



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL REFERENCES
COMMITTEE

Reference: Privacy and the private sector

MONDAY, 27 JULY 1998

BRISBANE

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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Monday, 27 July 1998

Members: Senator McKiernan (*Chair*), Senator Abetz (*Deputy Chair*), Senators Bolkus, George Campbell, Coonan, Cooney, O'Chee and Stott Despoja

Participating members: Senators Brown, Colston, Conroy, Margetts, Murphy and Neal

Senators in attendance: Senators McKiernan, Abetz and Bartlett

Terms of reference for the inquiry:

1. The need for Commonwealth privacy legislation to be extended to the private sector, with particular reference to:
 - (a) relevant international standards and obligations;
 - (b) international comparisons;
 - (c) current legislative and other frameworks for privacy regulation in the Commonwealth, States and Territories;
 - (d) the role, responsibilities and practices of Commonwealth, States and Territory governments;
 - (e) the needs and responsibilities of the private sector; and
 - (f) the rights of consumers.
2. The effectiveness of any privacy scheme that does not have legislatively-backed complaints, investigation and enforcement mechanisms.
3. The appropriateness of using the National Principles for the Fair Handling of Personal Information, as produced by the Privacy Commissioner, as a basis for a co-regulatory regime for the private sector and the best means of implementing such a scheme.
4. The appropriateness of the provisions of the Privacy Amendment Bill 1998

WITNESSES

BENNETT, Mrs Pamela Doris, Chairperson, REIQ Property Management Chapter Committee, Real Estate Institute of Queensland, 21 Turbo Drive, Coorparoo, Queensland 4151	37
COLLIE, Dr Jean Patricia, Representative, Queensland Health, Rode Road, Chermside, Queensland 4032	27
ELBORNE, Mr Leslie Allister, Agency Practice Adviser and Executive Officer, REIQ Property Management Chapter, Real Estate Institute of Queensland, 21 Turbo Drive, Coorparoo, Queensland 4151	37
MILTON, Mr Raymond Charles, Board of Directors, Real Estate Institute of Queensland, 21 Turbo Drive, Coorparoo, Queensland 4151	37
QUIRK, Assistant Professor Patrick Thomas, Bond University, Queensland	2
SEELIG, Mr Timothy George, Representative, National Association of Tenant Organisations, and State Coordinator, Tenants Union of Queensland, PO Box 1054, New Farm, Queensland 4005	16

Committee met at 10.56 a.m.

CHAIR—I declare this public hearing open. On 14 May 1998 a number of issues concerning privacy and the private sector were referred to the Legal and Constitutional References Committee. These references include: the need for Commonwealth privacy legislation to be extended to the private sector; whether it is possible to have an effective scheme without legislative backed complaints, investigations and enforcement mechanisms; the appropriateness of national principles produced by the Privacy Commissioner as a basis for a co-regulatory scheme for the private sector; and the appropriateness of provisions of the Privacy Amendment Bill 1998.

The committee has received 55 submissions and is now commencing a short series of public hearings to take further evidence from a range of witnesses, including the business community, tenancy rights advocates, organisations and individuals concerned with medical records and other health and disability information, individuals with expertise in privacy, including developments at an international level, and the banking sector. We also expect to hear from the government department responsible for the proposed amendments and from the Privacy Commissioner. The proposed reporting date for tabling our report is 12 August. However, the parliament will not return until late August and it is possible that the committee will not provide a full report until early in September.

QUIRK, Assistant Professor Patrick Thomas, Bond University, Queensland

CHAIR—Welcome. In what capacity are you appearing today?

Prof. Quirk—As a private citizen.

CHAIR—Thank you for your attendance here and the assistance you have given to the committee. I now invite you to make a short opening statement, at the conclusion of which the committee will address questions to you.

Prof. Quirk—Thank you. I have got a number of documents that I would like to give to committee members at the very beginning. It will save time if we are able to go through those. The blue document on the top is a guide to the kinds of issues I think are relevant. I have divided that into four broad areas: firstly, what is privacy and are the threats that people talk about real threats or are we just making all this up; secondly, will Australian fall off a cliff when the European directive comes into force; thirdly, I will look at some developments in the United States; and finally, is there a technological solution to the difficulties that have been raised.

The important thing I would like to start with is the yellow sheet I have given you, which is what I call my scare sheet. The first set of scenarios there is taken from an article written by Nina Bernstein in the *New York Times* on 12 June 1997. Those examples from a consumer day based on actual practices in the United States appeared at the end of that article, but I give you the thrust of what the article was about to start with. It tells the story of a woman who filled out some questionnaires in a supermarket, expecting that they might perhaps be entered in a database somewhere in that store or maybe elsewhere but not expecting that they would be sent on to a third party for data processing.

In the course of the data processing, the company which had control of that data gave the input to a private prison system and the data was finally input by a sex offender who noted all of the personal details of this woman and began to send her very serious threatening letters. The story goes on that she had some difficulties getting rid of this particular stalker. The article concerned is also part of the material there, towards the end, and I have given you the complete article. There is quite a lot of insight into privacy generally.

The examples that come from a consumer day there include everything from capturing one's 1800 number on the telephone and then using that to push various allergy drugs and medications to, through a list, sending email, dining, getting prescriptions filled, shopping, mail order services and so on.

I will leave you to read those for yourselves, unless you want me particularly to go through them. An interesting aspect of them is that there is always a second use for the data concern. There is a first use and there is a second use. Once the data gets locked into the system and begins to circulate it can be used time and time again.

The second scare scenario I have there is on the third page of the yellow sheets. They are examples of privacy problems which have only very recently been collected by the Federal Trade Commission. The commissioner, Mr Pitofsky, appeared before a subcommittee on telecommunications, trade and consumer protection of the House committee on commerce of the US House of Representatives on 21 July this year. He has outlined some problems there with the use, particularly of Internet sites.

There is a list of medical clinics, automobile dealerships, mortgage companies, child directed sites and so on. It is important to note that none of the sites that are quoted there actually post a privacy policy on the web site. A privacy policy on a web site is a policy that says, 'This is the type of data that we will collect from you and this is the use that we will be making of it.'

Particularly concerning are those that are dealing with children. You would probably be aware that the FTC has recently recommended that action be taken in this area, although they are prevaricating or they are not quite sure what they will do in the general private sector.

The bottom two are of concern. It says:

A child-directed site collects personal information, such as a child's full name, postal address, e-mail address, gender, and age. The Web site also asks a child extensive personal finance questions, such as whether a child has received gifts in the form of stocks, cash, savings bonds, mutual funds, or certificates of deposit; who has given a child these gifts; whether a child puts monetary gifts into mutual funds . . . and whether a child's parents own mutual funds.

The concern, of course, is obvious here, but the number of children that are going on-line, particularly in the United States, and I would imagine with the programs that we have in place, in Australia, is increasing rapidly day by day. This is a tool of the younger generation. Those examples at least cause one to sit up and think in terms of general privacy protection across the board.

Returning briefly to the blue sheet, when considering what I should say before the committee I asked myself: what exactly is privacy? I found what I think is not so much a definition but a workable set of ideas from a book called *Private Matters—In Defense of the Personal Life* by Janna Malamud Smith, which was published in 1997. To paraphrase, she said privacy plays two roles. Firstly, it shelters—in other words, it offers sustenance to fragile virtues. It supports freedom to make personal choices in areas like creative and artistic expression, intellectual endeavour, sacred rituals, love, intimate sexuality, friendship and individual dignity. She also says that at the same time there is a risk associated with privacy, and that is the absence of witnesses. People should be seeing what is going on in a particular area, and they do not.

I have given you a copy of that article in the material and it is at the very end. It tends to go on a little bit about talk shows but you do not have to read the whole thing. I have highlighted the areas that I think are important.

There are also some other things from very recent press, an Op-Ed, 'Losing Our Souls, Bit by Bit' by Richard Powers which appeared in the *New York Times* in July this year. It talks about privacy issues in a digital age.

In addition, I have put in a section from a report from the Australian German Educational Development Fellowship. I was fortunate enough to have one of those fellowships a few years ago but last year's winner took a visit to the Stasi archives in Berlin. I have included that because I thought it was particularly interesting to read from a European perspective, and perhaps that gives some insight into why the Europeans are doing what they are doing in respect of privacy at this stage.

I will let you read that for yourselves but you can envisage the spectre of thousands and thousands of torn up little pieces of paper in sacks slowly being put together by German bureaucrats in a big room in Berlin. The paper was torn up because Stasi members, when the Berlin Wall fell, decided it would be good to tear all these pieces of paper up. However, they are now being put back together. I am told it takes about three months to put one sack back in the order that it was originally.

There are also rows and rows of bottles that contain small pieces of yellow cloth that was wiped on the chair of someone who had been interrogated by the Stasi. The cloth was then sealed in the bottle so that the dogs could get the scent of the person from the piece of cloth. It is a very interesting summary, that small section, and I thought I would include that because that is the background against which the Europeans seem to be moving on privacy, at least as I discern it. The American moves are a bit different.

To move on to part B, which is entitled, 'Will Australia "fall off a cliff"', when the European privacy directive comes into place I would like to acknowledge some help of a friend, Dr Christoph Palme, in preparing this short section. The important thing to note at the start is that the European Commission did not actually invent this problem and quite a few member states already had privacy regimes in place before the commission came up with their idea.

So, within Europe you are going to have quite different approaches to this. Even though they are all working towards a harmonisation you will have some countries that have never had privacy legislation before and others that have had a very high level of protection. I say:

This means that some countries already had the capacity to block data from Australia even before the directive.

I cite the example there of the Federal Data Protection Act which under section 38 gives the power to block data transfer. I have given you the web addresses for that particular act which has been translated into English, and there are some very good other sources on the Internet as well at a site called 'datenschutz.' I have given you the address for that in the footnote. They are just a series of links to other sites that deal with privacy in the European Union.

I go on to say there I am not aware myself of any data blockage that has already occurred, for example, from Germany to Australia, and that is the worry we have with respect to the European directive. Are they going to block data supply or not? We do not know the answer to that. There have been various statements that I have been able to get a hold of, notably one in the *European Union News*, Volume 16, No. 4, May/June 1998, which deals with what the Europeans will do. People seem to be scratching their heads.

I will go on to say in a minute that the Americans are still scratching their heads too as to what the Europeans will do, so we are not on our own as far as this goes. But just to continue briefly with the directive, it will harmonise the laws of the member states. In other words, some might have to improve their privacy laws and others might no longer be able to impose as high a standard of privacy as they have done in the past. You could find that the Germans, for example, will have to climb down from their privacy high horse to some degree. It just depends on how the directive is implemented.

It does appear, though, that as the privacy directive works its way through the legislatures of the various European parliaments, the EU Commission will ultimately have the power to block or unblock transfer of data, even if individual member states object, because that is the whole idea behind the European Union, obviously—that there is a central harmonising force. I hesitate to use the word ‘controlling’.

Will we fall off a cliff? We don’t know because you need to look on a sector by sector basis, member state by member state, and even case by case. It will all depend upon how the directive is implemented in the individual state concerned. How do the Italians look at it? How do the Germans look at it? Then you have to look at the legislation that they have in place and compare it with what is actually going on in terms of the particular piece of data that is sought to be transferred or blocked.

Then you can go down another level and say, ‘This is the way the Italians are looking at it, but they are looking at and treating data in respect of travel information differently from data in respect of banking information,’ and so on. So that is another level down.

Then, to complicate matters more, there have been some commentators who have said that the European directive is just meant to deal with mainframes. It contemplates big chunks of data that you can control, and that is the European concept of privacy. But the whole thing is going to fall apart when you start talking about laptops, the Internet and client server based things. It is completely different.

In a book that I will mention in a moment, quite a bit of time is devoted to whether or not it will be legal or illegal for a US businessman to fly to Europe with his laptop, collect a list of business contacts and then fly out carrying out the same laptop. Will that breach the directive; will it be different if he flies out of one part of the EU to another; and so on? It is a complicated question.

From where I am sitting, the answer is we do not exactly know what is going to happen. But nobody knows, so that is okay. The Europeans are not quite sure what is going to happen. The Americans are not quite sure what is going to happen. I will talk about the Americans in a minute, but it would appear that they are threatening to legislate and the threat carries out over 1999. In other words, the directive will come into force in October this year. The Americans are not panicking. They are saying, 'If we have to legislate, we will do it then. We are not in a rush to do it now.'

It is certain though that the directive will raise European consciousness of privacy as an issue. That is clear. After you read the Stasi archives submission, I think you will see where the Europeans are coming from. They have lived under totalitarian regimes and in the shadow of the eastern bloc for the best part of the second half of this century, and that is very much an issue. This may be very anecdotal but it illustrates the point: when a German gets a piece of junk mail that is unsolicited and addressed to them, the typical response might be, 'How did they get my address?' Whereas for an American it is, 'Oh, great, we have some junk mail. Isn't this exciting?' How an Australian reacts, I am not sure. I think Australians tend to take a kind of middle-of-the-road myopia. They will look at it and say, 'Well, that is interesting,' and throw it away. But, when the second, third and fourth ones arrive, they start to wonder what is going on. Meanwhile, some large multinational company which has a great incentive to gather data has quite a bit of information about them.

Just as a postscript, I note that if Europe did take action against Australia or any other third country, there are various challenges that are available within the European law system. So you can argue non-compliance of the particular measure, the particular blockage with the directive. In other words, you have set up the rule and if what has occurred does not comply with the rule, you can say that general principles of EU constitutional law have been broken or you can challenge it on an international law basis perhaps. So you are not left entirely without redress.

Turning to part C dealing with what happens in the USA, the USA is concerned about the directive. I am certainly no expert on US law but I would like to give to the committee the manuscript of a book written by Peter Swire and Robert Litan which is posted on the Internet. It was a report issued for a conference of the Brookings Institution on 21 October 1997. The manuscript/book is called *None of your business: world data flows, electronic commerce and the European privacy directive*. It is about 130 pages long and it deals with privacy from an American perspective. It is well worth reading. There is much to discover. I have also given you a copy on disk and the web site address from which it is available.

That particular manuscript might be issued now as a book. I could not ascertain whether it is available yet. The title page says that it is coming out in 1998 some time, but I have not been able to check whether it is actually available yet or if updates have been made. The manuscript I have given you is also not entirely complete. They left out a couple of chapters when they posted it on the web.

The Americans are concerned about the directive. Back in 1997 the Federal Trade Commission met with business to urge them to take action on privacy. It would seem that

nothing happened—at least if you believe the US press reports—because in June 1998 the Federal Trade Commission issued their report with all sorts of figures. One of the statistics was that 92 per cent of the web sites that they surveyed—and they surveyed about 1,400 of them—do collect personal information, and only 14 per cent of those sites have a statement showing how that information is used. Children again featured in the report. The survey found that 89 per cent of children's sites collect personal information from them and, of those, only 23 per cent instruct the children to seek parental permission.

While it occurs to me, I will just mention this. There have been a number of initiatives taken in the States to try to educate children about what goes on in the web. If the committee ever considered education an important aspect here, I would recommend that you looked at those. One that I saw was a mouse pad that was given out to kids and was sponsored by a number of large companies, including Sun Microsystems and Microsoft, I think. It had a list of nine online safety rules. Those rules included if someone asks you for your address online, do not give it to them or ask mum and dad; never send a digital picture of yourself to someone online; do not agree to meet someone somewhere else in the real world that you have met online; if people start asking questions that you feel uncomfortable about, log off; do not give your email address to people, et cetera. I think that is a very sensible approach that has been taken there. Certainly, a need was filled. I have tried to get a copy of that myself, but I have not been able to find the actual script on the web.

So following the FTC report, you have the Department of Commerce, and there seems to be a bit of competition going on amongst the US executive about who actually deals with this. They held a privacy summit in Washington in June this year to take stock of where we are now and where we want to be. Roughly, at the same time, it seems that the big players in the computer world and business got a bit of a shock and thought, 'Uh-oh, Congress will get serious on us in a moment. We'd better do something about this.' Congress have been very serious, by the way, in introducing Internet related measures. At the last count I did, there were 150-odd bills before the Congress relating to the Internet in one way or another. So they are really legislating flat out. Internet tax is one example. The tax freedom bill has been chugging through Congress for quite some time now.

The Online Privacy Alliance was set up in June this year by various corporations—including Microsoft, America Online, AT&T, Equifax, Disney, Proctor and Gamble, the Direct Marketing Association and so on—primarily to advocate self-regulation. In other words, 'We do not need legislation, Congress. Just leave us alone and we'll fix it.' That was not a very impressive thing for some of the civil liberties groups and so on. EPIC, the Electronic Privacy Information Centre, which sends out bi-weekly updates by email for anyone who is interested, said that none of the proposals had any means of affecting compliance nor any means for addressing consumer grievances.

The most recent development that I can find at least—and there may be something on the Internet this morning that changes all this; I apologise if there is, but I did not get a chance to look at the Net before I came up—is that on 21 July, Robert Pitofsky, the Federal Trade Commissioner, gave evidence before the House commerce committee, and I have included a

transcript of that evidence in the material that I gave you. For the first time—at least in such a clear manner—we have a threat to legislate. Again, it was kind of veiled. He said:

. . . unless industry can demonstrate that it has developed and implemented broad-based and effective self-regulatory programs by the end of this year, additional governmental authority in this area would be appropriate and necessary.

What that means and what they are going to do, I do not know. On the same day, the Online Privacy Alliance unveiled an enforcement plan—‘These are the teeth that we are going to use.’ I do have a copy somewhere. It did not seem to indicate to me exactly the kind of legislative teeth that they contemplated there. I think there were none, in fact. It is more a case of technology to the rescue; let us put trust seals, let us license people to certify that a particular site has a certain level of privacy and so on, but I will get to that in a minute. To summarise the US position as I see it, they are threatening to legislate but large companies are fighting a rearguard action to stop it and we do not know what the result will be.

Finally, will the technology save us? You get a kind of third group in here. There are those who say, ‘We have to legislate,’ and those who say, ‘No, let self-regulation answer it.’ The third group say, ‘You don’t have to worry about either of those because the technology will solve the problem for the individual consumer anyway.’ That is an interesting approach. In particular, I refer to Esther Dyson’s book *Release 2.0*, which is an interesting and easy read about Internet issues generally. That came out late last year. She talked about privacy and a couple of different methods—the P3P, the privacy platform and the trustee one.

If you have not come across this before, this type of technology uses protocols. A protocol is a language that computers use to talk to one another, in the same way that we are using English now as our protocol. You use language interfaces for computers to chat with one another and make decisions with one another about the kinds of things that, let’s say, your Internet browser will allow onto your computer. That has been proposed in respect of the pornography problem, for example. When you are dealing with sites that might carry material that parents would not want their children to see, the parents are able to set the web browser. With one particular standard, the RSAC standard, you can say, ‘I would like no sex, no nudity, no violence and no bad language.’ You can set each of those on a scale of one to four: a little bit of sex, lots of sex, full frontal nudity, crudities, no crudities, a few crudities, gratuitous violence at one end and absolutely no violence at the other—and various in-betweens.

There are several of these standards floating around. Some of them have only four categories—four by four—while others have nine or 10, and there is also the option of adopting someone else’s version. For instance, you might want to use the Christian Coalition’s standards for your machine. They will do up the standards, you install that standard onto your machine and that is it. You know that if the Christian Coalition says that it will not go onto their web site, it will not come onto yours.

The same sort of thing is what is being proposed here in terms of the technology, where you set a particular standard of privacy for yourself. You tell your computer what is acceptable to you, and your computer then negotiates behind the scenes with whomever you

are interacting with—let us say an on-line store. Your machine talks to their machine and their machine might query yours and say, ‘Are you happy for us to sell this email address to someone else provided that we give you a 10 per cent discount?’ You might set your machine to say, ‘Yes, I will always take the discount,’ ‘Yes, I will take the discount in respect of retail sales but not in respect of drugs or medicines,’ or ‘No, I do not want any sale of any personal data whatsoever.’ Or you might say, ‘You can take my email address but you cannot take my real address,’ or ‘You can take my age but not my gender.’ You can get down to the specific levels that you want. The P3P is an example of that.

The TRUSTe system is a labelling and certifying system that is a bit different. The TRUSTe—an independent third party—has a thing called a Trustmark and they license you to use that on your web site, for a fee. That gives you permission to use that on your web site, you can display it and people know that you are certified by this independent body that says you will not use the information in a certain way. Some of the independent third bodies go around and check that those they have licensed are complying. They will guarantee that people have complied or the Trustmark will be revoked. They may, for example, seed a site with fake data and then trace it to see whether or not it ever leaks out and that sort of thing. It is a bit like a government watchdog but it is run by other parties, not the government.

That takes us to the end of the opening submission. I am sorry if I have gone on a little, but if you have questions or want to return to things—

CHAIR—Thank you for the presentation, Professor. It was most interesting and most helpful. I will just pick up that final point you were making about the technology to resolve the difficulties: it is my reckoning that nothing, from a technological point of view, would avert any of the scares that you put in this scare sheet: telephoning, driving, sending email, dining, prescription shopping and mail ordering. Am I correct in that?

Prof. Quirk—It is hard to say yes or no. It depends on how you set up the telephone. It depends upon what type of technology you put into, say, a credit card or a smart card that might be used when you are dining. With the running of the red light: no, I do not think the technology can do that. You cannot make your car invisible.

It depends on the technology. The technology is always racing against itself. As soon as you try to block someone from doing something or collecting some data, particularly if you are a young American software genius, you will try to figure out a way to get around it. That is the challenge—to figure out ways to stop whoever is trying to stop you from gathering the data. There is a tremendous incentive on the part of large companies to gather that data. The incentive is obvious. I heard it described that there is a kind of consumer myopia. People are very unconcerned about short-term loss of privacy. They will give out an address here and an address there, an email here and a credit card number there, but when all of that is added together you have a real problem.

Also, a kind of cross-fertilisation occurs. The last time I checked the technology to place banner ads—the advertising that goes on Internet sites—five multinationals might all licence

a sixth independent company to run the banner ads on their site—Toyota, IBM, Microsoft, whoever. If they are able to identify you when they go on-line, they may say, ‘Professor Quirk has been here before. Last time we showed him a picture of a fishing book and he clicked on the ad and went to amazon.com and bought the book. Let us try another fishing book.’ Or they may say, ‘No, he is not interested in fishing books. He is interested in something else, so let us try another thing.’

If all of those banner advertising programs being run on completely different sites—Toyota, IBM—are being run by the same company in the centre, there is nothing to stop them collating and cross-fertilising that data as it comes in from the completely different web sites. If I turn up at the Toyota web site the next day or the Microsoft web site the day after that thinking I am in completely different places, I possibly am not because that data is finding its way to a central depository.

A similar kind of scare is when you visit amazon.com on a number of occasions and they track your buying records and begin to suggest books. That is great in one sense but you also start to wonder what is going on. Another scenario is that the smart cards being proposed have big advantages for some. Give one to your kids and they do not have to swipe it as they get on to the bus. It is automatically checked from their wallet. They do not even have to get their wallet out; it is done with a magnet. It is only valid from the route to and from home and school. If they try to hook off down to the beach, the alarms will go off and you have them.

Smart cards could also be used, for example, in a David Jones card, a customer loyalty card, that snaps as soon as you go through the door that lets them know Professor Quirk is back. They are able to see what they sold him last time. On the computer screen, the shop assistant might see a note: ‘Try directing him to this particular area,’ or ‘Note that last time he was here he bought a fishing book. We have a special on these. Please, bring it up’—even though I might have gone to the store to buy perfume or something completely different. They are just examples.

To return to your original problem, the technology will answer it but then there is a way around the technology. To cut to the chase, you are going to need to form an opinion on whether you need to legislate or whether self-regulation will do the trick. That is a really difficult question to answer. My gut feeling is that in the Australian culture legislation may well be appropriate. It will depend a lot upon the type of education programs that you run with it and so on.

We need to step back a little and look at what is going on in Europe and the US and run in their slipstream a little at this stage. Some will say that we cannot afford to do that. Maybe we cannot, but it is early days in terms of Australian developments in electronic commerce, at least compared to the US. I would refer you particularly to a graphic illustration; by that I mean a graph.

The National Office of the Information Economy ran a big summit in Parliament House a few months ago. Andersen Consulting brought out a report in that particular conference summit. They tried to show how e-commerce ready the different countries were in the world. The US was right up here on the graph and then there was a huge gap. Australia, Japan, Norway and a few other countries were in a second tier cluster down here. So we are not yet really taking off. We are very busy, but we are not yet anywhere near the US level. They are over the hills and far away.

Perhaps we do have a little breathing space. At the same time, if you wanted to introduce something it is far better to do it early in the piece than late, because once people settle down to a way of doing things you lose a kind of leverage that you would otherwise have. You would convince a small group easier than a large group. I do not know whether that really answers your question.

CHAIR—You are suggesting that we might have to wait and follow the examples of the United States or Europe, but have we not passed that point already? I am not being party political here, but prior to the last election the now government made a commitment to introduce privacy protection in the private sector. The problem was with us so much then that during an election campaign a commitment was made. That it has not been fulfilled is a question that we have to address now. Have we passed that point of waiting to see what other places are doing? Do we not have to take some action for ourselves? To a certain extent, is not the fact that we have a bill before the parliament proof that we have passed by what the United States and Europe are about?

Prof. Quirk—Yes, I am not going to argue with any of that. You have Victoria striking out on its own. I would like to be able to offer comments on the specific provisions in Victoria, but their server was down on the weekend and I could not get a copy of it. I worry with that sort of development though that we are heading for a railway gauge problem again. That is to be avoided at all costs.

When I teach students about Internet commerce I use as an example the merchant cities that used to operate in Europe about 500 years ago. I think you will see the parallel if you stick with the example. There were no nation states. Each fair had its own set of rules which operated within the fair. There were no lawyers allowed, so it worked pretty efficiently. The elders of each fair, if you want to call them that, used to make up their own set of rules. There was a kind of competition that developed between the different city states: 'They are doing this in Berlin. Are you going to do it in Hamburg or not? If you are not, we may not come up to the fair this year. We have some good stuff to sell.' So there was a kind of competition: the best set of rules wins.

In terms of Internet commerce, there is that need for certainty. It may well be a case that having a good set of rules in place will attract more commerce than it will lose. It is a balancing question because if you have too many rules in place people start to feel that they are inhibited and they have all this regulation. There you have the classic clash of cultures between Europe and the US. We fall somewhere in the middle, I think. In Europe they are happy to be regulated because they know it is protecting their fundamental human rights, and

they know that those rights have been abused to a great degree. In the US, everyone is an individual. The consumer is king: 'I want to make my own choice. Do not interfere with my right to carry on business the way I want.'

Where we fall in that, I do not know because we are sitting in the middle. On the one hand, Europe is a major trading partner. On the other, the US is a long way ahead of us in terms of e-commerce and is the driving dominant force in that area. So we are going to have to tiptoe through the tulips a bit and talk to them a lot.

Part of the problem—and I was discussing this the other day—is that you are not quite sure what the Europeans are going to do and you are not quite sure what the Americans are going to do. That is okay. We need to live with that and keep talking and keep up to date with what they are doing and try to make a balanced judgment about what needs to be done.

Do not delay it too long. We may find that the Europeans will come up with their solution, and the Americans will come up with theirs. The two of them will reach a compromise and then they will both move on. Then we are left thinking that we have not done anything. What do we do? We probably need to come up with our own set of compromises, work with those and then move on ourselves. The specific form that that should take is a difficult question.

Senator ABETZ—There has been a general discussion this morning in your presentation about the generalities of it and it has been most informative. Thank you for that. For those of us sitting on this side of the table trying to nail it down into a report with recommendations to government, do you have anything that you would suggest that we ought to be embracing or steering clear of? I suppose a classic case is the Australian taxation acts: every time a loophole is plugged, it looks as though a few more are somehow created or discovered. So you have got a small piece of legislation that grows and grows and grows. Given your commentary about the technology, that if you had a technology that would develop to provide some protection other technology would be developed to overcome that, where do we as a government go in setting guidelines, encouraging self-regulation or legislating?

Prof. Quirk—A \$64 million question. That is a very difficult question to answer. You need data to make a decision about that and I wonder whether we have got any data to go on. I wonder whether we have got anything—

Senator ABETZ—What sort of data should we be searching for?

Prof. Quirk—All sorts of things that were looked at in the Federal Trade Commission's report, for example, do web sites have private policies and what is happening on a sector by sector basis with personal information that is being collected or otherwise? In that sense I would suggest that you adopt or at least look at the sector by sector analysis that was given in Professor Swire's manuscript because he goes through it in enormous detail: travel sector, financial services, ISPs, email servers and so on.

We need some hard data to find out the type of information that is being gathered and how it is being used and you can then start to make a guess about the kinds of measures that you need to put in place. It is also important to emphasise the type of technology that you are using, such as a mainframe system where you have got a very easy collection point or monitoring point. For instance, there is a data monitor for the Commonwealth Bank and you can threaten this person with all sorts of nasties and they will comply in the corporate interest and so on.

At the other end of the scale is a bunch of real estate agents that are running databases about tenants in a distributed database that anybody can grab and put on their laptop as a real estate agent from anywhere in the country or anywhere on the planet—even the Simpson Desert now that we have iridium phones. It is very hard to control that because you have got no collection point.

I have recently looked at the US Internet Tax Freedom Act and that has the same problem. It is the collection points that are a difficulty. They thought the bit tax would be an answer because you have got a series of very set places you can go to monitor the traffic but once they move away from that you have got no way of knowing. Every small business has to become a sales tax collector. So we need hard data about those kinds of things.

Senator ABETZ—We are going to have real problems. The book that you have provided to us will give us some assistance but if you have to deal with it sector by sector, I can imagine what is going to happen. Each of the professional groupings or interest groups around that sector will be making submissions saying that this is a special case and ought to be treated differently and so you will then have a regime of privacy where there are not general rules of application. You are dealing with a patchwork quilt of privacy policy relating to various sectors.

Prof. Quirk—There are probably some tools that you could borrow from the Europeans to help deal with that. I am thinking of two in particular: the subsidiarity doctrine and the proportionality doctrine. The subsidiarity doctrine says that you should be taking decisions in respect of general principles of rules at the lowest possible level. You presume that it is taken at the level closest to those people who are directly affected by the data, unless there is some reason to rebut that presumption. So you might even get down to the point where data protection decisions are made at the bank branch level, unless there is some reason why it is kicked up—and you might kick it up because the customer wants it to be kicked up or because it is a particular type of transaction or over a particular monetary level.

The proportionality doctrine says—and this has actually had quite a long interplay with data protection rules in Germany, in particular; it is an area that I am interested in—you do not use a sledgehammer to crack a nut. There is a lot of European case law about this as well. It is hard law. It is not soft fuzzy law: you do not use a sledgehammer to crack a nut.

In the data protection field, there have been German cases, for example, where data was protected for a certain purpose and was then not necessarily given to anybody else, but

within the one department that had collected these disparate pieces of data for their own purposes, they connected it. Someone complained and they said, 'No. What you have done is you collected those individual pieces in order to use those individual pieces for specific purposes. Now that you have connected them, you have something much bigger and you have to disconnect them now because you have gone too far. While what you have done might be appropriate, it is not necessary for the purpose, for the goal that you set yourself in originally gathering those individual pieces of data, so you have to undo it.'

I offer those as examples of the kinds of administrative law tools that you might be able to use to undo or to get around some of those problems. Whatever way you go, you are going to have people who are going to complain and you are going to have—

Senator ABETZ—We will be hearing from the Tenants' Union later on today. They have a persuasive submission talking about tenants being put on to a black list and how that should not basically be allowed because it could prejudice them. A small land-holder or a property owner can have terrible situations arising with mortgage repayments and needs to be protected if a tenant comes in and seeks to rip him off. So what is the basis on which one ought to be approaching those issues?

I can see it from the Tenants' Union point of view. But if you are a landowner with a mortgage, you might say, 'I need protection from those tenants who pay a bond and then sit in a unit for three, four or five months without paying rent.' You have to go through the legal process. They then run off and you never catch up with them again. You would like to know their names.

Prof. Quirk—Shutting the door after the horse has bolted.

Senator ABETZ—Yes, but you could protect other landowners from being dealt a similar blow.

Prof. Quirk—If you brought that database under some of the principles that exist in the OECD and even our own privacy principles that the commission has brought out, the operative factor there would be a right to correct data that was not correct and you would need some sort of judicial process to do that. But if it turned out that these people were not what the database said they were, you have got your answer there. I think it is the compromise between whether you can assure the property owner that they are okay, that that piece of data was false, then, okay, they can come in. If it is true, they stay out.

Senator ABETZ—But it would be, would it not, within the—sticking with this Tenants' Union or real estate example—economic interests of those dealing in real estate not to blackball a worthy tenant?

Prof. Quirk—Clearly, but anecdotally I have heard stories of tenants who have been and who have no way of addressing the problem. So I agree with you, the market forces should sort that out, but in the cases where they do not maybe you need some kind of appeal

process. The danger is that you are going to end up with this avalanche of administrative law again.

Senator ABETZ—Yes.

Prof. Quirk—And I see that as a real concern. We do not have a very live memory here of the kinds of misuses that can be made of data and that have been made of data by governments and by the private sector. I suppose that is why I hark back to the Stasi archives. When you read it, you will see why the chill goes down the spine. It is very difficult.

Senator ABETZ—Thanks.

CHAIR—How do you think the laws that are in place in protecting privacy in the government sector are working now? Have you cast your mind to it?

Prof. Quirk—Not recently, but I have no reason to believe that it is not working quite well. I will tell you next year after I have taught administrative law again. In terms of the tax file numbers, the credit reporting and so on, I have no reason to believe that that is not functioning quite well and would serve as a model or a means of introducing any further measures—‘You remember how you did this? Well this is just an extension of it.’ That kind of springboard.

CHAIR—I recall the debates that happened at the time it was being brought in. Of course it was mixed up with the Australia Card as well and there were great fears as to how even individual government departments might be able to use or abuse the information that they collect. From my perspective, they seem to have been working reasonably okay. The reason I put the question to you is to see if you have a different perspective on things.

Prof. Quirk—The danger that you are pinpointing is the trip-over-yourself problem. In other words, as soon as you introduce data legislation, people think, ‘Right, we can get some data now provided we comply with these rules.’ It focuses their mind on collection and it puts the collection process in centre stage. So even though they have to obey the rules, it is kind of, ‘It is legal, so let’s do it,’ and perhaps they will begin to do things they had not thought of before.

Yes, you are right. The spectre of the problems does not seem to have eventuated and nothing springs to mind in terms of abuses through the tax office, across matching of data or any other public sector problems that we have had. It would be interesting to look as to how that is working at the state level in terms of medical records, for example, or something like that, because it looks like we might be having a state based set of rules in respect of privacy. I just add on that, even if that does happen and Victoria goes ahead and it has a working system, it may not be as mad as that—as bad as that; a freudian slip—

CHAIR—The railway lines worked, didn't they?

Prof. Quirk—They did, you just had to change trains. Everyone is dealing in privacy principles so it is not as if you have to stick a train on two foot wide gauge. It is all principles and yet principles are applied in each case. So it might be that something similar to Victoria will work and keep the Europeans happy even though the Queensland regime is not identical or the New South Wales regime is not identical. It may not prejudice us. You might run into the other problem of people work transferring a business and working out of a Queensland server because there is a particular exception for them which does not apply in Victoria and because the real estate agents lobby is particularly strong in Queensland and not here.

CHAIR—I would like to say that you have answered all the questions that I had in my mind before your attendance here. I am afraid that you have put other questions in there as well as the ones that we did not have time to put to you. Time has caught up with us. I do thank you sincerely for your attendance here this morning and the assistance you have given the committee, not only in your oral presentation but also in the documents you have tabled here. Thank you very much.

[11.51 a.m.]

SEELIG, Mr Timothy George, Representative, National Association of Tenant Organisations, and State Coordinator, Tenants Union of Queensland, PO Box 1054, New Farm, Queensland 4005

CHAIR—Before I invite you to make an opening statement, I would just put on the record that I, with my wife, am the owner of a property that is leased to tenants. I am not sure whether or not the persons who did the leasing arrangement for us used the data or not, but I think I ought to put it on the record. I have got no day-to-day dealings with it.

I now invite you to make a short opening statement. In doing so, I remind you that we have received the submission from your organisation. We have authorised its publication. It is in the public arena. We thank you for that and invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to address questions to you.

Mr Seelig—Thank you for the opportunity to address the references committee. Both the Tenants Union of Queensland and the National Association of Tenant Organisations, which is really just a collection of the tenants unions and advice services around the country, have had a number of concerns about tenant databases or black lists. Our concerns have been getting stronger over the years. Tenants unions provide a lot of advice directly to tenants. Our concerns have come directly from consumers who have asked us about these issues.

Our main concern is that there appears to be a proliferation of database organisations which collect and maintain information about tenants. That information is then accessed by other agents to vet prospective tenants when they are applying for rental accommodation. As far as we can ascertain, there are basically no controls over that information's accuracy, its use, or of tenants' access to it—either to confirm that it is there or to get it corrected. In our view, that is of major concern, both from a privacy perspective and because it creates an enormous problem in the private rental sector, especially for low income tenants who may on occasion have had problems with payment of rent. On the basis of a history that could go back some years, they may be denied rental accommodation indefinitely.

In our submission we made clear our main issues and what we would like to see—that is, coverage under the Privacy Act at the federal level and, possibly, also at the state level. The bigger data organisations operate interstate, so I do not think a Queensland act on its own would be enough. We would like to see coverage extended to the private sector so that there are at least some minimum protections for tenants in terms of access to that information.

At the moment it is very frustrating advising tenants. We can say, 'You can go along to TICA'—the Tenancy Information Centre of Australia—'and they will charge you \$10 for the privilege of finding out whether you are on their database but they will then tell you to go off to speak to an individual agent or association who may or may not be in business anymore and you have then got to talk that agent into correcting information.' We have

come across so many problematic examples of where this information has been misused that we do not have much faith in a self-regulatory approach.

Senator ABETZ—Do you approach it, as an advocacy organisation, simply from the tenant's point of view? You would, I assume, accept at face value what the tenant tells you—that he or she has been hard done by and that things did not really happen that way in the past—whereas you never really get the opportunity of sitting down with a tenant and the landlord and having it out across the table as to the fact that the light globes were taken, there were cigarette burns in the carpet, et cetera and that was the reason why they were put on the list. So how much weight should we be giving to your submission? Anecdotal evidence is always good but it is when it is tested against the other side's version of events that the weight that one ought to give to it comes to the fore.

Mr Seelig—In response to that I would make a distinction. There are two different classes of concerns. The first one is about those cases where there is incorrect information or it is about the wrong person or, for whatever reason, the information is being misused in the sense that it is not a justifiable use of that data. Examples of the second one would be where there may well be genuine cases of breaches of tenancy agreements, debts or whatever but it is a question of whether there still ought to be some minimum protections to consumers regardless of the accuracy of the information.

To address the second issue first, certainly we do not just take the tenant's concerns at face value. If it is a serious issue, we will raise it directly with TICA on occasions, and I have had a number of conversations with the director of TICA. We will also contact real estate agents and get their side of the story if it is a serious case, and I have been involved in a number of media stories where the agents or owners have been interviewed. We are an advocacy organisation but that is not to say that we totally disregard the owner's or the agent's perspective.

In the cases where the information is correct and there has been a breach of the tenancy agreement, we would say that there need to be protections over the access and the use of that information and there needs to be some control over how long that information is going to be available. If you are in arrears a couple of times and you fix those arrears up, is it fair that you could remain on a database indefinitely? Is that fair? I would suggest that it is not.

Senator ABETZ—I would imagine that it would depend on how long the arrears were for and on what basis they were negotiated. If, for example, a person is in arrears for six months and the landlord—because he thought some money was better than nothing—accepted one month's worth of rent in full and final satisfaction, would you say that person ought to be removed from the list?

Mr Seelig—An example of someone who has been able to remain in a rental property for six months and not paid rent would be an incredibly rare occasion. In Queensland you can be evicted within a month. You would have to raise questions about property management practices if someone were to allow a tenant to go six months without paying rent. In

most cases in Queensland, if you are seven days late in the rent you are going to get a notice to remedy under the Residential Tenancies Act. If you do not remedy within the set period of time, which is seven days, you are going to get a notice to leave.

Senator ABETZ—If you do not leave, what happens in Queensland?

Mr Seelig—I should say that within the remedy period if you remedy that waives the breach. If you remedy after the notice to remedy has expired, obviously you, as the tenant, continue to owe the money but the breach is not waived automatically. In Queensland, if you are still in possession after the end of a notice to leave, the lessor or agent can apply to the Small Claims Tribunal for a termination order and a warrant of possession and you will normally be evicted within the following 14 days.

It is incredibly unusual to have a case where a tenant has not paid rent at all and remains on the property after about a month or so. On the odd occasion when that has occurred, we are not saying that there may never be an example where we could understand why lessors or agents would exchange information. In many of the cases which we receive, the tenant has remedied but has still had a black mark against their name. How long should that continue before that person can be viewed as having rectified their breach and have got on with their lives? How much of a risk do they really represent to the rental industry?

Senator ABETZ—You do not have a problem with the concept of a list as such?

Mr Seelig—I do not believe that that is necessarily the most effective remedy for what the real estate industry is looking for.

Senator ABETZ—If we assume that the industry ‘knows best’ as to what is best for them and they think that such a list is of benefit to them, what would your view be? Should such a list be allowed? If we answer that threshold question in the affirmative but subject to a whole lot of reservations, what should those reservations be?

Mr Seelig—The line that we have taken on that is that we do not support tenant databases. If they are to exist anyway—and I am sure our position on it is not going to affect it in any way—certainly there ought to be major restrictions on the use of that information. Our bottom lines include the sorts of things we have mentioned in our submission. Tenants should have a right to know they are listed because at the moment they do not have an automatic right to know. They should have a right to have incorrect information either removed or at least corrected. There should be a limit on how—

Senator ABETZ—How should that occur? Let us say I am listed and I am upset at the way I am listed. Should I have access then to an appeal body to force TICA to change the listing or the notation next to my listing?

Mr Seelig—I guess we have not looked into the details of how a regulatory approach would be established, although we have said that the Privacy Commission ought to have some jurisdiction. In the first instance, if the tenant has right of access to TICA information free of charge, or at least if reasonable costs have been charged—not the application fee as it stands at the moment—that information can be forwarded to a tenant and they can then look at it and check whether it is right. If it is incorrect, TICA claim that if you write to them and you can prove that information is not correct, they will correct it. The problem is that if—

Senator ABETZ—Do you find that that happens?

Mr Seelig—I have not come across an example of where they have. I guess the issue is: if they choose not to, then where would a tenant go? Whether it has to be through the courts or through the Privacy Commission, we have not looked into it in that much detail. Our position is that there should be some form of independent body that can take that up with TICA.

Senator ABETZ—You are, if you like, a tenancy advocacy group. The reason I have been asking you these questions is: do you see the approach you are taking as having a broader application not only on your tenant worthiness but on your credit worthiness and insurance worthiness? You can go through a whole host of human activities as to where various commercial groupings would want to run a list of those who might be a bad risk to do business with. Would you see the views you are expressing on behalf of the tenants of Queensland and, indeed, Australia and the organisations you represent, as having broader application to other areas?

Mr Seelig—I am not familiar with other consumer issues that may be impacted in the same way. My familiarity is with tenancy issues. I could see that there probably would be cases of other consumer issues that would apply. I am paid to work on tenancy issues.

Senator ABETZ—Of course.

Mr Seelig—That is my experience and that is my area of familiarity. If you are asking whether an approach that we are saying should be taken on tenancies would create a situation where every consumer group on every different consumer issue wants to take a different approach and whether that creates a problem in terms of regulating data, I cannot answer that question. We have only ever looked at it in terms of tenancy matters, but I have heard from the Privacy Commission that they receive a number of complaints about tenancies and tenant databases. It is my estimation that they make up a large proportion of consumer based complaints that are not protected. So they are not ones that are consumer credit issues or government agencies. But that is just my own personal experience.

Senator BARTLETT—In relation to the principles that might apply in terms of tenants getting access to information and being aware of having some principles applying there, what is the current situation with public housing tenants? What sorts of procedures are there for tenants that run into trouble with their landlord, the state government?

Mr Seelig—I cannot answer that question quite categorically. My understanding is that, under recent reforms made by the Queensland Department of Housing, they expect references from a private landlord or real estate agent as part of the application process to public housing. If you have a bad mark against your name as a private tenant, that could create a barrier to accessing public housing. That is the other thing. The Residential Tenancies Act takes a pretty tough approach to regulating tenancies in Queensland. This is not about enforcing the rights of landlords in terms of if a tenant is in breach. The law is already pretty tough on tenants. It does not resolve breaches. All it simply says is that because you breached in one instance we are going to make the inference that you are now a bad risk. In terms of other aspects of public housing, my understanding is that they will offer a reference when you leave public housing, but that is not a compulsory reference.

Senator BARTLETT—In terms of tenants being able to protect their interests in being able to access accommodation, is there a set of principles or protections that apply in the public sector at the moment, say, if you are applying for public housing and the housing department gets information from a landlord that you are a bad risk or whatever? Does the tenant get notified of that? Do they have a chance or not?

Mr Seelig—My understanding is that essentially the onus is on the tenant to go off and get the reference. So they have to come back with that information, so they are normally aware of what the reference has been. That is an enormous issue on its own. My understanding is that the Department of Housing in Queensland does not report tenants to agencies like TICA, although there might be some informal policies. They do use the Credit Reference Association of Australia. That is my understanding. But, otherwise, I am not aware of the department ever having reported a tenant.

Senator BARTLETT—Are there any principles that currently apply either in Queensland or, if you are aware, in other states in terms of public housing departments that may be able to be used as guidance for establishing privacy protections in the private sector?

Mr Seelig—I cannot really answer that question because I am not that familiar with public housing policies either in Queensland or interstate. If a tenant has a debt, then the Department of Housing does insist that that debt either be cleared or some negotiations be entered into before they will provide assistance to that tenant again. But I do not think they take a total black and white approach and say, ‘If you’ve got a debt you can never be housed again.’ I am not familiar with their practices enough to answer that question.

Senator BARTLETT—What is likely to be the situation if we are having to go to privacy legislation on a state by state basis and you have these databases, some of which operate nationally and can be accessed, to some extent, electronically? This is probably a bit of a legal question, but what would the situation be if we get six state governments doing the right thing and one not? Does that almost make the whole thing a waste of time in terms of these sorts of issues?

Mr Seelig—I am not familiar enough with how a state based privacy act would govern information gathered from other states, but my immediate concern would be that the big databases operate interstate, mostly from Sydney or Victoria, so if Queensland did not capture information being processed interstate it would seem to be a bit of a waste of time.

Senator BARTLETT—You could have good legislation from all the sound thinking Liberal governments around the country and not get anything good from the Labor people in Queensland, but it would operate more in terms of where the agency was rather than where the landlord was?

Mr Seelig—Yes, I think so. The other concern would be that you may end up with different legislation in different states, which means that you would have an inconsistent approach. Tenants do move interstate, so that would be another concern of mine, that tenants in one state may have quite good protection but in other states very poor protection.

Senator BARTLETT—Just in terms of the experiences you have had with complaints or concerns from tenants, have you perceived any evidence of these sorts of databases being used in a discriminatory way—such as people feeling as though they have been black-listed because of race issues or sexual orientation or things like that?

Mr Seelig—To the best of my knowledge, or as far as I can remember, I have not come across any clear examples of unlawful discrimination on the basis of gender or race. There has been a lot of discrimination; it is just not unlawful discrimination. It is mostly against low income tenants. Again, if we received evidence of that, we would take that up with the Queensland Anti-Discrimination Commission. Most of the cases we end up with are cases where there are no other avenues, where there is no legal avenue to deal with it, and that is precisely why we get to the point where we see that privacy legislation is the best approach because it will provide a safety net. There is a big gap.

That said, though, we have had a number of horrifying and sometimes quite amusing examples of where tenants have been listed. In fact, before this hearing, I asked some of my colleagues interstate to provide me with any recent cases they have had. Some of them are pretty scary. Apart from things like people with the same surnames being listed and being told that ‘Because you rented in town X you cannot now rent here,’ they can provide evidence to say they have never even been there, let alone rented there. But it does not seem to be good enough.

We had one example from Sydney, I think, of a tenant database agency coming out and demonstrating their database to a real estate agent firm when the agent was asked—just off the top of his head—to come up with a tenant’s name and address for demonstration purposes. They had a tenant who had a case in the tenancies tribunal, so they put their name and address in as an example to show how the database works when listing someone. A few months later, apparently, it turned out the person ended up being listed on the database from that point. The agent was so disgusted with what had happened they actually ended up waiving the fees and got the tenant off the list. They were pretty horrified that that could

occur. That is an extreme example, but the fact is you will always get cases like that where there is no regulation.

CHAIR—Have you got a list of companies that run databases here in Queensland and nationally that operate within Queensland or are accessible within Queensland?

Mr Seelig—I could not give you a comprehensive list, but there are two really big ones in Queensland. There is the Tenancy Information Centre of Australia, TICA, and RP Data is another one that is operating in Queensland. The big one in Victoria which operates in New South Wales and Western Australia is Remington White & Associates. There are a number of smaller agencies, but they are, as far as I am aware, the big three. Another one appeared on the Internet a few weeks ago called Tenant Check, but I do not know anything about it.

CHAIR—The committee has been told of one company called Console. They were invited to appear before us but they have declined our invitation. Are you aware of a company called Console?

Mr Seelig—Are they a Queensland based company?

CHAIR—To the best of my knowledge they are, yes.

Mr Seelig—I understand, but I could be corrected, they are the company behind Tenant Check. Funnily enough, it was the director of TICA who rang me up to tell me about Tenant Check, I think concerned about loss of business for TICA, and to ask whether I was prepared to make a complaint about Tenant Check. But, as far as I could gather, without a log-in name and password, you could not actually get any information.

CHAIR—Is there any organisation or government agency that knows who these companies are and could inform the committee who is collecting these databases now?

Mr Seelig—I doubt if any one single person or body could tell you about everybody. The Privacy Commission would probably have the best knowledge because we have been encouraging tenants to forward complaints to them. I would imagine that if anybody had a reasonably good picture it would be the Privacy Commission.

CHAIR—Regarding evidence on the existence of black lists, my mind went back to my trade union days when my name appeared on black lists—there being more than one. I have never been able to get any positive, definite or hard information that I would be able to use in a court room or an industrial commission, for example, that such a black list did exist. Does your organisation or any of your affiliate organisations have any categorical hard evidence that such black lists do exist, other than anecdotal information?

Mr Seelig—Yes. In fact, TICA now have an Internet site, and, unless you accept that somebody else has put up a site under their name, TICA definitely exist. I have had tenants

who have said that they have received information back from TICA that has indicated that they are listed. I do not think there is any question that they actually exist.

CHAIR—TICA exists, but does a black list exist? Does TICA have a list or a database containing names of individuals whom they are recommending to their clients not be given a tenancy on premises that are up for rent or lease?

Mr Seelig—We have had tenants who have come to us and said they have been informed they have been black-listed and are listed with TICA. We have advised them to get on to TICA, and they have, and they have received back written confirmation that they are on the TICA list.

CHAIR—In your submission you have provided us with two case studies of Sarah and John. Were those case studies you handled personally, or are they just part of the submission from the organisation?

Mr Seelig—They are not ones that I have taken personally, but I have taken calls of exactly the same scenarios.

CHAIR—In the case of John, on page 6, it appears that the argument was taken up with the real estate agent rather than with the organisation who was running the database. Am I correct in that?

Mr Seelig—Yes. That is actually what TICA advise. TICA say, 'If you pay \$10, we will confirm that you are on our list, but we will not take any responsibility for the accuracy of information, and nor will we take that up with the reporting agent.' The onus is then on the tenant to go back to the reporting agent, who may or may not be in business still, or may not be contactable. That is normally what we advise the tenant to do.

CHAIR—If the information on the list is clearly inaccurate, taking this matter up with the agent is not going to resolve that difficulty, is it? That is what you have portrayed here in the submission.

Mr Seelig—On one level it is and on the other level it is not. The agents themselves do not hold the information any more, it is on a central database. However, what TICA do is say that if they hear back from the reporting agent that that listing should be removed, they will remove it. They clearly place the onus on the tenant going back to the reporting agent and getting the reporting agent to agree to withdraw the listing. The reporting agent then gets on to TICA and has the listing removed. That individual agent does not control the central database but is the reason why the information has been listed in the first instance, and is also the key to getting that information removed or corrected.

CHAIR—I think the onus is on the committee to take that matter up with TICA. I would like to put what you have just said to them, as to whether or not they could confirm—

Mr Seelig—They confirm, on their own web site, that that is the approach they take.

CHAIR—Do you want to identify the document you are referring to for the committee?

Mr Seelig—Yes. It is just a printout of the TICA Internet site. The address is www.tica.com.au. They have a couple of pages of information, one for tenants and one for landlords. They also have an agent log-in system now so that, apparently, if you are a member agent, then you can dial in and you can now log in and get information over the Internet. I think it is a fairly recent phenomenon. I was not aware that TICA had a site for that, but that is where this information has come from, as well as our own personal experiences.

CHAIR—I thank you for that. We can access the identification ourselves, but I think, nonetheless, the obligation is on the committee to put what you have just said on the record to TICA and ask them either to confirm or deny what has been said. I think it would be useful for the committee to understand exactly what does happen. In both the case studies you have given us if what you have said is the way that it is followed through, it seems to be an awfully messy way of doing things while not necessarily providing the protection that the real estate agents might be wanting for themselves. If the informing agent happens to be a mate of the tenant who is applying, he can get them wiped off fairly easily.

Mr Seelig—Yes, except that actually the opposite is more likely to be the case. This is what we have put to the industry in the past. If you are a mate of the agent, you are not going to get reported in the first instance. The question for us is that we have come across so many examples of wrong information and laughable instances that, for me, that would actually remove some of the credibility of the database. If I were a real estate agent, I would be pretty suspicious about the accuracy of a lot of the information you get from TICA because there are just too many examples of wrong or inaccurate information. I think that they are doing themselves a disservice by not distinguishing between those few cases of really serious breaches and all of the very minor misdemeanours, inaccuracies, and so on. As far as I am aware, if you do not really want to delve into the details, you just take the stuff at face value. There is no way of distinguishing between malicious acts against a tenant and really serious cases of breaches of tenancy agreement.

CHAIR—It seems to me that there are three options facing the committee: we can recommend a regulatory course, we can recommend a self-regulatory course of action or, indeed, no regulations at all. In terms of your interest area, where you are coming from, obviously you are arguing for some form of regulation. It would seem to me that, without putting words in your mouth, you are not in favour of no regulations at all. Would there be any way that a self-regulatory scheme could and would work within the tenancy arrangements?

Mr Seelig—TICA claim they actually comply with the Privacy Commission's self-regulatory guidelines. I do not believe that they possibly can and I do not believe that they do. The fact that they do claim they comply with them makes me very suspicious then of

how seriously they take a self-regulatory approach. So the answer to that question would be: we believe that a legislative regulatory approach is the best approach for tenants because it is the only mechanism that is actually going to provide enforceable rights.

CHAIR—With that then, you would see a legislative regulatory regime that would necessarily need to be national, from what you have said earlier.

Mr Seelig—Yes. In fact, in 1996 when the Attorney-General's Department released its discussion paper on privacy protection, we very much supported the approach in that document which was to establish the information privacy principles that are in the Privacy Act to the private sector. That seemed to us to be a very good approach.

CHAIR—Again, we are talking about principles though. Our previous witness, in one of his concluding comments, mentioned the fact that a set of principles, even though they were different from state to state or territory to territory, could actually operate for Australia. Would you agree with that?

Mr Seelig—I did not catch all of his evidence. He was referring to state based legislation?

CHAIR—He referred to the fact that possibly the states are now going down different tracks where we could end up repeating what happened in Australia with the railway lines. Nonetheless, it still might be able to work because we are talking about principles only, rather than hard and fast, set in concrete laws.

Mr Seelig—As I have already mentioned, there is a problem with taking a state by state approach, because you will end up with inconsistency. Our preferred position is definitely that there be a national approach under the Commonwealth Privacy Act. Queensland has just gone through a review of privacy and has recommended absolutely no protection in the private sector. We do not have much faith that Queensland in the short term is likely to get to a point where it is going to have legislation that provides protection. Even if you did, though, there is going to be the problem of inconsistency.

CHAIR—Did your organisation give evidence in that Queensland committee of inquiry?

Mr Seelig—It tabled a submission. I was actually on leave when there were hearings. I could not tell you off the top of my head whether we appeared. We have certainly put in a detailed submission to them.

Senator BARTLETT—Just in terms of the actual type of information that is provided by TICA, for example, when a landlord wants to check on a person's name does the information provided actually say, 'We recommend that you do not rent to this person,' or does it just provide a record which says, 'This person has been reported to have conducted

ritual human sacrifices on a regular basis in the lounge room,’ and leave it up to the agent to make up his or her own mind?

Mr Seelig—I am not aware of any recommendation from TICA to say you should not ever rent to this person, but I think the clear inference is that just having the name listed on the database is enough for an agent not to want to rent.

Senator BARTLETT—So at least the details and then the nature of the sorts of breaches or reported offences, for want of a better word—

Mr Seelig—Yes. The statements that I have seen have been very brief. They have not gone into any detail and they certainly have not flagged any complaint by the tenant about the accuracy of that information. It has just been a very brief statement about whether it was rent arrears, or a matter of not keeping the gardens tidy, or having made a complaint to the Small Claims Tribunal.

Senator BARTLETT—So it would be listed if someone is seen as a complaining person and that type of information can be—

Mr Seelig—We regularly get complaints from tenants after we have given them tenancy advice on enforcing their rights. They say, ‘We would love to do that, but we have already been told that if we do, we might get reported and we will never rent again.’ That is a quote that keeps coming back to us time and time again.

Senator BARTLETT—So the information listed is not just supposed breaches of leases, or whatever. It can be a troublemaker type of thing, for want of a better phrase.

Mr Seelig—It is a lot more subtle than just giving—

Senator BARTLETT—Subtlety is not my strong point.

Mr Seelig—The way the system works is a lot more subtle. People probably do not worry too much about the detail of their actual breach. Our experience is that simply being listed is enough.

Senator BARTLETT—And having just a listing that they complained to the Small Claims Tribunal—which may well have been a legitimate complaint, or at least clearly within their legal rights—is still the sort of information that sometimes gets listed?

Mr Seelig—Assuming the agent is honest about the reasons for being reported.

CHAIR—Mr Seelig, thank you very much for your attendance here this morning. What you have put to the committee both in your presentation and your earlier submission is of

assistance to the committee in pursuing the inquiry that has been given to us by the parliament and is most valuable. Thank you very much.

[12.31 p.m.]

COLLIE, Dr Jean Patricia, Representative, Queensland Health, Rode Road, Chermside, Queensland 4032

CHAIR—I would invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to address questions to you.

Dr Collie—Thank you, Mr Chair. It may be helpful for the committee to hear a bit about my experience with this topic which extends over about 20 years of my working life in the health system. I have had a lifelong interest in the protection of personal information from public disclosure. My concerns about this relate to the collection of confidential data without the knowledge of individuals by a number of public agencies and particularly in our case health and health related agencies.

My major interest was stimulated by my appointment as the Director of the Division of Research and Planning in the Queensland Department of Health, a position which I held from 1981 to 1991. At that time I was responsible for a number of data collections within the health department. Those data collections had been in existence for many years prior to my joining the health department and they contained identifiable health information. In taking on this role I saw myself as what might be termed the health department's data custodian. In approximately 1985 I chaired a committee which developed privacy guidelines for hospitals and community health services under the jurisdiction of the Queensland health department. We actually based our guidelines on the then Commonwealth Law Reform Commission's recommended information privacy principles.

Senator ABETZ—Can I just interrupt you. Did that committee involve the private hospital system as well?

Dr Collie—No, it did not involve the private hospital system at that stage. In approximately 1987 we presented our document and the background to the Queensland government's privacy committee. At that stage the committee members endorsed the use of the Law Reform Commission's information privacy principles. In about 1988 I prepared a submission for the Queensland cabinet seeking approval, subject to the privacy committee's deliberations, on changes to the privacy legislation and the interim use of the information privacy principles within the Queensland Public Health Service.

Subsequent to that I had dealings with a number of Commonwealth committees associated with health in terms of relations with the Office of the Commonwealth Privacy Commissioner. Perhaps the most important responsibility that I had in that respect was in 1987. I was appointed to the interim board and then the subsequent substantive board of management of the Australian Institute of Health. The charter of the Australian Institute of Health was to collect health and health related statistics under its own legislation. The legislation was the responsibility of the Commonwealth minister for health but the institute was not managed by the health portfolio.

The initial legislation did have provisions to allow the Commonwealth minister for health to access the data that was held within the Australian Institute of Health, particularly data that had been provided by states about their facilities or about individuals, that was collected by that organisation. Through the support of the Queensland minister of the day, we did get the Commonwealth minister to tighten up the legislation to permit access—even by himself—only with the approval of the people who provided the data to the Institute of Health.

I next had some concerns about access to data during the commission of inquiry into ward 10B at the Townsville General Hospital, and you might recall that that was one of the significant investigations into psychiatric services in Australia at that time. The commissioner sought to access information on individual patients in facilities that were not associated with the Townsville General Hospital. The basis of that was for comparative purposes. I believe that this was outside the terms of reference of the committee, and in my role as informal data custodian sought to inform the commissioner of my views in relation to that. He accepted my argument and did not persist in seeking the data on patients who had not been associated with that particular institution.

In terms of my personal situation, particularly with the latter experience, I felt quite vulnerable in seeking to withhold data from a royal commission, recognising the powers of royal commissions and the commitment of the minister of the day to give full support to the commission of inquiry. I believe very strongly in the importance of protecting individuals' data from unauthorised access. The important issues that I see for the future include the increasing maintenance of electronic health records, the capacity then to transmit that data and the capacity for unauthorised access during transmission unless there is security encryption placed on the data during the transmission.

Once you have data in an electronic form, there is the capacity to create new data as a result of electronic linkages. An individual may give approval for the transmission of personal data to a second party, but that does not give the approval for linkages of that data and for third parties to access the link data, which may compromise the individual as a result.

I very strongly believe that there is a need for controls to be put on data-linking activities, so that the individual government departments that have collected certain sets of information for specific purposes should not be authorised to link that data without the approval of an independent person, or body of persons, who will actually look at the public interest in making those linkages. When I last spoke to people in Sweden—and that was probably about a decade ago—they had very strong disincentives in place to stop data linkage occurring without the authority of a highly placed and informed person, or set of persons, to approve it.

The other major area in which I have concern is the collection of genetic information. Although my preamble reflects the public sector, I think it is very important—because the public and the private health sectors are intermingled and becoming more intermingled in their activities—that whatever processes we have in place for the public sector should also

apply to the private sector. I think this is now becoming even more important with each state in Australia collocating a private hospital on public hospital facilities. In the minds of the public they just see it as the health system—they do not differentiate between public and private. There is an increasing expectation that patients have access to similar sorts of information in the public sector, and I would suspect that that will transfer to the private sector as well.

CHAIR—Thank you very much for that presentation. It was most interesting. Rather than resolving the questions, it has posed more questions. From a professional point of view, what ethical standards—if that is the correct terminology—exist within the medical profession to stop the abuse of data that has been collected and transmitted. Are there any regulatory frameworks within the profession itself?

Dr Collie—There are no regulatory frameworks other than self-regulation. I think that actually does work quite well within the profession, but so much of the data which is held by medical practitioners now is not solely held by them as individuals. There is the opportunity, if they are establishing computerised information systems, to have computer professionals accessing their data files as part of their job. They are not bound by the same professional code of ethics that, say, the medical profession is in terms of ensuring confidentiality of sensitive information which is provided to individuals.

CHAIR—So in areas like HIV-AIDS there is no regulatory framework in existence to stop that medical practitioner from divulging that an individual is a victim of HIV or of AIDS?

Dr Collie—Only the professional code of ethics. Certainly, in terms of legislation, it is my understanding that the medical practitioner has to do everything in their power to ensure that the patient with HIV does disclose that information to any sexual partners that they have. Some practitioners may actually see that it is in the public interest to disclose that information to sexual partners. It becomes very difficult, at that stage, to break down the patient-doctor confidential relationship which, by the very nature of some disorders, when it is very important that it remain as a confidential interaction.

CHAIR—I can understand the confidentiality from an ethical point of view, but I thought there was some other regulation in existence to stop a doctor or nurse—or whoever is assisting the doctor—from disclosing—

Dr Collie—There are the general laws of defamation which would actually come into play if people felt that information which was publicly disclosed had done them some harm. You could go through the normal legal processes on the basis of that.

CHAIR—The other question I have is whether you have any instances of abuses where medical data that has been collected has been so used that it could be seen that usage of that data was an abuse of the information and a gross invasion of the privacy of the individuals who were mentioned?

Dr Collie—I think there is anecdotal evidence of accidental disclosure. If I could perhaps paint a scenario—this tends to happen, we are led to believe, in small country towns where everybody knows everybody else. It is very easy then for, say, the doctor's receptionist to be going through the files and suddenly find the next-door neighbour who has been to the doctor and could accidentally say, 'I didn't know you were sick. If I had known you were sick, I would have come around and made a cup of tea for you.' There is that sort of anecdotal evidence.

When I was in the health department we were very interested in the views of the community when we were actually setting up a peri-natal database. One of the questions on the database was to ask doctors to disclose how many terminations of pregnancy a woman might have had. This could be a therapeutic termination or it could be for contraceptive purposes. The question was asked about how many terminations of pregnancy did the woman have, right through from a natural miscarriage to a therapeutic process.

The community in Queensland felt very strongly that that information should not be disclosed to medical practitioners even though the data would have been provided anonymously to the data collection. There was still enough identifying information, the community felt, so that any of the information which was kept by a government agency might compromise them in the future. I think we have to realise that sensitivity is perhaps unique to Queensland because of its relatively small population, relatively dispersed population, small number of country towns and the fact that it is quite easy for people to feel that there may be unauthorised access to confidential medical information as part of the care process that goes on.

CHAIR—That is very important in the light of what you said about the meshing or mingling of the private sector with the public sector. In terms of controls over the use of information, are there any distinctions currently operating—either from an ethical, professional point of view or from a regulatory point of view—between the two systems in the medical field: private, on one hand, and public on the other?

Dr Collie—The doctors who are employed in the public health system are governed by the Health Services Act 1991, which states quite clearly the need for the provision of confidentiality for health data and information. There are sanctions relating to unauthorised disclosure of that information. That has actually been taken to extremes by some of my colleagues who will not even send a letter back to the referring GP without the patient's approval to do so. I think most of the medical profession feel that is taking it a bit too far, but that has actually happened. It is a similar case with the sharing of information regarding a patient across public health agencies: people have seen that that is inappropriate in certain times even though it may be seen to be in the best interests of the patient.

That legislation has not been tested as to whether it actually applies to the private sector. I think that it probably would have difficulty applying to the private sector because the Health Services Act, to my knowledge, does not have any other interrelationship with the private sector. But, as I said, that has yet to be tested.

CHAIR—How does the private sector handle that now? Does it have a framework of standards that it seeks to comply with?

Dr Collie—Most of us in the medical profession feel that we are governed by the Hippocratic oath, the high ethical standards which have grown up as part of the profession and the AMA policies on information relating to patients. To a large extent it is self-regulated in the private sector. We do not actually hear of any massive disclosures but I think that the potential is always there. I think what perhaps worries the general public as much as anything else is their perceptions, as opposed to what is actually happening in reality.

CHAIR—I want to move from that theme to the adjunct of the direct medical professional thing. An earlier witness gave us this morning what he described as a scare sheet. He talked about the scare sheet—things that would happen to an individual consumer on an actual day. The individual was on a telephone, he was driving, he was sending an email, he was dining, he was mail ordering and shopping—all of which were linked into various databases.

The one I want to put to you is about getting prescriptions, which is an integral part of the medical profession. What was put to us this morning was that the individual stops at a pharmacy to get a tranquilliser prescription. His name, the drug and the doctor became part of the data base for the pharmacy chain and then:

FIRST USE: The chain is part of a pharmaceutical company that combines the data with lists of magazine subscribers.

LATER USE: A rival tranquilliser company advertises in Joe's favourite magazine; company mailings urge Joe's doctor to switch.

Joe is the hypothetical name given to the individual. Have you any instances of where data has been misused by an ancillary to the direct medical profession—where the Hippocratic oath does not apply—for example, by drug companies?

Dr Collie—Not to my knowledge, but I am sure there is an increasing potential for that to happen as the databases become more sophisticated and more targeted at individuals. It will only be a matter of time before that happens.

CHAIR—Could it be targeted at doctors as well?

Dr Collie—Yes. I would say doctors are probably more at risk of receiving the targeted information, particularly if there is a relationship between the prescriber and the drug companies' profits. At present it is very difficult for patients to demand a particular drug from a doctor. So to target patients in relation to increasing a company's profits is not a realistic view at the moment. It may be in the future as patients become more aware. Because of the Internet, we are finding patients becoming much more aware of their condition and treatments for their condition. We will see patients becoming much more

assertive about medications and the side effects. In the longer term, maybe the drug companies will have the potential to target patients.

CHAIR—Doesn't that make life easier for you? The problems are half diagnosed before they even see you.

Dr Collie—It changes the relationship between the doctor and the patient to a much more equal partnership, so that the doctor becomes the informed informant to the patient. It increases the patient's sovereignty in some ways. I would not be too unhappy with that situation, although a few of my older colleagues might be, because they would see it as a threat to their personal integrity and knowledge base in terms of the treatment of patients. HIV positive people, people with cystic fibrosis, young people who are growing up with congenital heart disease, are really a different group of patients from what we have ever related to before in terms of dynamics between service providers and patients. They know more about their condition than most of us will ever know.

CHAIR—The point I was trying to get to earlier was that a self-regulatory system seems to operate, from a professional point of view, with the medical practitioners, doctors and professional people. On the ancillary side of things, with pharmacists, drug companies and others associated with it, could a self-regulatory system operate without the need for a legislative framework to protect privacy?

Dr Collie—Where I tend to come from is that, if you can get self-regulation, that is the ideal. In my experience, if there is any doubt about self-regulation, you probably do have to enshrine prescriptions in legislation to ensure overall compliance. In 99.9 per cent of situations, self-regulation will probably be quite satisfactory, but there will always be that one breach which causes a patient or an individual group of patients a problem, and service providers as well. The problems associated with that are probably not worth while.

The one thing that medical professionals are concerned about with regard to access to the records they keep about patients is the objectivity of those records. When freedom of information legislation came into Queensland, there was a lot of concern in the public hospital system about what might happen. In actual fact, very little happened. The public is really quite understanding in lots of ways. There was anxiety on the part of the medical profession about the injudicious statement that they perhaps made at the end of a long and tiring day, where they committed a statement about a patient to the record, which they perhaps regretted in hindsight. They felt that it would break down the doctor-patient relationship if the patient had access to that.

I think most medical professionals in the private sector seem to feel that if any legislation were put in place, it should be made prospective for all data, but retrospective for objective data, not subjective data. That is what most medical professionals would probably accept.

Senator ABETZ—A number of issues were raised during the questioning by Senator McKiernan. First of all, in relation to self-regulation, you indicated that 99.9 per cent of

cases, you thought, would be appropriately dealt with through a self-regulation mechanism. Are you speaking just from the medical area?

Dr Collie—Yes.

Senator ABETZ—I suppose it begs a question. Often, the community does clamour for legislation for that 0.1 per cent. Often, with all the best will in the world, legislation cannot and will not deal appropriately with those hard cases. When you seek to legislate for that 0.1 per cent of hard cases, you create a whole host of other problems. Would you like to comment on the difficulty in trying to legislate for 0.1 per cent without occasioning a whole host of other difficulties?

Dr Collie—I think that is an interesting question and I guess that is one of the problems we have with the public perceiving bureaucratic red tape and perhaps there being so much red tape that it acts against the best interests of the patient, as opposed to being in their interest.

When we were writing the guidelines and using the Commonwealth's information privacy principles, we wrote down the principles and then we gave a number of examples of how those principles may be applied. I found that was quite a useful process because you are never able to cover every contingency, but you can provide a framework within which an intelligent person—and I think we have to accept that the majority of people that we are dealing with are intelligent people—can say, 'This situation fits into that particular principle and these are the examples that relate to the application of that principle; if I apply that consistently, I will get it right,' rather than being totally prescriptive in minute detail about what can and cannot be done.

I do not think we are going to be able to predict the future, say, in the area of genetics and what that may mean once you have had a diagnosis in relation to an area of genetic information. We do not know what the outcome of that may be, because the science is not there yet, nor have we got any idea how the community might use that information individually and collectively against groups of individuals.

The legislation should give guidance as opposed to absolute prescription in the majority of areas. I think we can cover a lot more contingencies in that way. There will always be a problem in a very small percentage of cases, but perhaps society has to accept that.

Senator ABETZ—I speak as a member of the legal profession when I say this: unfortunately, we are becoming a more litigious society. With regard to the cold that I am currently suffering from, if Senator McKiernan were to catch it, possibly there would be a lawyer who would be willing to take on a case to sue me, because nobody is ever wrong any more. It is always somebody else's fault and there is somebody to be sued. Could and would that restrict a lot of the professional assessments that are made on a genuine basis?

That takes me to another area of, let us say, reportable diseases. How do you balance what is within the community interest at large and what is within the best interests of a particular individual? They can often come into substantial conflict and, in the medical area, they are ultimately value judgments. Being value judgments, genuinely motivated people will undoubtedly get them wrong or people will simply have differing opinions based on different values. If people who have to make those sorts of subjective judgments think in the future that they might be subjected to legal action for exercising those judgments, you might then have a reluctance to provide information which may be of real benefit to the community.

Dr Collie—I think there has always been a concern over the practice of defensive medicine—with over-investigating of patients and exposure to things like radiation—to ensure that you do not miss that fracture, because if you miss it somebody will take you to court. The fact that it did not make any difference to the healing process is immaterial. I think the medical profession has had to exercise some judgments in that area and, as I said, there are concerns about us being driven to the same state as the United States in terms of the practice of defensive medicine.

The other scenario you were painting was the one of public health. How much information needs to be disclosed to public authorities in the name of the public's health so that actions can be initiated to protect the health of the public? Again, that really is a delicate balance, and I would suspect that HIV posed all of the issues in relation to that. Up until then, it had been accepted that, if you had tuberculosis, you were removed from the public gaze for months and months and months on end, as happened when the hospital in which I worked was built. You were given free treatment and a pension but you were not allowed to see your family. Now with modern drug therapies, it is a lot easier to handle those sorts of conditions.

One of the things that is concerning the world and the medical profession is the emergence of infectious diseases, which are becoming more difficult to treat. How much is it in the interests of the public to disclose that a patient has a new strain of virus? For example, the equine morbillivirus arose in Queensland with the fatality of two people and the infection of others in the transmission of a virus from animals to humans. How much do you inform the public on a day-by-day, case-by-case blow about that individual's illness in the name of public interest?

There is a very fine line in terms of that relationship because, if the outcome is fatal, then it is a really macabre story that is being told in the tabloid newspapers with an hour-by-hour description of that patient's demise. I guess people felt in that case it was in the public interest to disclose it to the public to prevent public panic, so to speak, in terms of evacuating the suburb and not allowing people back. It is a very fine line in that process. Certainly, it is much easier if you have the patient's consent to disclose the information, and most times we do try to obtain patient consent for any form of disclosure to a third party, but under the legislation sometimes you are compelled to report that information.

I would feel more comfortable if there was much more public debate and public knowledge about those sorts of things. But I am told that it is very hard to get on the front

page of the paper because it really does not mean anything to the average person in the street until there is a major problem. So you actually cannot get public debate on issues such as that.

Senator ABETZ—What potential applications could there be with privacy and the public campaign at the moment being undertaken by the federal government in relation to immunisation of young children, that if a child is not immunised, that child presents a potential health risk?

Dr Collie—I think the public health professionals and the nation were driven to that extent because we might say that self-regulation did not apply. The fact was the information was out there in the public about the importance of immunisation but parents were still not bringing their children along for immunisation for one reason or another. It was probably convenience as much as anything but also a lack of societal wisdom about the sequelae of these diseases. Our grandmothers remember when diphtheria was rife. In fact, they probably had diphtheria and survived it. So my mother's generation made sure that my generation were immunised against diphtheria. Whooping cough, smallpox and all of those sorts of things were real diseases a generation ago but today's young people have never seen them and never interacted with them. The most they have had is influenza. People have been given antibiotics and there is an assumption that antibiotics will cure everything.

So I think the public health professionals were driven to other ways of trying to target small children and to insist that the parents brought them along to immunisation. They actually had to consciously opt out and accept responsibility, otherwise they would be opting in. I think it is interesting to hark back to my own childhood. I was lined up with all the other kids and we had our shots at school. It seems rather strange that we could not institute that. In terms of the rights of individuals, you cannot collect children and do those sorts of things with their parents consent, but without their parents actually being actively involved in the process. We had to look at other mechanisms for identifying the birth of individuals and following them through the process either through general practitioners or public health clinics.

Senator ABETZ—I will follow up with one last question. It relates to the chair's question on Professor Quirk's scare sheet—as he described it—and prescriptions. You indicated that it would be unlikely for a patient to be contacted by a pharmaceutical company. It is usually the case that a doctor is next door to a pharmacy—there can be one or two doctors. It would stand to reason that a database is then collected that shows that a particular doctor is prescribing a particular brand of a particular medication as opposed to another one. That information may then become quite valuable to make that doctor ripe for a targeted campaign by the alternate supplier of the same medicine of a different brand to say, 'Why don't you start prescribing our brand of medicine?' Could you see that as a more likely scenario than the one where the patient might go to the doctor requesting a different brand?

Dr Collie—Yes, I could see that as a more likely scenario. The Commonwealth legislation in respect of the pharmaceutical benefits scheme would make that, in the short term, very difficult in terms of getting unauthorised access to those databases.

I think our computer colleagues see hacking as being an integral part of the professional development of young computer buffs. Anything like that always becomes a challenge. We need to be 100 per cent certain that people cannot get access to that data or to the link data. The thing that worries me more than anything else is that there may be two databases which are not seen to be sensitive to anybody and everybody feels, 'It is my subscription to whatever magazine,' but if you link that to another bit of information, which might appear equally as innocuous, you actually get a very good perspective of the individual which would not normally be disclosed to a third party on a normal basis, and it may make them the target of intrusive targeting which they may not be able to do anything about. As we see with the junk mail, it is very hard to stop it coming. Once people have your name on a database, it just keeps coming through the system.

Senator ABETZ—Can you see privacy legislation or detailed privacy requirements adding any costs to the delivery of medical services to the Australian community? Can you see it having any cost impact?

Dr Collie—I think any of these processes have a cost. One really has to look at the benefit and weigh it up against the cost.

Senator ABETZ—But with your more detailed analysis of it from the Queensland situation, would you be prepared to put a dollar figure on it?

Dr Collie—No, I do not think so. I think it is too difficult to put a dollar figure on it. I know it can tie up staff in selected areas quite significantly, and particularly so in the mental health area—say, under freedom of information. Sometimes there has to be quite a bit of editing of medical records in the interests of the patient or of a third party, who has provided information to assist that patient, who may be at risk as a result of that. It can actually be quite time consuming for professional people to make those sorts of judgments.

I have been harking back to the legislation about AIDS and HIV positive people. Certainly for public health professionals, the Health Services Act would preclude us from disclosing that information to third parties but, as I said, that has not been tested in the private sector. I was thinking more globally—in terms of medical staff throughout Queensland—with respect to the disclosure of sensitive information and legislative constraints upon that.

CHAIR—Thank you very much for your attendance here this afternoon. It has been most helpful and has given us quite a different perspective on the inquiry—one that I had not had the same appreciation of before your attendance.

Dr Collie—Thank you for the invitation.

[1.17 p.m.]

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CHAIR—Welcome. Thank you for your attendance here this afternoon and for assisting the committee in its deliberations. I invite you to make a short opening statement, and at the conclusion of that statement I will invite members of the committee to address questions to you.

Mr Elborne—The statement will take about two or three minutes. We are appearing on behalf of 1,446 real estate offices and 3,625 individual members of the Real Estate Institute of Queensland which, to the best of our knowledge, represents 70 per cent of real estate practitioners in Queensland.

The role of the real estate agency, and in particular the property management sector, is a very responsible one based on trust and duty of care. Trust is represented by the lessor/property owner placing their valuable property in the hands of a real estate agency for management. The duty of care is represented by the responsibility that the agency must take in the careful selection of tenants, who have the right to occupancy and care of the premises in exchange for the rental paid.

Current legislative requirements regarding privacy exclude real estate agents and property managers from the definition of ‘credit provider’ and, consequently, they are unable to be a member of a credit reporting agency and are prohibited from seeking references from finance companies, banks or other credit reference associations. This leaves the need for established tenancy databases. Such databases should contain information only on the default of tenants and their performance regarding previous tenancies—whether there has been default in relation to rental payments, the condition of the property, bond refunds or other information of importance when considering the suitability of a tenant.

There are a large number of case studies where litigation has been successful against agencies that have failed to exercise appropriate duty of care in the selection of tenants who have subsequently failed to pay rent and/or severely damaged the lessor’s property. Such databases must offer security of information, with access available only to appropriate people. Such information must be verifiable with and by the agency placing the detail on the database, and it must also be available to any tenant whose name is registered on the

database. There must also be provision for the information to be updated if the default is remedied.

The database offered by the Tenancy Information Centre of Australia which is used by the majority of Queensland agents is operated on a totally professional basis and does have the approval of the Privacy Commissioner. On behalf of our members I have been involved with the resolution of disputes that have arisen between members, tenants, agents and database companies where it was maintained that the information placed on the database was incorrect or unjustified.

We are currently aware of the existence on the Internet of Tenant Check. This is a list of names on a database. This is also a list that any person with access to the Internet can call up. The names, without any specific indicators as to identification by virtue of this listing, place the named individual at the risk of being classified as a defaulting tenant. The REIQ have deemed such a database as irresponsible, and if possible it should be banned.

It is recommended that a code of practice in relation to privacy in the private sector be implemented, and the REIQ would be happy to offer any assistance that may be needed in the establishment of such a code. The Real Estate Institute of Queensland supports the need for the right of privacy by any person in the private sector; however, there must also be available access to appropriate information to protect rights and properties of the individual. I am happy to leave a copy of that statement with you for *Hansard*.

CHAIR—Thank you very much. To your knowledge, how many agencies in the state of Queensland collect data on tenants—that is, those that are uniquely Queensland and those that are national organisations that operate in Queensland?

Mr Elborne—We can really only speak for Queensland. Of the 1,446 offices that are members of our REIQ, probably a good 1,200 of them would have rent rolls which would require tenancy database information to be available for access in tenant selection, and we are about 70 per cent of agents in Queensland.

Mrs Bennett—Probably TICA could answer that question more accurately. We are not sure. We would say that the majority of agents who are in rental properties would probably belong to TICA. It would be a failure in their duty of care not to be.

CHAIR—We are talking with TICA tomorrow in Sydney.

Mrs Bennett—They should be able to give you that figure.

CHAIR—Thank you. You said that these organisations operate on a ‘totally professional basis’—I think they were your words. How does one measure what a totally professional basis is?

Mr Elborne—On the fact that the information is secure and can be accessed only by people who have the need for it.

Mrs Bennett—You have to have a password.

Mr Elborne—We have to have a password to identify us so that we can get into it. The information is lodged on a declaration basis so that it is verifiable by the database back to the person lodging it.

Mrs Bennett—In most cases when it is lodged there is no actual comment made. It will probably say something along the lines of ‘refer to the agent’, and it is up to the agent to contact the noted agent to check exactly what the detail is.

Mr Elborne—It creates a network so that when a person who has defaulted with agent A applies to agent B, agent B can make an inquiry of TICA. TICA would say, ‘They owe so much money to agent A,’ and TICA would put the agents in contact with each other so that they could verify the detail.

CHAIR—Earlier today we had a witness from the Tenants Union of Queensland who gave us a couple of case studies as part of their submission. In one particular instance a person was refused rental because their apparently common name got mixed up with somebody else’s, and they were refused accommodation.

Mr Elborne—The database usually identifies passport numbers, drivers licence numbers, date of birth and all of those sorts of things which verify that particular person. The circumstances where there would be many people with the same information would be very small.

Mrs Bennett—You could not reject a tenant purely on the basis that the name was listed. You would have to have more information to identify that tenant than just the name. I believe it is not uncommon, even in government agencies, to use other forms of identification such as date of birth, drivers licence and passport. They are the three forms of identification apart from name. If that cannot be verified, if there is a lodgment of a name, you can check with TICA. They can only say that they have got a name, but they cannot identify that person. In other words, there is no date of birth, so you cannot really say that is the same person. I think you will find out from TICA that it is, apparently, being tightened. They are taking a new direction. Unless that is supplied, it does not even get noted. All that information has to be there.

CHAIR—You also said in your introduction that you had participated in negotiations, in conciliation and in dispute resolution.

Mr Elborne—My role at the REIQ is as the first point of inquiry for people ringing in and lodging complaints about real estate agents and that sort of thing. For example, I get a

complaint from somebody that the agency put them on a database. That information must come to us in writing; I take no action on a phone call. Somebody will write in and say, 'We believe we have been put on a tenant database unjustly.' Because of our access and association with TICA, I ring them and say that I have got an inquiry from Miss So-and-so about the database, and could they tell me if the record is there and what the record is. They will then verify with me that the information is correct. I will quite often speak to the agency as well. I undertake to sort out this information so that the person is not being treated unjustly.

CHAIR—There is one from a Western Australian point of view. You are the nominee on this body of the real estate agents of Queensland.

Mr Elborne—I am not a nominee on the body. I am an agency practice adviser of the Real Estate Institute of Queensland. I do not have any professional association with TICA other than the fact that we deal together. They use our facilities for training courses and that sort of thing.

CHAIR—How many other persons from the Real Estate Institute of Queensland would be able to follow that similar pattern of events that you have described to the committee?

Mr Elborne—No-one else, because that is my role at the REIQ; that is my position.

Mrs Bennett—No-one else would have access.

CHAIR—Okay, that was the point I was chasing. I am sorry if I did this in a roundabout way. You talked about developing a code of practice.

Mr Elborne—We had a gentleman from civil liberties speak to property managers at one of our forums at the REIQ. While there is nothing that governs privacy as far as real estate agents are concerned, he said that an industry itself should possibly look to set its own code in relation to handling privacy legislation. I think that is a great idea.

CHAIR—I just relate that to your earlier comments that it had been done in a totally professional manner and I was surprised to hear that you do not have a code of conduct, a code of practice, in existence.

Mr Elborne—We have our code of ethics and rules of practice as far as the REIQ is concerned. But in regard to the code of conduct specifically relating to the handling of privacy, we have our own advice that we give to our member agents, that we do not just give information out willy-nilly. If somebody contacts us and wants to know where a previous tenant has moved to, we would say to that person, 'You provide us with the information that you want passed on and we will pass it on to them.'

Mrs Bennett—It is now becoming real estate practice that we do not give out information unless we have a faxed request, so we know who we are giving it to. It is also good real estate practice and advice to our members when, say, a reference is being asked from a tenant, which is the normal thing, that we give a scale of performance rather than a personal comment on that tenant—an accurate comment on their payment. Basically, there are only two criteria we can check: ability to pay and ability to care for the property. We would say what their payment record had been with that agency and, on a scale of one to 10, how we considered they had cared for the property. Members are strongly advised not to say any more than that and also to respond to a fax rather than a phone call. It is the same as government departments; we are adopting this practice already.

Mr Elborne—If a person rings an agency and says, ‘Can you tell me where Mary Smith has moved to from such and such an address,’ we would say, ‘Don’t give that information out.’ The person could be an abusive husband she is trying to get away from or it could be anyone else. We are very careful in the advice that we give our members. We tell them that they have a responsibility simply because they are dealing with people’s private lives and private addresses, and they should be very diligent in the way they handle such information.

Mrs Bennett—Just from a time point of view, agencies do not want to be involved in looking up records or doing any more than they have to. We are small business operators, generally, and if we do not have to give out information, we don’t. Unless it is the police, the taxation department or a legitimate inquiry from another agent, we are not in the business of giving out information because we do not have the manpower.

Mr Milton—I support Pam in that very much. The problem that the industry has with duty of care is that the moment an agency has a problem with a tenant and there is an arrears situation—and we are not getting stuck into tenants because there are some very good tenants—the legal advisers of the landlord or lessor say, ‘Let’s check and see what the agent did in selecting that tenant. Was due care taken?’ So the gun is pointed at the agency. TICA has been very good in the sense that we are able to get tenancy information—and nothing else. The information is only on how the tenant performed in their last tenancy or the one before, so that we have some statistical data as to the performance of the tenant.

It is important because there are enough things out in the marketplace these days that are stopping people investing in property. More and more there are little hiccups that affect investor inquiry, and I think if something were removed which stopped professional property managers being able to get this information, that is another risk the investor has to take. We agree that it is very important that individuals’ privacy is maintained and that we are able to get some access to tenancy information.

Mr Elborne—The tenancy databases were formed out of a need. A few years ago when the privacy legislation was changed, real estate agents were no longer classified as credit providers. Before that, a lot of agents were members of organisations like Credit Reference Association, White Mercantile and Dun & Bradstreet, and they could get information. But once the legislation said that a real estate agent is not a credit provider and we were specifically excluded from doing that, our avenues for being able to check the suitability of

tenants were cut off. It was at that time that the databases started to be formed. There is Remington White which has been in Victoria for a long time, and then TICA—who were real estate agents—put together the information that, as real estate agents, they would want. TICA was founded by real estate agents for real estate agents, and they really addressed the need. Their success has been tremendous because real estate agents need to have that information.

Mrs Bennett—In the last few years there have been a number of organisations set up for the protection of tenants, and we see this as rightfully so. Whilst we can see that consumer protection is very necessary, there is also the fact that the average landlord is generally a one-off owner. That is their retirement superannuation and they do not have the safety net there to be able to absorb losses. The average loss on these defaults is just under \$1,000 a defaulter, so it is a considerable amount of money.

Senator ABETZ—On that very interesting and horrifying statistic, what percentage of tenants would you say default?

Mr Elborne—In any rent roll of 100 tenants, you would probably get 85 per cent who are perfect. They pay their rent on time and are no problem at all. Of the other 15, you will probably have 10 who get into arrears with the rent and catch up, but you have to go through the process of chasing them for it. There would probably only be the top five in any hundred who really give you the problems of skipping—doing a midnight run—damaging property and doing those sorts of things. In any legislation, we are talking about the minority group, but people have to have that protection against those situations.

Senator ABETZ—You say that TICA was formed out of a need of real estate agents, which I can understand. If I am a tenant, would I automatically have my name registered with them?

Mrs Bennett—No, only if a default has occurred.

Senator ABETZ—So they are only for default.

Mr Elborne—Only default tenants go on any database.

Mrs Bennett—Nothing is there.

Senator ABETZ—Would there be any benefit—although I suppose there would be an added cost with this—in also noting on the database if I were an exemplary tenant?

Mrs Bennett—There was a practice of certain franchise groups to have a system of what they called ‘A-rating cards’ for tenants. Because of legal advice, that has ceased. I am a real estate agent in my own right and have been in property management for 23 years. You can have tenants who have been great in one tenancy, go away, come back another time and in

the next tenancy—due maybe to circumstances in their lives—they do not perform and meet their commitment. It became advisable not to do that because you cannot say that anyone is bad or good forever.

Mr Elborne—Just simply, the other thing is that the volume and size of a database would be so incredible if every good tenant was listed as well.

Mrs Bennett—I think it is just one of those things today. Whether they give out employment references or anything, everyone is loath to put in writing something that could perhaps be used against them one day.

Mr Milton—I am part of a national real estate company. We have a program for good tenants. We have what is called a ‘gold key tenant’. If a tenant has performed well, they are about to be given—we have previously had a certificate going—a gold key. They are given this key and they can go anywhere in Australia and say that they have been, for the period of time we are referring to, a good tenant.

There are plenty of good tenants. The difficulty is, as Pam said, that a lot of people get the impression that owners of rental properties are big companies. They are not—in Queensland, anyway, which we can speak for. In the main they are just average people trying to provide for their retirement. When you do get a bad tenant in that five per cent, it is generally a fairly costly and a horrific experience.

I think that the present system seems to work pretty well. There may be some cases of the wrong information going out on tenants, which we do not like to see happen. The information is pretty important to the property industry—in that we can find out about their tenancy history at least—because it just makes it so much easier checking them out.

Senator ABETZ—It would not be in your interests or your client’s interests to black-list somebody who, in fact, was a good tenant, so it would stand to reason that there would be a genuine mistake or a misunderstanding. Is that so?

Mr Milton—Yes. If you have a really good tenant, you make sure that, if they are being transferred to Mount Isa, you ring an agent in Mount Isa or refer them to a colleague up there because it is a great benefit to the business in Mount Isa to receive a tenant that they know has a demonstrated ability.

Mrs Bennett—I do not think there is any doubt that the tenant is registered after a default; they are not registered because something has not happened. The danger that you are probably referring to is this: if the tenant makes good a payment or rectifies something, how are they protected once they have done what they have been asked to do? The point to be made is that they would not be in the system unless they had defaulted in the first place.

Senator ABETZ—If somebody has their property subject to a mortgage, making up the arrears will not overcome the problems that the banks caused them in the interim. I can understand what you are saying. There has been a suggestion—and I am quoting from page 5 of the submission called *Privacy and the private sector*—that:

However, there will inevitably be some real estate agents who list tenants simply on the basis of some personality difference, and on the basis of a dispute that arose due to the agent not abiding with the requirements of the Queensland Residential Tenancies Act 1994.

That has been put to us. I thought that you ought to be given the opportunity to respond to that. I think all three of you do want to.

Mrs Bennett—That is saying with no basis whatsoever that an agent would use that for a vendetta. I just do not think people are in the business today to be looking to put their head on the chopping block for no reason. You have to have guidelines. We are all well aware of what the acts are. It has to be a default under those guidelines.

Mr Elborne—If you put a tenant on a database purely for a frivolous reason and then somebody is going to check the database to take on that person, the people who have that person as a current tenant are never going to get rid of him or her because, as soon as the other people check the database, they are going to say, ‘He is a bad tenant; we are not going to give him a job,’ so he has to stay where he is. I just do not think it applies. I cannot imagine any agency doing that. It seems to be a contradiction in terms that you would want to simply be vindictive against the person for—

Senator ABETZ—Who has access to registering somebody on that database? I could understand that, possibly, a professional agency might deal with tenants on a more objective basis than, let us say, an individual landlord who runs his or her own show. He or she does not have access?

Mrs Bennett—No. By the way, the tenant can access all this information. If a tenant believes that there is something on there, they have the right to access it. The tenant can access the Tenancy Information Centre of Australia. I keep referring to the Tenancy Information Centre of Australia because it is my opinion that it meets the guidelines, as we understand it from the information with which we were supplied when the organisation was first set up.

I can see a concern that there may be other organisations that have it, and it worries us as an industry. We do not want to see that either. We want to see something that is useful, legal and has guidelines to it and something that we are not going to be questioned about using.

CHAIR—As for the comment about accessing the information on TICA, we were told this morning that yes, indeed, a person can access it but all they are told is, ‘Yes, you are on

the database,' or 'No, you are not on the database,' and not what is on the database about them. Is that correct?

Mrs Bennett—It would probably be best to ask TICA that. I was under the understanding they could access their information, which I would think would be like what an agent would be, which is being referred to as agent X, Y, Z.

Mr Elborne—I can verify that certainly any person can get a print-out of information that is on TICA. I think there is a fee that they charge to do that. I have just been told it would be \$10.

Mrs Bennett—If they get a print-out they should get the same as the agent, I would have thought, but I am not TICA.

Mr Elborne—There is a fee to do it.

CHAIR—That is something that we will follow through with TICA. Sorry, you were going to say?

Mr Elborne—I was going to say that, in regard to my statement about this tenant check on the Internet, I called it up in my office. I have actually got a page here from it. I did not intend to table it.

There is an introduction sheet and then you hit 'Search' and you come with this list. It is a list of names. I have the Smiths here. There are 28 and they wrap around. There is the information regarding their licence, state, date of birth and the date it was lodged. The lodgment is there and the names.

If I am a Mr Smith and I am applying for whatever, somebody can go to the Internet and look that up—'a private landlord or lessee—M. Smith.' That is on the database. Without going any further, by assumption, I am on the database. This is the sort of thing we believe should be controlled because it is available to anybody who wants to call it up on the computer. The information, even the name, should be available only to appropriate people. That sort of thing concerns us greatly.

CHAIR—Under what name is that document put out?

Mr Elborne—It is just called 'Tenant Check'. It is put out by Console Australia.

CHAIR—I will address some questions to you on that. Do you know anything about that organisation? We had, incidentally, invited them to appear before the committee today, but they declined our invitation.

Mr Elborne—I believe that they are a computer operation. That is about all I know of them. I did not even know they were into tenant databases. All I knew was that they were an organisation that had computer programs. They do have a property management computer program that they market through the industry. I only found about this last week, and I was appalled when I saw it. It is the worst form of database that you could possibly imagine. It is freely available to anybody to see a name and make assumptions. There is a Smith, Paul and Charmaine. If I was Paul or Charmaine Smith and I saw that, I would be pretty—

CHAIR—Perhaps, now that you have mentioned a name, you perhaps ought to table that.

Mr Elborne—Yes, I am quite happy to table that.

CHAIR—It is not something that we will be publishing as such.

Mr Elborne—Certainly, I am quite happy to do that.

CHAIR—If there are questions, come back to us at the end of the session.

Senator ABETZ—Chances are you do not know what is in the mind of the staff of Console Pty Ltd, but I will ask the question anyway. Something might be escaping me, but for what commercial benefit would Console be providing a list like that, which is accessible, as I understand it, by anybody who wants to access it? Where is the financial benefit for them if you do not need a special password to get in or need to be registered with them, et cetera?

Mr Elborne—I assume that you have got to identify numbers and things on the search page. I think once you buy their program you then have access to that. It is an add-on to buying their property management program.

Mr Milton—They have a software program for property management which they are selling to real estate agents around Australia. That is the add-on.

CHAIR—Do you know where they get their information from?

Mr Elborne—I have no idea.

Mrs Bennett—Probably from their members.

Mr Elborne—When the sheet talks about lodging, it asks about people, it talks about 'lists from your own database'. People put the information on defaulting tenants on their own database.

CHAIR—I put it to you that the appearance of information such as that which has been presented to the committee now provides the basis for a very strong argument for some form of regulatory framework to be put in place to control it.

Mr Elborne—Certainly over that type of thing. I have nothing against it. TICA could tell you. They are going on to the Internet as well. You will not be able to get onto the Internet and get any names at all until you use your password. They are putting out a tenant's information sheet that lets tenants know what may lead to their name being on a database. They are providing a total database service as well. Tenants may think: if we do not pay our rent, if we damage the property, if we do this and do that, we are going to end up on the databases as well.

CHAIR—I am not all that comforted by the need for discrete numbers or passwords to get into things. My wife had her handbag snatched in Kuala Lumpur a week on Sunday and, despite all the best protective measures, including the blockage on the card which was reported pretty quickly afterwards, we still found that withdrawals had taken place. We have not been told yet if there have been any purchases.

Mr Elborne—I understand what you mean. Anything to do with computers makes you think of hackers and that sort of thing. It worries me that my life insurance, my bank account, my finance and my house could be signed over to somebody else by a hacker. That is what we live with. That is technology, is it not?

Mrs Bennett—Every time you register your credit card by phone, you do not know who else has got it.

Mr Milton—I think the important thing with TICA in the present system is that it is only going to licensed real estate agents who are part of that organisation and they are only providing information in relation to tenancy. How they work that on the Internet I am not sure; I am not all that computer literate. But the current system seems to be working quite well and we have not had any cases brought to our attention where there has been a mix-up of information. None has come to our attention that we are aware of at this point.

CHAIR—We are talking with TICA tomorrow. In the registration of real estate agents in this state, are the licences renewable on an annual or biannual basis?

Mr Elborne—The Department of Consumer Affairs issues licences which are renewable annually.

CHAIR—Are all agents part of the institute?

Mr Elborne—No, there is no compulsion for an agent to join the REIQ. Of the numbers I quoted at the beginning, about 70 per cent of practitioners in Queensland are members of the REIQ.

CHAIR—And those that are members of REIQ abide by the standards—

Mr Elborne—Our own code of conduct and code of ethics.

CHAIR—But that other 30 per cent that are outside REIQ—

Mr Elborne—There is a code of professional conduct under the Auctioneers and Agents Act, which is the licensing act.

CHAIR—And under consumer affairs here in this state?

Mr Elborne—Yes.

Mr Milton—There is a code, and that is the important thing.

CHAIR—I wanted to elicit that for the record.

Mr Elborne—The other thing is that we are anxious to see the role of the real estate agent and property manager protected so that it is not diminished. If there is no basis for agents to be able to check out and verify tenants and undertake the duty of care to provide a good service, there is no need for private landlords to use agents. We are concerned about the things that diminish the role of real estate agents. We believe it is relevant that only real estate agents have access to the databases like TICA. They were approached by the property owners association to provide a service to those, but they said, no, only real estate agents could be members, only real estate agents could lodge the information and only real estate agents could access information. That protects the role of a real estate agent and property manager, to make them more professional.

CHAIR—In your opening comments you mentioned the amount of litigation against agencies. Do you have some statistics on that?

Mr Elborne—I do not have any specific statistics. We run regular forums, and Aon Risk Services, who are our insurance brokers and the REIQ professional indemnity insurers, tell us that there is a considerable number of complaints under professional indemnity insurance which come against agents in relation to property management and duty of care—not checking out tenants properly and that sort of thing. The world has gone mad with litigation.

Mrs Bennett—The bulk of litigation under the professional indemnity is against property management actions.

Mr Elborne—More so than sales or valuation.

Mrs Bennett—There is a situation in Cairns at the moment with an agent who I believe did not check a tenant through TICA. The tenant was on the database and the tenant did cause considerable damage to a property as well as defaulting on rent. That particular landlord took that agent to court because they failed in their duty of care. They had an avenue of checking that tenant and they failed to exercise that option. The costs were \$26,000 against that agent because they did not use it and the tenant was registered as a defaulter and had damaged property previously.

CHAIR—Under what legislation would that action have been taken?

Mr Elborne—Under common law and under the professional indemnity insurance. The REIQ requires that all our members hold professional indemnity insurance. We will not accept a person to membership unless we know that they do hold professional indemnity insurance.

Mr Milton—I have appeared on two or three occasions as an expert witness in litigation against property managers. The first question that seems to be asked by the landlord's solicitor, when they are having a go at an agent, is, 'What did you do to check out the tenant?' Then you get asked, 'Was the action of the agent in this case reasonable? Was everything done in terms of references, tenancy checks and that sort of thing?' So that is where the industry comes from if we do not. As Pam said, with the case in Cairns, the tenant was on the TICA database. The agent was not able to establish that they had done that check and subsequently paid the price. So it is a big issue.

Mrs Bennett—It is a primary function of the agent to make sure that they have good tenant selection. One of the problems is that, if you are a tenant who has a record of doing something wrong, the first thing you do is say that you live at home with mum and dad or your brother or your aunt or someone else. Of course, when you ring those people up, they say, 'Yes, they live here. They've been here—never rented anywhere.' How do you find out when those people give you only that information, and they say that is the only place they have lived? It is only through something like TICA that you will then find that they have been renting—and probably renting for some time and repeatedly done things. As we are saying, they may be only a small percentage, but they learn to use the system, and they know how the system works. This organisation only started to bite, probably, in the last 12 months, because it has taken that long for it to be established—for agents to come on board and use the system properly—and to start taking effect.

There was only a news show here locally. I think *Brisbane Extra* did a segment on 'black list', as they like to call it. People continually refer to it as 'black list'—which we do not; it is a default—and it did this whole segment on this tenant who was constantly in arrears, had had six notices to remedy issued, two notices to leave and was still 18 days behind in her rent. They interviewed her and she was saying how unfair it was. The Tenants Union—I think it was Tim—was interviewed on it. The whole point was that if she paid her rent she would not have a problem. The agent really did not want her out. He just wanted her to pay the rent. But in her mind, she thought, 'I'm a good tenant because I haven't damaged the house yet. The fact that I haven't paid the rent . . . ' And this was the general

theme of it. Everyone can occasionally not pay their rent, but you have to be seven days in arrears, and then you have to have another seven days to pay it. It is not that after one day you are on the list; it is way down the track before you do it.

Right now the legislation says that if you default and you get a notice to remedy, and then you pay the rent right now, you can still be asked to leave. That legislation changes from 1 December to say that you cannot make a tenant leave, even if they pay the rent in the remedy time. However, if, three times in a two-year period, they default on a notice to remedy, you can then ask them to leave. The system is already place to get more cutthroat with the tenant if you want to, but agents are not out there trying to get them out; they just want consistent payment of rent—the basic responsibility to pay the rent. So they do not get rid of tenants willy-nilly.

Senator ABETZ—If we were to accept the need for TICA and the default list, or ‘black list’ as it was called by the tenants’ representatives, can you see the need for certain safeguards?

Mrs Bennett—We do, definitely.

Senator ABETZ—What would you be recommending or suggesting, or do you say that the system is good enough now? What would happen, for example, if I have been a pretty good tenant, but I get listed because of a personality conflict?

Mrs Bennett—I have never heard that before. You would be able to query TICA tomorrow about something like that.

Senator ABETZ—Can you accept that that possibility might arise, nevertheless?

Mrs Bennett—There is nothing that is a default. It has to default against whatever act you are acting under. A personality clash is not a default.

Mr Milton—I suppose, human nature being what it is, that you could not totally rule it out. But I can say this: property managers are in the busiest section of the real estate industry; they are busier than the sales people; and they are handling 15 things at once. Whilst I would not rule out a personality clash, I do not see it happening, in practice, with a real estate agent. It might happen with a private landlord, but private landlords cannot get access to this. I could not see it happening with a professional agent.

Senator ABETZ—Let us dispense with the personality scenario. Let us take on a genuine mistake where the data processor accidentally types in a wrong name—sees Eric but thinks Derek, and for whatever reason types in the name Derek instead of Eric, and then somebody who happens to be a Derek Smith comes along instead of an Eric Smith.

Mrs Bennett—With the same date of birth? That is the safeguard; you would have to have that.

Mr Elborne—And possibly the same driver's licence number. The applications for tenancy that people have to fill in for the REIQ—

Senator ABETZ—Is all of that information put in as well?

Mr Elborne—Yes—driver's licence numbers, passport numbers, dates of birth and all those sorts of things. There is a whole range of verifiers. We get people who have defaulted at one place as Joe Brown and who might rent the next place as Peter Brown, but when he puts his driver's licence number on it, the database will show that Peter Brown and Joe Brown actually have the same driver's licence number. That is another verifier.

Mrs Bennett—I believe that the Queensland government, which issues bonds for people who are unable to afford them, does it on the basis of name and date of birth; that is their control. By the way, if they issue one bond and it is not paid back by that person, they will not issue another. I believe they have approached TICA about trying to be on this same system themselves.

CHAIR—What do you do in instances where a person does not have a passport or a driver's licence?

Mr Elborne—You would put a date of birth; that would be the third thing.

CHAIR—That is the only identifier. When the privacy legislation was passed in 1980 the real estate industry put up a very strong fight for the databases to be included in, I think it was called, the 'credit providers'. Does the industry still have that view?

Mr Elborne—If there was some way that they could be regarded as credit providers so that they could have access to the credit reference associations and those sorts of things there may be no need for tenant default databases. But I think they have now become a fact of life, and the industry certainly would be a bit behind the eight ball without them because they have come to rely on them.

Mrs Bennett—That may give a credit rating, but it would not give a record of the tenant damaging properties and the costs still owing. Most of the time the people who do this sort of thing do not leave forwarding addresses. There may be the Small Claims Court to recoup damages to \$5,000, and that would be somewhere you could check but, to my knowledge, the chance of success is not very great because you cannot find the people to get the money out of them.

CHAIR—Thank you very much for your attendance here this afternoon. It has been most beneficial. In the beginning of the inquiry today I made a statement on the record that my

wife and I hold a property back in Perth which is on the rental market. I did that merely for the record and declaration of interests. I perhaps also ought to declare that on the other side of the continent I am a tenant in a property in Canberra, so I have it from both sides if there is any conflict of interest. We are very sensitive these days about information like that.

Senator ABETZ—If we are declaring interests, my public register discloses that I am also a property owner for investment purposes.

Mrs Bennett—Could we ask: which would you prefer to be?

CHAIR—I would rather be a tenant.

Committee adjourned at 2.04 p.m.