr Billson, Mr Cadman, Mr Murphy, Ms Roxon, Mr St Clair and Mrs Vale

Terms of reference for the inquiry:

Privacy Amendment (Private Sector) Bill 2000

WITNESSES

ANDERSON, Mr Iain, Solicitor, Australian Taxation Office	227
BEEBY, Mr Warren Rees, Industry Representative, Australian Press Council.....	217
CHAPMAN, Mr Steve, Deputy Commissioner, Small Business, Australian Taxation Office	227
FAGET, Ms Patricia Joyce Clara, Director, Privacy FOI and Ombudsman Team, Department of Employment, Workplace Relations and Small Business	199
MOORE, Mr Stephen Philip, Assistant Secretary, Business Entry Point Management Branch, Department of Employment, Workplace Relations and Small Business.....	199
PEARCE, Professor Dennis, Chairman, Australian Press Council.....	217
STEWART-CROMPTON, Mr Robin, Deputy Secretary, Department of Employment, Workplace Relations and Small Business	199

Committee met at 9.44 a.m.

FAGET, Ms Patricia Joyce Clara, Director, Privacy FOI and Ombudsman Team, Department of Employment, Workplace Relations and Small Business

MOORE, Mr Stephen Philip, Assistant Secretary, Business Entry Point Management Branch, Department of Employment, Workplace Relations and Small Business

STEWART-CROMPTON, Mr Robin, Deputy Secretary, Department of Employment, Workplace Relations and Small Business

CHAIR—I declare open this hearing of the committee's inquiry into the provisions of the [Privacy Amendment \(Private Sector\) Bill 2000](#). On behalf of the committee, I welcome all witnesses and members of the public. This bill was introduced into parliament on 12 April and referred to this committee for inquiry by the Attorney-General. The purpose of the bill is to amend the current Privacy Act and to establish a national framework for the collection and use of private information by private sector organisations. The bill proposes to implement the national principles for the fair handling of personal information. These principles were developed by the Privacy Commissioner following consultation with business and other interests.

I welcome the representatives of the Department of Employment, Workplace Relations and Small Business. I 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. Do you have any opening statement which you would like to make?

Mr Stewart-Crompton—We will not make an opening statement, thank you.

CHAIR—In the discussions we had with the officials of the Attorney-General's Department, they indicated that the work policy and the drafting, if I can put it that way, of the provisions of the bill relating to small business, in particular, were undertaken within your department, so we would be interested in exploring some issues around that. Can I start with the threshold for small business of \$3 million. As I understand it, in the original exposure draft of the legislation that figure was \$1 million. Can you explain how the figure of \$3 million came about?

Mr Stewart-Crompton—I should, if I may, just briefly explain the role of my department in contributing to the development of the bill. It would perhaps be more accurate to say that the provisions of the bill relating to small business were the subject of quite extensive discussion between the Attorney-General and Mr Reith, in his capacity as minister for small business. The department itself of course had discussions with the Attorney-General's Department and advised Mr Reith suitably, but I would not want to leave an impression that we were responsible for the actual drafting of the legislation. Certainly, the department made a contribution to the final decisions taken by ministers.

If I may turn to your question, which is the threshold, it is correct that the figure of \$1 million appeared in the exposure draft, which was released last year. After discussion between ministers, it was agreed that \$3 million was a more suitable figure. That has to do with the actual structure of the business community in Australia. Frequently, when small business is being identified, it is done by the number of employees, and certainly for most of the work that is done within our department, we will, like the Australian Bureau of Statistics, differentiate between small business and other businesses by the number of employees. There are some other characteristics, of course, of small business, but typically we use the ABS definition of businesses with 20 or fewer employees.

With this particular case, the concern, as I understand it, that the Attorney-General's Department had in particular was that there may be businesses with a small number of employees but a very high turnover, particularly in the field of e-commerce. Therefore, the approach was taken that it would be better to use a turnover demarking point to differentiate between small business and others. This is against the background of the government's policy objectives that small business should be brought into the legislation in only a limited way.

The \$1 million turnover threshold that was proposed in the exposure draft would have, in effect, according to the ABS data that we have seen, covered 93.8 per cent of the total of small businesses when you look at small businesses by the number of employees. That would have, in other words, meant 986,000 small businesses have an annual turnover of less than \$1 million. However, if you look at—

Ms ROXON—Sorry, what figure was that?

Mr Stewart-Crompton—986,000.

Mr CADMAN—Just to make sure I have got that clear, the figure of 93.8 per cent is of—

Mr Stewart-Crompton—Small businesses under the employee definition. If we take the number of small businesses—

Mr CADMAN—With a turnover of a million or less.

Mr Stewart-Crompton—Yes, who employ up to 20 employees.

Ms ROXON—A million or three million?

Mr Stewart-Crompton—One million dollars. If we take the \$1 million annual turnover figure, then you would capture 93.8 per cent of the small businesses that we would characterise as small businesses applying the—

Mr CADMAN—Under 20.

Mr Stewart-Crompton—Yes, the employee definition. When you look at small businesses with an annual turnover—again using the employee definition—of less than \$3 million, we get 1,040,000 small businesses, which takes us up to 98.9 per cent of the total of small businesses.

In other words, there is a rough correspondence between a \$3 million threshold as a turnover figure to identify small businesses and the number of small businesses when you identify them by the number of employees. So the government's view was that, if it wanted to get a better approximation of the small business community, a \$3 million figure was appropriate.

Mr CADMAN—That is ninety-eight point what?

Mr Stewart-Crompton—It is 98.9 per cent.

Ms ROXON—Basically you are saying that the increase to \$3 million is a result of a government policy decision to try to make sure that the privacy provisions do not apply to almost all small businesses.

Mr Stewart-Crompton—There are a few negatives in that, and I think I got lost a little bit along the way.

Ms ROXON—Let me put it more clearly to you—

Mr Stewart-Crompton—But there is a policy decision.

Ms ROXON—My question is: the increase in the threshold to \$3 million by the figures you have just given us has effectively ensured that almost all small businesses would not be covered by the privacy provisions in this bill.

Mr Stewart-Crompton—Unless they lose their exemption by force of the other provisions. So it is correct, as Ms Roxon has pointed out, that the \$3 million in the government's view is a better descriptor of the field of small business given that the policy objective is to say that there should only be a limited application of the legislation to small business in relation to the areas where privacy is most at risk. For completeness, may I mention that, again according to ABS figures, the total number of businesses in Australia—and this is according to their survey, 'Small business in Australia 1999'—the total number of businesses is 1,107,100. The total number of small businesses in that population is 1,051,000 but, interestingly, although small businesses constitute the very great part of the total number of businesses in Australia, the larger businesses account for about 50 per cent of employment and, when one takes into account the number of cases in which the small business exemption does not apply, then it probably, in terms of the number of employees who will be employed by businesses who are captured by the legislation, gets to about 70 per cent.

CHAIR—All of that, though, will be thrown out of kilter as of 1 July, won't it, because we are told that the numbers that have registered for ABN and GST already far exceed those numbers.

Mr Stewart-Crompton—Correct.

CHAIR—So is there a whole lot of small business out there which at least will be defined from now on that are not counted in these figures?

Mr Stewart-Crompton—It is quite possible that there are a number of small businesses being identified now which the ABS has not previously caught, but quite a lot of the people who have registered for Australian business numbers are probably people who are not engaged in any ongoing business but are private citizens who have rental properties or other investments for which they have been advised to get an ABN.

Ms ROXON—These statistics are quite interesting for us but, in terms of the threshold essentially covering almost all small businesses and accounting for, I think you said, about 50 per cent of employment, is that really relevant in assessing whether or not those businesses should handle people's personal information in a way that complies with privacy regulations? As the department representing the interests of small business, to the extent that you are here, can you answer the question: why is there a principled reason? We can set the threshold to ensure that 98.9 per cent are going to fall within the exemption with your proviso all the time about whether they otherwise would. In principle, why should the privacy of consumers when dealing with a small business be any different from their privacy when they are dealing with a large business?

Mr Stewart-Crompton—The committee has already heard from previous witnesses that the approach taken by government has been one of trying to balance a series of interests. One of the government's policy concerns—and this is indeed one of the core policies of the government—is to ensure that there is not an unnecessary regulatory or compliance burden on small business. Indeed, there are a number of studies which show that regulatory regimes tend to have a disproportionate effect in terms of the compliance burden on small business. In that respect, I would be happy to provide to the committee, though not at this moment, an appropriate extract from a Productivity Commission report on the impact of regulations on small business. The report was entitled *Design principles for small business programs and regulations*—

Ms ROXON—I want to be clear. My question is quite directed. It is not about the basis upon which the government's policy decision is made; it is about the principle and whether there is any reason that privacy should be treated differently. If your answer is, 'No, the only reason is that we are concerned about compliance and regulation,' that is fine, but there is no need for you to go into any more detail on that. If that is the rationale and there is no other rationale, that is all I need to know.

Mr Stewart-Crompton—The reason I was giving you that preamble was to illustrate that this consideration was taken into account in designing the scope of the legislation. Of course, there are a number of other balances within the legislation. There are a number of ways the legislation could have been prepared. It is deliberately light-touch legislation. It also does take into account quite deliberately the balance, in the government's view, between the need to avoid the unnecessary regulation of small business and the potential hazard of the activities of small businesses. The government took the view that, particularly as this is a new regime and this is new legislation, there would inevitably be a cost for all businesses in familiarising themselves with the legislation and adjusting their business affairs to take account of it. Again, that is a reference to the regulatory effect of the legislation. For the reasons I have briefly mentioned, it could be expected that that task would be proportionately greater for smaller businesses than for larger ones. The issue then becomes: is there something about the types of risks that small businesses pose that says, 'This outweighs the concern that the government has not to impose a compliance

burden'? That is reflected in the way the legislation has been drafted so that, for example, health service providers who held health information lose their exemption, and those who are engaged, simply put, in the buying and selling of personal information also lose their exemptions.

In addition, starting from the principle that the government wanted to have a staged application of the legislation—and the committee will be aware that the legislation will apply to small business 12 months after it commences which gives those businesses who will be caught an opportunity to familiarise themselves with the legislation and adjust for its impact—there is also a provision which was not in the exposure draft that allows the Attorney-General to regulate in small businesses or activities of small businesses which are seen to pose a particular hazard. So if some activity of small business that has not been included in the coverage of the act in the first place emerges as presenting a particular risk, it can be brought in within the scope of the legislation in a way, through the prescription process, that is suitable to the circumstances of the activity or the type or types of small business concerned.

Finally, I should also mention something which has already been referred to by the Privacy Commissioner. The Attorney has indicated that two years after the commencement of the legislation he proposes that there be a review of the legislation, and we would anticipate at that time that the scope of exemptions along with other matters would be considered within the review.

CHAIR—In relation to the exemptions and small business, am I correct in my reading of the exemptions that a company or a business that operates e-commerce and has a turnover of less than \$3 million would qualify for an exemption, or would qualify under the exemptions if it is not collecting personal information?

Mr Stewart-Crompton—If we have a company which is buying or selling personal information it will not be exempted.

CHAIR—But if I just go online to Myer Direct or whatever it may be to purchase via the Internet or go online to a small equivalent of amazon.com or someone like that simply to purchase via the Internet, am I correct in my interpretation that, provided that business has not got a turnover beyond \$3 million, then this legislation will not apply to it?

Mr Stewart-Crompton—Yes, providing the business does not lose its exemption for another of the specified reasons that cause a small business to lose its status as an exempt small business operator.

CHAIR—Can I ask whether consideration was given to whether or not Internet trading ought to be exempt, given what we are told about the lack of security of transactions that occur via the Internet?

Mr Stewart-Crompton—I think I would have to answer your question in two parts. The first part is that there was a general consideration of the wide range of activities in terms of the extent to which specific consideration was given to e-commerce. I cannot say from my own knowledge how much consideration was given in the discussions between our departments. If it will assist the committee I would be happy to take that on notice. I do come back to the point that if there were, for example, in small businesses that were engaged in e-commerce particular

difficulties associated with the activity, the Attorney does have the capacity to address that particular aspect of the activity through his prescription power.

Ms ROXON—Following on from the same thing, I have a question in relation to the 12-month time frame for small business. As I understand it—please tell me if you understand it differently—the first 12 months will basically exempt all small business. After that 12 months, the exemptions to the exemptions, if you like, will come into play. But there is no suggestion that, after that 12 months, all small business will be caught by the privacy provision. For example, real estate agents presumably often would not go above the \$3 million threshold; they would fall under that. They handle intensely personal information about people all the time, and they would not—from my reading—come within any of the things that take small business out of the exemption. Are you saying that the way that could be handled, if we realised that that is a problem, is that the government then prescribe that real estate agents are a particular category of small business that should comply with the legislation?

Mr Stewart-Crompton—That is provided for in the legislation. It is open to the Attorney to regulate in any activity or type of small business that he considers ought to be brought in in the public interest.

Ms ROXON—A person will not have any way of knowing whether or not the information they are handing over is going to be protected by this legislation. If they are dealing with a small business, they should be particularly alert to the risk that their information will not necessarily be handled in way that complies with privacy principles.

Mr Stewart-Crompton—It is correct that, if I am dealing in the future with a small business after this regime has come in, I should be aware that the business is not required to comply with the Privacy Act, assuming it is not one of the types that is excluded from the exemption.

Ms ROXON—You said at the start that you wanted to make clear that there had been discussions obviously between your ministers on the advice provided, but you seem to be fairly cautious about that. Do I take it from that, that it means that you have not, through the department, had any consultation with the small business sector about their views on this issue?

Mr Stewart-Crompton—I should make it clear that I was simply responding to something that the chair had said about the department's drafting of the legislation. I think we all knew what that meant, but I just wanted to get it clear for the record that there is actually a process for the development of legislation and for drafting. In taking account of small business interests, or discussions with small business, the government's primary point of consultation through a public consultation process has been managed through the Attorney-General's Department. In looking at developments on the small business provisions—I cannot speak for the Attorney-General's Department—DEWRSB has had some discussions with the ACCI.

CHAIR—The Privacy Commission in New South Wales made the suggestion that the Privacy Commissioner should have the power to make a voluntary code for small business—if businesses chose to, on a voluntary basis, they could opt in and sign up. Do you have any comments about that?

Mr Stewart-Crompton—I think all I could say is that that is one approach which could be taken to the legislation, but ultimately it is a matter for the government to decide.

CHAIR—I will rephrase my question. In the consultations that have occurred, are you aware whether that approach was discussed, and what was the attitude of those in the discussions?

Mr Stewart-Crompton—I am not aware of that, but I can take that on notice if it would help the committee.

Ms ROXON—But that consultation is with only ACCI? In answering the chair's question, presumably because you are not speaking on behalf of Attorney-General's, you are just talking about the extensive consultation which you have had, which is the discussion with only ACCI.

Mr Stewart-Crompton—I did think I might be able to save the committee some work by finding out from our own department's point of view and from that of the Attorney-General's department how that issue came up in the consultations and provide the committee with as complete an answer as I could.

Ms ROXON—Can I ask you another question about the consultation? Some of the private sector organisations that have presented evidence to us in this inquiry have also said that they did not think that small business should have an exemption on the basis that, one, it was not a level playing field and, two, it was not in a business's interests to not be able to assure consumers that their privacy would be protected. Did that issue get discussed at all in your consultation?

Mr Stewart-Crompton—Certainly, in considering whether there should be a small business exemption and the scope of the small business exemption, the full range of issues that you have heard before the committee have been touched on in one way or another. As I said at the outset, ultimately for the government it was a balance of considerations between the policy aim of not imposing unnecessary regulations on small business balanced with the public good in ensuring that there is an appropriate privacy regime. They are obviously looking at it from the point of view of small business considerations about where the balance is to be drawn. Is there a commercial advantage in being able to say, 'We are subject to this regime'? The legislation reflects where the government came out. These sorts of issues are presumably the kinds of issues that might be taken into account in a review.

Mr CADMAN—I understand that there are a number of definitions of small business based on both turnover and on number of employees. It seems to be an area of diverse views. Could you outline for us some of the ranges? This \$3 million seems to be a completely new figure. Is 100 employees one definition?

Mr Stewart-Crompton—Mr Cadman is quite right when he reminds us that there are a number of tests used to identify small business. Just looking at it from the point of view of the Commonwealth government, let alone the approaches taken by other tiers of government, we know that generally an approach is to use the number of employees, rather than turnover—although that does occur. I have already mentioned the ABS definition of a business being small if it has less than 20 employees. Mr Cadman referred to the circumstance of up to 100 employ-

ees. That was an ABS definition of a small business in the manufacturing industries but they have changed their definition to be less than 20 employees.

Setting aside the tax regime for the moment, where turnover figures are used in government I understand that they tend to be more than \$3 million. The Office of Asset Sales and IT Outsourcing regards businesses with a turnover of less than \$20 million as small for the purposes of its industry development schedule for tender documentation; that is for a particular case. The ATO is using \$1 million as the cash accounting threshold for the GST legislation but it also uses \$50,000 as the threshold for registration and I believe it also uses \$20 million as the turnover threshold for determining whether you should fill in your business activity statements on a monthly or quarterly basis. So there are a number of definitions used. What one could draw from that is that they tend to be tailored to fit the particular circumstances.

Mr CADMAN—So, from what you have said, a range of turnover per annum ranging from \$50,000 to \$20 million could define small business.

Mr Stewart-Crompton—For particular purposes and in particular contexts.

Mr CADMAN—But number of employees is no longer considered a relevant indicator?

Mr Stewart-Crompton—It is, and the number of employees is particularly used by the ABS for its general statistical purposes, which of course feeds through to a whole range of assessments and forecasts that are made, particularly of an economic or business nature.

CHAIR—The difficulty I have with this is that it seems to me there is going to be uncertainty for both small business and for anybody dealing with small business as to whether they are in or out of this system. You are using the GST turnover test at a particular level, but my question applies whether you make it \$1 million or \$50 million: how does a company know whether it is in? Presumably you would say that if it is filing a quarterly return and that indicates that for the year it may have a turnover of more than \$3 million then it is in. But there are businesses that have seasonal operation. Somebody operating a business in the ski fields could have very little turnover in summer but considerable turnover in the quarter which includes the ski season. So it seems to me there is uncertainty there. That is one level of uncertainty for the business itself. Beyond that, it seems to me compounded by that for the consumer trying to know whether or not a particular business is in or out. You do not have to put a sticker on your window or something to say, 'We are subject to this legislation.' There must have been some consideration about how you address this uncertainty.

Mr Stewart-Crompton—Clearly it would be the case that there would be much greater certainty if you could use a simple objective test of, for example, the number of employees—

Mr CADMAN—Say, 20.

Mr Stewart-Crompton—Yes, if, for example, the ABS definition of a small business were to be used. I mentioned that the policy difficulty the government faced was its concern that there may be businesses which by any measure were very well-to-do businesses, particularly in the field of e-commerce, that have a small number of employees and so would fall out of the scope

of the legislation if there were a simple definition using only the number of employees. That has been resolved in the way the government has framed its legislation, but I think one would have to acknowledge that there are, particularly when one gets close to thresholds, going to be circumstances where there will be uncertainty. Could I say, for example, that there are obviously some micro-businesses where I think nobody would expect them to have a \$3 million turnover, and those would be many of the businesses that citizens deal with on a regular basis.

CHAIR—Was consideration given to a two-part test, though? It would be possible to design criteria, would it not, that say that you are a small business if you have less than 20 employees and you are therefore exempt, and then a further part to say that, if your turnover is beyond a certain figure, you come back into the system.

Mr Stewart-Crompton—It would not be appropriate for me to comment on the policy deliberations of the government. Clearly there are a range of options in terms of how the identifier could be—

Ms ROXON—Presumably you advise the government, enabling them to make better or worse policy decisions, and presumably you can still give the chair a view on the department's ideas.

Mr Stewart-Crompton—My experience before committees is that it is not considered appropriate for officers to offer opinions on matters of government policy or to disclose policy discussions.

Ms ROXON—We might as well not have you there, if that were the case.

CHAIR—If I look at page 37 of the explanatory memorandum, it says this:

The annual turnover figure of \$3 million was finally adopted on the recommendation of the Department of Employment, Workplace Relations and Small Business.

I am not asking you to second-guess government policy. I am simply asking you, as a matter of workability, based on your vast experience in this area—without addressing whether that is a good policy or not; leave the policy aside— whether it is possible to have a mechanism that would work along the lines that I have suggested and whether or not that could be a way of relieving some of the uncertainty which I perceive will occur.

Mr Stewart-Crompton—If it were a matter of concern to the parliament, about the identifier of small business, I think it is obviously the case that there are other aspects that could be built into it. The risk with any kind of definition is inflexibility or building in too many elements. In principle, it would seem to me to be possible to have more than one element in the identification. It has been suggested that there be a combination of turnover and size of business by number of employees. It is possible, but whether it is a desirable thing or not is a judgment that would have to be made somewhere else.

Mr CADMAN—Would just choosing the number of employees be a simpler mechanism in an administrative sense? For instance, 20 employees seems consistent. I do not understand \$3 million, frankly.

Mr Stewart-Crompton—Obviously it would be simpler, because it is a simple objective test and it is not subject to the kinds of fluctuations that the chair has alluded to. But it has the drawback that—

Mr CADMAN—I do not see that as a drawback.

Mr BILLSON—I would be interested in what was so persuasive about the benchmark that has been chosen in relation to the data they may hold. I am just wondering about that nexus between what triggers participation and what grants exemption, coming back to the substance of the bill. For identification purposes, sure, that is an interesting conversation we have been having, but neither of those criteria necessarily take you to the essence of the bill, and that is the information that they hold. In that light, what was persuasive about the model that has been recommended, given that it seems to be quite foreign to the objectives of the bill?

Mr Stewart-Crompton—Perhaps I could answer that by saying that the starting point for the government in its final decisions was, in this regulatory regime, that it only wishes to cover small business where there is a particular privacy risk and not to impose any unnecessary regulatory burden on them. The government took the view that the particular types of activity—which mean that you can never have an exemption—fell into that category of implying such a risk to privacy that you ought not be exempt from the legislation if you engage in that activity. For example, you are buying and selling personal information—

Mr BILLSON—Or you have a lot of financial transactions.

Mr Stewart-Crompton—Again, it is a question of judgment, and the government's judgment was that those activities were of such a particular risk that there should be no exemption, and the legislation carries with it a recognition that there may be other activities that are identified, or which emerge, that should be covered, and hence the capacity to prescribe a particular—

Mr BILLSON—So, at the end of the day, the size of an enterprise, however defined, is not solely going to be what guides. The confusion about whether people will know has another layer of complexity over it, that is, the nature of the business and the information that comes to hand. So, in terms of definitional issues about the size of the enterprise, that might be the easiest judgment that needs to be made. There will be more complexity in the machinations of the business which will involve people being covered by this legislation regardless of their size.

Mr Stewart-Crompton—Yes. We have discussed in an abstract way the principle for the small business exemption, but I think it is worth keeping in mind that the legislation actually does impose various obligations on a business operator and, apart from the fact that any business that is subject to the legislation is going to have to develop a proper understanding of the legislation and know what its rights and obligations are so that it can order its affairs appropriately, it may have to engage with particular customers who may be seeking to exercise rights they do not have—this is not an unknown phenomenon. So a business operator may again have

to draw on his or her knowledge or turn to someone for advice on the subject. Potentially, the business operator could be drawn in a relatively trivial matter into a complaint. The committee has already been told by the Privacy Commissioner that he is going to take a very practical approach towards dealing with complaints; nonetheless, if you are a business operator, particularly a micro business, and you are subject to a complaint, that is still time away from your business. So there are a number of aspects in which in practical ways you could say, 'This is not something in which there is no regulatory burden at all for small business.' This is a matter about which the government is concerned—in this and in all other pieces of legislation.

Mrs VALE—I have a question which you have, I think, already answered for the deputy chair, but just so I understand it in my mind: small business generally, under the regulations and under the criteria that you are using, will be exempt for the first 12 months—is that right?

Mr Stewart-Crompton—Small business is not covered at all under the legislation for 12 months so all small businesses can work out whether they are in or out and adjust appropriately. When the legislation starts, there will be some businesses which will continue to be outside the scope of the legislation because they are exempted—

Mrs VALE—Special exemptions?

Mr Stewart-Crompton—Yes, and there will be some businesses which, even though they fall under the threshold of the turnover, are engaged in activities which mean that they are not exempt from the legislation and must comply with it. So, 12 months after the start of the legislation, we would expect to see most small businesses who as defined are exempt, but there will be some who by force of the legislation cannot take advantage of the exemptions.

Mrs VALE—My concern is still with the confusion on the part of the consumer: how will they know? Has there been any regime or system thought up so that businesses, after the 12-month period, will be able to say, 'We come under this legislation'? Because, ultimately, it is the privacy of the individual consumer. The whole point of this legislation is to protect privacy, isn't it?

Mr Stewart-Crompton—The legislation actually contains a mechanism itself which will have that effect, because national privacy principle No. 5 requires all businesses to have a written statement about their privacy policy. So those businesses will actually have documents, and one could expect a number of businesses to make a virtue of necessity and have those documents available as information to customers.

Mrs VALE—Perhaps even a symbol might be sufficient. It does seem to be very confusing for consumers because they would not know how many employees there were in a business and they would not know the turnover of a business.

Mr Stewart-Crompton—Right. From my discussions with the Privacy Commissioner, I know he has turned his mind to how there will be both information to businesses and information to consumers about the new regime once it commences, but I could not tell you what Mr Crompton has in mind on this particular point.

Ms ROXON—There are two issues. Could you explain how you understand the legislation would work in the way the small business exemption interacts with the related business exemption? If you are a small business that is exempt and you provide information to a related business, does that related business automatically not have to deal with privacy regulations as well—which is my understanding of how it interacts? The second issue is: in respect of the exemptions, you say if you are disclosing personal information you will fall outside the small business exemption. But my reading of it is you only fall outside it if you are really trading in that information in some way.

Mr Stewart-Crompton—That is correct.

Ms ROXON—So if you want to disclose it for any other motive—generosity, maliciousness or whatever—but you are not actually charging or trading for it, you will not be protected.

Mr Stewart-Crompton—If you are a business which is trading in personal information, you do not have the exemption. If you are a business which is not trading in personal information or is not a health service holding health information, et cetera, then you are exempt and if you disclose personal information, it is not covered by this regime. In regard to the first part of your question, I would prefer to take the question on notice because there are some examples that I think might be useful for the committee.

Ms ROXON—Sure. But you would be aware that we have a fairly short time frame to report on it.

Mr Stewart-Crompton—I understand that. I will try to give you a very quick turnaround.

CHAIR—Can I move on to the employee records exemption? The explanatory memorandum to the bill states that acts and practices in relation to employee records are exempted as these are matters better dealt with under workplace relations legislation. Can you briefly outline what provisions there are in the workplace relations legislation that relate to employee records?

Mr Stewart-Crompton—There are specific obligations under the Workplace Relations Act concerning employee records. Under regulations which are contained in part 9A of the Workplace Relations Regulations, the Workplace Relations Act provides for a range of records which must be kept by an employer relating to employees. They go to the obvious things like identifying the employee, the hours worked, the amounts paid, the leave entitlements, et cetera. Various aspects of the terms and conditions of employment must be recorded under the legislation. The regulations include an obligation on an employer under regulation 131K to immediately correct any error in records and also when correcting an error to record the nature of the error with the correction. The regulation 131L gives employees and certain authorised officers a right of access to records and a capacity to make copy of records. There are rules about when records must be made available which, very broadly described, are ‘within a reasonable time’. So there are provisions about access, there are some provisions about correction, but they are in relation to the records which must be created and retained under the workplace relations legislation. I understand that state legislation has similar requirements.

Ms ROXON—Those provisions were actually provisions that were proposed to be deleted from the Workplace Relations Act as part of the second-wave legislation, or the proposed legislation last year, weren't they?

Mr Stewart-Crompton—I am afraid I cannot comment on that, mostly because I am not sure.

Ms ROXON—Would you be able to take that on notice?

Mr Stewart-Crompton—Yes, certainly.

Ms ROXON—My understanding is that employee records, hours worked and such matters were sought to be removed as allowable award matters, and that the access provisions were sought to be altered quite dramatically, so I would appreciate it if you could confirm that.

Mr Stewart-Crompton—I will take that on notice.

CHAIR—Do you know whether privacy matters of the nature that we are speaking about—for example, what is in the regulations you have referred to—are generally included in workplace agreements?

Mr Stewart-Crompton—No, I do not, but I will take that one on notice as well.

Mr BILLSON—Also, could you have a look at the template AWAs?

Mr Stewart-Crompton—Yes, certainly. Could I just point out on that point, since Mr Billson has mentioned AWAs, that there are particular provisions about privacy in relation to AWAs, but I can cover that in the response.

Ms ROXON—You would not be able to tell us if there were any privacy provisions in the AWAs because you do not have any right to inspect them, do you? In fact, no-one has any right to.

Mr Stewart-Crompton—That is not quite correct. There are circumstances in which research and so forth can be conducted in relation to AWAs which are held by the Office of the Employment Advocate.

Ms ROXON—I would be interested in how you seek to do that. Could you also tell us whether the department is actually undertaking any work or planning to put out a discussion paper or organising to draft any provisions that would cover privacy for employee records?

Mr Stewart-Crompton—Perhaps I could take that one on notice as well.

Ms ROXON—Can you save us the time? Are you going to take all of these on notice so we might as well stop now?

Mr Stewart-Crompton—In relation to that particular question I do not know the answer so I will have to take it on notice.

Ms ROXON—It is surprising to me that the Attorney-General can say in the parliament that employee records are worthy of privacy protection but they are a matter that should be dealt with by the Department of Employment, Workplace Relations and Small Business, yet you as a senior official presenting to the inquiry today cannot tell us. I do not want to know what your answer is once you have gone and found out from the minister what your answer should be; I want to know actually whether the department has done anything or not at this stage.

Mr Stewart-Crompton—The work that we have done to this point has been to examine the legislation, particularly given the intention of the privacy legislation and the policy intention, and we will look at that in the light of the privacy policy of the Commonwealth. It will obviously be a matter for the government to decide whether it thinks there is any change required.

Mr MURPHY—What is the practice that happens in other countries regarding the protection of privacy of employee records?

Mr Stewart-Crompton—I think we can provide that information to the committee quite quickly but I cannot give you the answer now.

CHAIR—Can I take you through a few examples to try and understand whether these are within the legislation or not?

Mr Stewart-Crompton—Yes.

CHAIR—If a future or prospective employer rings a past employer to ascertain information such as health information, any pre-employment psychometric testing, results of genetic tests or anything like that, is that covered by the legislation?

Mr Stewart-Crompton—It would depend in the first place on whether the employer was an exempt employer. The second element, which my colleague has just reminded me of, is that it also depends what the employer is asking for: whether it is something that involves access to previous employee records or whether it is access to an opinion or something which is known to the particular employer. Within the privacy regime, let us take your example and say that the employer wants to know something about the amount of sick leave that an employee took. The workplace relations legislation does not say that the employer who holds the previous records is prevented from disclosing that information to a successor employer.

CHAIR—On the definition of an employee record in this bill, there are some examples of personal information set out in clause 12 on page 8 under proposed subsection 6(1). It states:

Employee record, in relation to an employee, means a record of personal information relating to the employment of the employee.

What do those words ‘relating to the employment of the employee’ mean? For example, would information about any screening, personality or psychological profiling, genetic tests, psychiatric or medical information relate to the employment of the employee or not?

Mr Stewart-Crompton—I noticed that the words changed between the exposure draft and the version in the bill. I think the exposure draft said ‘about the employment of the employee’ and got changed to ‘relating to’. I assumed it was just a technical drafting change. The expression ‘relating to’ normally has quite a wide meaning, but when one looks at the context and the examples given these all appear to be matters which actually go to the employment relationship. I think there are probably some interpretation limits about the scope of ‘relating to the employment of the employee’. I would interpret it—although these matters are of course ultimately matters for the courts—as meaning ‘having some material relationship with the actual employment of the employee’.

Mr BILLSON—On a related matter, the bill proposes some particular arrangements in relation to service providers under contract from the government and relates them to the employee records. Are the Job Network, community work coordinators, Work for the Dole program sponsors and those types of things which do not directly relate to an employment relationship but where information is collected that may be of an employment record kind covered in here, or do we default back to the government contract provisions of the bill?

Ms Faget—All of the information Job Network providers collect about job seekers would in fact be covered by the information and privacy principles. They would be caught as outsourced providers under the bill anyway, but there are contractual provisions in all of our contracts which bind them to the Privacy Act at the moment, as if they were providers under the Privacy Act.

Ms ROXON—So you are saying that they would be covered by the existing public sector legislation rather than by the bill we are talking about at the moment?

Ms Faget—No, they would actually be covered by the bill because the bill brings in contracted providers. Provided there is a contractual relationship between the provider and the Commonwealth, providers are in fact caught by the bill.

Mr BILLSON—In terms of your contract administration, as I read it, remedies can be sought from the Commonwealth where an agency chooses to dissolve itself of whatever. Is that issue part of the performance monitoring of the contractors: how they handle privacy issues, what sort of information they make available and on what terms to prospective employers?

Ms Faget—There are rules which are also set aside in the contract. Apart from the standard provisions that bind the contractors, there are employment services records rules which set out detailed rules about how they may use or disclose information that they collect on behalf of the Commonwealth.

Mr BILLSON—Is that sufficient to be a model for each of the providers, or are they minimum requirements that are imposed upon the service providers?

Ms Faget—It is actually quite a good model. I do not think that they are really minimum requirements.

Mr BILLSON—Is that model transferable to other parties? I am trying to link it back to some of the smaller employer issues. Has there been enough leg work done in that context that it may be of use to others who are grappling with what their responsibilities are and how to discharge their obligations?

Ms ROXON—Perhaps you could provide to us a copy of the types of provisions that are included and we could have a look at that.

Mr BILLSON—And how they interact with contractual expectations with what is foreshadowed in the bill and, on that same basis, how you would put a fence around employment information.

Ms ROXON—I have another question related to this—drawing from your experience as the departmental officials responsible for dealing with employment related matters. From my perspective, employment is one of the things for which you have very little choice with regards to what information you provide to someone else. You have very little choice about providing your banking details, your home phone number, your address, your health situation and your personal circumstances. Pretty much, an employer is always going to know those things, and you can do very little to stop them knowing those things. Do you have a view on whether that type of information should be any more or less protected than other information?

Mr Stewart-Crompton—Clearly, the existing legislation and the proposed amendments all make quite clear that there is a policy of protecting personal information. That is one which I think is generally accepted across the community.

Ms ROXON—But not for employee records.

Mr Stewart-Crompton—In terms of employee records, I think perhaps the issue there is really one of a decision about whether the levels of protection of the information are satisfactory or meet the standards that are implicit in the wider privacy legislation. That is obviously an issue that any government that has provision for employee records has to consider.

Ms ROXON—That does not really answer my question. I guess I am trying to get at, again, the department's view—which I know you are disinclined to give us—as to whether you can see any rationale or reason, and there may be some, why employee records would not be covered by this privacy legislation.

Mr Stewart-Crompton—I will take that in two parts. The fundamental question is the extent to which that type of information should be protected. The second question is under what particular legislative arrangements it should be protected. The government's clear view is that that is a matter which is better dealt with in the relevant industrial legislation. There are two reasons why that view has been taken. Firstly, it is this legislation which actually creates the obligations and sets out the rules. So it would be appropriate for the source of the obligation and the rules

about handling the legislation to also contain the rules about disclosure, correction, access and so forth—some of which are already provided in the workplace relations legislation.

Ms ROXON—It might be comforting if you could confirm what I already know is true, which is that they were proposed to be deleted by this same government six months ago and that you cannot tell us whether there are any intentions, discussions or proposals about putting better privacy protection into the workplace relations legislation.

Mr Stewart-Crompton—I did say I would answer the question on notice.

CHAIR—Are there any other pressing questions?

Ms ROXON—One final one. Do you have any experience on whether or not this personal information is actually regularly handled, passed on or dealt with between employers or from employers to other organisations?

Mr Stewart-Crompton—Employment related information?

Ms ROXON—Employment related information. I am wondering whether you have a view on how regularly that might or might not be handled in the community.

Mr Stewart-Crompton—The only experience I have had of that is where there is a transfer of a business. I am not aware to what extent there is other use of employee records.

Mr BILLSON—Has the department received any complaints from micro and home based businesses that the current privacy provisions which are carried through the Telecommunications Act are being perversely applied to demand information of customers rather than protecting information of the customers? Have you had complaints of that kind?

Mr Stewart-Crompton—Not to my knowledge and Ms Faget, who is our FOI officer, has told me that she is not aware of any, but we will check for you.

Mr BILLSON—Most of them we farm through the telco ombudsman and people of that kind. I am curious to know whether you had that concern because I have been contacted about that.

Mr Stewart-Crompton—I would not expect such complaints to be made to our department, but I will check.

CHAIR—We might stop at that stage. There is a number of questions which you have taken on notice. There may be a few more which we could direct to you on notice. We will do so today. We would appreciate getting answers by next Wednesday because we are under a fairly tight schedule in order to report to the House on this bill.

Mr Stewart-Crompton—We will pull all the stops out, Chair.

CHAIR—I appreciate that. Thank you for coming along this morning and discussing the bill with us.

[10.56 a.m.]

BEEBY, Mr Warren Rees, Industry Representative, Australian Press Council

PEARCE, Professor Dennis, Chairman, Australian Press Council

CHAIR—Welcome. I have to advise you that, although the committee does not require you to give evidence under oath, the proceedings 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.

Thank you for coming along today. In particular, we are interested in discussing the exemptions in the bill which relate, obviously, to the media and to journalists. I do not know whether you wish to make any opening comments or not. If not, we are happy to embark on a discussion.

Prof. Pearce—I will make a very brief opening statement. The council—as you may well be aware but perhaps it needs to be restated—is a body representative of the industry and the public, and that is reflected in the mix of its members. It has two principal functions. One is to receive complaints about actions taken by the print media. In that context, could I say that of the 400-plus complaints that are received each year, only a tiny percentage are concerned with claims of breach of privacy by the Australian media. That is one of the functions of the council. The other is what we call the freedom of the press function. That is to keep an eye on issues that do impinge upon freedom of the press. We consider that that freedom is one of the essential elements of a democratic society such as exists in Australia, and we look very carefully to any apparent invasion of that broad freedom. The control of the release of information to the press is of course a matter that does impinge upon the freedom of the press, and for that reason the council looked closely at the proposals that are now embodied in this legislation. We had exchanges with the Attorney-General, and in the upshot the material that emerged in the bill—the provisions that are here in the bill—do recognise, we think, the significance of freedom of the press, and we are quite content with the measures that are here.

CHAIR—Concern has been expressed that we have to try to find some balance between the privacy of an individual and the freedom of the press, which are not absolutes in themselves. I think we all accept that as a starting point. In trying to achieve that balance, the concerns that have been expressed to us are essentially that the definitions are so wide that anybody can quite easily find a way of having themselves categorised for the purposes of the legislation as a media organisation and/or a journalist. Take the example that has been posited. If somebody sets up a web site—which is the new medium, if you like—don't they then fall within the definition of a media organisation, and aren't they, if they are contributing to that web site, most likely a journalist under this legislation? Their activities could be political activities, or any sort of activity, but provided that they claim their web site is providing some sort of news and information, it would seem that they would fall within the definitions.

Prof. Pearce—I agree that there are problems here, and we have been made aware that the definitions may be thought to be too broad. The difficulty is, as always with these sorts of questions, how to draw the lines, so that you bring within the ambit of protection the matters that

you do want to cover and the genuine and primary news distributors, but you not bring in persons who would be, as it were, hanging off the coat-tails of bodies of that kind. As with the example you gave, much of the mainstream media now have news sites, so the problem is to ensure that the way of purveying information by genuine media organisations is not curtailed by the need to cut out the ones that are simply jumping on the coat-tails of the broad media organisations.

The other side to it of course is that, as far as the print medium is concerned, anybody can set up a newspaper. One of the beauties of the concept of freedom in this country is that there is simply no control exercised over the print medium at all. Anybody who has the money can establish an outlet. We would prefer the view being taken that those sorts of bodies, that broad range of capacity for people to establish themselves as media outlets, is not curtailed in any way because we think that is to the advantage of the public. That might mean that you end up with some awfully, rubbishy outlets, but that is the price that I think one has to pay for the capacity of people to be able to say what they want.

CHAIR—I will give you a couple of examples that the Privacy Commissioner raised with us. I will read from his material:

The inclusion of the word ‘information’ within the definitions would appear to allow an organisation to publish or broadly disseminate any personal confidential information, which could include sensitive information, under the pretext that it was engaged in journalism. For example, a lobby group could publish a ‘newsletter’ that contained a significant amount of personal information about its critics, by claiming a media exemption on the basis that it was making information available to the public. A potential scenario could arise whereby such a lobby group may attempt to silence its critics by threatening to publish very personal information about them and their families.

An example of the kinds of activities that might be claimed to fall within the exemption is the gardening competition on the *Lock Stock and Barrel* (www.lockstockandbarrel.com.au) web site. This site collects personal information about a number of politicians including photographs of themselves and their house and garden, their address, opinions about their sexuality, their personal history and information about their families. While this information is being collected under the guise of it being a gardening competition, it could be interpreted as an attempt to pressure politicians into not criticising gun ownership through fear of having personal and family information disclosed to the world at large.

He refers to politicians, but it could be anybody. It could be professors at universities, journalists, media proprietors—the range is unlimited. The Privacy Commissioner then goes on and make some references to, for example, Internet sites like Crimenet, which has had some publicity arising out of a trial in Victoria recently. I am referring to the specifics only in order to tease out this issue about whether the way the exemptions for the media are effectively framed means that it is very easy to bring yourself within the exemption and therefore claim to be the media even though that is not really the primary activity that is being engaged in.

Prof. Pearce—I can appreciate the difficulty here. The Privacy Commissioner points to problem areas. I guess we would want to see what his solutions were, because it is the solutions that cause the difficulty, not so much the identification of the problems. The base problem comes back to how you say something in terms that allows the areas that clearly have got and do need the right to be able to say what they want to continue to do so and constrains those who try to jump on the bandwagon.

CHAIR—The answer to that is that the New Zealand Privacy Act provisions are more narrowly cast than what is proposed in the bill. That has been in operation for a number of years

now and has not curtailed freedom of the media in New Zealand and might be a better definition.

Prof. Pearce—That is not our understanding of the position. Mr Beeby may want to say something about that.

Mr Beeby—That is the sort of statement about the New Zealand Privacy Act that is made by people who have not asked the press for their opinion, I suspect. The legislation there has led to five or six years of quite significant conflict between the press and the Privacy Commissioner. The press have perceived that the law there is stepping in to stop them writing about the most trivial of things, that bureaucrats everywhere are treating the Privacy Act not as a privacy act but as a secrecy act and that it is having a chilling effect throughout the entire operation of the press. It has been taken to ridiculous lengths over there, where information about the nesting habits of pest birds has been withheld from the press under the guise of privacy. So it is simply not accurate to say that that New Zealand act has run smoothly and without conflict, because the reverse is the truth.

Mr BILLSON—Surely your interests are best protected by having this freedom being protected and the freedom being exercised in a wise way. Is it not an avenue to look at the journalism exemption having to be exercised by journalists that have some accreditation and have some association with industry bodies or the AJA, the MEAA, or where there is some effort to protect the integrity of the profession by the profession itself, and that if someone is clearly abusing this freedom to the point where it is damaging journalism then their peers can deal with that by striking them off as an MEAA member or something of that kind. Surely that is the way forward, where there is some accountability that comes with the freedom and some shared interest amongst the journalist community to protect that freedom by the wise discharge of it.

Mr Beeby—I do not have any difficulty with most of what you suggest there. If by some form of accreditation you mean some form of licensing—

Mr BILLSON—No, I am talking about membership of your own bodies, your own organisation.

Ms ROXON—You are not talking about compulsory unionism, are you, Bruce?

Mr BILLSON—No, I mean, it happens in the law where the Law Institute seeks to protect some of the privileges that lawyers have—not that I am one, so I can speak fairly freely about that—by making sure that they discharge those responsibilities appropriately, and if they do not then you can take some action through their peers. It just strikes me that, if we are going to protect journalism, the bona fides of people seeking to exercise that are in everyone's interest to protect and uphold, I would have thought.

Mr Beeby—Most mainstream media organisations these days have their own strict code of conduct. These have been introduced progressively over the last couple of years. I think the trend has accelerated since the privacy law changes were first mooted.

Mr BILLSON—So if to exercise this journalism exemption you needed to be in agreement with a code of conduct endorsed by the Privacy Commissioner, whether it be one of an industry body or whether it be one of a media outlet, is that a reasonable way to go? I do not want to see this trimmed either, but I do not want to see it used as an excuse for quite mischievous things that go nowhere near the object of this provision. I think it is in everybody's interest to try to protect the integrity of that.

Mr Beeby—I take that on board. I also take Professor Pearce's point that today's struggling web site or pamphlet producer might be tomorrow's leading media organisation. We have to be very careful that whatever is done does not in any way stop the growth of that sort of operation.

Mr BILLSON—I do not disagree with you. Perhaps you can discuss amongst yourselves how the bona fides of those seeking to exercise this exemption can be upheld in a way that everybody is confident about. You threw the challenge down. What is the solution? There is an idea. Your input would be appreciated.

Mr Beeby—I would be a little concerned about your suggestion that the Privacy Commissioner might have a say in the internal workings of newspapers in that way.

Mr BILLSON—I am just trying to assist the process by finding a way forward that does not see a suffocating of this provision.

Mr Beeby—The thing that we always have in mind, and we should not lose sight of, certainly from the newspaper perspective, is that there is no constitutional right to free speech or freedom of the press in Australia. Nor is there a bill of rights that underwrites freedom of speech, as there is in New Zealand.

Mr BILLSON—So we are in heated agreement that where we have opportunities to protect it we should do so.

Mr Beeby—That is right. But from the press perspective, we have only those rights that are not taken away by legislators.

Mr BILLSON—So help us not make this one vulnerable.

Mr Beeby—That is what we are hoping to do.

Mr BILLSON—We are very grateful for that.

Ms ROXON—Can I ask another question, approaching it from a different angle? Concerns have been expressed to us about the breadth of it. I think everyone agrees that there is a need for there to be some type of exemption. I would like some feedback from you on this: do you understand the provisions as they currently stand to protect media organisations and journalists, if you like—the whole gamut—for any type of activity? I guess what I am getting at is if you collect information that falls within these categories in the process of journalism—I think it says for the purpose of making it available to the public—if you collect it for that purpose, but you choose to use it then for something else, what protection do people have under the act? If you

collect it for the purpose of putting it in your newspaper or distributing it, fine. If you collect it for that purpose but then actually have a database that you can provide to people or sell to people or whatever, is it your understanding that you would still continue to have that exemption if you are going to use the information for some further purpose?

Prof. Pearce—I had thought it did because the exemption is, in fact, for the practice of the media organisation. Then you get back into these definitions that are, indeed, very broad. Then you pick up the ‘for the purpose of’ element of the definition of journalism. If it does not have that effect, then it certainly would be too broad, and certainly broader than we were thinking was appropriate. We were seeing the concept as being one where there was a gathering for the purposes of journalism—let me just use the word ‘journalism’ without getting into the definition—and then it being used for the purposes of journalism, not being used for the purposes of somebody’s other activities.

Ms ROXON—So there would not be any opposition, then, from what I am understanding, to clarifying that? The collection and dissemination will all be related to the journalism activities. You could not use the cover, if you like, of a media organisation or the processes of journalism to then collect information that would be used for other purposes.

Prof. Pearce—That was certainly our understanding.

Ms ROXON—And your understanding is there would be no objection from the press generally about that restriction, or from the group you are representing. I guess you cannot speak on behalf of everybody.

Mr Beeby—I assume you are not referring to the storage of material in our libraries. That is material that has appeared in the newspapers in our electronic libraries and then there is further dissemination to the public through library access.

Ms ROXON—Presumably that is still part of your journalism. I am thinking more of the sort of information or contact details you might have of a whole range of people when you are preparing for a story: only a part of that then gets published and then disseminated. If you then chose to use that information by giving it to a direct marketing organisation, a particular organisation you had a link with, or to a superannuation fund which is doing a drive in Victoria and asks you to provide it—it does not really matter what it is for, but something that is clearly not related to journalism—presumably you would agree it should not go that far.

Mr Beeby—As well as being a newspaper representative on the Press Council, I am also a group editorial manager at News Ltd and have some fairly intimate information about the way things operate there. The sort of information that you are talking about that is collected by the journalist remains with the journalist. It is never stored on a central database and never used in any other way. It is a working tool of the working journalist.

Ms ROXON—Which presumably everyone wants to protect for the purposes of the journalism but not necessarily if it is for use in some way that goes beyond that. I guess I am trying to work on where the parameters are. It may be that this is already covered by the phrase which says, ‘the practice of collecting, preparing for dissemination or disseminating the following

material for the purpose of making it available to the public'. My concern is this: can you say you are making it available to the public if you charge \$20 for some information that people want that you have but others do not, but not for the purpose of journalism?

Prof. Pearce—I would hope that the act would not be interpreted in that way, and certainly the view of the council would be that this is truly a journalism protection and could not be exploited for another purpose altogether.

Mr Beeby—It is simply not a pursuit that newspapers make of their material.

Mr MURPHY—Can I follow up on one thing Ms Roxon said, Mr Beeby? If a journalist has information stored, for example, at News Ltd, from your experience, and that journalist subsequently does a story which would obviously alert any number of people that that journalist has certain information, what protection would there be if, say, another journalist or an editor or sub-editor within News Ltd were to go to that journalist and say, 'By the way, can you provide me with some information'?

Mr Beeby—I would presume, in the example that you have given, that the information is already in the public arena having been published by the first journalist.

Mr MURPHY—If a journalist does a story, does the investigation, writes something, I am suggesting that would potentially alert, for example, another journalist working, say, within News Ltd—or maybe another newspaper within News Ltd's business—to go to that journalist and say, 'Oh, by the way, I know you wrote an article on such and such; I am looking for a bit of information in relation to something else which is not apparent, so perhaps you could help me and give me some information.' What are the ethical standards or guidelines for journalists in that situation, particularly when they are working for the same family?

Mr Beeby—Journalists have always fed off one another in my experience. If someone gets an exclusive story it remains exclusive only for as long as it takes another journalist to read it. So in that sense the information is shared around.

Mr MURPHY—But what I am saying is that in many cases things are said which are never printed, for lots of reasons which you would understand as well as I do because we all talk to journalists, particularly as members of parliament, and that is necessary. Therefore there would be journalists who would have records in their notes, perhaps on their computers—and obviously they carry it around in their grey matter—which potentially could be useful to another journalist within the existing family, or a competitor. Therefore, I suppose the proposition I am putting to you is: what protection is there in relation to that material?**Mr Beeby**—That sort of information sharing does go on; there is no doubt about that. The protection is that the subsequent journalist is covered by the same codes of conduct as the first journalist would follow. It has to be material that is of interest to the public or in the public interest and it has to be material that is legitimate to the story that is being written. There is no point in just pumping out gratuitous information with no story to weave it into. All of the journalists are covered either by their company code or by the journalist code if they are members of the MEAA.

Ms ROXON—I think one of the things Mr Murphy might be getting at—and he can tell me if I am wrong—is that the other principles that will apply to other organisations when this legislation is passed would mean that, if I give information to a particular organisation, that organisation if it is going to pass it on to anyone else really has to have my consent or advise that it is going to do that or have notified me that it is going to use it for particular purposes. Presumably your view is that in this situation, if you give some information that would be protected by privacy—some of these particular types of information—to a journalist, information can then be provided between journalists and still would not attract any privacy protection; is that right?

Mr Beeby—I think it would in the sense that it would stay within the organisation that it was given to in the first place.

Ms ROXON—Presumably for good competitive reasons rather than for any—

Mr Beeby—Exactly. Journalists are very guarded about their sources. I have never known journalists to give away the identity of the sources providing material to them.

Prof. Pearce—That, of course, is the very purpose of this exemption: if you give information to a journalist, unless you get into an exercise of signing up confidentiality agreements, it is intended to be available to be disseminated to the world. If that is to another journalist, well and good. If it is to a different firm, well and good. The person giving the information in the first place determines the extent of the distribution.

CHAIR—Professor Pearce, can I clarify whether my interpretation of the bill accords or otherwise with yours about the parameters of the exemption for journalists? The actual exemption is found in clause 7B where it says:

An act done, or practice engaged in, by a media organisation is *exempt* for the purposes of paragraph 7(1)(ee) if the act is done, or the practice is engaged in, by the organisation in the course of journalism.

So it relates to a media organisation but the practice is one pertaining to journalism.

With media organisations, as I think you said earlier on, we are now moving into the new technological digital world where newspapers are being published online. Obviously, in that world there is the ability to collect information about who the readers of the newspaper are simply because of the way in which we can trace any exchange over the Internet or any downloading, et cetera. My interpretation of this would be that the collection of such information would not fall within the provision of the exemption for journalism. If the media organisation itself was to collect information about those who read online the *Australian* or the *Sydney Morning Herald* or whatever, that would not be within the practice of journalism. I would be interested in your opinion of the matter.

Prof. Pearce—I think that is right.

Mr Beeby—I agree with that too.

Prof. Pearce—Unless, for some reason or other, you were doing a story about that.

CHAIR—Mr Beeby, earlier you made a reference to difficulties with the New Zealand legislation. You gave us one example of nesting birds or something like that. It would be useful to the committee if at some time you were able to provide us with some examples of where you see, or where the media in New Zealand see, those provisions as unworkable. As I said, this was a proposal advanced by the Privacy Commissioner, and it would be useful for the committee to have evidence of where you see that particular formulation as being one which would not necessarily work.

Mr Beeby—Yes, I would be happy to do that. The New Zealand Press Council and the New Zealand section of the Commonwealth Press Union were very helpful to us in the early days when this act was first talked about. They provided us with a lot of material, and I would be happy to pass that on to you.

CHAIR—We are working to a very tight deadline with this bill—

Mr Beeby—I would be happy to subedit it for you!

CHAIR—If we could have it early next week, that would be very useful.

Prof. Pearce—Yes, we should be able to get that to you. It may be in a somewhat rough form. We went to them when this legislation was in prospect and said, ‘What’s your experience?’ They wrote back to us with suggestions about the problems they had encountered. So, if you would be happy simply to get that material that came to us sent on to you, we could provide that quite quickly.

CHAIR—Yes, thank you. The other question comes back to what Mr Billson was asking. It seems to me that one can summarise what you have said to us as: in trying to reach a balance between privacy and freedom of the press, one should, as a matter of course, tend to favour freedom of the press over privacy because of the dangers of not having freedom of the press. You might express it differently; I am just trying to summarise it. It has always struck me, though, that ‘freedom’ is a freedom to act responsibly. If that balance involves the potential diminution of rights, then ideally one would want to see some upholding of responsibilities and duties on the other part of the equation. So my question is: are there provisions, guidelines, et cetera, which encourage responsibility in the activities of the media that would balance out this potential for diminution of rights because we uphold freedom of the media as being such a fundamental principle in our democratic societies?

Prof. Pearce—Mr Beeby mentioned the in-house controls. Can I talk about the general across-the-industry controls, such as they are. One of the reasons for the establishment of the Press Council was a recognition of precisely what you are saying—that the concept of freedom of the press must carry with it a concept of responsibility of the press as well. One of the principles against which we judge whether the press have acted properly includes the question of an improper invasion of privacy. As I said, we get a tiny trickle of complaints on that issue each year. We are aware that the Privacy Commissioner in New South Wales similarly holds himself open to receive complaints. He gets on average two per year, which is an interesting comment about the extent to which the print media is seen as being invasive of privacy.

The area where real concern lies in the longer term is the Internet. As you have properly said, there are many avenues there which do not come under our aegis. We have recently taken a decision to extend our range of coverage to all the electronic publications of our members, so that picks up all the News Ltd and Consolidated Press online sites, and so forth. We have said that we will do this initially as an experiment to see how it works and how we are able to cope with that sort of activity. If it does appear that we are able to function, we will hold ourselves open for other online organisations that are not members of the Press Council to use us as a complaints point, which we see they might choose to do for their own status, and we will charge them for that privilege. We do think that, in the longer term, we will be available as a point of complaint for breaches of a code of ethics, which would include privacy. We see that as the direction in which we are heading to pick up this point of the responsibility of the press—in its absolute widest sense, not just in the traditional print media and its electronic versions.

CHAIR—Is it fair to characterise that as the development of a voluntary code of privacy by the Press Council?

Prof. Pearce—That is absolutely right. Mr Beeby might care to mention the fact that, within all the organisations, there are very strict codes of conduct in this respect.

Mr Beeby—Within all the industry codes that I have seen, there is always a clause covering privacy that seems to me to be quite effective. It is one of the principles of the Press Council that we operate under and that people make complaints under. It is interesting that we get so few complaints in this area.

Ms ROXON—Does that mean you do not count defamation complaints?

Mr Beeby—I do not count defamation as a complaint to the Press Council.

Ms ROXON—No, but they may be matters that relate to people's concerns about breach of privacy.

Mr Beeby—It is hard to commit defamation in a privacy area. We get hundreds of problems a year with defamation. It is a fact of life of newspapers, and legislation covers it. Not only that; legislation covers it oppressively. If you are concerned about that as an area of newspaper operations, it is well looked after, I can assure you. Under the present defamation laws, newspapers are on the back foot all the time.

Ms ROXON—The question was more about the number of complaints about privacy. There would be, to some extent, some overlap in some circumstances, but it is not really relevant to our considerations for this bill.

Mr Beeby—There is certainly recourse for perceived breaches of privacy and, of course, defamation is one of them.

Ms ROXON—I asked a question earlier about the handling of information that you can collect under the protection of journalism and being a media organisation and your use of it if you are going to hand it on to other organisations. I cannot put my finger on the particular provision

at the moment, but there is also a provision in this bill for related corporations, which means that there is freedom to pass that personal information around within any related organisation. Could you tell me how that would work with a media organisation that has related businesses that are not media organisations? Do you understand this exemption as allowing you to pass that information on to those other businesses?

Mr Beeby—From my perspective, this exemption is for journalism, and I would not tolerate the passing on of that information to an associate company that was not involved in journalism. It is as simple as that.

Ms ROXON—Thank you.

CHAIR—Professor Pearce and Mr Beeby, thank you very much for coming along this morning and discussing these issues with us. I would appreciate that further information if you can provide it. Thank you.

Prof. Pearce—Yes, we will do that.

[11.36 a.m.]

ANDERSON, Mr Iain, Solicitor, Australian Taxation Office

CHAPMAN, Mr Steve, Deputy Commissioner, Small Business, Australian Taxation Office

CHAIR—Welcome. 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 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.

Thank you for coming. The invitation arose out of evidence that we received from other witnesses in the course of this inquiry and also some publicity, of which you are aware, in relation to the use of Australian business numbers. Would you like to make any opening comments?

Mr Chapman—I do not have a written opening statement, but I would appreciate the opportunity to make some broader contextual comments. I think it is fair to say that some of the stories associated with the ABN and privacy issues have perhaps got a little ahead of the facts in some cases, and we do appreciate this opportunity to clarify matters with you. By way of broad background to the Australian business number, I would take the committee back to the government's Small Business Deregulation Task Force of several years ago, which focused on cost of compliance. A strong theme emerged about one number that business may use in their dealings with government. At the time it was couched in terms of being the UBI, or unique business identifier. Sitting behind that as a cost of compliance issue was the notion that if a business could advise one government organisation of their address details, that information would be shared amongst all arms of government and reduce some of that compliance cost.

It is also referring to the tax reform agenda of the current government, where there was a number required by business for GST purposes. In a design sense, that was sought to be linked to the unique business identifier notion that came out of the Small Business Deregulation Task Force. There are two aspects there; one is cost of compliance reductions and the other is compliance improvement. One of the notions we are looking at here is: with a single identifier there is the option of having a single return to the tax office, a business activity statement as it is currently being described, which would bring some cost reductions for business. There is also the opportunity to improve the integrity of the tax system overall, through requiring the business number to be used in business to business transactions, or there would be withholding sanctions.

Importantly for the community and the consumer was the notion of having a public register which allowed consumers to confirm that they were being legitimately charged GST by registered businesses and would allow other businesses, in a business to business sense, to confirm the bona fides of the other business they were dealing with. That went on and also it allows taxpayers to confirm the tax deductibility status of organisations, again with a notion of being a public register there.

The third and final element I will touch on in that broader contextual sense is very obviously a government agenda—and this has been common for a number of governments—for encouraging e-commerce. So there was an opportunity with the Australian business number proposal

and the business activity statement for us in a sense to prime the pump in some ways through using and issuing PKIs as a means of encouraging electronic commerce. I guess we are expecting that the Australian business number will be fairly commonly used by the business community as currently happens using ACNs in the corporate world.

Ms ROXON—They will not have a choice, will they, Mr Chapman?

Mr Chapman—They do not have a choice in some ways. Looking to the positive, if we are looking to encourage national and international trade, here is an opportunity to get businesses online and reduce their cost of compliance by provision of this register. That is the broad context. I make those points to give the committee that background. I also appreciate it is not on all fours with the private sector privacy act that you are currently reviewing, but it does give that perspective.

In terms of the Australian business number, the law was passed last year—a law which requires the register to put information under the Australian Business Register. The act does provide a public access provision. It provides for a fee to be attached to that public access provision. It does give some guidance on the fee. It is a cost recovery fee. It is not there for profiteering as such by a government agency. The registrar of the Australian Business Register, who is the Commissioner of Taxation, has decided that basic information will be provided free and that is available on the web site. Charging a fee of \$20 in some ways discourages access to personal information—being address type details—compared with the Australian Securities and Investment Commission arrangements where there is an \$8 fee for access to similar information. In that sense, these proposals are not breaking new ground in any way.

I just need to clarify for the committee the nature of the information that is obtained through the ABN registration process. Quite a comprehensive application form and booklet has been provided very widely through the community and is also available through the web. The information there is probably in three broad categories. At one level there is information for tax administration purposes which would include things such as whether you are a registered employer, subject to the pay-as-you-go regime; turnover information which might determine your frequency of payment arrangements; contact details—telephone numbers or email addresses. That information is for administration of the tax act and is not placed on the Australian Business Register. I need to make that point strongly. Importantly, that information also goes to the integrity of the number. There are a range of identification tests which are built around the tax file number. As you would be aware, it is not compulsory to quote a tax file number. If you do not, you can be asked to provide the other sorts of identification—the 100-point test, which I think you would be broadly aware of. That integrity is very important when we consider the use of the number and the need to avoid or reduce GST fraud or other sorts of fraud that might occur within the system.

The second element of information—and this is information that is contained on the register—is specified in the law. It includes information such as the ABN; the entity's name; the address for notices; principal place of business; kind of entity—sole trader, business company and so on—ANZIC code and statistical information there; the name of the entity's public officer; the name of the entity's trustee, if appropriate; their email address, which it is not compulsory to provide; and some other information around gift deductibility and GST registration. That is the

broad information contained on the register. That information is available to Commonwealth departments as such.

What we have also done to assist the community in operating with the system—the community including consumers and other businesses—is provide a subset of that information on the web site and it is also available through telephone contact. That information is very much a restricted set of the available information. It is the ABN, the ABN status, the trading name, the legal name, the entity type, the state in which the business operates and its post code and whether it is registered for GST or as a gift deductible information. That is the only information on the web site.

The final matter has achieved some coverage in the media, that is, dealing with privacy issues. We have been consulting for some 12 to 18 months with the Privacy Commissioner about this information and its availability. I think we have a common or shared concern about the register being used as a marketing tool. We did look at various options. For instance, an important design feature is that the register is available publicly on the web site. We looked at options of making it a read-only file. We were a bit concerned that that did not provide the full range of controls we would like to have, so we settled on making only a subset of information available and decided not to make address information or contact information available on the web site.

Ms ROXON—Not only available on the web site but still available on request under the public access provisions?

MrChapman—That is correct. The model we are following is basically the Australian securities model where what we might call ‘headline information’ is available free and, on request and payment of a fee, people may obtain additional information. The charging of that fee does provide some element of control in the system. Because of the most recent discussions, we have had further consultations with the Privacy Commissioner. In particular, there is a matter which received some wide press coverage dealing with provision of information to the Dun and Bradstreet-Commonwealth Bank consortium. The information that was provided to them was only information that was publicly available. So it was open to that organisation to obtain that same information from the web site. It was for testing purposes only in that I understand they are looking to incorporate the Australian business number on some of the existing databases or any databases they may create. There was a licensing agreement available, specifying those terms and conditions. The business entry point provided a randomly selected sample of 10,000 records for them to use as a test file for the purposes of system design. Our agreement with them was that that information could not be used for any commercial purpose and would not be used beyond 1 July. I repeat myself by saying that that same information is available on the web site for any other user. We did see that we were providing a service to the business community by providing that information to them separately. If they or other organisations had sought to obtain that information through accessing the web site, it could very well have brought the web site down through high-volume usage at a time when many in the community were still looking to use the web site to register and apply for an ABN.

The Privacy Commissioner has indicated that what we were doing is authorised by the ABN act. This included the provision of that information to Dun and Bradstreet. In addition, the Privacy Commissioner has raised a number of other matters with us concerning some of the pri-

vacy notices that we have included in our mail-out material on the web site, the prominence of that information and the nature of it. In a very constructive sense, we are currently working with the Privacy Commissioner to make sure that we fully comply with and fully satisfy both the intent and the spirit of the privacy legislation under which we operate. Thank you for the opportunity to present that information.

CHAIR—Mr Chapman, there may be more, but there are two areas that I think we are interested in pursuing given the matters raised with us. One is the nature of the information which is being held, which I would like to start with, and then I will come back to the question of notices. So that I am absolutely clear, can you confirm for me that, under the regulations under the A New Tax System Australian business number provisions, the register includes the business name of the entity; the principal place of business; the kind of entity being registered; the Australian and New Zealand standard classification code; if it has one, the Australian company number; the registered body number; the name of the entity's public officer and the name of the entity's trustee or trustees; and the entity's email address, optional.

Mr Chapman—That is correct. There is some further information there which deals with the date of effect of the ABN being given and the cancellation information if that is appropriate.

CHAIR—All that information is on the register.

Mr Chapman—Yes, and recent amendments have also included the date the GST registration took effect and the statement that the entity is a gift deductible gift recipient if that is appropriate.

CHAIR—So that information is publicly available if somebody wishes to avail themselves of the search provisions and pay the \$20.

Mr Chapman—Yes. Can I pick up your use of the term 'search' there. The only way this information is available is by providing either a name or an ABN. There is no search facility as might be commonly interpreted. For instance, there is no provision for someone to seek a listing of all businesses by postcode or address or industry type or whatever. With the search provision we are providing, if you know the Australian business number or know the name of the entity, you can get the full record for that particular business provided, and we provide that on paper, not electronically.

CHAIR—But this applies not just to companies or corporations as normally; this also applies effectively to individuals who are required to register for an ABN if they are a sole trader or they have some income from a source other than a normal employer-employee type relationship.

Mr Chapman—Probably that is correct, yes.

CHAIR—I presume that some of those individuals would register their businesses under their own names.

Mr Chapman—There would be a significant number of contractors or trades people operating as sole traders under their own names in that small sort of way.

CHAIR—So provided you know the name of the person there is an ability to obtain the fuller details on the register.

Mr Chapman—That is correct. That is in accordance with the act.

Mr CADMAN—And not-for-profit organisations?

Mr Chapman—The same would apply.

CHAIR—Let me take a couple of examples that have been put by way of potential problems. Somebody is a gun dealer, a sole trader, and operates from their home business. If a person can obtain information about that, then there is some potential for criminal activity in relation to that person. What I am getting at is this: is there some provision that can enable a person to apply or request that that sort of information not be released?

Mr Chapman—At the moment the law is silent on that fact. The scenario or the nature of the scenario you have raised has been brought to our attention and we are in the process of advising government on that matter.

CHAIR—You cannot foreshadow the advice you might provide?

Mr Chapman—One model that might be worth considering is the arrangements that exist in regard to the Australian Electoral Commission where, for instance, if a person believes that they will be placed in some danger if that information was made publicly available, they can seek to have some of that private information withheld.

Ms ROXON—The regulations that applied to the Australian Electoral Commission prior to them having given you the list of 10 million names and addresses, or the ones that have applied since then? You do not have to answer that.

Mr Chapman—Thank you, I will take your offer.

CHAIR—Leaving aside Ms Roxon's episode, can I take this a bit further. There are many people in the community who—for what they regard as good reason and we allow—have silent telephone numbers. Would the basis upon which you can get an unlisted telephone number be the type of basis that you would consider appropriate, not for a person's ABN as such, but for all this further information? It could include their private address, for example, being not disclosed publicly on application or what I will call 'search'—I understand your qualification on that—but upon inquiring, if I can put it that way.

Mr Chapman—I will answer in the broad. The ATO has no particular agenda around this issue. We have some broad government direction of the intent of the Australian business number and the potential that the Australian Business Register might offer. There are some needs which exist predominantly in the taxation legislation to allow other businesses which might be dealing

with businesses or consumers to check the status of the business they are dealing with: is it registered for GST and therefore legitimately claiming GST; is it a legitimate business so that if a number is quoted they do not have to withhold the penalty amounts? There is a need for a certain level of information to be available.

CHAIR—I understand that, but why is that information not simply provided by what is available publicly and free? If Kevin Andrews runs some business that forces me to have an ABN, then what you have said is that there is a category of information available which anybody can go and check.

MrChapman—That is correct.

CHAIR—If I am running a business and I want to avoid the withholding tax, I understand who I am dealing with wants to know that I have an ABN. I do not think anybody is querying that. Once you have information available, which allows you to check whether I have an ABN, why is there a need for this other information to be available to anyone other than the tax office?

MrChapman—The tax office or other government agencies, going to the broad intent of what small businesses are saying they would like to achieve through the—

CHAIR—Say I have also not disclosed my private address, I have an unlisted number for whatever reason and up until now I have been able to maintain that degree of privacy about my personal details. If I can disclose an ABN, that should satisfy anyone I am dealing with. I have not looked at this but I would be very surprised if you do not confirm that there are severe penalties in the act for misusing an ABN or quoting an ABN when you do not have one. I am trying to tease out why any additional information would need to be available to anyone other than the tax office or legitimate authorities.

MrChapman—In doing the initial design work on this and putting some recommendations to government around it, we were trying to achieve the balance between satisfying the purposes of the tax system, satisfying the needs of the broader business community of having a number which can be usefully used by them in their dealings with all areas of government and also recognising, because of that, that we are likely to see this number being used more and more at a business to business level as a means of identification.

In looking to address the broad issue you have raised we have sought to provide that minimal identification material free on the web site or available through a telephone call, and in accordance with the act, the government has imposed a regulation process—a \$20 fee for further information. I think the basic item of information that might be of concern is the residential address. I do not think businesses would be too concerned about their business address being on the records.

CHAIR—There would be many businesses there that wanted the same. We live in this world of outsourcing and consultants and people working from home and all that now. For more and more people their home address and their business address, for the purposes of the tax legislation, are one and the same.

Mr Chapman—Correct. I do not disagree with anything you had to say there, Mr Chairman. All I am saying is that the act as it stands, as passed by the parliament, quite explicitly states that information provided through this process—and it is specified in the act and the regulations—will be placed on the register, that the register is available to the public for access and that there is a fee arrangement attached to that. That is the legal framework in which we are currently operating.

Ms ROXON—Can I follow that legal framework question then? Does that mean that when a sole trader—or even a small business, but we will use the sole trader because I think they are the most dramatic example—is asked by the tax office for various information that they have to provide to get an ABN number, are they told, ‘The address that you provide here will be made publicly available on request?’ Is there notification? You might be able to compare it to an individual tax file number. Everyone knows that when they fill that information in it is only going to the tax office.

Mr Chapman—In answer to your question, the registration guide, which is issued to all applicants, includes a large heading saying ‘Publicly available material and your privacy’, and page 8 has a list of all information that is placed on the register. It explicitly makes the point that members of the public can obtain this information by applying to the register, that subsets of it will be available free and that it also will be available at other government agencies.

Ms ROXON—If you are applying for your ABN number via the Internet, which I understand is a popular way now to do it, is that same information actually provided if you apply for your ABN through the Workplace Relations and Small Business web site or through your web site or through any of those other methods?

Mr Chapman—Yes. The single entry point to obtain a number is through the business entry point. You can gain access to that through our web site, but there is a single portal administered by the Department of Employment, Workplace Relations and Small Business. And, yes, those statements are included in the web site. Part of our discussions at the moment with the Privacy Commission includes consideration of whether it is prominent enough or could be—

CHAIR—Mr Chapman, I have actually gone into it and I must have missed it, so it did not seem to me to be that prominent.

Ms ROXON—Yes, and the other issue is: is there a choice? Whether it is prominent or whether it is not that prominent, if a person who needs an ABN wants to provide the information that they are required to to the tax office but wants to ensure that their private address or phone number is not available, is there some sort of way—

Mr Chapman—Let me be clear: phone numbers are not available on the register. If we ask for a phone number it is for internal ATO purposes. No way do phone numbers—

Ms ROXON—So it is the home address?

Mr Chapman—It is the home address issue.

Mr CADMAN—And type of business?

Mr Chapman— And type of entity, yes.

Ms ROXON— You can be pretty sure what the answer is when you can opt out, basically.

Mr Chapman—At the moment, under the law as it stands, you cannot opt out. But, as I indicated earlier, as this matter has been raised with us we are in the process of advising government.

Ms ROXON—Can you provide a post office box rather than a residential or street address? Is that acceptable for the purposes of the tax office?

Mr Chapman—There are two addresses that are being asked for. They want an address for service of notice, and I think it is quite common for a post office address to be provided there. It also requests a business address, and that would be, in normal terms, a street address.

Mr CADMAN—Could I clarify the type of business? I see listed the Australian-New Zealand standard industrial classification code for business conducted by the entity. That is a digital code which classifies, to a very fine degree, what type of business is being conducted. Is that right?

Mr Chapman—That is correct.

Mr CADMAN—So it goes beyond the entity. It goes into what type of business is being conducted.

Mr Chapman—That is correct.

Mr CADMAN—If you could download this information, you would have a very valuable directory of business types.

Mr Chapman—No, I need to be very clear on this point: you cannot download this information.

Mr CADMAN—But you can print it?

Mr Chapman—You can. If you name a business by ABN or name, you can obtain a hard copy of that business's record.

Mr CADMAN—And then you can scan successive hard copies.

Mr Chapman—At \$20 a time.

Mr CADMAN—Yes, but is it 10c for successive pages?

Mr Chapman—Per record, \$20 gets you the first page, then it is 10c for each subsequent page. If you wish another record, that is another \$20.

Mr CADMAN—Okay.

CHAIR—Did I understand you to say earlier that from the tax office's perspective you have no particular interest in this sort of information which can—

Mr Chapman—be made publicly available, other than achieving the purposes of the act.

CHAIR—I understand what you are saying: this is what the legislation is. You are not responsible for the legislation, and you are administering it according to what it is. What I am trying to get at is: from the tax office's point of view, is it fair to say that you would be satisfied if what is available free on the searchable web site was all that was available and there is no particular reason why anything else should necessarily be available?

Mr Chapman—We gave some consideration to that issue in terms of the design of the system, and we would be quite comfortable with that arrangement.

Ms ROXON—So that means, presumably, that you do not foresee any compliance problems in terms of collection of the GST or any other tax if this further information were not available to the public.

Mr Chapman—The tax office would have this information available, as would other government departments that use the register. I imagine there may be purposes served in the business world by having that information and being able to confirm the actual address of other businesses you are dealing with. It might be in delivering goods or whatever, or it might be a means—a rather expensive means, at \$20 a time—of confirming the street address for making an appointment or delivering a good.

Ms ROXON—Could I check again on this issue of the tax office not having any agenda, and I understand with respect to the legislation. What I do not understand is why the tax office should not have an agenda in respect of the privacy issues. Again the comparison that I think the community should be entitled to make is the sort of security with which they think their tax file number is handled compared to the apparent accessibility of information once you have to have an ABN. I do not really understand your position on why the tax office would not have an interest in the integrity of that system.

Mr Chapman—We have a very strong interest in the integrity of the system and we have a strong interest in the integrity of the data but, more importantly, we have an intense interest in the privacy issues associated with this whole matter. The tax office has brought a credibility, and I think a cornerstone for the whole tax system is that the privacy of individuals will be respected. We have strong internal rules and strong programs to ensure that we do comply with the Privacy Act and, importantly, the secrecy provisions of the taxation act. We go to great lengths to adhere to those requirements. What I am saying is that we have here a piece of legislation, passed by the parliament, which quite explicitly outlines the information that will be held on the Australian Business Register and the process by which that information can be made

available. **Ms ROXON**—If you have got that strong view and strong interest in it—and I think you said you have been consulting with the Privacy Commissioner for up to 12 months already on this—does that mean that you have given advice previously to the government with respect to this issue?

Mr Chapman—We would have been giving advice to the government continuously through the development of the design of the Business Register and the bill that went forward. The general public concern that has come to the fore at the moment with respect to those business taxpayers who, as the chair has indicated, perhaps operate from home and would have concerns about their private addresses being made available has come through as a strong message in very recent times, and we will be providing further advice to government on that point.

Ms ROXON—Obviously it is a strong message when it is on the front page of the paper. Presumably if you were having detailed discussions about these privacy issues, it would be something that would have been dealt with previously. I am really trying to understand if—

Mr Chapman—I need to repeat the framework under which we are operating. This is information that is not made freely available to the public on the web site. It is information that is held on the register for a range of government administration purposes. There was a model that the Australian Securities Commission operated under whereby, say, headline information was provided and other information was available for a fee. I think there is a clear distinction between personal privacy and business privacy. There is an issue within the community that if one is operating in a commercial world that one might be operating to slightly higher standards in terms of what information is available or not available.

Mrs VALE—In regard to what you were saying about private individuals who are also businesses and if they register for an ABN, if a consumer actually wants to sue that person, where do they go to find the address for service of documents? I know you said that there is a post office used for that but if you have to provide an affidavit of service in a court that is not sufficient. You probably cannot answer this but, to my way of thinking and from listening to what you are saying, I see a great difficulty, though—and there is probably a tension in what some of my colleagues are asking—in a consumer wanting to sue a private individual who has an ABN if there is no address at which they can actually serve documents.

Mr Chapman—I acknowledge your point. The points I was making earlier were coming from a tax administration or public administration perspective. I did refer to the fact that the business community may have some other issues that they would look to progress. At the moment I guess the current system would apply. If it was a company involved then a consumer or other business supplier would go to the Australian Securities Commission and pay, I think, \$8 to get that information. If it was a private individual, they would perhaps look in the *White Pages* or the *Yellow Pages* and have access to that information. If someone through fraudulent intent looked to avoid their responsibilities and sought to live out of the post office box, so to speak, there are some issues there which currently exist which this provision, as the parliament enacted it, may have addressed in some way. But that is very much the tension that I have referred to, and balancing those issues is a difficult matter. I appreciate the difficulty that governments have in taking decisions on those things.

CHAIR—Given the issues that have now arisen, and there is obviously some concern about what we have been discussing, I suppose what we are interested in is how it can be resolved. I will ask a couple of things about that. Is there an obligation on the tax office to provide this information if somebody comes along with their \$20, or do you have any discretion?

Mr Chapman—The act provides that the register will be available to the public, so if someone comes along with their \$20, I guess prima facie they can. What we are looking at currently developing are some guidelines about how we might respond to that request. For instance, we would not be looking to provide this information electronically; we would only provide it on paper. We would also consider whether, if we had an approach from, say, a very well-resourced marketing firm which might come along and be prepared to pay—I think some commentator calculated it—\$50 million to get access to the register, I think we would look very seriously at that request and consider whether it was in the interests of the act to comply with that request.

Ms ROXON—How would you be able to stop that? Is there a provision whereby you can assess whether it is in the public interest or in the interest of the act?

Mr Chapman—I think the act says that the registrar ‘may’ provide this information—if I am correct—and we would be giving some emphasis to the word ‘may’.

Ms ROXON—Do you keep a record of who makes requests?

Mr Chapman—We are talking into the future here. There is no provision for this provision to be exercised at the moment. It would be effective from 1 July this year. As I say, I would expect the number of people willing to pay \$20 for a record to be quite small.

Ms ROXON—I am just thinking of the situation of a sole trader. If there are concerns about, for example, the home address being provided, and if there is some incident at a later date with that person at their home address, will the tax office then have a record of to whom they provided that information?

Mr Chapman—We would have a record of to whom we provided that information. The provision of that information cannot be obtained other than by coming to the Taxation Office, to the Registrar of the Business Register.

Ms ROXON—Does that mean that you can hand your \$20 over at the counter and you can walk away with it, or does it mean that you fill in a form which says, ‘I, Nicola Roxon, want the ABN of this particular person’s business’?

Mr Chapman—Our procedures are still being developed because, as I say, we are talking about future events. I would envisage that we would have a form that people would fill in and we would seek to obtain enough information from that form to establish the broad purpose for which the information was required.

Ms ROXON—Then we will have a new privacy issue, will we not, about whether you should really be entitled to know why someone wants the ABN? I know it is difficult to have it

both ways, but presumably that does create another problem as well if there is a purpose involved more than just an aim of who is seeking the information.

Mr Chapman—I think it would be quite appropriate for the Commissioner of Taxation, in his position as registrar, to issue guidelines on this matter. Those guidelines might, for instance, cover the event that he would not be looking to provide information, say, for the development of a marketing list.

Ms ROXON—I know we are talking about something that is in the future, but it is not very far into the future—it is only a matter of a couple of weeks. Presumably these questions need to be answered before that time so that the public is confident about what information is being provided, how it is being provided and how they can get that information—all those sorts of things.

Mr Chapman—The broad regime which we are describing is contained in the registration kit that has been issued. As I say, we are not in the business of selling this information, which I think has been part of the media headline around this—far from it. We are required under the act to provide this information on request, or there is a right of public access to the Business Register. We see we are meeting the broad needs of the community by making a subset of this information available on the web site or through telephone contact. We are really talking at the margin here. I have noted the issue of those sole traders where their business address may be their personal address and I have flagged that we will be drawing that matter to the attention of government.

CHAIR—Many people will have already registered, for whatever reason, not understanding that, when they provided their registration details, this information could be available on application. Is there any provision to allow those people to either opt out or change their details? If they are able to opt out or change their details, will what was first recorded be entirely deleted? You may know that, under company legislation, when you change the registered address of the company, the previous registered address still is on the document. What I am asking is: if there are people who are concerned about this—the sole trader type situation—and we have a couple of weeks to go, is there some way that that can be addressed?

Mr Chapman—If the details for the businessperson have changed, certainly there is provision and actually a requirement to advise the Australian Business Registrar of that changed detail. On your second question of whether we then would hold a history of address detail, sorry, I do not have the answer to that. My understanding is not—that there will only be the one address on the file—but I would need to clarify that and we will take that one on notice.

Ms ROXON—Presumably people can change it if they think there is a more appropriate address to provide or they are more comfortable with another address to provide publicly. They do not have to prove to you that they have changed a business address or anything, presumably.

Mr Chapman—That is correct. I would expect that the address on file for service of notices, for instance, could change quite regularly. People use different advisers or have different post office boxes, and that would happen with some regularity. We would like that information. I think the act provides for it to be provided within 28 days. For address information or place of

business information, again that is going to alter and we will be looking to have the register as accurate as possible.

Ms ROXON—I will go back to a point you made before which you seemed to persist with, which is that the tax office is not in the business of selling this information. I do not really understand that, when you were going to charge \$20 for it. I understand that you say that is a cost recovery, but you are still charging for it. It is still actually a transaction that is occurring when people have to pay for it. On that side of it I do not really see how the tax office can pretend that that is not selling the information. The second question is whether there is access to that information if for some reason people do not have the money. If there are legitimate reasons that people want that information and they do not have the \$20, is there some reason it should be made available only to people who do have the resources?

Mr Chapman—An interesting range of comments and questions there. The first point I make is that, in respect of your own record, if as a businessperson you have registered you will get provision of that information without paying \$20, so you can obtain your own record without incurring a cost.

Ms ROXON—That seems generous!

Mr Chapman—That is the sort of people we are in the tax office, as you have probably noted. If you could not get together the readies of \$20 for some purpose, I guess we would need to treat each case on its merit. Again, it is not a situation we would expect to see happening with great frequency. In terms of the notion of selling and my comments there, to my mind selling brings with it some notion of profit motive or marketing. That is certainly not the intent. I think the legislation in section 32 actually precludes the information on the register being used for profit making purposes and gives us some guidance that it is cost recovery. As I say, we would expect to satisfy the needs of the vast majority of users through the free provision of that subset of information on the web site.

CHAIR—You say, Mr Chapman, you are giving some further advice to government as a result of those issues having arisen. Can I clarify with you how, if there was a desire to rectify what has arisen as a perceived problem, it can be done. As I understand it, it is under the regulations that this information is required to be collected and placed on the register. Is that right? It is not in the act itself.

Mr Chapman—It is contained in the act, as I recall. Section 26 deals with access to the register.

CHAIR—No; I am asking what is on the register.

Mr Chapman—Some items are contained in the act and some items are contained in the registration. The ABN, the entity's name, the date of effect of the registration, the address for service of notice under the ABN act and details prescribed to be contained in the regulations are specified within the act itself.

CHAIR—Could you read that to me again?

Mr Chapman—The entity's ABN, the entity's name, the date of effect of registration, the address for service of notices and there is a further provision in the law which provides for prescribing in regulations the further information.

CHAIR—So things like industry classification, the address of the principal place of business and those other issues are matters of regulation?

Mr Chapman—That is correct.

CHAIR—Would it be possible—if there were a desire to do this—to amend the regulations so as to exclude the personal type of information that the concerns have been raised about; that is, a person could provide an address for service of notices—

Mr Chapman—If I could anticipate your question: I would suggest that the provision of that information and its inclusion in the register is of importance to government users of the register.

CHAIR—Can the regulations be amended in such a way so that it is only for that use?

Mr Chapman—If we were looking to restrict the information that is available on the register for other purposes, my understanding of the law would be that that would require amendment to section 26 of the act, which provides for access to register by the public. What I am suggesting is that, not by regulation by legislative amendment, one could if one so wished—and that would be a matter for government, for the parliament—amend the law to restrict the information that could be made publicly available.

CHAIR—But there is information collected that is not available to the public; it is available only to the ATO, such as turnover information.

Mr Chapman—That is correct. That information is collected for the purposes of administering the tax acts, not for ABN purposes.

CHAIR—So that information is not on the register?

Mr Chapman—That is correct—it is not on the register.

CHAIR—That is obviously available to the tax office.

Mr Chapman—That is correct.

CHAIR—Is it available to anybody else?

Mr Chapman—It is available to those other organisations which are authorised under the taxation act to have access to it. There is an example actually included in the registration booklet. We specifically mention the Australian Bureau of Statistics. But there would be other agencies specified in the law—for instance, law enforcement agencies, the National Crime Authority, royal commissions and such.

CHAIR—All I am getting at, Mr Chapman, is whether it is possible to move, for example, the personal address from one category to another, so that it no longer appears on anything which can be obtained by making an application but is still available to the legitimate purposes of the tax office?

Mr Chapman—There would be those options available. That can be achieved through the processes of the parliament in amending the law. As the law stands at the moment—

CHAIR—Amending the act or the regulations? That is what I am trying to get at.

Mr Chapman—We are getting into a level of detail, but my professional advice would be that it would require an amendment to the act to preclude that information being available. What perhaps could be done by way of regulation would be—and we would take legal advice on this—some way of making some fields on the register not for publication. In terms of a model, I would point to the Australian electoral roll, where—

CHAIR—I am asking this because if there is a concern which we want to address it is easier to address things by way of regulation than legislation. Legislation takes time; regulations can be made more quickly.

Mr Chapman—Yes. We would be seeking to fully advise the government on those matters.

Mr CADMAN—I want to pursue with you, Mr Chapman, the taking of copies and the inspection of the register. The fee is only payable if you want to take a copy; you can browse, I would take it, without charge. That is what the act seems to say when it says:

(1) A *person may inspect the *Australian Business Register and take copies of entries in the Register on payment of the prescribed fee ...

Mr Chapman—That is correct.

Mr CADMAN—So you can browse at no cost.

Mr Chapman—No. I might take exception to the word ‘browse’, a bit like the ‘search’ word used earlier.

Mr CADMAN—I need to be exact. That is true.

Mr Chapman—Yes. If you specify to us an Australia business number or trading name you could have access to that individual record.

Mr CADMAN—Okay, so there is not a wild card capacity in the search process for a name that I may imperfectly remember. My company name might be Alan Cadman Pty Ltd, but it might also be Alan Cadman and Co. If I cannot remember the suffix of the business name, can I still find the name?

Mr Chapman—Again—we are still in the process of finalising our procedures on this—if you knew your ABN we would be able to go directly to that record on your behalf. If you provided the trading name information we would need to have an extremely high level of confidence that we were able to go to the right record.

Mr CADMAN—But say I was somebody conducting a business relying on a contractor and I wanted to establish whether that contractor was registered.

Mr Chapman—You would go to the web site.

Mr CADMAN—Yes, but I would not have an ABN; I would only have his name.

Mr Chapman—That is correct. You could go to the web site and search on that trading name.

Mr CADMAN—Okay, but if I have only got an imperfect account of what that trading name is, I could not find it. Is that right?

Mr Chapman—I would need to take on notice the specifics of that search mechanism.

Mr CADMAN—I am worried that it might be possible to access the register and select from the register those facts which are of interest to me. If I am particularly looking for a mailing list of lawyers, I would have to go through a lot of records—I understand that—but it might pay me to go through a lot of records.

Mr Chapman—I do struggle with the example, I have to admit. What you would have access to is the register on the web site, which would probably be your first port of call. That will give you trading name, ABN, postcode, state in which the business operates, and GST and gift deductible registration details. If through looking at those trading names you could identify lawyers—

Mr CADMAN—But you have already told me that you are going to have within the Australia-New Zealand standard industrial classification code—

Mr Chapman—That is not on the web site. That is the information you would get if you provide a name or ABN and pay your \$20.

Mr CADMAN—So you do not even get access to anything, unless you have either the ABN or the business name in full.

Mr Chapman—That is correct.

Mr CADMAN—So it is not the hard record that attracts the fee; it is access to any information.

Mr Chapman—Any information beyond that that is on the web site, yes. And the information on the web site is quite limited. It is, as I say: ABN, trading name, entity type, postcode, state, and GST or gift deductible registration.

Mr CADMAN—I would have thought that with cross-matching between that and Australia on Disk a slick computer company would quickly build a list of names that they may not otherwise be able to acquire.

Mr Chapman—I am not sure why they would come to the register if they wanted to use Australia on Disk, in a sense.

Mr CADMAN—That is where they get the address.

Mr Chapman—So what you are suggesting here is that they would identify a name on the web site, use that name to go and look it up on Australia on Disk, where they would get a range of information—

Mr CADMAN—They just match what they have found, yes.

Mr Chapman—then to confirm or expand that information then look to go and pay their \$20 to access that individual record.

Mr CADMAN—You have not been able to assure me that a person needs to know precisely the business name. Whether it is a company, proprietary limited, or what the suffix is you were not able to provide me with an answer in that regard.

Mr Chapman—If some of this is in respect of those people who have come to the tax office, wish to pay their \$20 to get a full extract in relation to a specific business, they do not know the Australian Business Number but they have got—

Mr CADMAN—An idea of what the business name may be.

Mr Chapman—Of what the business name is, I can offer you the assurance that we would not be offering an array of records from which to select. I would suggest that if you are in that circumstance you may go to the web site and try to clarify which business record it is you are seeking, but we would need to further determine what our procedures would be.

Mr CADMAN—I see some dangers there. I take it from the press release from the Privacy Commissioner that it would be the intention of the ATO to provide data to other agencies on the same basis as that provided to Dun and Bradstreet.

Mr Chapman—That is correct. We are still working on the detail of that. Again I put the context around it. This is information that is available on the web site, so this is publicly available information. The alternative those organisations have is individual accesses to the web site 2½ million times or, if we think there is a broader community service served by us giving electronic access to that same information, we would look to do so.

Mr CADMAN—With confidentiality agreements in place?

Mr Chapman—Yes, but again, going forward, I think we need to look at how this information may be used. As I understand what Dun and Bradstreet and the Commonwealth Bank were looking for, it was to be able to include on their own databases the Australian business number recognising that, in the business world, particularly some large organisations who might be dealing with multiple suppliers would like a level of confidence that their suppliers have in fact got ABNs. Their reasons for doing that might be to avoid them getting into the administrative role of having to withhold 48½ per cent of any payments, or it might be driven by a desire to have access to the GST input tax credits they will get from the buying of goods.

Mr CADMAN—I put it to you, Mr Chapman, that I have been dealing this morning with the independent grocers, and there are about 130,000 of them. I know they have not approached the tax office; I know they are coping with the problem you have described without access to taxpayer information of the type you have given to Dun and—

Mr Chapman—We have not given taxpayer information.

Mr CADMAN—ABN processes, and they have to, in every transaction, account for an ABN number. Every transaction for every independent grocer from their suppliers has to have over 40,000 commodities, 130,000 organisations. That is lots more transactions than 10,000.

Mr Chapman—That is correct, and I am aware that some of those organisations are writing individually to each supplier and asking them to send back their ABN so they can include it on their records.

CHAIR—For that sort of information there is an argument for making it readily available being the easiest way if it is the name of the entity and the ABN; otherwise everybody has to go through this process over and over again.

Mr Chapman—Correct. I appreciate your comments.

Ms ROXON—I know we have to finish up very soon, but can I ask you another question that you may need to take on notice. It is regarding the exemption in this privacy bill for employee records. Essentially it is an exemption which says that all information that an employer collects in the course of an employment relationship will not be covered by the Privacy Act. Presumably a tax file number is one of the pieces of information that an employer obviously must have access to for an employee.

Mr Chapman—Not to be picky on it, but if the employee decides to provide the TFN to the employer they can do so and there will be a withholding regime applicable to that. If they decide not to provide their TFN, which they can quite legitimately do, the employer is required to withhold tax at a higher or more punitive rate.

Ms ROXON—Sure. It is the normal course of practice that that information would be provided. My question, though—

Mr Chapman—To mutual advantage, yes.

Ms ROXON—Yes. My question really is the restrictions upon an employer for the handling of that tax file number, which is presumably covered by tax legislation, although it would appear, if you just read the privacy bill, that an employer may be free to provide that information to other people. I am happy if you want to take it on notice. I am assuming that there is something in the tax act which prevents an employer from doing that and that they would not gain some exemption from the introduction of this employee records provision.

Mr Chapman—I have to say I am not fully conversant with the proposed private sector privacy bill. I do know that there are quite rigid requirements associated with the use of TFN information, either as an employer-employee arrangement or as an investor with a financial institution.

Ms ROXON—It might be useful if you could take it on notice, because I would be anxious to know whether a later piece of legislation exempting employee records would somehow affect the restrictions that otherwise apply for the holding of a tax file number.

Mr Chapman—To be clear on your question, you are asking whether the bill you are currently considering, the private sector privacy bill, would overrule the privacy law associated with tax file numbers.

Ms ROXON—I guess my question is in two parts. What controls are there currently for the handling of a tax file number that an employer must adhere to. Secondly, will those current provisions be affected by the introduction of this bill if the employee records exemption remains? That would be useful.

Mr Chapman—I will take it on notice. I will give my professional answer now and say not. It would be a rather significant drafting oversight if that were to occur, but I think it would be prudent of me to take it on notice and give you a fuller response.

Ms ROXON—Sure. There are a couple of other issues we would like to raise, but it may be that we can get them to you for a response quickly. I am not sure whether the committee members want to do that.

Mr Chapman—We would be most pleased to assist the committee.

CHAIR—In relation to the notices provided to people when they go into the site, do I understand from what you said earlier that there have been discussions with the Privacy Commissioner about making those notices more prominent so that people are aware of it?

Mr Anderson—Yes, there have certainly been considerable discussions. We have made considerable changes already to our web site to make the privacy statements and disclosure statements more prominent, and we are continuing to have discussions with the Privacy Commissioner about those disclosure statements as well as about a number of the other aspects. For example, on the bulk provision of information to entities such as Dun and Bradstreet, we have

agreed that we will keep talking with the Privacy Commissioner about how that sort of thing occurs as well.

CHAIR—Thank you for coming along this morning and discussing these matters with us. We have appreciated the opportunity.

Resolved (on motion by **Mrs Vale**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.43 p.m.