

Small business exemption

Outline of chapter

2.1 In this chapter of the report the following issues are considered:

- Support for the exemption.
- Criticism of the exemption concerning –
 - ⇒ its fairness;
 - ⇒ its complexity;
 - ⇒ the compliance costs it might create; and
 - ⇒ the damage its application may do to small business.
- The application of the exemption to particular businesses –
 - ⇒ non-profit organisations;
 - ⇒ health service providers; and
 - ⇒ tenancy databases.
- Other issues such as –
 - ⇒ the proposed regulation making power; and
 - ⇒ employee records.
- The Committee's suggested amendments.

Background

2.2 The Attorney-General has said that:

...while protecting privacy is an important goal, it must be balanced against the need to avoid unnecessary costs on small business. For this reason, only small businesses that pose a high risk to privacy will be required to comply with the legislation.¹

- 2.3 The Bill generally will apply to 'organisations' as defined in sub-clause 6C(1). However, small business operators are excluded from the definition of organisation and are therefore not regulated by the provisions of the Bill. Further, the National Privacy Principles (NPPs) will not apply to any small business for a period of 12 months after the commencement of the Bill to allow those small businesses that will be required to comply with the Bill time to ensure that their practices and systems are compliant.² Paragraph 2.5 contains an outline of those small businesses whose activities will be regulated by the Bill because their activities are considered to pose a potential privacy risk.
- 2.4 A small business operator is defined as an individual, body corporate, partnership, unincorporated association or trust that carries on one or more small business but does not carry on a business that is not a small business.³ 'Small business' is in turn defined as a business with an annual turnover of \$3 million or less.⁴ Annual turnover in this context is calculated in the manner set out in the *A New Tax System (Goods and Services Tax) Act 1999*.⁵
- 2.5 The Bill provides for certain entities to fall outside the definition of small business operator and therefore become subject to privacy regulation. Entities that are not small business operators are those that:
- have an annual turnover at any time in excess of \$3 million;
 - provide a health service and hold health information except in an employee record;
 - disclose personal information for a benefit, service or advantage;
 - provide a benefit, service or advantage to collect personal information; or
 - are contracted service providers for Commonwealth contracts.⁶
- 2.6 The Bill also establishes a regulation making power that would allow prescribed small business operators to be treated as organisations or particular acts or practices of small business operators to be treated as acts

1 Hon Daryl Williams AM QC MP, Second Reading Speech, 12 April 2000, House of Representatives, *Hansard*, p.15077.

2 See clause 16D of the Bill.

3 See clause 6D(3) of the Bill.

4 See clause 6D(1) of the Bill.

5 See clause 6(D)(2) of the Bill.

6 See clause 6D(4) of the Bill.

or practices of organisations.⁷ In effect, this power purports to allow small businesses to be brought within the regulatory scope of the Bill if their practices warrant such an intervention.

- 2.7 Before the regulation making power can be exercised by the Governor-General, the Attorney-General must have satisfied him or herself that it is desirable in the public interest to make the small business operator or a particular act or practice of a small business operator subject to regulation under the Bill. In addition, the Attorney-General is obliged to consult the Privacy Commissioner about the desirability of prescribing the business, act or practice.⁸

Support for the small business exemption

- 2.8 Few organisations expressed unqualified support for the small business exemption in their submissions, although some did support elements of the exemption and the general principle of reducing compliance costs for small business. For example, the Australian Chamber of Commerce and Industry (ACCI) supported the exemption noting that it had:
- ...advocated a scheme that would not impose unnecessary costs to small business, but would be flexible enough to ensure that risks to privacy could be covered by the legislation where necessary.⁹
- 2.9 The Department of Employment, Workplace Relations and Small Business (DEWRSB) gave evidence to the Committee that it is a core government policy to reduce or minimise the compliance burden placed on small business by regulatory regimes.¹⁰
- 2.10 The Federal Privacy Commissioner, on the other hand, was generally supportive only of the proposed power to enable small businesses to be prescribed by regulation.¹¹ The Victorian Government opposed the exemption and supported only the 12 month delay in the application of the Bill to small businesses.¹²

7 See clauses 6E(1) and 6E(2) of the Bill.

8 See clause 6E(4) of the Bill.

9 Australian Chamber of Commerce and Industry, *Submissions*, p.566.

10 Department of Employment, Workplace Relations and Small Business, *Transcript*, p.202.

11 Privacy Commissioner, *Submissions*, pp.385-386.

12 Victorian Government, Department of State and Regional Development, *Transcript*, p.271.

Criticism of the small business exemption

- 2.11 Criticism of the small business exemption took a number of forms:
- a number of submissions questioned as a matter of principle the need for such an exemption;
 - that the use of a turnover threshold in defining the extent of the exemption is an inappropriate measure in the context of privacy;
 - that the exemption as drafted is excessively complex;
 - that the exemption has the potential to increase the compliance costs of small businesses; and
 - that the exemption will disadvantage small businesses, particularly in the context of electronic commerce.
- 2.12 In addition, a number of other specific criticisms were made about the exemption including the uncertainty in how it will apply to particular types of businesses.

Equity

- 2.13 Those who submitted that, as a matter of principle, the small business exemption should be removed from the Bill argued that, in order for privacy laws to be effective and for fairness, all businesses should be subject to the legislative regime.
- 2.14 AMP, for example, argued in its submission that:
- Competitive neutrality requires that privacy protection apply across the market place. ... Where businesses do handle personal information, they should be bound by privacy legislation.¹³
- 2.15 The Australian Direct Marketing Association took a similar view, opposing the small business exemption on the grounds that it does not create a level playing field.¹⁴
- 2.16 The Committee recognises the importance of an equitable regulatory regime for business, particularly in relation to the new economy where technology allows small and large businesses to compete in the same markets with little consumer differentiation as to the size of the entity they are dealing with. However, an effective regulatory balance must be achieved in order to avoid overly burdening low privacy risk small businesses and this cannot be achieved without some form of exemption

¹³ AMP, *Submissions*, p.S176.

¹⁴ Australian Direct Marketing Association, *Submissions*, p.S192.

for small business. The form the exemption should take is considered further below.

- 2.17 The Bill proposes a turnover threshold of \$3 million for the purposes of defining a small business. The December 1999 key provisions of the Bill released by the Attorney-General's Department contained a threshold of \$1 million.
- 2.18 DEWRSB gave evidence to the Committee that the figure was increased 'after discussion by the Ministers'¹⁵ (the Attorney-General and the Minister for Employment, Workplace Relations and Small Business). The Department also noted that there were a number of different measures used to determine whether a business was a small business. The Australian Bureau of Statistics (ABS), for example, describes a small business as a business with fewer than 20 employees.¹⁶
- 2.19 However, given the likelihood of the existence of high privacy risk low staff number businesses in, for example, the personal service sector or the online world, it was decided that an annual turnover figure that would capture the same number of businesses as the ABS measure should be used.¹⁷ The original figure of \$1 million would have exempted 986,000 businesses.¹⁸ This equates to 93.8% of the businesses that would be defined as small businesses under the ABS definition.¹⁹ The \$3 million threshold exempts 1,040,000 businesses. This equates to 98.9% of small businesses as defined by the ABS.²⁰ It was decided by the Government, therefore, that the \$3 million turnover threshold best represented a consistent measure of what was a small business.
- 2.20 The Committee also asked the Department what proportion of the private sector as a whole would fall below the \$3 million annual turnover threshold. The Department advised that, based on the ABS *Business Growth and Performance Survey 1997-98*, approximately 94% of all Australian businesses fall under the \$3 million threshold.²¹ The Department noted that the survey indicated that the 95% of Australian businesses that are small businesses accounted for only 30% of total sales of goods and services.²² On this basis the Department estimated that the

15 DEWRSB, *Transcript*, p.200.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 DEWRSB, p.S673.

22 Ibid.

proportion of private sector business activity undertaken by small businesses was around 30%.²³

- 2.21 The Committee accepts that the use of employee numbers to determine whether a business is 'small' in the privacy context could have unintended consequences in relation to Internet based businesses. However, provided that the Committee's recommendations in relation to the small business exemption are accepted, the Committee accepts the use of an annual turnover threshold to make that determination. It is the Committee's view that if access to the exemption is determined by addressing issues of privacy risk, the use of a turnover threshold is of reduced significance.
- 2.22 Clearly, any form of threshold will appear to be arbitrary in some circumstances. However, the Committee is of the view that the means of identifying small businesses is not as significant as the means by which small businesses are encouraged to practice and observe appropriate privacy practices. That is, from the perspective of protecting privacy, what is important is the nature of the information being handled and how it is used rather than the size of the business involved. For example, a business with a small turnover could nonetheless handle particularly sensitive data while a large business may not.

Complexity

- 2.23 The NSW Privacy Commissioner argues in his submission that the small business exemption is excessively complex and that those '...wishing to establish the scope of their privacy will be presented with a confusing set of conditions and options.'²⁴
- 2.24 The Federal Privacy Commissioner made a similar comment in his submission:
- If the legislation is to be successful...it needs to establish a scheme that members of the community can understand so that they can be confident that their personal information will not be misused. However, as the Bill is currently drafted the small business exemption is very complicated. Members of the community are likely to find it hard to work out how it will apply in practice and the businesses to which it applies.²⁵
- 2.25 The complexity that these submissions refer to is both general and specific. The Committee accepts that the exemption is generally hard to follow and that the legislative language used is complex. The number of exceptions
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23 Ibid.

24 Privacy NSW, *Submissions*, p.S291.

25 Privacy Commissioner, *Submissions*, p.S385.

to the general exemption may make it difficult for members of the public to have certainty about whether any given business will be subject to privacy regulation.

- 2.26 At a more detailed level, the Committee also accepts that some elements of the exemption are complicated. For example, the use of the methodology set out in the *A New Tax System (Goods and Service Tax) Act 1999* to calculate annual turnover was questioned by the Federal Privacy Commissioner. The Commissioner pointed out that the use of that Act in combination with the Bill's provisions may have unintended consequences as some large businesses that are input taxed could fall within the small business exemption by being considered to have a turnover of less than \$3 million.²⁶ Annual turnover calculation for the purposes of the Goods and Services Tax excludes supplies that are 'input taxed'. Some organisations will be, because of the nature of their businesses, almost entirely input taxed. Examples of these types of businesses include those in the financial sector such as banks.
- 2.27 Clearly, large businesses (such as banks) being able to obtain the benefits of the small business exemption was not intended by the drafters of the legislation. In response to a question taken on notice on this issue, the Attorney-General's Department acknowledged the possibility of anomalies in some circumstances but suggested that organisations benefiting from such an anomaly could be prescribed by regulation to be within the scope of the Bill.²⁷ The Committee does not feel that relying on the power to prescribe such businesses is an adequate response from the consumer's perspective. It is the Committee's view that the use of the prescribing power should be reserved for situations that were genuinely unforeseeable at the time of the development of the Bill. The Committee is confident, however, that the adoption of its recommendations will reduce the need for excessive use of the regulation making power.
- 2.28 It is beyond the scope of the Committee's current inquiry to conduct an analysis of input taxed enterprises. However, the Committee suggests that the Government consider whether the use of an annual turnover calculation based on the *A New Tax System (Goods and Services Tax) Act 1999* is appropriate. If there are unintended consequences associated with the adoption of the calculations under that Act, it may be necessary to consider describing the full method of calculating annual turnover in the Bill.
- 2.29 On the current drafting of the Bill, a small business that is otherwise entitled to the protection of the small business exemption will become

26 Ibid.

27 Attorney-General's Department, *Submissions*, p.S626.

subject to the National Privacy Principles (NPPs) if it discloses or acquires personal information for a service, benefit or advantage. The Committee understands this to mean that businesses that trade in personal information (whether that trade is for money or some other form of benefit) will be denied the small business exemption. However, at paragraph 2.67 the Committee sets out a recommendation that would refine this provision to deny the small business exemption to businesses that collect or disclose personal information without the consent of the individual concerned. As discussed further below, it is the Committee's view that its recommendation will ensure that the availability of the small business exemption is limited where there is an unacceptable privacy risk.

- 2.30 The NSW Privacy Commissioner submitted that these provisions were so obscurely expressed that he could not determine their purpose.²⁸ In addition, the Committee notes that these matters would have to be assessed after a complaint was made to the Privacy Commissioner or an approved code adjudicator. This could require evidence to be produced to determine whether the business is exempt or not.
- 2.31 The Committee recognises that it is appropriate that businesses that engage in activity that involves inherent risks to the privacy of individuals, such as the unauthorised disclosure of personal information, are rightly subject to the Bill. The Committee is of the view that the provisions may need to be amended. This view is based on a desire to see them strengthened to take into account the non-commercial utilisation of personal information that may nevertheless constitute a risk to the privacy of the individual.

Compliance costs

- 2.32 Related to the issue of complexity is the question of whether the exemption will meet its stated aim of reducing compliance costs for small businesses. The Committee heard evidence from a number of organisations to suggest that it will not. For example, the Federal Privacy Commissioner argued that:

The small business exemption provisions mean that even small businesses to be excluded from the operation of the Bill could be required to respond to a complex and expensive range of inquiries to determine whether or not the NPP obligations apply to it. The evidence it may have to provide includes evidence about its current and past annual turnover, evidence about the current and

past annual turnover of other businesses run by the operator, and evidence that it does not trade in personal information.²⁹

- 2.33 Similarly, while the Victorian Government recognised the important public policy consideration of reducing the compliance burden on small businesses, it pointed out that a business could be subject to the legislation one year and exempt the next depending on whether it has had a successful year.³⁰ However, given that the Committee's recommendations reduce the importance of the turnover threshold in favour of focussing on issues of privacy risk this is not, in the Committee's view, likely to lead to excessive compliance costs to be borne by business.
- 2.34 The Committee also received evidence to suggest that compliance with the legislation should not give rise to any excessive compliance costs. However, the Committee notes that no evidence was received from representatives of small businesses about compliance costs.
- 2.35 AMP submitted that small businesses that generally only handle small amounts of personal information would face a minimal compliance burden.³¹ The Australian Bankers' Association (ABA) submitted that the NPPs and the Bill as a whole were developed to be 'light touch' and strengthen self regulation. The ABA concluded that, provided the Bill retained its light touch character, it should not introduce any significant compliance costs to small businesses.³² However, it cannot be assumed that the views put to the Committee were representative of the concerns of small business people.
- 2.36 The Committee accepts the need to ensure that compliance costs for small business are kept to a minimum and believes that, following the amendment of the Bill to take into account its recommendations, the compliance costs of determining whether a business can take advantage of the small business exemption will be acceptable. In these circumstances, it is appropriate that the Bill continue to contain some form of small business exemption. Further, see the discussion beginning at paragraph 2.65.

Damage to small businesses

- 2.37 Evidence was also given arguing that the small business exemption would in fact damage the reputation of the Australian small business sector as a

29 Privacy Commissioner, *Submissions*, p.S589.

30 Victorian Government, Department of State and Regional Development, *Submissions*, p.S199.

31 AMP, *Submissions*, p.S176.

32 Australian Bankers' Association, *Submissions*, p.S559.

whole. Electronic Frontiers Australia Inc, for example, submitted that in relation to trading on the Internet:

Both local and overseas customers will have no way of knowing what size organisation they are dealing with, and given that consumer confidence is vital in building good customer relationships, Australian traders are likely to be bypassed in favour of suppliers from countries that have introduced good privacy law.³³

- 2.38 Electronic Frontiers Australia Inc advised the Committee that, although it would prefer to see the exemption removed from the Bill altogether, a compromise position could be to ensure that all businesses engaged in e-commerce would be subject to the Bill regardless of their size.³⁴
- 2.39 The Committee notes that the Federal Privacy Commissioner provided evidence of recent surveys which suggest that concern about the privacy of personal information provided over the Internet is a major reason why consumers are choosing not to make online purchases.³⁵ If it is the case that consumers lack confidence in how online businesses deal with their personal information, it is unlikely that the small business exemption will increase that level of confidence. Consumers will not be able to determine, simply by looking at a business website, whether that business is subject to the Bill. A consumer concerned about personal privacy may, therefore, choose not to participate in an electronic commercial transaction.
- 2.40 It has also been suggested to the Committee that damage to small businesses as a result of the exemption may not be limited to the Internet. More traditional businesses could also be disadvantaged. Professor Graham Greenleaf argued that the exemption will harm small businesses that wish to differentiate themselves in the market place by complying with privacy standards. As there is no provision in the Bill to allow small business operators to opt-in to being subject to the Bill, some small businesses will be denied the opportunity to obtain a competitive advantage in terms of the privacy protection they offer.³⁶
- 2.41 In addition, the Australian Privacy Foundation argued that in situations where a small business is in competition with a larger business and only the latter is subject to the Bill, consumers may become more reluctant to give personal information to the small business.³⁷ This reluctance would stem from the knowledge that because the larger business is subject to a
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33 Electronic Frontiers Australia Inc, *Submissions*, p.S319.

34 Electronic Frontiers Australia Inc, *Submissions*, p.S637.

35 Privacy Commissioner, *Submissions*, p.S384.

36 Professor Graham Greenleaf, *Submissions*, p.S303.

37 Australian Privacy Foundation, *Submissions*, p.S514.

legislative privacy regime, consumers can have greater confidence in the practices of the larger business.

- 2.42 The Committee accepts that the absence of a provision to allow a business to opt-in to the privacy scheme established by the Bill is a limitation that should be addressed. A small business that wishes to comply with privacy standards and fall within the jurisdiction of the Privacy Commissioner should be able to do so.

Recommendation 1

The Committee therefore recommends that a mechanism be included in the Bill to allow otherwise exempt small businesses, if they choose, to opt-in to the coverage of the Bill and be subject to the jurisdiction of the Privacy Commissioner or an approved code adjudicator.

- 2.43 A final argument in relation to the potential of the small business exemption to harm small businesses relates to the requirements of the European Union Data Protection Directive (95/46EC). Professor Greenleaf suggested that exempt Australian small businesses may be excluded from any assessment of adequacy made by the EC.³⁸ If this were to occur, Australian small businesses would be at a disadvantage in relation to a significant export market.
- 2.44 The Committee received a submission from the Delegation of the European Commission concerning the adequacy of the Bill. In relation to small business the Commission stated that the exemption ‘...would be problematical, since it would be very difficult in practice to identify small business operators before exporting data to Australia.’³⁹ In effect, this means that the small business sector would be excluded from any consideration of adequacy under the Bill.⁴⁰
- 2.45 The Committee is also concerned about the comments of the European Commission in relation to the adequacy of the Bill. An adverse finding could result in damage to potential export trade. In addition, the Committee notes that one of the stated objects of the Bill is to establish a privacy scheme that ‘...meets international concerns...’.⁴¹
- 2.46 The Committee discusses Commission’s submission further in Chapter 8 of the report.

38 Professor Graham Greenleaf, *Submissions*, p.S306.

39 European Commission, *Submissions*, p.S607.

40 Ibid.

41 See clause 3 of the Bill.

Application to particular businesses

- 2.47 A number of submissions received by the Committee concerned the suitability of a blanket exemption for small businesses in particular sectors of the economy.

Non-profit organisations

- 2.48 It is the Committee's understanding that under the Bill if a non-profit organisation with an annual turnover of less than \$3 million collects personal information for its own purposes and does not disclose it, the small business exemption will be available to the organisation.
- 2.49 The Fundraising Institute – Australia recommended⁴² that the Bill be amended so that it applies to all organisations that participate in fundraising activities, regardless of the organisation's size. This amendment would be based on the tax deductible gift status that is conferred by the Australian Taxation Office on many charitable and non-profit organisations.
- 2.50 The Institute noted that in the absence of such an amendment, many non-profit and charitable organisations could prima facie take advantage of the small business exemption. It argued, however, that the privacy protection enjoyed by individuals would be diluted if smaller charities were not required to comply with the same rules as larger charities. In addition, the exemption of some fundraisers from the Bill would, in the Institute's view, cause confusion in the public perception of fundraising.⁴³
- 2.51 The Federal Privacy Commissioner expressed concern about the application of the exemption to non-profit organisations, saying that it is not clear from the face of the Bill whether a non-profit organisation would constitute a business for the purposes of the exemption.⁴⁴ The difficulties of interpretation in this context are illustrated by the submission from the Australian Council for Overseas Aid which clearly saw a distinction between small businesses and small non-government organisations providing overseas aid.⁴⁵ The Commissioner argued that given the large databases that some non-profit organisations maintain, it would be appropriate to ensure that they are covered by the Bill.⁴⁶

42 Fundraising Institute-Australia, *Submissions*, p.S149.

43 Fundraising Institute-Australia, *Submissions*, p.S155.

44 Privacy Commissioner, *Submissions*, p.S385.

45 Australian Council for Overseas Aid, *Submissions*, p.S159.

46 Privacy Commissioner, *Submissions*, p.S385.

- 2.52 The Committee recognises that the Fundraising Institute – Australia has a genuine interest in protecting the privacy of individual donors and establishing appropriate information handling practices. However, the Committee is concerned that the solution proposed by the Institute could capture more organisations than intended.
- 2.53 Adoption of the Committee’s recommendation that small businesses be allowed to opt-in to the private sector privacy regime, however, will provide organisations represented by the Fundraising Institute – Australia with the opportunity to demonstrate their commitment to privacy. The Committee encourages the Institute to discuss its particular requirements with the Privacy Commissioner.

Health service providers

- 2.54 The exemption is specifically denied to organisations that both provide a health service and hold health information (as those terms are defined in the Bill). However, all small businesses are exempted from the Bill for a period of 12 months after it commences. This delayed commencement concerned the Department of Health and Aged Care (DHAC) which argued in its submission that the delay may be questioned by consumers whose right of access to health records is delayed.⁴⁷
- 2.55 The Committee considers that the delayed lead in time for small businesses is an important aspect of the exemption. It provides a necessary opportunity for small businesses to ensure that they are compliant with the new privacy regime. Businesses already have to deal with the introduction of the New Tax System and will require additional time to cope with new regulatory requirements in relation to privacy. The extra opportunity provided in the Bill will also assist in reducing the compliance burden on businesses as they can spread the financial and other costs of compliance over a longer period.
- 2.56 However, the Committee is concerned that the 12 month delayed application of the Bill to small businesses extends to health service providers. DHAC cited ABS figures from 1994-5 which indicated that only 5% of medical practices in Australia had an annual turnover in excess of \$1 million.⁴⁸ This means that the vast majority of medical practices are small businesses that can take advantage of the delayed application of the Bill. Given the sensitive nature of the information held by health service providers, the Committee is of the view that they should be subject to the legislation from the time at which it commences generally.

47 Department of Health and Aged Care, *Submissions*, p.S406.

48 Ibid.

Recommendation 2

The Committee recommends that clause 16D be amended so that the delayed application of the National Privacy Principles does not apply in relation to small businesses that provide a health service.

- 2.57 In making this recommendation the Committee understands that the definition of 'health service' at Item 17 of the Bill includes naturopathy, gymnasia, services provided by personal trainers and like services. If this interpretation does not accord with the Government's intention, the breadth of the term 'health service' should be clarified in a supplementary explanatory memorandum.

Tenancy databases

- 2.58 A number of submissions⁴⁹ drew the Committee's attention to the existence of tenancy databases maintained by organisations such as Tenancy Information Centre Australasia Holdings Pty Ltd (TICA). These databases hold information about tenants including information on rent defaults, damage to rental properties and similar highly sensitive matters. The use of such databases by landlords and real estate agents has been identified as a major barrier to many prospective tenants when seeking access to private rental housing.⁵⁰
- 2.59 It was suggested to the Committee that tenancy databases could fall within the small business exemption as they are likely to have turnovers of less than \$3 million and may be structured so that they do not receive a benefit, service or advantage when disclosing information about tenants.⁵¹
- 2.60 The application of the Bill to Tenancy Databases is considered in detail in Chapter 8 below.

49 Residential Tenancies Authority, *Submissions*, p.S434; Hawkesbury Women's Housing Information Service, *Submissions*, p.S451; Northern Area Tenants Service, *Submissions*, p.S453; Uniting Care, *Submissions*, p.S457; Ms Kathryn Lucas, *Submissions*, p.S463; Tenants' Union of NSW, *Submissions*, p.S468; Tenants' Union of Queensland, *Submissions*, p.S526.

50 Uniting Care, *Submissions*, p.S457.

51 Tenants' Union of Queensland, *Submissions*, p.S526.

Other issues

Regulation making power

- 2.61 DEWRSB suggested that the regulation making power illustrates the balance that has been reached between the conflicting needs of privacy protection and the need to minimise compliance costs on small business.⁵² The regulation making power provides, in effect, a last line of defence in relation to new and perhaps yet unthought of privacy invasive practices. The Committee endorses its retention.
- 2.62 The Committee is concerned, however, to reduce privacy risks for individuals from the outset of the legislation. It therefore considers that the regulation making power should only be used where an unforeseen privacy invasion becomes apparent. The power should not be used as a stop gap means of overcoming existing deficiencies in the Bill. If the Committee's recommendations are accepted it envisages that these provisions would only need to be used sparingly.

Employee Records

- 2.63 As discussed in Chapter 3 below, it is the Committee's intention that the acts and practices of all employers in relation to employee records other than exempt employee records are subject to the National Privacy Principles (NPPs).
- 2.64 The Committee's intention is to ensure that employee records are handled consistently by all businesses including small businesses.

Recommendation 3

The Committee therefore recommends that a new subclause be inserted after subclause 6D(4) of the Bill which clarifies that the small business exemption does not extend to acts or practices of a small business operator in relation to an employee record.

Suggested amendments

- 2.65 The Committee is of the view that a small business exemption in some form in the Bill is justified. However, the Committee also believes that some amendments to the exemption may be necessary to ensure that the

exemption strikes an appropriate balance between certainty for business and addressing unacceptable privacy risks for consumers.

- 2.66 The Committee agrees that attention should be paid to the means by which small businesses are brought back within the scope of the Bill. It is the Committee's view that if these factors are appropriately balanced by the adoption of its recommendations, questions concerning the definition of small business and annual turnover are secondary.
- 2.67 The Committee believes that the motive for a collection or disclosure of personal information is irrelevant to the question of privacy protection. It is unclear to the Committee whether the expression 'service, benefit or advantage' used in paragraphs (c) and (d) of subclause 6D(4) is intended to describe all collections and disclosures of personal information or whether it involves a requirement that a particular gain flow to the small business.

Recommendation 4

The Committee therefore recommends that the Government clarify that, in respect of the small business exemption, to collect or disclose personal information for any motive, including for example a malicious or altruistic motive, without the consent of the individual concerned should attract the application of the National Privacy Principles.

- 2.68 This amendment is designed to ensure that any small business that engages in the practice of collecting or disclosing personal information, whether for benefit or not, will be subject to the NPPs unless it has the consent of the individual concerned to collect or disclose the information. The requirement for consent will enable small businesses to conduct the majority of their dealings with personal information unhindered. For example, the disclosure of the name and credit card details of a customer to a small business' bank would be a disclosure for which the business would have implied consent as a consequence of a credit card transaction by the customer.
- 2.69 For the purposes of the revised small business exemption, the Committee believes that an individual's 'consent' should be specifically related to, and restricted by, the purpose for which the consent was originally granted at the time of the collection of the information. The Committee believes that this interpretation should be made clear in the supplementary explanatory memorandum for the Bill.
- 2.70 The Committee is confident that by simplifying the exceptions to the general exemption, the Bill will provide increased privacy protection

while at the same time ensuring that compliance costs to small business are minimised.

