
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# HOUSE OF REPRESENTATIVES

## STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

**Reference: Privacy Amendment (Private Sector) Bill 2000**

FRIDAY, 9 JUNE 2000

MELBOURNE

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**HOUSE OF REPRESENTATIVES**

**STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

**Friday, 9 June 2000**

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

**Members in attendance:** Mr Andrews, Mr Billson, Mr Cadman and Ms Roxon

**Terms of reference for the inquiry:**

Privacy Amendment (Private Sector) Bill 2000

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**Committee met at 9.34 a.m.**

**PENNICUIK, Ms Susan, OH&S Coordinator, Australian Council of Trade Unions**

**RUBINSTEIN, Ms Linda, Senior Industrial Officer, Australian Council of Trade Unions**

**CHAIR**—I declare open the Standing Committee on Legal and Constitutional Affairs inquiry into thePrivacy Amendment (Private Sector) Bill 2000. On behalf of the committee, I welcome all the witnesses and members of the public who are here today. The bill which is the subject of this inquiry was introduced into the federal parliament on 12 April and was referred to this committee for inquiry by the Attorney-General. The purpose of the bill is to amend the current Privacy Act to establish a national framework for the collection and use of private information by private sector organisations. The bill proposes to implement the national principles for the fair handling of personal information. These principles were developed by the Privacy Commissioner following consultation with business and other interests.

I welcome the representatives of the ACTU. I advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the Houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of the submission from the ACTU. I invite you to make some opening comments.

**Ms Rubinstein**—Thank you, Chair. The ACTU welcomes the opportunity to appear and to give evidence. We assume that you have read our submission and we do not intend to take you through that, but we would like to make three or four points. As the submission stated, it is focused on one aspect of the bill only, which is the proposed exemption for employee records from the privacy protection that would otherwise be afforded by the bill.

Our concern is that the effect of this, if the bill were passed, would be that different standards would apply to an employer's obligations in respect of protecting the privacy of employees and the obligations that that same employer would have in respect of his or her customers, clients, suppliers or anybody else. A number of examples can be given. There is the example of a doctor who could not pass on medical information in respect of his patients but who could pass on medical information in relation to an employee to, for example, a prospective employer of that person. Similarly, an employer could not pass on credit details or financial details of a customer or supplier, but could, to a prospective employer, provide information gathered, for example, if that employer was administering a garnishee order on the employee's wages.

The question of trade union membership is another sensitive issue where an employer would be able to—as, of course, they can now—reveal to prospective employers or other people, if it could be seen to be related to the employment relationship, the issue of the trade union membership of an employee. As we understand it, the only reason that is given for the exemption is that matters to do with employers and employees are best dealt with through the workplace relations legislation. We would say a couple of things in relation to that. First of all, under the current legislation, the question of privacy issues, we do not believe, could be included in awards; it would not be an allowable matter within the meaning of the act. Certainly, privacy issues could be dealt with through the enterprise bargaining process, but we think that it

is undesirable, even if it were actually happening, to have these issues being dealt with on an enterprise by enterprise basis quite differently in many cases and not at all, undoubtedly, in most cases—and, of course, leaving the substantial proportion of the work force that is not covered by such agreements completely uncovered.

Secondly, we would say that there has been no indication to us of any intention by the minister for workplace relations to amend the legislation to deal with these types of issues. As you might be aware, there has not been a shortage of proposals to amend the workplace relations legislation. In addition to those that have had some publicity, there is an extensive registered organisations act, which is, I think, scheduled to be introduced into the parliament shortly, which certainly does not deal with these issues. To the best of my knowledge there has been no proposal in respect of that. But even if there were, we would put the case that it would be unacceptably onerous on employers, as well as leading to inconsistent results, to have privacy issues dealt with under two pieces of legislation with different requirements depending on what relationship was being dealt with. If there were a need for different principles to apply to employees, as opposed to customers and suppliers, then that could be dealt with through the general privacy legislation. But it would be a recipe for inconsistency, for confusion and for increasing our regulatory burden on business for these issues to be dealt with separately. So what we are really saying is that it is undesirable in principle and unlikely to occur in practice.

The final point is to make it clear to you that it is our belief that substantial abuse of privacy does go on in the workplace—for example, monitoring and gaining information about employees' health, the keeping of information about such matters as criminal convictions, political beliefs, disciplinary matters and so on, issues to do with surreptitious monitoring of telephone calls and emails and, of course, the issues of disclosure that are associated with that. Sue Pennicuik has come today because, in her capacity as the occupational health and safety coordinator, she is aware of many of the issues in the collection of data that are health related or related to areas such as psychological testing and so on and also the disclosure of that data. She is of course available to answer any questions that you might have.

**CHAIR**—Thank you very much. I will take up the last point you were making. Isn't it arguable that, if you define 'employee record'—and we can debate what that means precisely, but in general for the moment—and then exempt certain things which constitute an employee record from the privacy legislation, in fact you would have privacy protection under this bill that you do not have now? For example, you mentioned things like psychometric testing and a range of other things. It would seem to me that if there is no protection for employees now, then this bill—and as I said, we can argue about the extent of it—at least provides some protection that is not there at the present time.

**Ms Rubinstein**—For example, it would protect employee records being given to a direct marketing company. That would occur if this bill were passed so, yes, that is an example of some protection. But to say that there is some protection offered by this bill is not enough when a far greater deal of protection is offered in other ways. It is also theoretically true, I suppose, that if 'employee record' were defined in such a way as to be essentially empty of content, then of course that would amount to protection of privacy, but that is not the case. It is quite clear that information to do with matters such as disciplinary records, criminal convictions, financial

information—particularly something like garnishee orders—trade union membership and health records, could be passed along.

**Ms ROXON**—I am sure you have had a look at the definition, but 'employee records', as currently defined, includes information on health, engagement, training, disciplinary action, resignation, termination of employment, terms and conditions, personal and emergency contact details, performance or conduct, hours of employment, salary, membership of trade unions or professional organisations, recreation, long service, sick, personal, maternity, paternity and other leave, taxation, banking and superannuation. Is there anything in the employment relationship that does not fall within those categories?

**Ms Rubinstein**—Not that I can think of, although I would not like to say that there was not—it might be a failure of imagination on my part. What is clear from that is this: if you take it further, for example, the employee would have no access to that information if this bill was passed. An example could be information about leave taken. It seems fairly innocuous, but it may be that the records about the amount of sick leave an employee has taken are wrong. Yet a prospective employer, or some other person, could be told that the employee has taken a significant amount of sick leave. Even if the records are correct, that information can be passed on. Personal contact details can often reveal matters such as custody and family arrangements, which could also be passed on. Information that may look innocuous can, in fact, reveal a great deal about employees. Matters such as health information and trade union membership, as we said in the submission, would fall within the bill's definition of sensitive personal information, about which there are additional safeguards which apply to everybody except employees.

**CHAIR**—I understand. You are saying that amongst that list of things which relate to the employee records there are things which—leaving aside how you interpret them for the moment—are beyond what ought to be exempted. Are there items there which are reasonable to exempt, or are you taking the position that this should go entirely?

**Ms Rubinstein**—No, because the question has to be this: why should they be exempt? Exemption means that the employee does not have an opportunity to see and correct those records or to give consent to the passing on of those records. The bill does provide that, in some situations, information can be disclosed without consent, but why should anybody have access to any of this kind of information about employees—the terms of their termination, what they were being paid or any other details? What person is entitled to that information without the employee having the right to consent or otherwise? Presumably, if a prospective employer wants that information they can get it from the employee.

**Ms ROXON**—Yesterday I asked the department some questions about the rationale for excluding employee records. I would be interested in your comments. In my view an employee has less opportunity to refuse to provide information to their employer than have customers in all sorts of circumstances in commercial transactions, so you would think that that would lead to extra privacy protections being in place rather than fewer. In your experience, are you aware of an employee really having the entitlement to, say, refuse to provide their banking details or those sorts of things? Where do you think privacy breaches are currently occurring—if they are occurring? Is it in the collection of information? Is it in the passing on of information to

prospective employers? What are the biggest problem areas in what is happening currently in the workplace from your experience?

**Ms Pennicuik**—Information that is and can be collected—foreshadowing the information that may in the future be collected—from all types of employee testing is becoming more and more prevalent in the workplace and calls for it are increasing. Employees have very little opportunity to refuse to undertake that testing, which could be drug and alcohol testing, psychological testing, other forms of medical monitoring or genetic testing—that is foreshadowing the future. In most cases employees would be entitled to expect that that information be kept confidential, as any other person would expect that that information be kept confidential.

In our submission we refer to the ILO guidelines on health surveillance. Under those guidelines, health information should only be collected for legitimate purposes, that is, for known hazards in the workplace—for example, exposure to lead or other chemicals in the workplace—and that that should only be collected with the involvement of what is called the competent authority. In Australia that would be the OHS authorities. We say that information collected on an individual basis from the employee would be available to that employee and would not be disclosed to a third party without that employee's knowledge or consent, and that in almost all cases the only information that would be disclosed to third parties would be collated information about a whole group of workers so that the individual workers would not be able to be identified. My understanding is that this would not be the case with this exemption.

**Ms Rubinstein**—I would just make the further general point that a lot of this information is required at the point of applying for a job. If an employee refuses to give that information then the likelihood is that they will not get the job, or at least they would believe that. Information from customers and suppliers is a different kind of market. Not always, but often, customers and suppliers will be able to go somewhere else. In any event, they will have this protection. Also, employers, depending on the types of goods and services that they are offering, would be less likely to have information as intrusive in any event than they do in relation to employees. Some would have it, of course.

**Ms ROXON**—What do you think are the current risk areas? One of the things raised by another witness was about prospective employment. Is that an area where privacy is often breached?

**Ms Rubinstein**—That is unclear. That is where it is often breached. An employer will contact a previous employer and ask about an employee's health records such as whether they have had accidents, have they had a lot of time off sick—that kind of thing. They might ask if they have time off for other reasons so that other kinds of personal information can be disclosed. They will ask for pay information which assists the prospective employer in negotiating the pay arrangements. And remember, this is information which may or may not even be correct. It may be incorrect and the employee does not get to see it as of right. There may be issues to do with whether or not the employee was actually terminated. Sometimes in settlement of separations there will be a statement issued that the employee left of their own accord or whatever that is and that will be the technically formal way in which it occurred, but

the employer could disclose other information about the circumstances of the separation. And, of course, trade union membership has already been discussed.

So you can see the huge scope there is for abuse in this area. It is something that does occur all the time. I have known of workers who have explored the possibility of taking libel or slander action against their previous employer, but the possibilities of remedies in those circumstances are very limited.

**CHAIR**—There was something we were told yesterday by the department, and I would be interested in your view of this. They said that under regulations 131K and 131L pursuant to the Workplace Relations Act, employees have a right to access and to copy employee records, and a right under 131K to immediately correct any errors.

**Ms Rubinstein**—That would be only in relation to wages and leave records; it would not go any further than that. Of course, the government has proposed to water down those regulations quite significantly in those cases. But that information would be what is kept in the actual wages records and it would not cover a lot of this information in any event. And, of course, it does not go to disclosure. That is the other point.

**CHAIR**—Could I ask about workplace agreements: are privacy considerations or privacy matters commonly or uncommonly covered in workplace agreements?

**Ms Rubinstein**—Privacy as privacy I think would not be. Sometimes—I think very occasionally—agreements might cover issues like the circumstances under which drug and alcohol testing, for example, can take place. But they would be pretty few and far between, so the general view would be not very often. Sue may have something to add to that.

**Ms Pennicuik**—First of all I want to go back to the question about the duty of care that applies between an employer and an employee. We have mentioned in our submission that the duty of care should extend further towards employees than it does to customers and suppliers. It goes to a question that was asked before about the level to which an employee can refuse to provide information. Often they can have the right to refuse, but under the circumstances of the arrangement between employer and employee they often are not in a good position to exercise that right, whereas a customer or a supplier is in a better position to be able to exercise that right. In that way, more information can be collected on employees, either with their knowledge or without their knowledge, than can often be the case with a customer or a supplier or any other person with which the employer has a relationship. Therefore, the duty to protect that information, I would suggest, is stronger and it does not actually exist in this country but does in other countries, as we mention in the submission. That protection should be introduced into this country. Much of the international regulation does allow third parties to check and assist employees to verify information that is kept about them.

As for the alcohol and drug testing, that is becoming a growing issue. Some of the policies I have seen—draft policies from employers about when and where and who can be tested—are quite draconian. The ACTU is attempting to come up with some guidelines about that issue. It is a sensitive issue and it is a difficult issue. As I said, some of the policies that I have seen are quite draconian in terms of forcing people to undergo testing for really spurious reasons.

**Ms ROXON**—You mentioned guidelines. You probably would be aware that the rest of the bill proposes that private sector organisations that will be covered by the privacy regulations should establish guidelines which will assist, and that the Privacy Commissioner will be involved in confirming those standards et cetera. Presumably if the Privacy Act did apply to employee records or to employees generally, there would be the capacity to work on those guidelines in a consultative way. I would like you to comment on that because I have also seen the submission from ACCI who say that they have been extensively consulted over the terms of this bill and the establishment of the national privacy principles and I wondered whether the ACTU has also had that extensive consultation in the development and lead-up to the drafting of this bill.

**Ms Rubinstein**—Not that I am aware of. I think that material was sent to us. I could certainly find out about that and respond to that at a later time.

**Ms ROXON**—If you could let us know, that would be good. Do you have a view on the capacity of peak organisations to establish guidelines? If this exemption was not to be in place, obviously it would be necessary for there to be some appropriate guidelines, as there are for health and as there will be in other industries. Is there any reason that you can see that you would not be able to work through establishing appropriate guidelines?

**Ms Rubinstein**—The ACTU has had experience of developing guidelines in a number of areas on a tripartite basis with government and employer organisations. There is no reason to believe that that could not occur in this case.

**Ms Pennicuik**—However, that is apart from the general question of whether employees should have protection from the law in respect to their privacy, the same as other citizens would be afforded by this bill.

**Ms ROXON**—Certainly the report does provide for the other types of protection, that there will be guidelines established in different industries where appropriate. What I was looking for was whether there would be any reason to think that we would not be able to do the same type of thing with employee records.

**Ms Rubinstein**—No, there is not.

**Mr CADMAN**—Neither the employer nor employee groups seem to have given privacy a high priority in public statements or in their policies to this point. It appears as if the initiative of legislation to cover the private sector has been a starting point. Would that be right?

**Ms Rubinstein**—No, not exactly. It has been an issue in respect of health testing, psychological testing, intrusive pre-employment questionnaires. Those things have come up in the context of particular cases, and they certainly have been examined. It would be true to say, in light of all the other things that both unions and employer organisations are concerned with, that it is not a top priority. But that is not to say that it is not an important issue. Obviously, it is.

**Mr CADMAN**—Would any of your members have developed policies or guidelines or be seeking to have provisions included as part of awards?

**Ms Rubinstein**—They cannot include them in awards. It would be contrary to the provisions of the current act. The issues do come up from time to time, but usually they come up in particular contexts. Employees, in fact, expect that personal information about themselves will not be disclosed by their employers, and usually it is when it is disclosed—often it is after the employment relationship has ceased—that the issue flares up. We have had, in recent times, issues to do with monitoring of telephones and emails, for example. The Privacy Commissioner has guidelines for protection of privacy in respect of emails at work, and those guidelines are available on the commissioner's web site. The issue is there very firmly, particularly as technology increases surveillance possibilities. For many years there have been issues, for example, about videoing of employees as they do their jobs.

**Mr CADMAN**—Surveillance of employees—

**Ms Rubinstein**—It is surveillance. Many years ago I recall many issues coming up about searching employees' lockers, drawers and so on. So it has always been an issue that has tended to be dealt with in the job, successfully or unsuccessfully.

**Mr CADMAN**—Case by case issues?

**Ms Rubinstein**—It will blow up and then it will go away again unless the employer keeps doing it, and it will depend on the strength of the employee's position as to whether they can change the employer's practice or not. What we say is that that is completely unsatisfactory. It is a bit like saying that consumers will have to go and fight out the privacy issues with the organisations, rather than legislation being introduced at all. The very fact of the introduction of this legislation is saying that it is not considered appropriate or sufficient to expect individuals, or groups of individuals, to have to sort out the privacy arrangements with the organisations with which they deal. This legislation is saying that there is a need for consistent standards, and we would say that those consistent standards, albeit with varying guidelines if necessary to reflect the different nature of the relationship, ought to be there to protect employees as much as anybody else.

**Mr CADMAN**—What I was looking at is an organisational approach rather than an individual thing. Are there policies or guidelines that are established as part of any particular union approach?

**Ms Rubinstein**—Different unions would have that. Years ago I worked for a union, and we put out guidance to members about issues of search—employers searching their lockers and so on. But at that time there was not unfair dismissal legislation. We really said to people, 'At the end of the day, if you will not let the employer search your locker and they sack you, it is going to be very difficult to do anything about that.'

That example really reflects the nature of the power relationship. Even now, with unfair dismissal legislation, it would not be entirely clear in those circumstances that somebody would have a case for unfair dismissal. It would depend on all the circumstances. Yet, clearly, there should be provisions that say that the way in which information is obtained, maintained and disclosed should be subject to consistent minimum standards.

**Mr CADMAN**—So this is quite forward looking in that regard because it has not been a front-of-the-mind issue.

**Ms Rubinstein**—It has probably been a nagging issue and one that has been a problem in the workplace and a problem for unions for a long time, but so has the general lack of privacy protection in Australia. It is to be expected that, in the context of the community accepting that high standards of privacy protection need to apply, this issue would be approached in this way by the trade union movement, when the opportunity for doing that had previously not been there in the same way.

**Ms ROXON**—In some of your answers the sorts of things that obviously have flared up that you have been telling us about have related to performance, search and health testing. But it seems to me that there is also this whole other category of information, being the personal information that does not relate to performance—home addresses, phone numbers, family arrangements, banking details and things like that. You said employees really have an expectation that that will not be passed on. Am I right in my assessment that that expectation is quite unfounded? There is nothing that protects it currently. This will actually specifically raise that there is no protection for it.

**Ms Rubinstein**—Certainly, there is no protection where the behaviour, the disclosure, could be seen as being in the context of the employment relationship. There is protection in this, to be fair, for commercial use of that information, and that is to be welcomed. There is nothing to prevent the employer disclosing the information to prospective employers or to a past employer of a person—for example, where the person is involved in some legal controversy with a former employer.

**Ms ROXON**—Is there anything to prevent that information being passed on, as you read the bill, if it is not for a commercial purpose? What is to stop a large employer saying, 'We want to have a good arrangement with this superannuation fund and we'll give them all of the home address details of all of our employees so they can do a mail-out to them. We're not charging them for it so it won't be caught by the provision prohibiting commercial transactions.' Presumably, employees expect that that will not happen, but is there anything that stops it?

**Ms Rubinstein**—The exemption is only where the act or the practice is directly related to a current or former employment relationship. So with respect to just giving it to anybody for the sake of it, there would probably be some difficulty with that. But it is not very clear, which raises the other question about what is related to the employment relationship and what is not. These are issues that have bedevilled the High Court in relation to the scope of the industrial relations legislation since the turn of the century.

Even leaving that aside, arguably in the case that you have given, it is to do with the employment relationship, because the employer might say, 'I want my employees to be in X superannuation fund, so I will give them the names and addresses so that they can send their agents around to persuade people to leave the fund they're currently in and join that one.' The employer may be doing that for whatever reason, but he may well think that that would be related to the employment relationship, and it would be a difficult argument to run. I do not know how it would come out in a court. But we do not want legislation where we have to shrug

our shoulders and say, 'The courts will sort it out.' We want legislation that is as clear as possible so that people do not have recourse to these situations.

**Mr CADMAN**—As an alternative, it has been put to us that health is such a complex area that that should be developed in a separate manner, that there should be a separate code for health records and the handling of health details of an individual—and I am not talking about an employer/employee relationship; I am speaking generally. Is the relationship between employer and employee different enough from our day-to-day requirements for protection of privacy to warrant the development of a separate code?

**Ms Rubinstein**—No, I do not think it is. It may well be that, if you took the view that there ought not to be an exemption, then there may need to be some consideration of how that would operate in the employer relationship. There may well be—and I am not saying that there is, but I am not saying that there is not—some need for some variation to the way in which the principles would be applied. As I have said, I believe, on past experience, that once it is said that privacy protection will apply to employees then it would be possible with the major employer organisation, the ACCI, to develop jointly agreed guidelines, as has been done in a range of areas, where you could look at any exceptions to the general issues that might apply.

The reasons to do with health—as I understand it; I am not an expert in that—are the complexities of it and the issues of the people who are actually providing the health services. That is really what it is about. Employers do not provide health services to employees; they do not have a health based relationship. They are collecting information which is provided to them either by the employee or through their own medical staff or through testing, and all they are doing is holding that information. They are not doing anything to deal with the health issues, by and large, of the employees; they are holding that information and they are using it only in relation to that person's job—they are using it for another purpose. So I think the issues are quite different—and I am no expert on the health issues. To the extent that there need to be any differences, those can be sorted out, but the general principle of privacy protection needs to be put in place first; it needs to be asserted and confirmed.

**Mr CADMAN**—I was just wondering whether enough attention has been given to the national privacy principles as they apply in the workplace?

**Ms Rubinstein**—I have looked at them and I do not see why they could not because it is about information that is collected and maintained about people and it is fairly clear what it is. I have not heard an argument or an example. Maybe if an example was put to us we would say, 'Yes, that might be difficult,' but I do not know of one. That will presumably only come out once there is an agreement to go forward on this.

**CHAIR**—If this exemption was not in the legislation, what would you say about a proposition that there be a mandatory code developed by the Privacy Commissioner?

**Ms Rubinstein**—On its face, you would say that is a good thing. What you would want to make sure is that you did not have too many completely different codes and practices that employers had to look at. You do not want to increase the regulatory burden when it is unnecessary. But in terms of developing something based on the existing principles, consistent

with the existing principles that apply to the employment relationship, you would look at whether that was mandatory or whether it would be a matter for employers to include those issues within the general code that they adopt in response to this legislation. You would have to look at whether you had one that applied to everybody or one that was a default, and how it fitted with the default principles, but in principle it is a good idea. Certainly doing something with the Privacy Commissioner, with appropriate consultation, could be a positive way forward.

**Ms ROXON**—Could I ask you something about that. There seems to be quite a significant difference if you are talking about the collection of personal information and then the handling and passing on of personal information. It seems that, if you are looking for some way that potentially did not overburden employers—particularly, maybe, smaller employers—the greatest risk of breach of privacy is in the passing on of the information in some way, not just the collection of it. Would you agree with that?

**Ms Rubinstein**—Collection is a breach of privacy if information is collected that is not directly necessary for the purposes of the job. It is dealt with by discrimination legislation, but, as we all would know, information about somebody's fertility or likelihood to become pregnant, for example, can be related to the job but generally is not. It is inappropriate to collect that information. As I understand it, you could give me a pen at a job interview and when I left it behind you could collect—if not now, later—genetic information from that. So that information could be kept without any direct relationship.

**Ms ROXON**—What I am trying to get you to focus on, whilst I think that is an important point, is the very day-to-day, far more mundane examples. I am interested in how you have adequate protection for people with their home addresses, phone numbers and banking details—very basic things that every employer deals with. You do not have to worry about what the genetic testing is going to be in 10 years time. It seems that no-one has really worried about the collection of that information but people are worried about the passing on of that information.

**Ms Rubinstein**—What you can do is distinguish between information that employers have a good reason and a necessity to collect. That is, obviously, banking details, superannuation fund, name, address, contact details, all of that, plus wages and leave information, and also in the case of things like garnishee orders and so on.

**CHAIR**—Which in reality is going to be consented to. You may not always want to give it, but if it is child support information or something like that, an employee may not think this was ideal but the reality is that there is going to be consent to that sort of information being collected, isn't there?

**Ms Rubinstein**—The employer is going to have that information and there is not an argument about their having it. There is only an argument, in respect of that information, about disclosing it.

**Ms ROXON**—I am thinking that some of the national privacy principles may be a little cumbersome for that very basic information: I think pretty much everybody in the community accepts that it is going to be needed, but, if it were to be passed on, that would be an entirely

different matter. I was really looking at that, rather than the health sort of circumstances or the rarer situations where people might try to get genetic information from your fingerprint or—

**Ms Rubinstein**—But there are real examples that are not science fiction but are to do with criminal convictions and health information and so on, which are very real and occur all the time in terms of inappropriate collection of information as well as disclosure. But I take that point, and I take the point that the employee has the right now to check some but not all of that basic information that is kept, for accuracy. Given that the problem there is with disclosure, I am not sure that the principles are cumbersome, because I am not sure that the principles in respect of the collection and maintenance of that kind of information which is not sensitive require any more than giving the employee the opportunity to check the accuracy.

**CHAIR**—If the exemption is to remain—I understand your argument against that—what would you want changed?

**Ms Rubinstein**—In terms of the exemption?

**Ms ROXON**—So, if the exemption for employee records were made, would you change the definition?

**CHAIR**—Would you change something, that is what I am saying. Ultimately I do not know what will happen. I am simply asking you if you want to put on the record what your position would be if the exemption were to remain.

**Ms Rubinstein**—We have not given a great deal of thought to that because, frankly, it is quite difficult. One thing you would do would be to change the definition of employee records. You would certainly take out of that anything that could be described as sensitive information. It is a bit difficult, I have to say.It is a bit difficult to identify what information employers should be able to disclose. If somebody needs to know somebody's name, address, superannuation fund and emergency contact details, they can get it from the employee. There seems to be no reason for even that information to be disclosed. Why should somebody be given the details of wages and conditions that have perhaps been negotiated with an employer? What possible business can it be of someone who has to determine what that employee is worth in terms of what they want to pay them? It is an intrusion. Most people, if you ask them what their wages and conditions are—and I know that parliamentarians are not in this position—would say that it is none of your business. I think that is how it should remain.

**CHAIR**—Presumably, though, there are at least exceptions required by law?

**Ms Rubinstein**—Yes, exceptions required by law are quite different, obviously, in the interests of law enforcement.

**CHAIR**—I am just thinking that, say, under superannuation legislation for example—

**Ms ROXON**—Except that employers give their consent. Employers currently require on their forms consent to pass that on to super funds and things. There is not really a—

**Ms Rubinstein**—Yes, even with the tax file number there has to be consent.

**CHAIR**—There has to be consent. If you do not give it then you cop the financial penalty.

**Ms Rubinstein**—Then you pay a tax premium for that, so it comes out. But, in the interests of law enforcement, of course we are otherwise required by law. That is not an issue. But one would think that the privacy issues would be dealt with in relation to that other law. There are certainly circumstances in which information is disclosed, particularly between government bodies. The tax office has powers in this area. People's banking details can be made available in all sorts of circumstances, but that is not our concern. In any event, the employee's position is no different from that of anybody else. Presumably, if it is otherwise required, this bill will be overridden in those cases anyway.

**Ms ROXON**—I would like to ask one last question. If you cannot answer it, I can find out the answer somewhere else but I thought you might know. With regard to the current privacy bill that applies to the public sector, I am not aware as to whether it has an exemption for employee records. I can find out the answer, but if there were an exemption, presumably it would be something that has been brought to your attention. I think there is not. One of our advisers might even be able to tell us, if you do not know.

**Ms Rubinstein**—My guess is that there is not. It would have been brought to our attention, as you say. The fact is that the definitions are inserted there. That is just a guess. I do not know the answer.

**Ms ROXON**—If that guess is right, do you have a view about whether public sector employees should be treated differently from private sector employees?

**Ms Rubinstein**—Arguably there are higher standards on governments that should apply to the private sector. People may well have higher expectations of government as an employer because it is such a huge employer. But they are very general arguments. I cannot see why that should be the case. Of course, we have large private sector employers that rival governments, or certainly government departments, in their scope. I would also make the point, which we have not dealt with, that this bill provides exemptions also for small business, which of course is a very large exemption and would in any event exempt employee records along with everything else from a very large number of employers. However, I would also make the point that the exemption for small business is different in respect of what the bill calls 'sensitive personal information'. Those are issues of very great concern—health, trade union membership, et cetera.

**Ms ROXON**—Thank you.

**CHAIR**—I thank you very much for the submission and also for coming along and discussing it with us this morning.

[10.27 a.m.]

**HUDSON, Mr Michael James, Acting Manager, Legal Policy, Multimedia Victoria, Department of State and Regional Development**

**STRAW, Mr Randall, Director, Government Online and Community Development, Multimedia Victoria, Department of State and Regional Development**

**CHAIR**—I welcome the representatives of the Victorian Department of State and Regional Development. I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the Houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of the submission from Mr Brumby. I invite you to make some opening comments.

**Mr Straw**—Michael and I work at Multimedia Victoria, which is a business unit in the Department of State and Regional Development. Multimedia Victoria's responsibility is to look holistically at information economy issues from a business, community and government perspective. Under the direction of the Minister for State and Regional Development, we have had the responsibility for developing the government's information privacy legislation. Administration of the Victorian laws and responsibility for implementation will ultimately be transferred to the Attorney-General's Department in the Victorian government. As a result of this commitment to privacy legislation, the government has a keen interest in a number of aspects of the operation of the proposed national laws.

In its submission, the Victorian government stated that it supported a national privacy scheme, recognising that this is the best way to achieve the objectives of both business and consumers. The government wishes to emphasise that a national information privacy scheme based on federal legislation is the best way to achieve business and consumer objectives in Australia and the most efficient method to meet emerging international standards. Accordingly, the Victorian government welcomes the federal government's decision to develop such a scheme across the private sector. Clearly, though, the Victorian government has a number of concerns with the scheme proposed by the Commonwealth which are noted in the submission. Hopefully, I do not have to restate them, at least in these opening remarks. Suffice to say that the concerns relate both to the achievement of appropriate regulation in the private sector and to management of the lines of responsibilities between the state and Commonwealth in information privacy.

However, there have been some important information privacy developments in Victoria after the lodgment of the submission and after the introduction of the federal bill which I would like to bring to the committee's notice. On 26 May, the Victorian government introduced the Information Privacy Bill 2000. Copies of the bill and the second reading speech are available for committee members, if they would like them.

The Information Privacy Bill is further evidence of the Victorian government's support for a national scheme because it adopts essentially the same framework obligations as the federal bill. Both sets of privacy principles are based on the federal Privacy Commissioner's NPPs for fair

handling of personal information which have been developed over the last few years. As such, the Victorian bill creates very similar obligations, although a number of changes to the national principles have been made for the Victorian law to reflect the fact that they are operating almost exclusively in the public sector context and to adapt to particular Victorian requirements—for example, in law enforcement and direct marketing.

The Victorian bill also reveals a very different approach to exemptions. Obviously, many of the exemptions which the Commonwealth has proposed for its bill would not have any proper function in the state public sector. For example, there is no need in the state public sector for any business exemptions, a media exemption or an exemption for household and domestic use of personal information. In its submission the Victorian government made comments about the Commonwealth's approach to some of these exemptions through its interest in seeing the development of the best possible national privacy model and achieving an information privacy framework that works effectively in the Victorian private sector.

Other exemptions contemplated in the Commonwealth bill would not necessarily be inappropriate in a state public sector scheme. However, the Victorian government's approach to some of these reveals a different view from that of the Commonwealth government. For example, the Victorian government believes that a higher level of privacy protection should be afforded to pre-existing databases and to employee records. As a result, the proposed Victorian scheme will restrict the use of and access to personal information that is held by agencies at the time of commencement of the Victorian law and will not exempt employee records from privacy regulation.

The Information Privacy Bill aims to cast a net over personal information held in the public sector and also to follow that information outside the public sector where appropriate—for example, in the hands of private sector or public sector contractors. When the state and federal laws operate together, the aim is to have a seamless environment for the flow of personal information within and out of Victoria. The government considers that the flow of information should be according to accepted privacy standards which are applicable as ubiquitously as possible.

The Victorian bill will establish the Office of the Victorian Privacy Commissioner who will administer the act and oversee compliance by Victorian agencies. Like the federal proposals, the Victorian scheme will be complaints based. Complaints will be conciliated by the Privacy Commissioner in the first instance. Binding decisions where necessary can be sought from the Victorian Civil and Administrative Tribunal. It is envisaged that the Victorian Privacy Commissioner will also have close ties with the federal Privacy Commissioner and that their operations be as consistent as possible. The Victorian Privacy Commissioner will have power to refer complaints to the federal Privacy Commissioner where appropriate. Moreover, the Victorian bill could provide a model law for other states, which would bring Australia closer to having a fully comprehensive approach to information privacy with substantial uniformity. Thank you for allowing me to make an opening statement in regard to our submission.

**CHAIR**—Thank you, Mr Straw. On the Victorian Information Privacy Bill, I take it that the bill applies to the public sector and not to the private sector?

**Mr Straw**—It applies to the public sector, not to the private sector, and we are hopeful that it applies to all state owned enterprises as well, even though they may be constructed and structured under the Companies Act, which is one of the areas of not quite harmony between the federal private sector bill and the proposed Victorian public sector bill.

**CHAIR**—I was wondering if we could go through your submission and address the issues that you raise. You say that the Victorian government does not support the treatment of government business enterprises under the bill. Can you expand on that?

**Mr M. Hudson**—I think a distinction needs to be drawn between government business enterprises, which it may well be appropriate to cover under the Commonwealth bill, and state owned enterprises, which are not government business enterprises. The real issue is that the state regards it as its prerogative to decide whether corporations or other entities that it creates should be governed under federal law or under its own regulations. Just because the state chooses to incorporate a body as a company, it does not mean that it buys into regulations, for example, under the Privacy Act, which the Commonwealth chooses to apply fairly arbitrarily at some later point in time.

The state government has more than 100 companies at the moment which it owns and which it has chosen to incorporate under Corporations Law. Some of those it will be appropriate to have regulated under the Commonwealth privacy scheme and some of them it will be appropriate for the state to retain regulatory control over under its privacy laws. The real point is that it should be up to the state to decide that rather than a federal minister.

**CHAIR**—If the states use the Commonwealth laws to incorporate these business enterprises, why should it be able to say, 'We will take the benefit of it but not comply with it entirely?' If what you are saying is that we want to create a seamless system—I think they were your words—why does it really matter, apart from this being a turf war between the Commonwealth and the states?

**Mr Straw**—In terms of the rationale behind why we structure things within corporate entities, I am not the right person to answer that. One of the stark examples of some of the inconsistencies between the proposed state bill and the proposed federal private sector bill is the Gas and Fuel Corporation that is incorporated. If that were regulated for privacy under the private sector bill that you propose, employee records would be exempt. All existing holdings of information would also be exempted, which are basically the name and address details of every Victorian household. We do not believe at this stage that would be appropriate for organisations that do hold sensitive information like that.

**Ms ROXON**—That might be right. Presumably, in the current circumstances that is not protected because your bill and our bill are not in place and do not cover gas corporations anyway.

**Mr Straw**—No, it does not at the moment.

**Ms ROXON**—One of my questions in that area is in regard to the privatisation of more of these essential service providers. Would the Victorian bill in its terms—and I know you are

going to provide a copy to us—ensure that information continues to be protected by what will essentially be a public sector piece of legislation in Victoria? One of the risks of the proposal that you are putting is that not only will the Commonwealth private sector bill not apply but also the Victorian public sector bill will not apply. That is because these organisations are in that in between phase and questioning whether they are really private sector or public sector and whether they will get any protection, which presumably is the worse outcome for everybody.

**Mr M. Hudson**—In some cases the bodies are privatised. That is mostly true in the case of the electricity and gas industries at the moment in Victoria.

**Ms ROXON**—What provisions does the Victoria bill make for those sorts of organisations?

**Mr M. Hudson**—At the moment, privacy and confidentiality provisions are binding on those companies by virtue of a supply and sale code. The government at the moment is looking at developing legislation that puts those obligations into law. Whether or not that legislation is effective gets to the next point about conflicts of laws, which we will probably come to. It is important in those cases for the state legislation to be preserved. In cases where essential services are provided by a state-owned entity like the water companies in Victoria, the public sector bill will apply to those and all the regulations about existing data and employee records will also apply to those bodies unless the Commonwealth bill takes that jurisdiction.

**CHAIR**—The difficulty here though is that whilst you are saying that there is proposed legislation in Victoria which will deal with such entities, the reality is that in other states of Australia there is not even proposed legislation in most instances. Therefore, whilst there may, from your perspective, be inadequacies in the Commonwealth bill, at least it does provide some privacy protection for individuals in similar entities in other states which, if we remove this provision from the Commonwealth bill, then it is left totally unregulated.

**Mr Straw**—I do not think we are proposing to remove it, I think we are proposing an amendment to it. Is that right, Michael?

**Mr M. Hudson**—The protection—

**Ms ROXON**—But why would you opt out of the provision that is there at the moment which allows a state, if they do have superior standards in their view, to opt out? I have two questions. Isn't the best option to get rid of the exemptions that you think cause the problem? In that case you then will not have difficulties, because employee records would be protected and existing databases would be dealt with more adequately. If we actually picked up the rest of your submission, presumably this point is not as important because the consistency would be there. That is one option.

The other option is: what is there with this opt out provision? Presumably it means Victoria can say, 'We have a better regime that applies and we think it should be covered by the state legislation and we are choosing to opt out for that reason.' The Commonwealth can be confident that the other states get protection and that Victoria is dealt with adequately.

**Mr M. Hudson**—The opt out provision would be something we would certainly invoke if no other changes were made to the bill. As I say, there are in excess of 100 state-owned companies at the moment in Victoria.

**Ms ROXON**—The opt out one is not the only provision as it stands, is it?

**Mr M. Hudson**—It requires the federal minister to make an assessment about whether it is appropriate to allow that state-owned entity to be governed under the state laws. The minister has certain criteria to assess when making that decision, one of which requires the minister to be satisfied that the state-owned entity will be governed by a scheme which has standards at least as stringent as the Commonwealth's scheme. That is not appropriate because it is really giving the federal minister the power to decide the level of standards applicable to a state-owned company.

**Ms ROXON**—Except if what you are saying to us is right then there will be no problem. I could understand if what you are saying to us is that the minister should have no discretion if the state is requesting that certain enterprises be able to opt out where there are similar or better standards that apply, but it is difficult if you are going to say to us, 'The Victorian provisions are going to be better, but we do not really want anyone to have to assess if they are better before we opt out.' If you do not want the minister to have the discretion on it, because the minister may not be an appropriate person who can tell that, it just seems there is a bit of a mixed message there.

**Mr M. Hudson**—It depends what you mean by better. In some cases it will be preferable for the state to impose lesser standards. For example, it may decide to create a company to manage its prison systems. For that sort of example the state company will need exemptions in the way it collects personal information in some cases, or handles it, or in what circumstances it can disclose it.

If the minister at the federal level is looking at whether such a company should be opted out of the Commonwealth scheme, he or she may see that the standards under state law will be somewhat less because of targeted exemptions for that sort of organisation and, as a result, may not be inclined to allow the opt out provision to be invoked. The real point is that when the state chooses to create these organisations, as it has done for some years under the Corporations Law, knowing what the obligations will be that apply to those sorts of corporations, the state should have that right to determine the level of obligations rather than having this fairly arbitrarily foisted upon it at a later time.

The provision in the Commonwealth law at the moment allows opt-in as well—under 6F of the bill, I think. So there will be a number of cases where the state considers, as it has done with incorporating companies, that some of its state-owned enterprises are better off under the federal privacy law as well, for reasons of competitive neutrality, just as it has exercised in the past in other areas. But in that case the state is really deciding what level of regulation applies to its owned bodies. In the case of government business enterprises, most of them, I would have thought, would be opted in because they are business enterprises; they are not exercising core government functions or other public functions.

**Ms ROXON**—What can we do as Commonwealth legislators, though, to ensure that the suggestion that you are making does not mean that any state that is completely disinterested in privacy for some reason or another will say, 'We want every organisation to opt out because we basically do not think privacy matters—and you can all go jump'? Your examples that you have put to us so far are quite sensible, reasonable ones, but your solution to it seems to be quite sweeping, not giving citizens the protection that they might otherwise expect in dealing with these organisations across a number of states.

**Mr M. Hudson**—We are only talking about the public sector or bodies that are owned and controlled by the state, and that is a fairly limited number of bodies. The suggestion that we have got in our submission is that a set of criteria are applied, and they relate to whether the body is completely owned by the state or its board members are appointed by the state, whether it has public purposes—things of that nature. That sort of provision has precedence in tax law at least, although I cannot refer you to the particular example. I think it is actually in relation to the taxation of government business enterprises. It may not be that that provision is particularly suitable in this area, but the rationale behind it is really the same. Using that sort of scheme, you would really be limiting the total number of state bodies that would be exempt.

**Mr CADMAN**—Could I just understand this. You want to have your cake and eat it too. The chairman has outlined the role of the Corporations Law—Australia-wide, universally applied. State instrumentalities are taking advantage of that, but then using a choice to say, 'Whether we will have more stringent or less stringent privacy laws we will choose.'

**Mr M. Hudson**—The states have also chosen whether to use Corporations Law or not. We have had for some years a knowledge of what being incorporated under the Corporations Law means, and the state has chosen to use that route for one reason or another in exercising its right as a state to control its state-owned enterprises.

**Mr CADMAN**—What the Commonwealth appears to be doing here, anyway, is setting a bar, a standard, that it would like to see applied to corporations universally. It seems that, in some ways, you want to have the right to beg that question.

**Mr M. Hudson**—The bar has been set arbitrarily. The state has used a number of different ways to incorporate its bodies. Sometimes it is under its own acts and sometimes it is under the Corporations Law, and that was a matter for the state to determine. The Commonwealth does not choose to let those out or require that particular obligations are met in terms of the state choosing to use the Corporations Law for those.

**Mr CADMAN**—I have not got much problem with your objectives, because I can see that with gas and water corporations that is highly valuable commercial information, and you do want, I take it, to make sure that that information is protected from general use in great marketing databases. Do you publish them or sell them at the moment?

**Mr Straw**—Not to my knowledge.

**Mr M. Hudson**—No, there are provisions under licence at the moment that bind those sorts of companies in privacy and confidentiality. So they are quite restricted.

**CHAIR**—I think the next one was the non-profit organisations.

**Mr M. Hudson**—The point about non-profit organisations is a very quick and simple one from our point of view. We do not consider that the exemption in relation to collecting sensitive information that is applied to non-profit organisations has any real justification. It is recognised that a number of non-profit organisations do need to collect sensitive information. However, we are not sure where that needs to happen without consent. I would have thought that members of all those organisations would know they were members and would certainly understand that that information needs to be collected and held by that organisation.

**CHAIR**—I understand what you are saying. What about related bodies corporate?

**Mr M. Hudson**—Again, this is a fairly simple point. The Commonwealth policy at the moment is to allow related bodies to disclose information to each other without reference to the purpose for which that information was collected. On the current version of the principles, leaving aside the exemption for a moment, there is quite considerable freedom for related or other bodies to disclose information they collect. That is because those bodies are bound, when they collect the information, to inform the subject of the information as to why it is being collected. At that point the purpose for which that information can be used is set. That body is then entitled to disclose and use that information for that purpose.

**Ms ROXON**—Can I ask a question in order to have a better understanding of how these provisions would operate. If the small business exemption remained but a small business as defined under the act was a related corporation to another much larger business, is it your understanding that the exemption that would apply for the small business, in the collection of the information, and the exemption that applies for related bodies corporate means that that small business can hand it over to a larger organisation which would otherwise be bound by the privacy principles; that the larger organisation would be free to use the information in the same way that the small business would, thus avoiding the protection at all of the privacy principles?

**Mr M. Hudson**—I do not think so. The definition of small business operator is structured to avoid that problem. It does depend on exactly how you group companies. The only case where that sort of an abuse of information could occur is where a large business divided itself into smaller businesses, all of which had a turnover of less than $3 million.

**Ms ROXON**—Could you tell me where you think those provisions are? Certainly, the Commonwealth department could not tell us yesterday. They could not tell us much, actually.

**Mr M. Hudson**—The definition of small business operator is in 6D. Subsection (3) reads:

> A small business operator is an individual, body corporate, partnership, unincorporated association or trust that:
>
> (a) carries on one or more small businesses; and
>
> (b) does not carry on a business that is not a small business.

In other words, it carries on a business that is a large business. So if you have got related bodies which—

**Ms ROXON**—Do you think that would take in outside the definition?

**Mr M. Hudson**—I think so.

**Ms ROXON**—I suppose that could be clarified.

**Mr CADMAN**—What about a body gaining information and legitimately passing it through to a related body which would not have the same need for or the capacity to collect that information—a related body?

**Mr M. Hudson**—Under the current draft of the principles, passing on that information to the related body which did not do the collection, provided it was for the same purpose, is allowed. There is no need for an exemption in those cases.

**Ms ROXON**—Can you say that again?

**Mr M. Hudson**—Yes. When a body collects information, it sets out the purpose for that collection and everyone knows at what point that is. Under principle 2, it is then entitled to use or disclose that information for that purpose. So, if a collecting body, say a magazine, is collecting information from someone who wants a subscription to the magazine, then that body could pass it on to its distributing arm for the same purpose—in other words, to fulfil the subscription requirement—without the need for any exemption about disclosing between related bodies corporate. Then the related body could use that information for the purpose of delivering the magazine.

**Ms ROXON**—But you are saying that does not apply for a small business that has a related, larger corporation. If it is the small business collecting the information about a magazine, because they would be exempt under the current bill they do not have to tell people what they are collecting it for, get their permission, or any of the things that are in the principles, as the passing on of the information is different. But you are saying that they would not come within that category to start with by the nature of their relationship with the larger corporation?

**Mr M. Hudson**—That is right. They would not be classed as a small business operator if they were related to a large business. That is my understanding of it.

**Ms ROXON**—Yes.

**Mr CADMAN**—But between large businesses you say there is no need for an exemption?

**Mr M. Hudson**—I do not think so—

**Ms ROXON**—Provided it is for the use—

**Mr M. Hudson**—Provided they follow the collection principle properly. I think they have got quite substantial flexibility as it is.

**CHAIR**—As an example, if I subscribe to something published by—

**Ms ROXON**—But it would not matter because it would all be covered by the media exemption as it currently stands, which lets them get that information.

**Mr M. Hudson**—I do not think so.

**CHAIR**—If I subscribe to a magazine published by the Australian Consolidated Press, and that magazine is distributed by an unrelated company—I do not think it is, but hypothetically—Gordon and Gotch, then that information obviously needs to be passed on to the distribution company in order for me to get my magazine, but there is no problem with that under the bill, as I perceive it?

**Mr Straw**—There is no problem with that under the privacy principles without that exemption already, and that is explicitly contemplated in the principles. In addition to that, under principle 2, that information can be used for a secondary purpose if it is within reasonable expectations and it is related. So there is additional flexibility there as well.

**Ms ROXON**—But that does take us on to the next one, which is the media exemption. We asked a lot of questions of the Press Council yesterday about the breadth of the exemption, which they were very happy with. But the concerns that you have raised are concerns that other organisations have raised as well—that, by including in the definition of information, and by the only requirement really being that you are collecting it for distribution to the public in some way, you become a sort of media organisation, and it becomes for the purposes of journalism. Your suggestion, as I understand it, is that there should be some sort of public interest test. Is there not an easier way, or a better way, of defining it rather than adding another layer, which is a fairly complex test, presumably, and would make it difficult for people to know when the exemption applies and when it does not?

**Mr M. Hudson**—The other way that you might think about is simply better targeting the nature of the exemption itself, trying to define the types of organisations that can take advantage of it.

**Mr Straw**—Or the activities.

**Mr M. Hudson**—And/or the activities. I think you have been pointed to a couple of examples where that type of approach has been tried, and New Zealand is one of those. The previous government in Victoria, when it was looking at private sector legislation, had a draft which did a similar—

**CHAIR**—The Press Council said to us yesterday that the New Zealand legislation has created all sorts of problems about what you can and cannot report. There was some absurd example, which no doubt we will get the details of, about not being able to report the nesting habits of some bird in New Zealand because somehow that fell within that.

**Ms ROXON**—We thought we were caught in a Monty Python movie.

**CHAIR**—I cannot say any more about it because we are still waiting for the details, but certainly the Press Council's view was that the New Zealand legislation has been far from ideal.

**Mr Straw**—However, on the literal meaning of the current legislation, any organisation with a webpage qualifies as a media organisation.

**CHAIR**—That is true, but the exemption is then narrowed if you look at 7B(4), which says: 'An act done, or practice engaged in ... in the course of journalism.' So simply to have a webpage for XYZ company, you have still got to come within the course of journalism, so it seems to me that—

**Ms ROXON**—Except journalism is defined equally broadly I think, is it not?

**CHAIR**—It seems to me that the question of what constitutes journalism is more important than what constitutes a media company. What is a media company? Is News Ltd these days a media company if it has got other interests around the world? I am just plucking that out of the air as an example, but most media companies seem to me to have a collection of other activities associated with them. It makes it very difficult to define a media company, so it strikes me that journalism is probably the relevant definition we ought to be looking at. Your suggestion, I thought, was to add a public interest test and narrow the definition by deleting the term 'information.'

**Mr M. Hudson**—The other point about the definition is that, in the explanatory memorandum, it is explicitly recognised that public relations exercises undertaken by an organisation would qualify it as a media organisation. I am not sure that we really want to go that far. What we are talking about is trying to protect freedom of the press and balance that with protection of privacy. When you are considering, on the press side of things, any organisation that undertakes PR work, you are really distorting the balance that you are trying to strike there, I think.

**Ms ROXON**—Of course the protection of freedom of the press is important. My questions are not to suggest that they are not important, but it seems to me a bit ironic that personal information, that is protected everywhere else, is not protected if the purpose is to provide it to the public—which seems to be what we should be aiming to protect in our privacy principles. Is there any real reason that there cannot be a particular exemption which deals with sensitive information and the way that it should be handled? I can understand why the Press Council and others want information to be in there, but I am not convinced that it is unworkable for them to have some sort of restriction on that, either the use of it or the collection of particularly sensitive information as it is defined.

**CHAIR**—The trouble with that is that if sensitive information could not be collected and published by the media, then there would not be much left in our newspapers. When you look at that list—

**Mr CADMAN**—You also mention the retention of information. In most areas where information is collected, there is a sort of barrier that comes down when the time for use of that information has passed. Then the information should be destroyed, particularly databases and cross-matching databases. I think there are a number of areas that that applies to. That provision does not apply to the media. Is there any way in which a limitation should be applied?

**Mr M. Hudson**—Yes. The approach adopted—if I can again refer to the previous government's bill—was to isolate some of the principles and provide an exemption in respect of those, but at a certain time, which I think was after publication of the information, a person would be able to get access to that information to correct it if necessary. So you actually allowed the press a certain amount of freedom in collecting information for the purposes of a publication, but, once it had been published, you gave rights to the subject of the information to see what was collected and to correct it, in accordance with principle 6.

**Ms ROXON**—With regard to your position on employee records, you say that the Victorian government does not support the exemption, which I can understand, and you say that it is cast too widely. But your suggestion that the disclosure of information should be permitted to potential future employers intrigues me. I am not sure if you were here for the previous witnesses from the ACTU who said that the provision of personal information to future employers was one of the major breaches of privacy that currently occurs in the workplace. Can you explain your position on that? Obviously employers have to be able to provide references and things like that, but that may well be quite different to providing personal information about health records, family arrangements, religious beliefs, trade union membership or any of those sorts of things.

**Mr M. Hudson**—The exact thing that we had in mind when we referred to future employers was the reference example.

**Ms ROXON**—That is the only thing that you are seeking to ensure that a former employer would be able to pass on to another employer?

**Mr M. Hudson**—Yes. Arguably, thinking about that further, you may well have the implied consent of employees to do that sort of disclosure.

**Ms ROXON**—It depends if they name you as a referee or not. I understand that there are very good reasons for allowing former employers to provide some sort of reference, but distinguishing what is legitimate information to pass on and what is personal and should not be passed on seems to me to be a very important distinction that you did not appear to make, so I wanted to be sure what your intention was.

**Mr M. Hudson**—The government did not actually go into that issue in that sort of detail.

**CHAIR**—I am looking at 7B(3), 'Employee records', which says

> An act done, or practice engaged in, by an organisation that is or was an employer of an individual, is **exempt** ... if the act or practice is directly related to:
>
> (a) a current or former employment relationship between the employer and the individual;...

You say that there should be disclosure in use of information internally. But if it can be passed on, the reference to a former employment relationship is a big ambiguous as to that. What I am saying is that it seems to me that that is directed towards the prospective employment relationship, because if you are still employed and you are providing information on the potential future employee, it is about a current employment relationship, or if the person is no

longer with the particular employer, then the information is about a former employment relationship. To that extent it meets your criteria, so doesn't it then come back to what constitutes the employee record which is important? The exemption seems to me to be directed towards what you are saying, but you are saying that it should be in the nature of a reference type material rather than all the details provided in the definition of employee record?

**Mr M. Hudson**—That is right.

**Ms ROXON**—Except that your proposed exemption deals with who that information is handed on to, whereas what the chair has just read out provides the exemption for the collecting employer, for the person who is actually collecting the information. That does not limit who they pass that information on to once they have collected it. I think you are saying that it should be passed on only to a future employer, that it should not be passed on to the neighbours who have got a fence dispute or passed on to—

**Mr CADMAN**—To the debt collecting agency.

**Ms ROXON**—To the debt collecting agency or anybody else, for that matter.

**Mr M. Hudson**—That is right. We are really trying to define more closely exactly who is entitled to the disclosure.

**Ms ROXON**—And, if anyone comes in, what you would give them.

**Mr M. Hudson**—And what they should get, yes.

**Ms ROXON**—But your concern is the who. You have not turned any particular attention to what they should be able to get.

**Mr M. Hudson**—Yes.

**CHAIR**—On the small business exemption, your submission says that the government supports the delayed application of the principles to small business. However, it does not support their ongoing exemption from the privacy scheme. It seems to me that you are saying, 'Yes, we accept that there is going to be a transition period required for small business,' and, rather than exempting them entirely, we should have a longer transition period but bring them into the scheme. Is that in effect what you are saying?

**Mr M. Hudson**—That is what we are saying.

**CHAIR**—Do you think there should be any limitation at all as to what a small business is—for example, in the exposure draft the limitation was $1 million in turnover. Workplace Relations told us yesterday that a $1 million turnover means that 93.8 per cent of small businesses would be exempted, whereas $3 million means that 98.3 per cent would be exempted. The choice of $3 million rather than $1 million was really to try to exempt more of what is generally regarded as small business as far as you can.

**Mr M. Hudson**—How were they defining small business?

**Ms ROXON**—Twenty employees or less.

**Mr CADMAN**—A similar approach would be to just alter the numbers and say 20 employees or fewer. Do you have any opinions on that? Have you looked at that?

**Mr M. Hudson**—I think the $3 million is problematic because the statistics that we have from the Australian Bureau of Statistics suggest that, if you use a threshold of $3 million annual turnover, you will pick up 95 per cent of all business. That is not 95 per cent of small businesses. If you are really exempting such a high proportion of Australian businesses, you pose substantial risk to the objective of achieving consumer confidence, particularly in dealing with electronic commerce.

**Mr Straw**—Electronic commerce is where some of our focus is.

**Mr CADMAN**—What do you think the basis of the definition should be? Would you say 20?

**Mr Straw**—The Victorian position is that we do not believe there should be an exemption for small business at all. We recognise that there are some compliance costs, but we do not believe exemption is the way. There may be some other transition arrangements that should be put in place.

**Mr CADMAN**—But you say you believe in the delayed application?

**Mr Straw**—Yes. The delayed application is a recognition of Y2K, GST and some of the other burdens that have been on them but not necessarily—

**Ms ROXON**—It is not because you think that the privacy principles should not apply.

**Mr CADMAN**—On that basis only. I think that is the only way we are discussing it at the moment. That is what the legislation says. What would then be the basis for an exemption for a temporary period?

**Mr Straw**—I do not think we have thought through the period of time at all.

**Mr CADMAN**—Or the size or the scale.

**Mr M. Hudson**—That becomes slightly less important and the government would probably live with one or three million, provided that after 12 months or whatever transition period it was that the exemption would lapse.

**CHAIR**—You do not think that a two-year review or three-year review of the legislation is sufficient to see how it has worked for large business and then—

**Mr M. Hudson**—No. It is a matter of basic principle—the government does not support the exemption for small business.

**CHAIR**—What about how small small business is? If you do not have an exemption for small business, then anybody who is regarded as a business is brought into it. We have seen in the course of this inquiry that in another context people who have been regarded as employees in the past who may have some earnings on the side under some independent contractual arrangements—say a journalist who writes a book and earns some royalties, or a sole trader who is just operating from home—because of the provisions of the ABN system coming into operation on 1 July are now caught in the web of being defined for those purposes as a business, whereas at least the former category would not have generally been regarded as a business in the past. In the GST system, if the turnover is less than $50,000 then there is no obligation to be in the GST system unless you opt into it. I suspect there are some levels where, just because of the way we define things, we would be placing burdens on people that should not be in the system at all.

**Mr M. Hudson**—It is a balance when you come down to it. Small businesses, for the most part, pose very little privacy risk. However, sole traders or other businesses who have only one person, particularly in the case of Internet type businesses, can pose huge privacy risks because of the technology involved. We are not really in a position to make a qualitative assessment.

**CHAIR**—The way this is defined here, you are not a small business if you are under this threshold. However, even if you are under this threshold you can still be regarded as in the system if you provide health service to another individual or you disclose personal information to provide a benefit or service, or you are a contracted service provider for a Commonwealth contract. Wouldn't a way of approaching this be to say that you come back into the system if you are operating over the Internet or you are engaged in e-commerce? Then you do not have to worry about whether it is a single person operating out of their bedroom at home, which you might not regard as a small business in any other sense, or it is a company that has got 50 employees or whatever. You just say the nature of this activity is consistent with bringing certain things back into the system.

**Mr CADMAN**—If it were changed in that way, Crimewatch, for instance, would fit within that definition almost.

**CHAIR**—That is another issue. That is possibly right. I would be interested in your comment on that proposal as an alternative.

**Mr M. Hudson**—That provision which adds back into the scheme small businesses which are perceived to have a high privacy risk does not catch all the ones that you want to, it only catches those businesses which disclose or collect information to or on behalf of another individual and receive a benefit.

**Ms ROXON**—I was about to suggest that to you. My concern—and this is an area that state governments are largely responsible for—is the example of real estate agents, who generally will not necessarily be over the $3 million threshold because often the money is not coming through them. They hold an immense amount of personal information about people—their

rental history, what they have made bids on at auction, all sorts of things—but they do not necessarily disclose that personal information to others for a benefit, service or advantage. In my experience, they largely disclose it because real estate agents like disclosing that information to each other to ensure that, if one person has had a bad experience with a tenant, that person cannot be a tenant anywhere else—which is not very helpful for the particular person. Would a problem like that not be solved by bringing a small business back into these principles, just by deleting the words 'for a benefit, service or advantage', so that basically if you are disclosing personal information about another individual, then the privacy principle should apply? It means that all the fears that people have about whether the butcher has to comply with privacy regulations are not there, because they generally do not have personal information that they disclose, whereas real estate agent businesses that are in e-commerce, if they are using that information for whatever purpose, would be covered. It may be because the Victorian government's position is that small business should not be exempt, full stop, that you do not have a view on this staged proposal, but it seems to me that that would be one way of getting around it. Any small business that does not handle personal information does not have to worry, and any business that does has to deal, quite rightly, with some sort of privacy provisions.

**Mr M. Hudson**—'Benefit, service or advantage' can be pretty broadly interpreted anyway. In disclosures between real estate agents you may well find there is an advantage, a mutual benefit to each other, even if you cannot really quantify it. I agree in principle—

**Ms ROXON**—It is hard for an individual tenant or buyer or seller to actually enforce that, though, isn't it?

**Mr M. Hudson**—Yes, and I agree with your point in principle that there is no real reason to distinguish disclosures which might be an abuse of privacy and which you get a benefit for from those where you do not get any benefit. But the thing that that provision does not pick up is abuses which go on internally within an organisation which collects personal information but does not disclose it at all, just using it for its own purposes.

**Ms ROXON**—So it does not deal with all of the access, the correcting the record type issues such as—to stick with the real estate agent—something being on your record as a failure to pay some amount when actually you were in a dispute over who paid for fixing the hot water? Removing those words that I suggested would not give a consumer the right to get access to the record and correct it if it was wrong, but all those sorts of things apply to other organisations?

**Mr M. Hudson**—That is right.

**Ms ROXON**—So you say that it would not be adequate?

**Mr M. Hudson**—It also does not prevent that organisation from using the information for any other purpose it likes, provided it does not disclose it to other organisations but uses it for its own purposes.

**Ms ROXON**—If it collects the information because it collects the rent on behalf of an owner, but it then uses the information to run its direct marketing campaign on selling something that is nothing to do with housing?

**Mr M. Hudson**—Or any other sideline business where it thought it wanted to. The other thing with setting a threshold of $3 million is that you create anomalies roundabout that threshold and a competitive imbalance between those that fall over and those that come underneath it. You also create confusion for small businesses in deciding whether or not they need to comply year to year. Some years they have a good year, some years they have a bad year, and they will not necessarily know whether they are in or out of the scheme.

**Mr Straw**—Until after.

**Mr M. Hudson**—And consumers will be faced—

**CHAIR**—It may not be a year. Take a business that is involved in a seasonal activity such as the snow season. You can have six months of virtually no activity and no turnover, and six months of very high turnover.

**Mr Straw**—Depending on the weather.

**CHAIR**—Yes.

**Ms ROXON**—Don't talk about the weather. I have one last thing, because I know we are short of time. With regard to existing databases you say that the distinction is undesirable. We have had some other witnesses suggest, or in our discussions with other witnesses they have talked about, having an appropriate time frame. It is understandable. They say that any existing material on a database, will not necessarily be able to comply as soon as these principles come into place, but that there should be some time frame for any organisation to go back and ensure that all of the records that are held on a database would comply. Is that the sort of proposal that you have in mind? How do you view this working in a way that is practicable?

**Mr M. Hudson**—I do not think we explicitly recommended an additional transition period in respect of existing information, although I do not think the government would be opposed to that. In this legislation and in the proposed Victorian legislation as well, there is a 12-month transition from when it has passed both houses anyway. In addition to the time that it is running now, organisations have a fair bit of leeway in getting existing data up to—

**CHAIR**—Once you use any information you have got and you have brought into the scheme, yes, you could have people archive information, but if they seek to use it in some way, then they are caught.

**Mr M. Hudson**—For the previous information, as I understand it, the obligations about use, disclosure and access do not apply. Unless you re-collect it, the obligations will not kick in. There is a lot of information on databases at the moment that does not have any use-by date.

**Mr Straw**—Names, addresses, birth dates, et cetera.

**Mr M. Hudson**—Ethnicity, gender preference—it is quite sensitive information.

**CHAIR**—Maybe your interpretation is correct, but the evidence we had from others was that, once you seek to make use of any of that information, the obligations of this bill would apply. That is what the people in Sydney were saying.

**Ms ROXON**—I understood that they were saying that, if you made contact, you had to then start providing the opt-out but not necessarily that you would have to confirm with them their continuation on a database, your intentions for use or anything that you would have to do for a new contact. I think that is what they were saying.

**Mr M. Hudson**—That is right.

**CHAIR**—Just to finish that, I understood that they were saying that the practical effect of that is that the information is useless because you cannot make any use of it unless you then abide by the provisions of the legislation and principles.

**Mr M. Hudson**—That is true for some information which does require to be updated; an address is a clear example of information which would go out of date. But there is a substantial amount of information that does not go out of date and which will not come under any of the obligations to which no access will be allowed to subjects of the information forever.

**CHAIR**—Can you give us some examples of that?

**Mr M. Hudson**—It would be the examples that we mentioned before about important information—ethnicity, sex, birth dates, former marriages or marital affairs. There is a lot of information that will not change; it is historical and does not need to be updated and can still be accumulated and subject to abuse.

**Ms ROXON**—I presume you mean that age and ethnicity are extremely valuable marketing tools— that is, if you know that you can isolate all women between 20 and 40. The example that you were using before was wanting to target people who were in the age groups that were having families; that is a very valuable tool and it does not change. You know when people pass outside that category, even if you have got to update their address.

**Mr CADMAN**—We have had evidence to say that the address has got a life of about three years. So unless you can identify a person's whereabouts, what value is the information?

**Mr Straw**—There are other ways of contacting people in the future. There are email addresses that may or may not be transferable, so they may last a lot longer than addresses. Another example is mobile phone numbers because of mobile phone number transportability between carriers. Some of the electronic contact methods may last even longer, rather than the physical ones at the moment.

**Mr M. Hudson**—And addresses are often public. You can look in the phonebook for addresses or on the electoral roll. The use of that information is not regulated under this proposed act, so you could easily match it to what you have got and update the address.

**CHAIR**—Thank you for your submission and also for coming and discussing it with us this morning.

[11.37 a.m.]

**GRIBBIN, Ms Anne, National Secretary, Fundraising Institute of Australia Ltd**

**HUDSON, Mr Peter, Victorian Executive Member, Fundraising Institute of Australia Ltd**

**ZERMAN, Mr David, National President, Fundraising Institute of Australia Ltd**

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

**Mr Zerman**—We would like to make some opening comments. The first thing really is just to tell you very briefly about the Fundraising Institute of Australia. We have more than 1,100 members. It is an individual member organisation, and our members represent probably more than 750 organisations in the not-for-profit sector. The not-for-profit or charitable sector in Australia, according to the Industry Assistance Commission report of a few years ago, raises more than $5 billion, so it is a very large sector in the general Australian community.

We welcome the legislation now before this committee, particularly the national privacy principles for the simple reason that they will undoubtedly increase public confidence in fundraising. The Fundraising Institute of Australia, amongst other things, but more importantly than anything else, stands for accountable, transparent and ethical fundraising, and all that we do is encourage our members to ensure that our fundraising is accountable, transparent and ethical.

Before you question us on our submission, we would like to raise four points which have come out of other submissions we have read about, a bit of research we have done and the ongoing public debate. We generally support the bill on three points but disagree on one. In summary, we support the one year's grace, the opt out as opposed to opt in and the national privacy principles, and we are against exemptions for government departments.

**Ms ROXON**—For the states?

**Mr Zerman**—Yes, state government departments. There has been some discussion and possibly concern about the existing data and the period of grace for one year before some of the principles, particularly on collection of data, come into effect. We understand and share those concerns and I ask the committee to look at the existing data issue from the point of view of my organisation. That is probably the best way. Even though my organisation might or might not be typical of the whole fundraising sector, it will give you an idea. Hopefully, I might be able to convince you that the one year period of grace is sensible and practical.

Most businesses are in contact with their customers on a regular basis. Unlike a business which typically contacts its customers—I will say 'donors'—once a month, we conduct only

two or three major appeals per year. If all the national privacy principles came into effect from day one, we would have to conduct a special mailing to, say, 65,000 donors, to ask, 'Do you want us to be able to contact you again?' It is a waste of money—the compliance costs for us would probably be $40,000 or $50,000. How are other organisations, like the Salvos, who probably have databases of 200,000 or 300,000 names, going to contact their people? The expense is—

**Ms ROXON**—Are there organisations within your broader group that would find a 12-month period a burden? Presumably most would make contact at least in a 12-month period.

**Mr Zerman**—Yes, that is what we are saying—a 12-month period would be sufficient. For example, the Flying Doctor Service contacts people in May each year for Flying Doctor Week, which celebrates our birth, and in November around what we call John Flynn Day, which celebrates his birth. As a minimum, we contact our supporters twice every calendar year, and we feel comfortable about being able to contact them and seek their views and support in that timeframe. The 12-month period would be acceptable to us; there would not be additional compliance costs if this 12-month period is there.

The second issue is opt out versus opt in, and we sympathise with those favouring the opt-in regime, particularly in relation to Internet and e-commerce. However, consider how fundraising works, we might acquire a list from somewhere—a public list of potential donors—and write to them seeking their support for our organisation. If we have the opt in, as I understand it, we would have to write to those people first of all saying, 'Can we contact you later on to support our organisation?' It is a double cost, and if people get the first letter they will say, 'Why didn't they contact us in this letter and ask us to support them?'

**Ms ROXON**—If they are going to be annoyed abut the contact, then presumably they will be just as annoyed about the first letter asking whether you can contact them.

**Mr Zerman**—Precisely. They will be more annoyed about that and they will think, as my daughter would say, 'They are real dorks as an organisation.' We believe that opt in would be the death knell of fundraising in this country. It really is a great concern to us. Anne Gribbin has recently taken up the position of director of support and development for the James Ethics Centre based in Melbourne. You are probably aware that the James Ethics Centre is centred in Sydney generally, but they are opening a Melbourne office. Prior to this appointment Anne was the director of the Alfred Foundation associated with the Alfred Hospital, and she will be able to talk about this aspect, as well. I will hand over to Anne.

**CHAIR**—I think you are going to convince us on this.

**Ms Gribbin**—Okay.

**Ms ROXON**—I would like to ask two questions which go further than that. We have had evidence from Reader's Digest and from the Direct Marketing Association and they said that their affiliated organisations all have a provision which enables a person to sign on to a 'don't ring me, don't write to me' option and they then tell all their affiliates that this person has exercised this option. Do you have a similar sort of facility?

**Mr Zerman**—Not at the moment. As a result of this legislation—and I will be talking about this at the end—we are proposing to adopt a code of practice which encompasses the principles.

**Ms ROXON**—What they are doing, however, potentially goes beyond the principles, but they have said, 'For us it is a smart marketing tool. There is no point spending money sending letters to people who have already told us they do not want them.' I think they told us 20,000 people a year were being added to this database—which is a huge number.

**Mr Zerman**—Amazing.

**Ms ROXON**—I am a little amazed, but that is what they told us.

**Mr P. Hudson**—The not-for-profit sector tends not to share, if you like, mail-out or donor database information. If an individual notified my organisation that they wanted to be deleted we certainly would not be sharing that with another organisation because we would not know whether they had that person on their records or not.

**Ms ROXON**—That is my second question. You obtain a list from somewhere and make your first contact. Presumably you do not obtain those lists from each other?

**Mr Zerman**—No, even though we are friends.

**Ms ROXON**—Is there any reason that you do not? There is nothing currently to stop you doing that—other than your own concerns about what is appropriate ethical conduct?

**Mr P. Hudson**—Without being overly territorial, I am damned if I am going to share my mailing list with my colleagues here and I would not expect them to do it.

**Ms ROXON**—You are opposition.

**Mr P. Hudson**—We are.

**Mr Zerman**—We are friends here, but there is hand to hand combat.

**CHAIR**—There is no such thing as affinity marketing within the fundraising sector?

**Mr P. Hudson**—Not to my knowledge.

**Ms Gribbin**—There is a saying in fundraising that your donors are not your donors, meaning that if you think you own donors exclusively you are very wrong. People have allegiances and special feelings for all sorts of causes and they do not often, in our experience, share that with you and that is not something you go out to seek either.

**Mr P. Hudson**—You made the comment that you believe the opt in is not appropriate. On a very simplistic level, for a not-for-profit organisation, such as my organisation, to write to one of my donors and say, 'This first letter is to ask whether I can write and ask you for a donation.'

a lot of my donors, and not-for-profits also, wrestle with this fact: we must be professional and we must be seen to be professional but by golly we had better not waste any of our donors' money. If we sent two letters a lot of my donors would say, 'What the hell are you wasting my money for? If you can afford to do that you do not need a donation from me.'

**Mr Zerman**—Another example is that if we do two or three appeals a year and we have some donors who say they want to donate only once a year, we put them into that category internally. We put them in for RFDS Week in May because it is something they can understand in terms of the material that we are going to be sending them about the organisation and because it is close to the end of the tax year and there is a good reason for contacting them at that time. Each organisation handles it differently. ADMA is really different from the Fundraising Institute of Australia: we do not have a large budget and we do not have a large staff—we have a chief executive officer based in Sydney and two other employees.

**Ms ROXON**—Absolutely. That is why I am asking. My interest is not in how similar you are; my interest is in whether you have these facilities that do share between organisations. What about the information you collect via telephone canvassing where you have some of your affiliates randomly ring people—I do not know whether it is random—to make the first contact? Would the code of conduct that you are talking about cover that as well? It seems to me that that is a situation where the current standards are quite different from what they are with mail contact.

**Mr Zerman**—The Royal Flying Doctor Service in Victoria has a telephone campaign. We have outsourced it to a private company. They contact people who are asked whether they wish to purchase a product or to make a donation. If they purchase a product the information is kept by the outsourced company.

**Ms ROXON**—A product that is related to your organisation—or not anything to do with it?

**Mr Zerman**—They purchase a product and we get some money from the sale of that product.

**Ms ROXON**—But they are not purchasing a Flying Doctor badge or something; they are purchasing an airconditioner or whatever.

**Mr Zerman**—Something like that. If they decide they do not want to purchase a product but would prefer to make a donation, we get the name of that person, who becomes one of our donors.

**Ms ROXON**—Do they get asked whether they want to make a donation to a particular organisation?

**Mr Zerman**—They say, 'My name is so and so; I am from XYZ company, calling on behalf of the Royal Flying Doctor Service. Would you like to support the Royal Flying Doctor Service through purchasing a product or making a donation?' and then the person says, 'I prefer to do one or the other.'

**CHAIR**—Keep going through your submission, Mr Zerman.

**Mr Zerman**—I suppose we could talk about small business, which was the next issue. The essence of our submission is quite simple, I suppose: we believe that because we encourage all fundraising in Australia to be accountable, transparent and ethical, there should not be a $3 million limit. Our submission requests that you consider, with respect to all organisations that have what is called tax deductibility, as we know it today—it is going to change on 1 July—that they have to comply with the principles, so that all fundraising organisations that receive tax deductibility will further be accountable, transparent and ethical because the work that they are undertaking in contacting supporters is in line with these principles.

**Ms ROXON**—How do you get that status?

**Mr Zerman**—What status?

**Ms ROXON**—Tax deductibility.

**Mr P. Hudson**—You have to apply to the ATO and put in a submission to prove your 'significant benevolence'—those are the two operative words—and the ATO makes a determination as to the activities that the applicant organisation carries out.

**Ms ROXON**—Are you suggesting that at that point the particular organisation has to say, 'And we have also signed on to the appropriate privacy code,' or are you just saying that once they get that status that is when they should then have to apply whatever privacy principles are out there in the private sector?

**Mr Zerman**—That is right.

**Ms ROXON**—The second rather than the first.

**Mr Zerman**—The second rather than the first one, but it should not be up to $3 million; it should be all organisations that obtain tax deductibility for donations.

**Ms ROXON**—In the not-for-profit sector?

**Mr Zerman**—In the not-for-profit sector, yes. Tax deductibility is a right given to us by the government because the government of the day sees that this organisation is making some contribution to the community.

**Ms ROXON**—What sort of fundraising organisations do not have tax deductibility status at the moment?

**Mr P. Hudson**—A lot of fundraising, as opposed to an organisation, does not fit the bill because it does not comply with 'significant benevolence' under the act.

**Ms ROXON**—Give me an example.

**Mr P. Hudson**—A sporting body raising money for a football match or whatever—that would not be tax deductible.

**Mr Zerman**—The Western Bulldogs.

**Mr P. Hudson**—There are a number of community based organisations, social clubs—

**Ms ROXON**—If they do not, they should, I must say—but only because you picked that team!

**Mr P. Hudson**—Social clubs, community organisations that fall outside the requirements of the ATO tax deductibility status. There are lots of them.

**CHAIR**—If the $3 million exemption for small business were to remain, you are suggesting that the act should be changed so that if you are an organisation with tax deductible status you are brought back into the privacy provisions in any event.

**Mr Zerman**—Just by virtue of the fact that you have tax deductibility, the principles should apply to you. As we were discussing previously amongst ourselves, this would not apply to most of our member organisations if the $3 million level is defined in legislation. I keep harping on 'accountable, transparent and ethical'; if we want fundraising to be that, there has to be compliance in the general community so that the community will support the organisation.

**Ms ROXON**—What process have you gone through within your organisation to ensure that all your affiliated organisations that would be covered by the privacy principle will support or consent to your proposed amendments if they go through? What process have you gone through?

**Mr Zerman**—When we found out about the inquiry, we faxed all our members about the fact that we were going to be appearing before the committee, that we were going to put forward this particular one suggestion and that, if any members had any thoughts or discussions about the way were heading to contact either myself or the chief executive officer before we put in our submission. We were underwhelmed by the response. A few people rang and said, 'Yes, it seems reasonable that we should comply,' but there has not been a great response. The national board of directors felt that, if we are to be appropriate in our fundraising, we need to adhere to certain principles. We tried to have a consultative process in a very short time, but, as I said, we do not have the resources to do it extensively, other than that.

**Ms Gribbin**—Maybe as an aside, could I add that, as you are aware, fundraising is under state legislation; there is no national legislation. This is one of the few national ones that perhaps we can take a leadership role in. I very much reiterate what David was saying about where we stand about being accountable. The legislation in Victoria that was passed couple of years ago, and with which Peter and I were very involved, is about getting rid of anyone who is inappropriate in this sector and about making sure that everything is honest, honourable, transparent and ethical. We are very supportive of that.

**Mr P. Hudson**—To be a member of the Fundraising Institute, you have to comply with a code of ethics and a code of practice which are indelibly printed on paper and which the association as such in its totality has accepted and adopted. I really see—

**Ms ROXON**—Do you have a copy of that here?

**Mr Zerman**—No, we have not but we can.

**Mr P. Hudson**—We will certainly make a copy available to you. I guess as part of an amendment or in addition to that, we would see the privacy legislation as coming within that code of ethics and code of practice bag. As Anne just alluded to, one of the flaws in the state legislation—the Fundraising Appeals Act which came into force last year—and I am not talking about the legislation but the position, is that in reality that should be federal legislation because a number of not-for-profits operate in multiple states across the country. Some states have legislation; some do not. The legislation requirements in various states are totally different to any of the others, and compliance can be quite difficult in that light. We have urged—and I guess it is fair to put this view to you—that the federal government speak with state government ministers relevant to an implementation down the track of a national standard of fundraising appeal.

**CHAIR**—States are very jealous of their jurisdictions.

**Mr P. Hudson**—I realise that but I wanted to make the point.

**CHAIR**—That is right. We had evidence of that this morning, in a small way. I take it that what you are proposing in relation to this was not put to the government during the process of developing this bill.

**Mr Zerman**—We only came to this very late in the process, which was due not only to an oversight on our part but also, even though we all focus on the work that we do, to the fact that the communication from the office of the Privacy Commissioner was not as extensive as it might have been over the past couple of years

**CHAIR**—So that I am clear about this: what you are proposing now has not been put to the government, it has just been put to us?

**Mr Zerman**—Yes, that is right.

**CHAIR**—We understand that point. Is there anything else?

**Mr Zerman**—We had a briefing from the Deputy Privacy Commissioner in Canberra a couple of months ago, which has been insightful to us, so that we can try to do something in our area of the not-for-profit sector to try to enhance the work that people do to make it accountable, ethical and transparent. So, in the long run, we are proposing to develop a code of practice which will incorporate the principles—more or less coregulation.

**Ms ROXON**—Presumably you will do that whatever the outcome in the legislation. If what you are saying is right, it is in your interest to do that anyway, is it not?

**Mr Zerman**—Absolutely.

**Ms ROXON**—Roughly, what sort of percentage do you think of the not-for-profit fundraising sector does your organisation cover through its affiliates?

**Mr Zerman**—Our 1,100-plus members are represented by, say, 750 organisations. So do you take the Salvos, for example, as just one organisation? There are probably 750 different organisations. The Taxation Commissioner the other day said that there are 200,000 not-for-profit organisations that need to register to get an ABN. Seven hundred and fifty is a minuscule amount, but a lot of those organisations might be football clubs or softball clubs that need an ABN.

**Ms ROXON**—Do you have any information about the proportion of fundraising money rather than the individual organisations? I am trying to understand how representative you are without being as rude as asking you that, but perhaps I should.

**Mr Zerman**—Anecdotally, I would say that our members belong to the major organisations throughout Australia that undertake professional fundraising in the health and welfare field, in the arts, in the sciences—virtually everything.

**Ms ROXON**—I have no reason to doubt it; I just did not know from previous experience what the extent of your coverage is.

**Mr M. Hudson**—I guess, in reality, the 750-plus organisations that have representatives who are members—and it is the individual in the main who is the member, not the organisation—by definition, employ a professional officer or professional staff. Therefore, the association, by its various activities, attracts those that are professionally involved in fundraising. Collectively, those 750 organisations raise in excess of $5 billion a year. So it is a fair amount of money.

**Mr Zerman**—Just to take one organisation, for example, we have members as individuals from World Vision who belonged to the institute. World Vision is regarded as the 'pre-eminent' fundraising organisation in Australia in terms of revenue. They raise $90 million a year. We have, just over the road, the development officer at Melbourne High, but I do not know how much she raises. It is everything in that spectrum.

**CHAIR**—You have spoken about the Salvation Army and agencies which have an affiliation with various churches. Where do the churches fit into this? They are obviously involved in raising money from their congregations all the time. That is really separate to your—

**Mr Zerman**—It really is. There is an organisation of fundraisers within the Catholic Church—and I am desperately trying to think of what it is called—but a lot of their members are also members of the Fundraising Institute of Australia.

**Ms Gribbin**—Perhaps to clarify a point, the fundraising, for example, that the Salvation Army would do in its church would be different from what it is doing for its welfare. They actually have a person or a group of staff who are involved in their Red Shield Appeal and their major very public appeals. That would be very different to what I would see as their annual Sunday-type congregational fundraising.

**CHAIR**—If people attend their church or synagogue or whatever and provide money on a regular basis—as they do—of which there is not necessarily any record kept—

**Mr Zerman**—That is right.

**CHAIR**—But I think most denominations and churches now have systems where they encourage people into a planned giving or tithing—whatever you call it—type of process about which there are records kept, et cetera.

**Mr Zerman**—As opposed to them offering during the service.

**CHAIR**—It has become more formalised I suppose.

**Mr Zerman**—Your question is: do those people belong to our organisation?

**CHAIR**—That is not really my question but I am interested in the answer anyway.

**Mr Zerman**—There are a few people from various churches who do belong to the Fundraising Institute. The other side of that is also how much money is raised in Australia in a year is truly not known.

**CHAIR**—I am trying to think through, out aloud almost, how this would affect them because presumably they would have tax deductible status. I do not know how that is determined, whether on the level of the individual congregation, parish, temple or whether it is the overall Anglican Church of Australia or Catholic Church of Australia or whatever.

**Mr Zerman**—As I understand it, tax deductibility is given by the Treasurer to either an individual organisation which might have different branches—it might give one global one for let us say the Anglican Church in Victoria; rather than each parish seek tax deductibility the Anglican Church overall gets the tax deductibility—or, for example, the Red Cross in each state gets tax deductibility for their section as well as the national Red Cross. It is more historical than good management these days.

**Ms ROXON**—But they are not necessarily part of your organisation but would be caught by your suggested amendment that the principles apply if you use tax deductibility as a guideline?

**Mr Zerman**—Yes.

**Mr P. Hudson**—From a church viewpoint contributions made in the plate on Sunday or Saturday depending which religion you follow are not tax deductible. It is only the donations made for welfare and/or buildings and things like that.

**CHAIR**—But don't they have formula for determining that part of that contribution is tax deductible and part is not?

**Mr Zerman**—I suppose what we are saying is that any organisation which gives receipts for tax deductible donations should adopt the principles.

**CHAIR**—I understand that. All I am saying is that it is my observation that legislators often look for the intended consequences of what they are doing but we also have an obligation to look at any unintended consequences. That is all.

**Mr Zerman**—Sure.

**CHAIR**—I need to think through that but I understand what you are saying.

**Mr Zerman**—I do not know if we have been able to convince you or get you to think about the idea of making the principles apply to those organisations which do have tax deductibility. We come from the point of view, as people who are working in the not-for-profit sector, that all organisations that we are working for are making some contribution to the fabric of Australian society. In doing that, let us be under extreme public scrutiny in every possible way. If we are having the benefit of the opportunity of going to the community and seeking support let us come and go with open hands so that people cannot say we are adopting incorrect practices. There is nothing complex about what we are saying. We just hope that we want fundraising to be all of those things that are accountable, transparent and ethical.

**CHAIR**—I think we understand the argument. We cannot tell you now whether you have convinced us or not.

**Mr Zerman**—Sure.

**CHAIR**—Can I thank you for your submission and also coming along and discussing it with us today.

**Mr P. Hudson**—The other aspect of concern to the Fundraising Institute of Australia is the exemption that is applying to state and territory governments. Our problem is simply based around the concept of a level playing field. By excluding state and territory bodies, we believe that the institute membership, in terms of our not-for-profit sector fundraising activities, is being disadvantaged. While government organisations at a state and territory level obviously substantially perform core body government functions, there are many of them that also undertake fundraising activities to support their services. The institute is of the view that the national privacy principles should also apply to the fundraising activities that are undertaken by these state and territory public sector departments.

If I were to compare my own organisation, the Lord Mayor's Charitable Fund, with that of the National Gallery of Victoria, which presumably would be exempt under the exemption for state and territory bodies, they have been put in an advantageous position and my own organisation is being put in a disadvantageous position. I would question the rationale behind that. Finally—and this is a moot point I realise because the media have been running with it—in

the last 48 hours or so, the media publicity on the ATO's decision to market ABN information is of great concern to me. I understand that as late as this morning the Treasurer made a statement that they certainly will not be marketing the ABN information. Again, using that as an aspect of concern for the Fundraising Institute, we would voice that the exemption of state and territory organisations could lead to a similar set of circumstances arising.

**CHAIR**—What you are saying, Mr Hudson, is that there are some constitutional difficulties that we are going to run into in relation to that.

**Mr P. Hudson**—Our answer to that is that it is strongly recommended that state and territory governments pass complementary legislation to get over the problem.

**CHAIR**—We can always urge, but urgings are not always acceded to. I think we understand that point as well. Again, I thank you very much for coming along.

[12.16 p.m.]

**GRAHAM, Ms Irene, Executive Director, Electronic Frontiers Australia Inc.**

**WHITAKER, Ms Janet, Board Member, Electronic Frontiers Australia Inc.**

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

**Ms Graham**—Thank you. First of all, we would just like to thank you for giving us the opportunity to talk with you today. As we have said in our submission, EFA has primarily addressed the aspects relating to the privacy of Internet users. This is not to suggest that we do not have concerns about certain other aspects of the act or the proposed bill but that EFA's charter is primarily concerned with computer mediated communications.

One of the major issues that we have regarding the bill is the exemption to the privacy principles for direct marketing. We see this exemption as effectively legitimising the practice of spamming Internet users. 'Spamming' is the term used on the Internet for sending unsolicited email advertising material. This privacy intrusive practice is already a significant problem and we see that it is likely to get considerably worse. Revelations that the ATO has sold contact details of ABN holders is obviously one major issue because this information has been sold to certain commercial enterprises and it is pre-existing.

**CHAIR**—Can I just say that that is not correct.

**Ms Graham**—But some of it has been sold, as I understand it. Those media reports were false?

**CHAIR**—Perhaps I will let you finish. I know there are concerns there, but we ought to be accurate, and I know it has been developing.

**Ms Graham**—The ATO aside, the fact still is that spamming on the Internet is a major problem, and I think there is some misunderstanding in some areas as to what this practice actually involves. There is a view that, because a lot of email messages come out with messages on the bottom of them that say, 'If you want to get off this mailing list, hit "Reply" and we will remove you from the list,' in fact, more often than not, that is not what happens at all. That is used by the spam merchants as indicating that that is a live email address and it in fact ensures that you will stay on their direct mailing lists long term. In fact, one of the worst things you can do is actually reply to an email address that says, 'Here, you can opt out.'

As well as that, the other issue with this kind of direct marketing is, of course, that it puts the cost of the direct marketing onto the Internet user, not the commercial organisation that is actually sending the material, because the Internet users are the ones paying for the time to

access the Internet to download the messages, and the ISPs are paying for the bandwidth that is used to send the message. The actual enterprise that is sending out the messages is not spending anywhere near as much as they would, for example, when they have to bulk mail via Australia Post or whatever. So there is a double issue that it is not only privacy intrusive but that it is actually the costing the person to receive the information.

The matter of unintended consequences was mentioned previously. There has been some legislation passed in various states in America where they have tried to control spam matter to some degree. They, for example, require that people sending out this kind of direct email message should include in the subject line the letters 'adv' to signify advertising. What has happened is that now we are receiving email messages that say at the beginning of them, 'This message is authorised by US legislation, act No. clause No. whatever.' In fact, Internet users are seeing messages that say, 'We're allowed to send this message to you even though you didn't want it because the law says we're allowed to.' I really think the current exemptions in the proposed bill mean that we are likely to see in Australia certain business enterprises sending out messages to consumers saying, 'This is authorised by the Australian Privacy Act.' That is perhaps something that no-one would want to see happening.

Another area that we are a bit concerned about is that the current definition of personal information is not necessarily going to cover the aspects of Internet use in terms of web profiling. A web site does not necessarily need to know your actual name to be able to identify you by name in order to be able to identify that you are the same person, to profile information about you as you access their site and direct market back to you on the web, via email or whatever. We do have a feeling that this bill is not really going to provide very much protection for Internet users. One aspect that we are particularly concerned about is the enforcement provisions. We feel that that needs to be tightened up so that there are more rights to the consumer to actually appeal decisions and have whatever provisions end up in the bill being enforced. I think I will leave it there. We are happy to answer questions.

**CHAIR**—How do other jurisdictions deal with direct marketing? You say it should be a case of opting in. Are you proposing that if someone wants to direct market via email, they have got to send you an email saying, 'We wish to do this'? How do you opt in?

**Ms Graham**—No. That is even worse; that just annoys you even more because you do not even know what they want to say to you. Our view is basically that direct marketing should not take place via email unless there is already an existing relationship with the business and the business has obtained approval to send further advertising at the time of the first communication with that particular Internet user. With respect to a lot of the business web sites, for example, when you read information about them, they say, 'Can we send you information about this?' People are perfectly able to tick the box, give their email address and that is fine. But this idea of just being able to direct market anybody is a serious problem.

They are not only getting information from their customers; the organisations go out into what are called news groups. I do not know how familiar people are with the Internet. News groups are just general discussion areas where anybody who posts there provides an email address. There are these automated programs that download archive messages and skim out the email addresses of anybody ever discussed in that particular news group. Then they just bulk

mail millions of messages out to all these people that they have never heard of. We are not even talking about them only sending messages to people that have actually had something to do with them; there is this massive commercial value in grabbing email addresses off web sites and out of news groups and spamming everybody. That is what we are concerned about—that it will get worse, and that the way the bill is written at the moment will actually legitimise it. It will encourage businesses to do it because they can say, 'It says in the Privacy Act that we can do this.'

**CHAIR**—On the level of principle, what is the difference between being able to do this in the new technological world of the Internet and being able to bulk mail or walk around the suburbs and put a notice in everybody's letterbox? Aren't we talking about the same thing?

**Ms Graham**—There is probably not a lot of difference in terms of the fact that consumers do not necessarily want to receive that kind of information, but we do feel that on the Internet the issue is far worse because the consumer is the one who is paying for it.

If you get junk mail in your letterbox, you can just dump it straight into your rubbish bin. When it comes into your email box, you have basically got to open it, you have got to delete it, and you have paid. Sure, it is the same as deleting it if you drop paper in the rubbish bin, but you are paying for the time waiting for these messages to download. You are paying to receive it, yet you did not ask for it and you did not want it. So we do see it as quite different from the normal junk mail.

**Ms ROXON**—It depends if you are the same as me: when it is the Reader's Digest on the outside, you throw it in the bin straight away. When it is a Reader's Digest email, you delete it straight away too. So it does not really make any difference, I would not have thought, on that front. In fact, it is quicker to delete it than walking to the rubbish bin.

**Ms Graham**—If it is from the Reader's Digest and you can see in the subject line—

**Ms ROXON**—I should say that I am only using them as an example because they were before us previously. They are not the only offenders, and they have a very strong opt-in, opt-out provisions.

**Ms Graham**—I see exactly what you mean. The problem is that if you get something from the Reader's Digest or any of these known businesses in the mail, you can usually tell by what is on the outside of the envelope who it is from, but when you are getting email messages, you can usually only see, for example, the subject line and whatever the 'from' address is.

**Mr CADMAN**—That is heaps. That is all you need.

**Ms Graham**—It obviously depends on who you get email from. Sometimes you cannot tell that it is junk mail.

**CHAIR**—That is true, but most of us would probably get dozens, if not hundreds of emails every day from every vested interest group that you can think of, on every subject and even some that you had never thought of.

**Ms Graham**—Yes, I can imagine.

**Ms ROXON**—I do not regard that as junk mail, though.

**CHAIR**—No, but we have to deal with it. I think that most members of parliament were being entirely frank about it—the delete button gets used a fair bit. I am not saying that that is ideal, but isn't that part and parcel of this new world we are moving into?

**Ms Graham**—I think the dividing line comes down to, for example, constituents trying to contact you, as opposed to a business trying to sell you something that you have absolutely no interest in buying, when you did not ask them to get in touch with you. They are doing this to make money for themselves. It is a completely different issue from the political scenario.

**Ms ROXON**—I have a question on the privacy front. I apologise for missing your introduction; tell me if you have covered this. Part of what seems to be invasive of people's privacy in terms of direct mail or a phone call, or whatever, is that people know where you live, or they know how to contact you in what is generally regarded in the community as your private sphere. That can be the same with your computer at home or whatever. But that access does not give you an identification in the same way by which someone can camp outside your front door, or can provide the information to any other person. I understand that you are saying that you can still identify people and you can still email them again, but it does keep at some distance the contact that you can have with an organisation. I am not, in my head, across why making contact via the email or Internet is invasive of privacy in the same way. I would not mind your spending some time on that very basic principle.

**Ms Graham**—Do you see an email address as being different from a telephone number, for telemarketing calls?

**Ms ROXON**—I guess I see it as different, but that is because I have a silent number. It irritates me that telemarketers can still randomly call your silent number, but they can.

**Ms Graham**—What I am getting at is that, although an email address will not generally—probably—will not let people find, for example, your home address, I do not think we are too many years down the track from the point when the White Pages is going to have everybody's email addresses in it. If I have my way they will never do that. But I think it is quite possible that that kind of thing is going to start happening, and it is going to be just as easy to find out from an email address where somebody lives as it is from a phone number.

**Ms ROXON**—My question is: is it your view that the aim in terms of privacy is to stop irritation of contact—which is obviously the same, if not greater, by email—or to ensure the protection of some other personal information which would, say, allow someone to come and knock on your door or to know personal information about how many people you live with, or whatever those things are? You cannot get that through your Internet contacts.

**Ms Graham**—I think that that depends on who you are and the state of the Internet and technology at the moment. You say that at the moment you cannot get any information about people from an email address. That may be the case with some people at the moment and not

the case with other people. It depends on where those addresses are available. If you have given details to a particular vendor on the Internet—if you have bought something and you have given them your name and address and your email address—and then they go and sell that to another direct marketing list, who sends—

**Ms ROXON**—I understand that. I was talking more about the exchange between email addresses. Obviously, purchasing things over the Internet or having to provide that other information over the Internet is exactly the same as having to provide it in any other forum. It should be protected in the same way.

**Ms Graham**—Sure. I do not think I quite detect what you are trying to ask.

**CHAIR**—To take your example, if you buy something over the Internet you are caught by the legislation. There is not an exemption that gets you out of the legislation if you purchase something over the Internet.

**Ms Graham**—No, assuming that it is not a small business, and we would be of the view that a large percentage of web sites are going to be exempt in terms of being a small business.

**CHAIR**—Right.

**Ms Graham**—A large number will be exempt for quite some time.

**CHAIR**—This is a question I asked someone earlier this morning: do you think, if you engage in e-commerce, you should not be exempted regardless of the size of the business?

**Ms Graham**—EFA's view is that small business exemption should be deleted altogether. I do not think there is a justification for treating the Internet small business operators any differently from any other small business.

**CHAIR**—I understand that; my question is hypothetical. We do not know what we are going to decide and I want to cover the options to hear what your view is. If we do not adopt your course of removing the small business exemption, if we say that the small business exemption, for whatever reason, should stay there, would you favour a provision that brought back into the legislation anyone engaged in e-commerce?

**Ms Graham**—No. This is not something that the EFA board has actually discussed. So I cannot say that I am speaking directly on behalf of the board. But I would be 90 per cent sure that the board would take the view that there should not be anything special, more restrictive, or whatever, applying to businesses just because they are on the Internet. You are going to have a situation where a lot of businesses are in the real world with a shop address and also a web site. How are you going to decide which part applies to them and when? At the moment, there are certainly some businesses that really only operate on the Internet but there are a great deal that—

**CHAIR**—What you are saying is that, if you engage in e-commerce, even if it is only one transaction in a year, you are not exempted. Your whole business is in. If that were the provision, I would be interested in—

**Ms Graham**—I cannot see any justification for bringing small business e-commerce sites under provisions of the bill, and not general small businesses. We just do not see any reason for the exemption of the services at all, and we do not think there is any reason to treat Internet e-commerce differently because this is where the world is going. It is no use legislating now with this artificial line because this is the Internet and that is not Internet.

**Ms ROXON**—Ms Graham, it means your position is all or nothing. If that is the position you want to put to us, which is, unless you accept our view that small business should be completely exempt, we then have nothing to say to you on the rest of the bill, so be it. But that seems like a risky position to put to us. I think the chair is trying to get at whether there is a sensible position somewhere else.

**CHAIR**—I am just saying that I do not know what this committee is going to decide because we have not discussed it.

**Ms Graham**—I certainly understand that.

**CHAIR**—One of the options for the committee is to say, despite your submission, that we still think there are reasons, whatever they might be, for retaining a small business exemption. If we take that path, the question then arises in my mind of whether or not there should be some provision that relates to e-commerce. It would seem to me that, if we were taking that path, but at the same time trying to meet the thrust of what your submission to us is, you might say that if a business engages in e-commerce, no matter what its turnover is, the business is subject to the legislation.

**Ms Graham**—Can I possibly take that question on notice and get back to you later this afternoon or contact the secretariat next week with an answer?

**CHAIR**—Early next week would be fine.

**Ms Graham**—I tend to think what I have already said would be the view of the EFA, but I would prefer to check a little further before I make a categorical statement on that.

**CHAIR**—In putting the question to you, we are not denying what your primary submission to us is, but we have got a look at alternatives.

**Ms Graham**—I understand that, but I am sure whether we even want to say that we think it is legitimate to go that one step back. I appreciate what you are saying.

**CHAIR**—Trying to look at this realistically, even if we were to do what you were suggesting, would that have any impact at all in a global environment where all a business would have to do is to operate through an Internet service provider in the United States or the Bahamas or God knows where else around the world and avoid it?

**Ms Graham**—Sure, but if they want to be seen to be an Australian business by Australians then they would still come under Australian law. If they are sending it through a service provider on the other side of the world, if it relates to a business that claims to be an Australian business operating in Australia it would still be covered by the Australian law. While we do not ever say that Australian legislation will solve any particular problem in full with regard to the Internet, the issue is that if we are going to have Australian legislation it should do the most it can to protect the privacy of Australian Internet users. We certainly acknowledge that even doing this is certainly not going to kill the problem of spam, but spam is one of the issues that, worldwide, is hated by Internet users. It is one of the things that may increasingly become legislated against, in one way or another, so that it may eventually get to the point where legitimate businesses are less inclined to do it. As much as anything else, it is sending the message to the businesses that this is just not an acceptable practice. A lot of businesses will not do it because they know how much it is hated. For a lot of Internet users, if they get a spam message from a business that is the end of it—they will never ever deal with them. That is how strongly people feel about it.

**Ms ROXON**—Why would the current national privacy principles—you refer to 2.1(c)—not protect against spamming? I understand that it will not protect against the first contact. But, as I read those principles, it is not going to allow multiple contact, so it will allow someone to pick up—

**Ms Graham**—It assumes that the person who receives the message is going to be willing to email that address back and tell them they want to be taken off the list.

**Ms ROXON**—Sure. The problem is they might not even open it to find out they have got an option to tell them not to do it. I just wanted to be clear that you would be breaching these privacy principles if you were to do anything other than send the first one with all of the opportunities to opt out et cetera, as required under the principle—

**Ms Graham**—Yes, except in the case of the small business exemption.

**Ms ROXON**—Sure, we understand, and you are not the only witnesses that have given us evidence about the big gaps it leaves. Do not think we necessarily disagree—

**Ms Graham**—It is difficult being categorical because you keep thinking: what exemption applies to this?

**Ms ROXON**—Except that you have been saying it fairly strongly, using examples of repeated contact, whereas that would actually breach the existing principles if you otherwise—

**Ms Graham**—Probably why I am sounding so strong about it in that regard is because I do think the majority of e-commerce sites are going to fall within the small business exemption, therefore, to me, it is not covering them at all. If they are covered by the legislation, what you are saying is right—they can only do it once.

**Ms ROXON**—I just think that should be clear.

**Ms Graham**—The basic problem is that we see it as legitimising it, we see it as effectively saying to businesses, 'It is okay to do this.' We have got the Internet Industry Association of Australia code of practice under the Broadcasting Services Act that specifically says that direct marketing is not on, it has to be opt in. We have got the government's e-commerce best practice rules that again say it has to be opt in. And now we have got privacy legislation proposed that effectively says, 'It is okay to direct market, so long as you only do it once.' It is sending a completely contradictory statement, we feel.

**Mr CADMAN**—They are two different aspects— one is a commercial process and the other one is my right to protect my privacy.

**Ms Graham**—Sorry, could you rephrase that?

**Mr CADMAN**—I would have thought that one was a code of practice for commerce, the other one is for me as an individual to protect my privacy.

**Ms Graham**—Yes.

**Mr CADMAN**—So to compare them in the way that you have, I do not think you are really comparing likes. You are saying to a group who are the providers, the promoters, the activists, 'This is the way you will behave,' and you are saying to me as an individual, 'If they do it more than once and you have told them not to, you have got a cause, they are invading your privacy.'

**Ms Graham**—All I was just mentioning was that the government's guidelines for best practice in e-commerce suggest that e-commerce should not direct mail, should not spam people, and yet I would see this clause in the privacy principles as saying to business you can direct market.

**Mr CADMAN**—You would ban direct marketing?

**Ms Whitaker**—Unsolicited.

**Ms Graham**—Without specific prior consent, we would say that sending email messages—

**Mr CADMAN**—If I do not know about it, how can I know that the product is there?

**Ms Graham**—As I say, e-commerce sites have web sites where people can find out information about them. You can look up shopping malls on the Internet, and a lot of them have now got their web sites.

**Mr CADMAN**—You are talking big business now rather than small business, aren't you?

**Ms Graham**—No.

**Mr CADMAN**—Shopping malls and things like that tend to be big business. That is the Westfield—

**Ms Graham**—Sorry, I am talking about shopping malls on the Internet, sites on the Internet that list—

**Mr CADMAN**—Fine, but that is big business too.

**Ms Graham**—No, they are not, they are just basically web directories that list shops.

**Mr CADMAN**—Coles are into it in a big way, Myers are into it in a big way, and Woolworths—they are all into it.

**Ms Graham**—Sure, but that is not the sort of shopping mall I was talking about is all I was meaning. When you were saying, 'How would you find out about products?' on the Web there are what they call shopping malls. For example, for a particular area there are web sites that work out of that area or in those types of products that have links to their particular products and services and things. It is the same as you might go into a shopping centre in the real world—

**Mr CADMAN**—Some do and some don't.

**Ms Graham**—It is very early in the stages of e-commerce. Things are moving along. All I am saying is that there are ways you can find products on the Internet without needing to be spammed with direct mail that you do not want, that you did not consent to receive; that is the issue. We feel that it is unacceptable to direct mail to people without prior specific consent to receive that information.

**Mr CADMAN**—Is it a common facility for most email recipients to be able to code in any mail they do not want to receive, to automatically delete it, you need not even see it?

**Ms Graham**—Certainly not with this kind of commercial unsolicited email. They use false addresses, they use different addresses each time they do it, or they change the subject lines. It is very, very difficult to filter it out. Certainly, there are various email programs that will enable you to filter, and I myself have got one. I have spent hours programming, putting in these words, those words and some other words to try and get all the junk mail thrown into a junk folder. Certainly I have achieved it to a large degree, but there are some particularly intrusive emails that keep coming through. I will not say on the public record how they do it, but they have got a particular way of addressing the email to make sure that it will get through nearly any way that you try to block it out. The only reason I am not saying it is because, of course, I will be advertising to people how to do it on the *Hansard* transcript.

**CHAIR**—But leaving aside your point about small business—I know you have got queries about that—let us assume for a moment that the companies doing this are covered by the legislation when it is finally enacted. If they do that then you would entitled to go to the Privacy Commissioner and the commissioner would then take the action that he is allowed to under the legislation. Why won't that deal with it?

**Ms Graham**—We just do not think people should have to do that. We believe that people's email box is their own property, it is their private space, it is their home environment, and they

should not have to download their email and get 50 messages from commercial people trying to sell them products that they do not want to receive.

**CHAIR**—There are two things: one is about somebody doing it the first time, and the second is about the ones who repeatedly do it.

**Ms Graham**—Sure.

**CHAIR**—It may not happen straightaway, but presumably if people like you or members of your organisation, or ordinary citizens unrelated, complain to the Privacy Commissioner that this is happening and the Privacy Commissioner starts taking action, won't this, combined with the suggestions about what should be good practice—and I would have thought that commonsense would have dictated that the last thing people trying to sell goods would want to do is to send potential customers—

**Ms Graham**—You would certainly hope so, wouldn't you? But it does not seem to be the case.

**CHAIR**—Won't this occur over time? I was interested to note in your submission that you have quoted from Warren and Brandeis from 1890 about privacy. It has taken a century to get this far; I am not sure that we are going to solve it all overnight.

**Ms Graham**—We would agree with that completely. Yes, we are certainly not going to solve it overnight.

**Ms ROXON**—One of the things that is interesting, too, is that this committee has just conducted an inquiry into extending the copyright legislation to the digital arena, and one of the principles that people spent a lot of time talking to us about—and, in fact, it is the government's stated policy objective—was to make sure that the legislation was technology neutral so that the same rules that apply to print media would apply to the digital form. I have some concern that you are seeking to have higher privacy standards in the electronic media rather than—

**Ms Graham**—It really would not be. EFA's charter concerns computer medium communications, but I expect that, if we were looking at it in general, we would still be saying that direct mail, even by postal mail, should be a matter of opting in. I think you will find that this is the view of most of the privacy advocate groups—that direct mail should be a matter of opting in with specific prior consent. These people should not be sending unsolicited advertising material. It is just something that it is not approved of by people concerned to protect their privacy. So, whilst I am emphasising the matter with regard to Internet email, I agree with you about the aspect of not really wanting artificial lines between something happening on the Internet or in the real world. But it is really our view that direct marketing, without prior specific consent, is privacy invasive and should not be permitted.

**Ms ROXON**—That is why I am asking, because it depends on whether you compare spamming to direct mail or to a personally addressed letter, or whether you compare it to the Coles throwaway glossy not addressed to anyone that get puts in every letterbox. Do you see what I mean? The other privacy groups do not suggest it. People might get annoyed and it might

be a waste of paper and all that sort of thing, but it is not suggested that there is any breach of privacy in doing that.

**Ms Graham**—In delivering unaddressed material, yes, I agree.

**Ms ROXON**—That is why I am asking you what an appropriate comparison is: so that you would have a standard that is technology neutral. From what you are saying, I am not sure that the spamming is necessarily a directed advertising, or whether it is more comparable to the unaddressed letterbox advertising material. I am really just trying to tease it out. I know that I probably sound as though I am giving you a hard time, but I am trying to understand where the lines are?

**Ms Whitaker**—I will jump in on that. I was thinking just this morning about this whole concept of technology neutral, and I am wondering why it is such a big deal now as to be a consistent theme through so much legislation we have seen. We have seen it in the digital TV stuff; we have seen it in the censorship stuff. It seems to have popped up quite a bit in recent legislation. If we were talking about cars and long haul trucks and all that, there are all kinds of technological differences in terms of the regulations that we place on them. We do not let long haul trucks go through local neighbourhoods; we put different speed limits on them. So in different arenas in society we do take into account that it is not technology neutral. I think that what we are dealing with now is a stage where not enough people in the general public have the instinctual understanding to realise why long haul trucks go differently from an automobile in a local neighbourhood—to take the same kind of decision making in electronic communications.

So I am starting to question whether the philosophy actually holds up at all, because I am thinking in regard to your question about what is different: I could send to your mailbox not just an email that is about five lines of text saying, 'Hi, I have this thing to sell you,' but a five-megabyte file that could crash your system, and you would have no defence against my doing that. That, under this legislation or any other practice, is a legal activity. We are already seeing that a lot of the unsolicited emails that are coming—I get these all of the time now—are formatted emails, and they are huge. It is becoming a very common practice to have that because people see it as bells and whistles.

**Ms ROXON**—But it is not their commercial objective to see anybody's computer crash.

**Ms Graham**—They do not understand that that will happen. That is often the problem.

**Ms ROXON**—That is not their intent.

**Ms Graham**—They are people that have just got into it, got told they will send their email message and this is the way to do it. They really do not understand that not everybody has the latest state-of-the-art computer, et cetera. In some cases it is just not enough information about the technology because, yes, it is certainly not something that would normally happen.

**Ms Whitaker**—Another factor that comes in is the ease with which you can touch a button and it does it. Whereas if I were doing it from a physical standpoint I would have to do a huge print run in order to send you an equivalent amount of information that cost me absolutely

nothing to send you in this other way. If we start talking about extremes of examples, some of that starts to come to light.

**Mr CADMAN**—There is another way of approaching this. Surely you would regulate the road rules if you were dealing with truck drivers. You do not change the laws of the state; you change the laws of communication. What you are seeking to do is modify conduct by a privacy code which seems unrelated to what you are really driving at.

**Ms Graham**—No, we are trying to give the Internet users the right to their privacy by way of the privacy legislation. That is what I understand this legislation is proposed to do: enable individuals to protect their privacy. As I trust I have explained, we see unsolicited email as being privacy intrusive. Therefore, we believe that users should have the right to not receive that information and to maintain the privacy of their email box, in the same way as they can maintain the privacy of their letterbox or home. We simply see email as being another private area of an individual. That is all I am saying.

**Mr CADMAN**—It seemed to go further than that, with the crashing of sites and all that sort of thing.

**CHAIR**—I just want to ask about where there is an opt-out system. You said earlier, I think in your opening remarks, that possibly the worst thing a person can do is to seek to enforce the opt out, because they get kept on the system. Leaving aside the other matters that you have put to us, do you have any comment about the enforcement provisions in the legislation where that might happen? Again, an alternative might be that we may not adopt everything you have said to us, but one thing that does concern me is that if there is a system which is meant to provide a way of opting out and that has the opposite effect in many circumstances—and this is your evidence to us—then I think we would want to address any deficiencies.

**Ms Graham**—It is really difficult to try to come up with something that might be effective, but one aspect that makes it worse is that this kind of marketing can be sent out with really only a web address. I am trying to think of an example. I am wondering whether it really needs to specify that there needs to be offline contact details provided in the email address, as opposed to just an email address to reply to, because you are getting the junk email and you have then got this basic problem that you know you really cannot reply to the email address because that will probably make sure you stay on the list and you have no way of finding out where it came from. They might have a web site URL listed, and you might be able to go there, and you might be able to track down an ‘in the real world’ address. Then again, you might not be able to, and all that might have is another email address. But at the end of the day, even if you wanted to complain to the Privacy Commissioner—again, depending on the site—they might be covered by an industry code, so the Privacy Commissioner does not initially get involved. There are all of those kinds of issues.

Perhaps the main point I am trying to get at is whether there is some way for the person who is receiving this message to find out where they can complain to and who they can complain about. That also reminds me of the business that was mentioned earlier about ADMA and being able to opt out. I do not know what the situation is right now, but about six months or so ago when the Axciom matter was getting a lot of public attention someone from ADMA was on one

of the radio programs talking about their opt-out provisions. They gave out a telephone number—from memory I think it was an 1800 number—that you could ring to opt out. When you rang that number, you then had to sit on the phone for about three minutes while it gave you details of street addresses that you had to write a letter to. You could not just ring up and say, 'My name and address is so and so, delete me from the list.' You had to sit there and write down street addresses and everything and then write them a letter and post it. You can still opt out. Theoretically you can opt out anyway, but a lot of the talk about this opting out is not actually made anywhere near as easy as it might sound when someone just says, 'We give you a way to opt out.' It might not sound difficult to write a letter but when you start to talk about large amounts of junk mail, having to sit down and write a letter and get a stamp and all the rest of it, it is not really satisfactory.

**CHAIR**—If we were to favour the opt-out system, you would favour a system which provided, as part of the details in order to enable a person to opt out, a provision that had to provide a name, or at least a business name and a street address.

**Ms Graham**—I think a name, a street address and a phone number in Australia would be a good start. If they are willing to provide that, there would probably be an increased probability that the actual email address they were providing in order to opt out actually would succeed in allowing opting out.

**Ms Whitaker**—How about their ABN?

**Ms Graham**—All I am trying to look at is giving the recipient of the email message potentially a chance to identify whether this is a legitimate business offering them a chance to opt out or whether it is complete junk mail and replying to it is just going to result in your getting stuck on their lists forever.

**CHAIR**—I would like to clarify whether you have to put your ABN number on any correspondence from a company.

**Ms Graham**—I do not think so, from what I have seen. A company can put an ACN on, but I do not think as yet I have seen anything about the ABN in that regard.

**CHAIR**—That is an interesting point. But presumably if it is a company involved in e-commerce they should have their ACN number on what they transmit.

**Ms Graham**—A company, yes, I would agree. Most of the electronic transaction legislation now makes no difference whether it is an electronic email message or it is hard copy material. Again, we are talking about small businesses on the Internet who may not even have an ACN.

**Mr BILLSON**—I am taking my life in my hands arriving late and asking questions. We talked about media issues yesterday, and broadcast faxes can equal journalism under the definition. I note you talk about a public interest test. They are notoriously difficult. Have you got some thoughts on whether the journalist might be the focus of that exemption so that they are an accredited signatory to a code of conduct with their employer, so there is some

accountability that accompanies the exemption and freedom in the bill rather than a public interest test?

**Ms Graham**—Yes and no. We find that difficult in that there are a lot of issues with regard to who is a journalist on the Internet. We do not want to see a situation where, because people are setting up reporting sites on the Internet, they are not going to be able to be accredited as being reporters or journalists simply because they cannot get the approval of the Australian Press Council or whoever it is that approves journalists. There have been a few debates along these lines—

**Ms ROXON**—You might be surprised to know that the Press Council yesterday very strongly supported the position that you are putting, saying that it would not be appropriate to have to be accredited in any way.

**Ms Graham**—It surprises me but not completely, because these issues have been discussed. There were some related issues in America a couple of years ago. I will not go into it, but somebody came up with this bright idea about how to solve the problem. Initially, the major news organisations supported it, until it occurred to them that one of them was going to have to decide who else was actually a 'real' journalist. They all backed off in the end and the proposal never went forward. We see on the one hand a real problem with the risk of stopping people from communicating on the Internet because they will not be seen to be a journalist, but by the same token we certainly see that there is vastly more opportunity on the Internet for privacy intrusive practices by people claiming to be a media organisation when in fact there is no public interest in what they are saying.

**Mr BILLSON**—Rather than a narrowing of the definition, which has the hazards you are speaking of, perhaps the Privacy Commissioner or somebody should provide a code of conduct that they subscribe to in return for the protection that the law seeks to provide them. There is a bit of a cut both ways situation.

**Ms Graham**—You could do that. As you are probably aware, EFA is very pro freedom of speech, so we are very cautious about restrictions.

**Ms ROXON**—But not advertising speech.

**Ms Graham**—That is right, not commercial advertising speech. Generally, you will find that, amongst free speech organisations, commercial advertising speech is not regarded as protected in the same way that normal speech is. This is a longstanding practice. That is a business enterprise. It is nothing to do with general freedom of communication relating to political and any other social issues; it is a business practice. You will find that most civil liberties organisations do not see advertising speech as being protected speech. Sorry, I have got sidetracked now.

**Mr BILLSON**—It is the argument over whether to contain the exemption, or whether to look at what accountabilities accompany the exemption.

**Ms Graham**—I was thinking about the Privacy Commissioner. I come back to feeling that, rather than perhaps trying to get definitions too clear, with unintended consequences, we put the position that perhaps there just needed to be an overriding 'in the public interest' test, that the Privacy Commissioner could investigate if there was—

**Mr BILLSON**—The most clearly defined test in public life is the public interest test!

**Ms Graham**—We are aware that it is difficult. Really, what we are saying is that we think that, in general, most media organisations are ethical and will do the right thing. We really do not expect to see very many complaints in this regard in general. We are really just looking for some sort of backstop position. Where normal media organisations that we all know about or new people are setting up on the Internet, we are looking for some backstop option by which an individual can go to the Privacy Commissioner or whatever if their privacy has been invaded and it really looks as though there was no legitimate interest whatsoever in doing that. It is not even so much in terms of general communications about those persons. It is that someone can basically set up a web site and publish millions of home addresses and phone numbers and say, 'I'm reporting on who lives in Brisbane.' They are saying, 'This is reporting. We have collected this for the purpose of providing it to the public.' It actually says somewhere in the actual act or the principles 'collected for the purpose of making it available to the public'.

**Mr BILLSON**—I would hate to see the exemption narrowed because we cannot differentiate legitimate journalism from bogus journalism.

**Ms Graham**—That is the thing. I really do not know how you would do that at the moment. I am not saying that it is impossible, but I agree that it is very difficult to do. That is really why we went to that backstop position of looking for a—

**CHAIR**—I must draw this session to a close. I thank you for your submission and for coming along and discussing it with us today.

**Ms Graham**—Thank you very much.

**Proceedings suspended from 1.04 p.m. to 1.57 p.m.**

**CARTER, Ms Meredith, Executive Director, Health Issues Centre**

**CHAIR**—Welcome, Ms Carter. I should advise you that the committee does not require you to give evidence under oath, but the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false and misleading evidence is a serious matter and may be regarded as contempt of the parliament.

We are in receipt of the submission from the Health Issues Centre and I invite you, if you wish, to make some opening comments.

**Ms Carter**—In the submission I have outlined the various privacy issues that arise in health and focused on how these may be particularly exacerbated in an electronic era. We are moving into the use of electronic management of health information, and the recent *Health On Line* report released jointly by state and federal governments proposes a raft of new initiatives which raise a plethora of new challenges to privacy as well as the potential for great improvement in health care.

It is certainly our view that the current bill is quite inadequate to deal with those challenges, and we reject the suggestion that the inadequacies in the bill can simply be remedied at a later date. We are concerned that there is a range of pilot projects and other initiatives now that are in place, without an adequate privacy framework to support them, and the speed with which developments in that area are taking place suggests to us that the appropriate legislative framework must be one of the basic building blocks to be developed and implemented before any steps are taken, certainly under the National Health Information Action Plan, to escalate these efforts. Our position is that it requires enacting effective information privacy legislation that is specific to the health sector and covers both the public and private sectors.

We propose in our submission that possibly an enforceable code under the current bill, with some enhancement of the broad framework of the bill, might be sufficient, but, as we have considered the issues further, we have affirmed the view that it is health information-specific legislation that we require, building on at least the ACT health privacy legislation and the MBS and PBS privacy legislation and guidelines.

I note that New Zealand does have a code for health under its broad privacy legislation, but that legislative framework and the code covers both the private and public sectors and does not have to deal with the issue of potentially different legislation at the state level either. I note also the deferral of the application of the Privacy Act provisions to small business for a significant period of time—I think it is about a year. Many health businesses are small businesses, so I would think that taking an extra 12 months or so to develop legislation that would kick in at the same time for health, would be time well spent.

We have raised concerns about a number of specific issues in terms of the framework, the complaint based system and the reliance on industry bodies to administer the schemes. We have raised concerns about the exclusion of employers from the scheme, and we have raised issues

specific to health such as the access provisions and the research provisions. I am happy to talk further about any of those issues.

**CHAIR**—There is a dilemma here. If you take health out of this bill in the hope that something separate will be developed, and assuming this bill goes through the normal course you would expect—through both houses of parliament by the end of the year—(a) you are leaving the area free of privacy legislation in the meantime and (b) who knows when it is actually going to end up being developed? Isn't there an argument for saying it is better to have this even if your position is that it is inadequate, rather than leaving it unregulated?

**Ms Carter**—The concern is about giving the impression we have done something when really we have not. In many ways consumers are more exposed to privacy intrusion under this bill than they currently are. I do not see it as a bill that provides consumers with much protection. I am concerned particularly because the *Health on line* report envisages the need for stronger protection, and if we have some legislation in place it may give people a false sense of assurance about how urgent the need for legislation to deal with the specific initiatives being promoted under Health On-Line might be.

**CHAIR**—You mentioned the ACT legislation. I take it from that that you endorse that approach.

**Ms Carter**—I do. It is base level and it was not designed with the challenges of the information society in mind. It was really just designed to give consumers a legislative right of access to their records. In my discussions with the ACT Complaints Commissioner he has suggested that, in his view, the ACT legislation requires some revision to deal with these challenges. I would consider that to be base level legislation, but it is certainly better than this legislation in terms of health.

**Ms ROXON**—My understanding is that the Privacy Act currently in place to cover the public sector would cover some aspects of health care. How do you see that operating if the public sector is going to have certain terms, and this bill is really designed to bring the private sector into line to some extent with the public sector?

**Ms Carter**—The unfortunate thing is that the legislation covering the public sector is operating from principles different from those that we are now looking at for the private sector. In the health arena people are using public and private sector agencies all the time to treat the one illness and this will create two different frameworks.

**Ms ROXON**—I do not pretend to know the detail of how the existing public sector provisions specifically apply in the health area, but if there were a proposal that they simply be extended to the private sector health care area, would there be as many criticisms as those you raise of this bill?

**Ms Carter**—This legislation expands the range of access exemptions, for example, beyond those currently in the federal Privacy Act for the public sector. But the Commonwealth public sector legislation does not cover many public sector health agencies. Most of those are at the state level. In terms of access, for example, we are talking about the freedom of information

legislation at the state level, and that has much narrower grounds on which you could refuse someone access to their records than this proposed legislation.

**Ms ROXON**—This bill will not apply to state instrumentalities in any case.

**Ms Carter**—No. But you will have people in public hospitals who are private patients—so they are covered by the private sector bill—and the public patients in the beds next to them are covered by the FOI legislation. The public patients, somewhat ironically, will get better access to their records than the private patients. That is the kind of dilemma that this creates.

**Ms ROXON**—But, if you take health out of this bill and if there is not any coverage at this level, you still have the difficulty of the different state standards and the different private sector ones.

**Ms Carter**—Yes. I think the states are looking to the federal government for leadership so that they can have complementary legislation. States—Victoria, for example—are already developing proposals which would provide more rigorous protection than this bill does. The ACT already has in place legislation that provides more rigorous protection than this bill does.

**Ms ROXON**—From your organisation's point of view, the inevitable delay that would be involved in negotiating a health industry-wide protection—across all states, the Commonwealth, the public sector and the private sector—and not having any protection in the meantime is preferable to having this implemented as it currently stands. Is that what you are saying?

**Ms Carter**—That is essentially what I am saying—if we are talking about 12 months. The need for legislation is urgent, but I think we can live with 12 months to get it right.

**Ms ROXON**—You are probably aware, as we are, that once it comes out of this bill, there is no guarantee that it will be 12 months—or five years, for that matter.

**Ms Carter**—That is true. We have waited 13 years to get amendments for the private sector since the introduction of the federal legislation for the public sector. It is well recognised in the health sector that legislation is urgently required—but not bad legislation. Bad legislation makes for bad practice, and we need good practice in health care, particularly where you are wanting to introduce electronic management of health information. People need to have confidence that it will protect their rights for those developments to move forward. If people do not have confidence in them and they go ahead regardless, which is what would happen, you have people trying to undermine the systems that are put in place and either not using the health services that they require—and then putting everybody at risk—or putting bad data into the system so that you are not much more advanced.

**Ms ROXON**—Why, if it is such a pressing issue, haven't we seen in this industry what we have seen in other industries—you all getting together and agreeing, at least, on the major principles for a code of practice quite apart from the government's being able to intervene and legislate in some way to do that?

**Ms Carter**—The consumer movement has been pressing for some time for legislation that is based on a set of principles which are reasonably well enunciated. There have been particular sticking points, because the culture of the health sector is fairly paternalistic. So, on issues that the consumer movement thinks are fundamental—such as access to records—we have the AMA, for example, with quite a different view. Their view is, 'Yes, access to records is good, but we want to control when you get the access.' So those negotiations have been occurring for years and years, without legislation at the federal level that deals adequately with them. One of our concerns about shifting to an industry based approach is that that would continue. You are not going to get agreement in the field, certainly not the high-level agreement between the consumer movement and groups like the AMA on issues like access to records that would be desirable. It is an area where some leadership has to occur.

**CHAIR**—I would be concerned that, if you excise health from this bill, negotiation is going to go on for years and years and years.

**Ms Carter**—I don't think so because there is too much interest in having electronic management of health information. Everybody agrees that the community has to have confidence that their privacy is protected if we are going to be able to maximise the benefits from electronic management of health information. There is a very broad range of stakeholders, commercial and otherwise, who are interested in getting those building blocks in place, so I do not think that we are in a situation where people will abandon the need for legislation to protect health consumer privacy.

**CHAIR**—You do not think giving the Privacy Commissioner the power to arrive at a code which is mandatory, but after consultation with all the parties in developing it, is a way forward?

**Ms Carter**—It might be, but at the moment the high level principles that the commissioner would be operating on are not strong enough to give us confidence that the code would be strong enough, that any code under this legislation would be strong enough. So there would need to be considerable revision of this legislation for people to feel confident that what you are actually delivering is an enforceable code that would be acceptable.

**CHAIR**—Can I just tease that out a bit? Are you saying that the national privacy principles are not adequate for the health sector?

**Ms Carter**—Yes. The access provisions, for example, have some 10 exemptions whereby consumers might be denied their records. That is much broader than you would have in the public sector under freedom of information legislation, for example. So if a code is going to be developed based on that access principle, it is not going to give consumers adequate access to their records. Similarly, if the disclosure provisions are what we work from then consumers will find that they have more limited access in the private sector to their records than they do in the public sector, but that there are broader grounds for disclosure of the records that they themselves do not have access to.

**CHAIR**—We had the AMA telling us that even this is too stringent, that even what is provided in the bill is too stringent. That is why I am wondering how we are ever going to achieve this nirvana of the future—

**Mr BILLSON**—We need a love-in somewhere.

**CHAIR**—A love-in somewhere, yes.

**Ms Carter**—I think we have achieved it in the Freedom of Information Act, and the AMA lives with that in every state in Australia.

**CHAIR**—It lives with it because, surely, it does not impact upon its members in a direct sense that a private sector bill will.

**Ms Carter**—It does. Their members work in public hospitals, so it does.

**CHAIR**—Yes, I understand that, but it does not impact on the clinic, on the private practice.

**Ms Carter**—Increasingly it does because there is the interchange of records between the public and private sectors. When they are sending information from their private clinic to a public hospital, a patient may well get access to it. So there is that interchange already, and as we have more electronic interchange of information, that will be more and more an issue.

**Mr BILLSON**—You mention in your submission that the MBS framework and the PBS framework are more satisfactory. How would you characterise the factors that make them more satisfactory? What do those have as provisions that are not envisaged in the bill and in the principles?

**Ms Carter**—There are a number of provisions that are required. The first issue about them is that they are enforceable and that there are criminal sanctions that can apply if you do not comply with them.

**Mr BILLSON**—So it has teeth?

**Ms Carter**—Yes, it has got teeth, and it is not a complaints based system. So part of it is about the framework. I referred in my submission to the recent example of a Health Insurance Commission employee who was prosecuted for browsing the records of women who had had IVF treatment, and of Asian women.

If you have a complaints based system, that may never come to light. None of the women whose records were invaded would necessarily know that had happened, and what would they actually complain about? He did not actually, so far as we know, do anything with the records that he had been looking at. In addition, if there is no overarching monitoring framework, you have no assurance that there is a good security system put in place—for example, that the agencies have got in place adequate audit trails.

Various privacy commissioners—we have had a few in recent years—have commented that the voluntary guidelines even under the Privacy Act are not well complied with in the public sector. So we are concerned that, if you have a system that is not based on enforceable guidelines supervised by the Privacy Commissioner, you may well be looking at the same sort of scenario. There are the specific provisions in the MBS and PBS guidelines around data matching and data linkage and around how long information may be retained in identified form—for example, after a linkage exercise has taken place. So it involves a whole range of specific requirements being in place to deal with management of health information in a computerised environment.

**Mr BILLSON**—So even though the Privacy Commissioner by this design has the flexibility to look at industry idiosyncrasies, if I could put it that way, you are not confident that the particular issues in the health sector would be picked up?

**Ms Carter**—No, it is an industry where I think the argument for fairly stringent regulation is a fairly persuasive argument.

**Mr BILLSON**—So without prescribing those things, you would not imagine they would be satisfactorily embraced?

**Ms Carter**—No, I am concerned that they would not be and that the community would not have the level of confidence that is required, particularly in an electronic environment.

**Mr BILLSON**—The issue of health data versus health deliberations is a bit of a contentious one. I understand there is some concern about the deliberative interchange between a referring medical practitioner and, say, a specialist in diagnosis, and the like. How far does that need to go to have those sorts of deliberative exercises included in the data?

**Ms Carter**—In terms of consumer access?

**Mr BILLSON**—Yes.

**Ms Carter**—These exercises were canvassed at length in the recent Senate inquiry into access to records and they have been well canvassed in the report of that inquiry. I do not think there is too much information on the record that the person who is the subject of that information should not have access to. There are outlined in the Freedom of Information legislation, for example, provisos where there is a serious risk to the life and health of the data subject. You can rely on that to deny access. I think that applies regardless of whether it is factual or deliberative information and regardless of who provided that information. So there are very limited circumstances where it would be justifiable to deny access. But I think there also needs to be provision in the legislation that puts the onus on the person denying access to give reasons for the denial and there needs to be provisions for a review of that denial. You have that, for example, with the ACT access to records legislation. The classic example is that it is not only giving consumers access to their records that doctors have concerns about. They often are concerned about forwarding the consumer's records to a new doctor when the person moves residence, for example. So the provision in the ACT legislation to facilitate that is quite a well-utilised provision, which we do not see in this proposal.

**CHAIR**—If we were, after our deliberations, minded to keep health in the bill, are there some specific changes you would like to see? I understand that your point is that it should come out.

**Ms Carter**—We would like to see the framework beefed up so that the Privacy Commissioner is not just developing guidelines but that they are enforceable guidelines, that the Privacy Commissioner has a direct audit and monitoring role in relation to those guidelines and that breach of those guidelines could lead to serious sanctions. I am not persuaded that the sanctions available in the current bill, the range of sanctions, necessarily are significant enough sanctions. There needs to be, within a stronger framework, a range of health specific provisions such as some of the ones that you would find in the MBS and PBS privacy guidelines. There also needs to be a tightening up of the grounds on which access to records can be denied to consumers and the grounds on which disclosure to third parties can occur.

**Mr BILLSON**—You mentioned something about a review process too.

**Ms Carter**—That is in relation to access. There needs to be an onus on the providers to justify a refusal of access, a mechanism for review of any refusal of access and a mechanism to facilitate transfer of records from an initial doctor to a subsequent doctor when a consumer changes their doctor.

**Mr CADMAN**—You have listed a number of areas where the Health Issues Centre had found a problem.

**Ms Carter**—Yes.

**Mr CADMAN**—Except for one or two of them, they appear to be procedural processes that have not been adequately attended to. The refusal to transfer records has been claimed to be a copyright issue, and I fail to understand that myself. To what extent do you think that my specialist notes about a patient are an aide-memoire or an assistance to diagnosis about something where I need to make sure my memory and my impression at the time do not fail me, but, to that patient, may be shocking or disabling or difficult to accept, while, for me, they are a part of a process? To what extent should notes and personal impressions and professional diagnoses be available to patients?

**Ms Carter**—What you see in most health specific privacy legislation and in the FOI legislation is a provision saying that, where consumer access would present a risk to the life or health of either the data subject or someone else, then a practitioner may refuse access.

**Mr CADMAN**—I can see lawyers making a lot of money out of that sort of uncertainty.

**Ms Carter**—Lawyers?

**Mr CADMAN**—Is it prejudicial to your health or not? That is question No. 1. To what extent is it—

**Ms Carter**—That is why it is helpful in the ACT that you can just go along to the Complaints Commissioner. You do not have to go to a lawyer. You just go to the Complaints Commissioner and the commissioner can review the reasons.

**Mr CADMAN**—Yes, but is there a right of appeal?

**Ms Carter**—By the practitioner?

**Mr CADMAN**—By the patient.

**Ms Carter**—That is the consumer's right of appeal—they go to the Complaints Commissioner.

**Mr CADMAN**—But there is no further follow-on?

**Ms Carter**—As I understand it, if the practitioner gives reasons what happens then effectively is a negotiation process. Often some compromise can be found whereby whatever it really is that the consumer is concerned about can be advised to them or another medical practitioner can review the information and give the advice to the consumer or suggest that they think that the consumer should be able to get access direct to that information. So there is a process that is gone through; they do not have to go to court about it. I am not sure whether ultimately you can then appeal to a court. I do not think it works that way.

**Mr CADMAN**—But apart from that most of these seem to be procedural things, many of which should, under current laws, prevent the inappropriate use of personal information for marketing services. I would have thought that that is a matter that—

**Ms Carter**—It is not covered by present laws. The sort of example I have used there is a health department that cross links its data with, for example, the births registry and sends women congratulatory packs on the birth of a new baby. That is a marketing exercise, but it is not prevented by law.

**Mr CADMAN**—It must be a state instrumentality.

**Ms Carter**—Yes. There is a concrete example where a woman complained to me that she received a package of information which she thought was a cruel joke after the birth and death of her baby. She tried to find out under what authority the health department had done that and was unable to get a satisfactory response to her inquiries. So I think some of these things may be procedural but you need to have a process in place where people can go to a body that has some teeth to get some answers and some action by way of response to concerns that are raised.

**Mr CADMAN**—But you are talking about a state matter—

**Ms Carter**—Yes.

**Mr CADMAN**—in the public arena; we are looking at federal matters in a private arena, aren't we?

**Ms Carter**—Yes, and I think that if public sector agencies get it so badly wrong and are breaching people's privacy in that way when they do have a level of accountability, the concerns are greater in the private sector where there is less accountability.

**Mr CADMAN**—Okay. Thank you.

**Mr BILLSON**—Ms Carter, the reach of the health provisions is something that interests me and most of our discussions are focused on more traditional health areas—natural therapies and those sorts of areas. Would you envisage that being embraced by the health sector specific model you are talking about or are you imagining that that might be picked up elsewhere but then rely on the small business type exemption? I am just trying to work out where we put a fence around what is 'health provider' and what is 'health information'. My gym probably has a view on my health, and I am not sure quite whether that is—

**Ms ROXON**—Do not share it with us!

**Mr BILLSON**—No, I would be mortally wounded if that were shared by my gym.

**Ms Carter**—Certainly at the state level the complaints commissions that have been established to deal with health complaints generally deal with any provider that claims to be delivering a health service. So they would deal—

**Mr BILLSON**—Registered provider?

**Ms Carter**—And unregistered. So they would deal with natural therapists. They themselves would say that they suffer from a lack of teeth—these complaints commissioners—particularly in relation to the unregistered groups. But they do try to deal with complaints about those sorts of things.

**Mr BILLSON**—And for people not in the health sector but who may carry and draw from health related information, is that the same deal where the complaints commissioner could pick up a complaint about those types of things?

**Ms Carter**—I think there needs to be a capacity for the Privacy Commissioner to deal with misuse of health information by agencies which are not in the health sector. I am thinking, for example, of employers who often require people to provide a considerable level of health information before they will employ them. That would be important.

**Mr BILLSON**—What I am trying to get to is: if you are arguing for a health specific framework, you would err on the side of health and near health being covered by it rather than—

**Ms Carter**—Perhaps health and use of health information, given that many sectors have an interest in it.

**Mr BILLSON**—Right, for health purposes?

**Ms Carter**—Yes.

**Ms ROXON**—Your submission has some concerns about the employee records exemption, but I think only touches on health information. As I understand it, your concern is that health information is sensitive; it is sensitive no matter who has it.

**Ms Carter**—Yes, that is right.

**Ms ROXON**—Does that mean that your recommendation is just to alter the definition of employee records or do you have other concerns about the employee records? Does it interact with health any more or less?

**Ms Carter**—I have tried to restrict my comments to the impact of the bill on health. I was really thinking just about the health records utilised by employers.

**Ms ROXON**—So your suggestion for that is simply taking out health information as being within the definition of employee records?

**Ms Carter**—Yes.

**Ms ROXON**—Thanks.

**CHAIR**—I thank you very much for the submission and also for coming and discussing it with us.

**Ms Carter**—It is a pleasure. Thank you.

[2.34 p.m.]

**LOCKWOOD, Ms Susan Margaret, Victorian State Representative, Breast Cancer Network Australia**

**MANASZEWICZ, Ms Rosetta, Member, Breast Cancer Network Australia**

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

**Ms Lockwood**—Thank you. Seven people die of breast cancer every day in Australia. As representatives of breast cancer consumers who have both had breast cancer, we are concerned to reduce this toll wherever possible. Reducing these deaths depends on good quality medical care and support and the empowerment of consumers to make decisions about their own care. Access to and the privacy of medical records is integral to the trust which is built up between a woman—and I apologise to the gentlemen; there are men who get breast cancer, but they are mainly women—and her clinician which in turn is a key component of good quality care.

We have three points we would like to make about the bill. The first is that information is power. If consumers are to participate in making decisions about their own care, they need access to information about their treatment options and information about their own personal circumstances. The medical records are part of the information about their own personal circumstances. In our view, access to medical records is not adequately defined in this bill.

Good quality care also depends on being treated by a team of specialists. This team usually consists of representatives from both the public and private sector. Making an arbitrary distinction between public and private health sector areas, and having different privacy requirements for those two areas, is inappropriate for meeting the needs of consumers. In our view, a completely new approach is needed to health records, so health records should be removed from this bill.

There are something like 10,000 people diagnosed with breast cancer each year and about 2,500 deaths. We estimate that there are something like 100,000 women and men living with breast cancer in Australia at any one time, and the impact is obviously broader than that. The diagnosis affects not only the patient but their carers, family, friends and the broader community. Breast Cancer Network Australia has currently 4,500 members and 45 groups nationwide. One of their roles is to train consumers to sit on a range of bodies—international, national, state and local hospital organisations—to represent the views of individual patients, and that is why we are here today. We are trying to comment on this bill from the point of view of an individual patient.

Women and men with breast cancer are treated by at least three different specialties. There are surgeons, medical oncologists and radiation oncologists. There may also be a need for other specialists in other areas such as lymphoedema, counselling, psychology or psychiatry. If

women or men then develop advanced breast cancer, they will be treated by orthopaedic surgeons, pain specialists, palliative care specialists, and so it goes on. Those with advanced breast cancer can be considered as having a chronic disease which will eventually lead to death. But, hopefully, the chronic disease phase will last for some time.

For all patients, both those with early breast cancer and those with advanced breast cancer, the interaction with the health system can become a long and complicated relationship. Navigating the system requires a considerable amount of skill and commonsense. We encourage women to take responsibility for decisions about their own health and treatment. Sometimes women choose to delegate that responsibility to their doctors, but more often in this day and age women are making decisions about their own treatment in conjunction with their medical practitioner.

In the medical world, as in all other worlds, information is power. For women to be able to make those decisions in conjunction with their doctor, they need to have access to information. Part of that information, as I said before, is their personal medical records. It must be possible for consumers to have access to those records to ensure that they are accurate, complete and up to date, and that they are safeguarded by privacy regulations which are consistent and enforceable.

The exemptions of this bill do not allow for effective access by consumers to their records to verify their accuracy and completeness. I notice that it is assumed in the bill that consumers may make frivolous or vexatious requests for access to records. However, it is not assumed that the medical profession may also be frivolous or vexatious. In our experience, there are occasions on which clinicians have responded to requests for medical records in an extremely vexatious manner. So the proposed methods of dealing with requests by industry bodies is, in our view, inappropriate.

Members of Breast Cancer Network Australia are interested in privacy, as are most members of the general public, and this interest also extends into areas of employment and insurance issues. There is increasing concern about the issues relating to genetic testing and extensive research has been carried out into the roles of genes in the development of breast cancer.

Research in the UK has shown that people treated for breast cancer within a multidisciplinary team do much better in terms of survival times than if they are treated by a series of individual practitioners. For this reason, we are encouraging the treatment teams concept to be developed and implemented within Australia, and there is research being carried out to this effect. So if this treatment team idea is actually implemented widely, as we hope, most women with breast cancer will be treated by a treatment team, which will consist of practitioners from both the public and private sector dealing with an individual woman. Even if a woman is basically treated within the public sector, almost invariably her disease will be diagnosed initially by a general practitioner who is working in the private sector. So there is always going to be some complexity in all of that.

There should really be no distinction made between the types of doctors who are working together to meet the needs of an individual woman. In our view, privacy must surely relate to the unique and sensitive nature of the medical record, not to the business arrangements of the

practitioners. When the woman is sitting on the other side of the desk to the doctor discussing her condition and treatment options, the last thing that is in her mind is whether the practitioner is operating in the public or private sector. The information which is being collected and given relates to her ability to beat breast cancer, and the other arrangements have no consequence. I think she would expect the same level of privacy arrangements to be in place whether she is dealing with a public or private sector clinician.

We are not experts at privacy law, but we do believe that this current legislation does not meet the needs of individual patients within the health system and that the health system has some unique characteristics which would require the removal of health records from this bill to be dealt with in separate legislation. Thank you.

**CHAIR**—Can you give us some examples of where information has been mishandled, if I can use that expression—where the sorts of privacy considerations which you would wish to be in place have not been accorded with?

**Ms Lockwood**—I have examples from a number of our members who have asked for copies of their medical records and those medical records have not been made available to them. They have then had to make choices as to how they deal with that issue, how far they push the issue and to what extent they can take it further. For most of them, the difficulties in doing that when they are already ill and they are already dealing with chemotherapy and radiotherapy and some of those sorts of issues are just far too great and they have not been able to pursue them because there has not been an appropriate mechanism for doing it.

**Ms ROXON**—What is the usual situation with people wanting their records because they want a second opinion, they want to change doctors or they just want to have a record? Is it your understanding that the difficulties are caused by the doctors seeking to keep their patients, those sorts of commercial interests; or is it driven by something else? I just want to get a sense of how often that is breached or why that happens.

**Ms Lockwood**—I think by the time some of the women are finished with their doctors, there is no way the doctors would want to keep them as patients and they would be happy to hand them on to as many other doctors as they possibly could. Usually, it is to determine the accuracy and the completeness of the records. In other words, is the appropriate information being exchanged between the medical practitioners who are treating this particular woman? So it is usually an issue of, 'Are they looking at my case completely accurately and taking all the information which I think is important into account?'

**Mr BILLSON**—Just on that subject, listening to your explanation it strikes me that taking on board all of the information means: are all the inputs to the medical judgments before the person making the judgment? That makes perfect sense to me. I then find the next part of the argument being deliberative notes and communication with other professionals. That seems to be taking it a step further, where it is not so much whether all the inputs are accurate but the cognitive process or the decision analysis process that the professional is engaging in, and that is also information that is wanted to be made available.

**Ms Lockwood**—Yes, that is correct.

**Mr BILLSON**—The argument is less clear to me then on the basis on which you put it before. I can understand why that would be of interest and—

**Ms Lockwood**—The argument about the decision making processes?

**Mr BILLSON**—Yes. If all the data is there and you can check for its accuracy, it makes perfect sense and I understand that quite clearly. The deliberative stages—what is the language these guys are using?—the notes and—

**Ms Lockwood**—Their aide-memoires and all the rest of it.

**Mr BILLSON**—Their pre-considered therapeutic conclusion, whatever that involves. That seems to be a review of the data; how they have interpreted stuff. I am just wondering whether that is as clear as—

**Ms Lockwood**—What women are looking for is a satisfactory relationship between themselves and the medical practitioner. That relationship is quite important because they are women and that is the way in which they tend to operate.

**Mr BILLSON**—Blokes do, too.

**Ms Lockwood**—Yes, but we do not hear from them quite so much about some of these issues.

**Ms ROXON**—My raised eyebrows are not going to be in the *Hansard*!

**Ms Lockwood**—There is a relationship set up which is an ongoing relationship which can go on for many years. So there is an issue of trust and a feeling of concern that that doctor has for you in your individual circumstances. You would expect that the doctor will be making judgments about you all the time—about your ability to cope with the information and deal with what is happening, your ability to deal with the treatment that you are undergoing, your ability to deal with bad news which is about to be given to you. That is the whole picture of the woman in the relationship. I suspect that it is part of the whole view of how women would treat the accuracy of that particular record. The accuracy is not just a matter of saying, 'The pathology says this.' The accuracy is really about—

**Mr BILLSON**—I am just wondering whether we are coming at that need for empathy, understanding and a shared insight into the relationship—quite personal issues that go to the professional practice.

**Ms Lockwood**—Absolutely.

**Mr BILLSON**—I am wondering whether privacy legislation is the tool to deliver that. That seems to go more to the relationship between patient and treating—

**Ms Manaszewicz**—I think part of the issue in what Sue was saying was about trust. Certainly, the AMA or any other organisation would be well and truly behind any mechanism

which could lead to patient confidence, shared decision making and therefore better outcomes for the patient. As a consequence, it is important for the patient to understand the thinking processes of the doctor, especially when you have a wide variety of treatments available.

The woman has to understand, for instance, 'Why should I opt for this form of chemotherapy as opposed to that form of chemotherapy?' or 'Do I have a mastectomy or do I have breast conserving surgery?' So it is absolutely vital for her to fully understand the information to understand her doctor's reasoning. That does not have to be aide-memoires. That can be a clinical judgment put into the record so the woman has that on record, has access to the record to understand exactly why she is being recommended this form of treatment. Then she can go away, think about it, it is all there and she has open access to deliberate, to think, and therefore to have greater confidence in her surgeon.

**Mr BILLSON**—I do not disagree with any of that. I can absolutely understand what you are saying from some family experiences about how important that is. My concern is in trying to deliver that sort of knowledge, introspection and exchange of thoughts through a blunt tool. I am wondering whether we can pursue what you quite rightly are putting forward and whether privacy laws are the way to get doctors to be more human in the way they interact with people.

**Ms Lockwood**—Absolutely not. There are all sorts of other things going on to try to improve that interaction.

**Mr BILLSON**—So this may be helpful in that.

**Ms Lockwood**—This is a component. This is about certainty and trust, and it is about building a baseline on which you can build a relationship.

**Ms ROXON**—Just to follow up on that, presumably whilst other things may have been done in the discussions that you can have between organisations, we have seen in other sectors—and health is not so unique—that requirements that mean you have broader access do improve the record taking and keeping and care with which people keep information about you. I can understand why some of that information might be confronting, but it worries me that one of our earlier witnesses said it is a bit paternalistic to think that in the health care area you should not have that information even if it is confronting. I can understand that.

**Ms Lockwood**—That is a continuing issue—paternalism.

**Ms ROXON**—We have asked the other witnesses, particularly in the health area, that have put a similar position to yours which is, 'We think it should be dealt with separately.' I still must say that I am concerned that if health is taken out of this bill altogether it may be difficult to get privacy issues in the health industry back on the agenda and in some form of legislation quickly enough. So are there any key areas that, if health were to remain in this bill, you think jump out at you as having to be changed? I think in your introduction you refer to the exemptions.

**Ms Lockwood**—Yes, it is the access issues which are particularly paternalistic.

**CHAIR**—Can I take you through those specifically, then? Have you got a copy of the bill?

**Ms Lockwood**—I haven't got a copy.

**CHAIR**—I will get you a copy. On pages 78 and 79 of that copy are the access and correction provisions: 6.1(b) is, I think, really where health access starts. I will run through these as they relate to health and seek your comments on each of these provisions. First, 6.1(b):

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

**Ms Lockwood**—We would not have a problem with that.

**CHAIR**—6.1(c):

... providing access would have an unreasonable impact upon the privacy of other individuals.

**Ms Manaszewicz**—I think 'unreasonable' needs to be more carefully and fully defined. That is just a personal reflection.

**CHAIR**—The difficulty with that is that the law traditionally has not wanted to define 'unreasonable' or 'reasonable' any more precisely than that.

**Ms ROXON**—I do not understand what that exemption means anyway, though—'providing access would have an unreasonable impact'.

**Ms Lockwood**—I was trying to think of an example when I saw that. To be perfectly honest, I do not actually understand what it means.

**CHAIR**—I am just trying to think of a circumstance. If someone had AIDS, for example, the disclosure of that information could have an unreasonable impact on a partner? Obviously you are thinking from the breast cancer perspective.

**Ms ROXON**—So whether you should be addressing whether there is someone else that should consent to information being handed on rather than just—

**Ms Lockwood**—Doesn't that come in later on in terms of other family members—carers, partners or whatever—being dealt with?

**Ms ROXON**—We will put a query about what that actually means.

**CHAIR**—Righto.

**Mr BILLSON**—An example might be someone who is HIV positive and they have asked the question: who have your partners been in the last little while? You might not want that shopped around.

**Ms Lockwood**—That is exactly right.

**Mr BILLSON**—That is an example that I can think of off the top of my head.

**Ms Lockwood**—I would agree that you would not want that information shopped around.

**CHAIR**—Frivolous or vexatious—

**Ms Lockwood**—I have a basic problem with that sort of statement. That makes a comment about the way in which the industry considers consumers more than anything else.

**Mr BILLSON**—Just on that, you are saying that, by its very nature, any request for health information by the patient should be deemed to be legitimate?

**Ms Lockwood**—Should be deemed to be legitimate unless there is something else as part of that. As I understand it, in the ACT most of the requests for information have been entirely legitimate.

**Ms ROXON**—It is not really that you object to there being an exemption if it were actually frivolous or vexatious, it is just that you think it implies that consumers generally are—

**Ms Lockwood**—I do not know who decides whether that particular request is frivolous or vexatious.

**Ms ROXON**—'Frivolous and vexatious' is pretty standard in a whole lot of procedures—and it is very strict, in fact—but I can understand that where it is placed and it not being clear who determines it is insulting in a way.

**Ms Lockwood**—It is in fact.

**Mr BILLSON**—So you would accept a view that said that in some other sectors of our economy there could be frivolous and vexatious requests for access but, in the health area, because it is so immediate to your person, you think—

**Ms Lockwood**—There are always going to be frivolous and vexatious requests. I am not trying to suggest that health consumers out there are as pure as the driven snow, but I equally suggest that the medical profession out there is not in the same position—

**Mr BILLSON**—I am just trying to draw out your case for filleting off health and to see what the turning points are that led you to that conclusion.

**Ms Lockwood**—The point about this is that it is representative of the normal paternalistic approach that has been taken to access to records in the past.

**Mr BILLSON**—When applied to the health sector.

**Ms Lockwood**—Absolutely.

**CHAIR**—So, presumably, if this were going to stay, you would like also 'and nor should any refusal be frivolous or vexatious' added.

**Ms Lockwood**—Absolutely.

**Ms ROXON**—It is quite common to have consent not being unreasonably withheld type of provisions, of which there are none in this for access for the doctors.

**CHAIR**—Part 6.1(e) says:

... the information relates to existing or anticipated legal proceedings ...

**Ms Lockwood**—I am not really in a position to comment on that. I am no lawyer.

**Ms ROXON**—Presumably, that is when you want the information a lot of the time. I would have thought from my previous life that, certainly in medical negligence matters, getting your records is one of the things that you really need and it is the one time they really do not want to give them to you.

**Ms Lockwood**—That is right.

**CHAIR**—Although this does say that any information would not be accessible by the process of discovery. I presume that the drafting of this was to maintain the status quo—that is, if you can get it by way of discovery that is okay, but you cannot do anything beyond that.

**Ms ROXON**—Except you can only go to discovery once there are legal proceedings. So you cannot get them in time to assess whether you should take a case. You have to push consumers to the cost of litigating first before they can actually get them.

**Mr BILLSON**—You are running the 'no win, no fee' argument there.

**Ms Manaszewicz**—I think evidence has stated that usually why people go to litigation in medical cases is simply because they want to find out what happened. It is not that they are being malicious or whatever. Giving access to records outside of this domain is simply to answer the question 'What happened?' and to try to understand that. It is not to go with the intent of litigating.

**CHAIR**—Yes, it says:

... providing access would reveal the intentions of the organisation in relation to negotiations with the individual in such a way as to prejudice those negotiations;

**Ms Lockwood**—I think that depends on what the negotiations are about. If the negotiation is about access to health records, then this intent presents a problem. That reads to me as if it is a normal commercial negotiation. I do not think that that is applicable in the issue of access to health records per se.

**CHAIR**—And in 6.1(g):

... providing access would be unlawful;

**Ms Lockwood**—This is all starting to get outside my area of expertise, but my understanding is that similar problems would arise with most of these options here in terms of some areas where there are unlawful activities going on but the health people would prefer to have access to that information, such as intravenous drug use and those sorts of things.

**CHAIR**—Or the Health Insurance Commission in relation to abuse of Medicare service numbers and things like that.

**Ms Lockwood**—There is a whole stack of things in here which are outside my area.

**CHAIR**—I take it that these things are not really at the core of your objections.

**Ms Lockwood**—No, they are not the sorts of things that we would normally be dealing with, but I can envisage that there are other areas of the health sector where some of these issues would be of serious interest.

**CHAIR**—What that leaves me with, though, is that maybe you would like to see (d) and possibly (f) removed. But, on the basis of what you said, that does not seem to be sufficient to meet what you regard as being a core problem. Even if those two provisions were taken out of the bill—

**Ms Lockwood**—One of my core problems is this distinction between the public and private sectors—that you would have different sets of rules relating to the public and private sectors. The doctor who is sitting across from you on the other side of the desk is sometimes acting as a public sector employee and at other times as a private doctor.

**Mr CADMAN**—You seem to be talking about one comprehensive medical record that can be scanned, whether it is public or private, backwards and forwards.

**Ms Lockwood**—Absolutely. That is exactly what is going to happen, as far as I can see in the future, with the stuff about electronic medical records. To some extent it happens now with the exchange of information between the public and the private sector medical practitioners

**Mr CADMAN**—But you welcome that from a consumer point of view?

**Ms Lockwood**—To have a single record?

**Mr CADMAN**—Yes.

**Ms Lockwood**—I am not sure, but with appropriate safeguards, yes. I think that there is a lot to be said for that so that everybody has a common understanding of what the situation is.

**Mr CADMAN**—Some groups are saying they do not like the concept of that at all.

**Ms Lockwood**—Yes, I understand that. I am not 100 per cent sure what my response is to that. I have not sat down and thought through it.

**Mr CADMAN**—You seem to be arguing, if I may say so, that you want to be able to scan from top to bottom the whole process, and you give Elisabeth's example here—I do not know how many hands she goes through—saying that Elisabeth needs to be able to see how consistent the treatment is and whether all of the people she sees have a common understanding of her condition.

**Ms Lockwood**—That is right. From that point of view, a single record would be a sensible way to approach it. From the point of view of whether that is actually practical, I am not sure at the present time and whether there are appropriate safeguards in place.

**Mr CADMAN**—So that the privacy provisions apply to the total record and each element of it?

**Ms Lockwood**—Absolutely. Yes.

**Ms ROXON**—I will ask you about a separate aspect in respect to research: I assume that this is one area where there is a significant amount of interest in the health information of individuals, not for the purpose of knowing anything about that individual but for the purpose of public health interest, to the extent that people want to know whether there is an increasing incidence of breast cancer, whether there are hereditary links, whether there are all sorts of other things. What view does your organisation have in general on access to information for the purposes of research and statistics, and what is your view in respect of how these privacy principles would apply?

**Ms Lockwood**—How many hours do you want us to be here for? We support research into all aspects of breast cancer—the treatment, management, prevention, causes, all of that sort of stuff. We do have serious concerns, though, about the lack of transparency of the research process in Australia, in the sense that the research is carried out by a relatively small coterie of people who know each other, talk to one another and deal internationally, and there is very little consumer involvement in that process at the present time. Therefore, we have no way of knowing whether appropriate standards are being applied.

**Mr CADMAN**—There are conditions, though.

**Ms Lockwood**—There are conditions and there are ethics committees and all of those sort of things, but there are a number of cases overseas—I cannot say this for Australia—where those sorts of processes have been compromised seriously and there have been cases of major fraud.

**Mr CADMAN**—But you cannot point at anything in Australia at this time?

**Ms Lockwood**—Not at the moment, but equally I cannot be confident that those things are not happening in Australia, because I have no way of knowing.

**Ms ROXON**—Before you answer Alan's question, I want to be clear on this. My question is in relation to the privacy aspects, because I understand that there are a whole lot of other issues that your organisation may legitimately be interested in, in terms of the way research is undertaken.

**Ms Lockwood**—But they are all related. We cannot know whether people in the research community are actually meeting any privacy requirements that are there at the moment, except by their telling us that they do so. I accept that they are doing so, but I have no way of knowing.

**Ms ROXON**—I see what you are saying.

**Ms Lockwood**—There is no way at the moment of consumers actually being involved in that process to any significant extent to be confident that that is happening. I do not disbelieve them—do not get me wrong. I think most of them are following appropriate practices but—

**Ms ROXON**—But there is nothing to give you the confidence that they are?

**Ms Lockwood**—I do not have any way of knowing that.

**Ms ROXON**—It just seemed to me that in this area the issue about access, personal information and research overlap a little bit—

**Ms Lockwood**—They do.

**Ms ROXON**—to the extent that a researcher may have an interest in contact. If I had breast cancer or had been diagnosed to have had breast cancer, then any researcher may well be interested in contacting my sisters, mother, grandmother and children, and perhaps cousins—I am not sure how far it extends—whom I may not have chosen to tell. What standards apply for that at the moment and how would you see this operating?

**Ms Lockwood**—At the moment you would have to consent. If you are the individual on whom the researcher is focussing their attention—that is, you and your immediate family, let us say—they would have to ask your consent to approach those members of your family.

**Mr CADMAN**—Can I just question that, because I am not sure whether that is the right response. If I was a researcher and I preconditioned one of the people that I was putting a survey to by saying, for instance, 'One of your relatives has a cancer condition and we would like to know what your state of health is,' that would load the outcome of the research and it would be flawed. I would have thought that you would sign a condition when you received treatment to say that you understood that all procedures may be required to be part of a research program.

**Ms Lockwood**—No, they would have to come and ask you specifically for permission for that particular research activity.

**Mr CADMAN**—But her name would never be disclosed?

**Ms Lockwood**—It would not matter because—

**Ms ROXON**—What would require anyone to do that now?

**Ms Lockwood**—There are ethics committee approvals and there are NHMRC guidelines on medical research that require that.

**Ms ROXON**—Is it your understanding that the bill will actually give some legislative force to that, rather than—

**Ms Lockwood**—I do not have an understanding of that. I do not know the answer to that question.

**Ms ROXON**—That is all right. It is very specific but I was just trying to get my mind around how it is done.

**Ms Lockwood**—I do not actually know the answer to that question. I have no idea what the relationship would be because I do not know what the standing is of the NHMRC guidelines at the present time. I do not know whether there is any statutory backing.

**Mr CADMAN**—There is.

**Ms Lockwood**—Okay. Then I do not know what the interaction would be in that case.

**Mr BILLSON**—If the committee was of a mind to recommend a filleting off of health service and health related information, would your organisation be supportive of it going not only to privacy issues but to the sorts of things we are talking about now—how health information that is available can be better used to inform public health and preventative health campaigns and the like?

**Ms Lockwood**—That would be my view. I think there needs to be a far more encompassing approach to health information than just dealing with privacy in one component, research access in another, then the electronic issues and the genetic issues, which are going to be enormous. There is a whole stack of different things that really need to be brought together.

**Mr BILLSON**—I am staggered that the HIC data is used, for instance, to pinpoint dodgy doctors who are overservicing and those sorts of things, yet what an enormous wealth of data it has on a region where we have divisions of general practice supposedly getting into preventative health, health maintenance and health management as a public health goal. I am just wondering whether, if you are going to get that far into health, you would look into that sort of stuff.

**Ms Lockwood**—I think some of that information is used on occasions, with appropriate safeguards in place. For example, as far as I understand it, one of the big debates is about the level of mastectomies in Australia and how many women are having mastectomies versus breast conserving surgery. You can actually use some of the Health Insurance Commission data to find out that sort of stuff. But it is fairly limited because the codes that are used are not specific enough.

**Mr BILLSON**—That is right. It is the way it is collected.

**Ms Lockwood**—Yes, so there are some limitations with all of that, but I do not actually know an enormous amount about Health Insurance Commission data.

**Mr BILLSON**—I was just curious about this whole idea of filleting out health, where you—

**Ms Lockwood**—Sure. That information is there, and we should be able to use it in satisfactory ways. The only trouble is that we do get into real issues about comparisons and things like this, which the medical profession are loath to enter into, like, 'What is the mortality of breast cancer in Victoria compared with New South Wales?' and so on. We know it is worse in Victoria than in New South Wales. But when you start to get down to the reasons why that might be, in terms of treatment practices, then you start to get into some really interesting discussions.

**CHAIR**—Are you happy with the access to information within the public health sector?

**Ms Lockwood**—Am I happy? It is adequate.

**CHAIR**—If the provisions that relate to the public sector related to the private sector, would you have fewer objections?

**Ms Lockwood**—That would be a better option than what we have at present.

**Ms ROXON**—Better than what is in the bill that we are reviewing?

**Ms Lockwood**—Yes.

**Mr BILLSON**—If that were done, would you be happy to see it proceed in the bill at this time?

**Ms Lockwood**—If you just converted it so that health would have the same?

**Ms Graham**—Yes. If that idea was picked up in some way would you still look to have it—

**Ms Lockwood**—I think we could live with it. But, as I said before, I think you should be looking at health information in that broader, more encompassing area, with the new technologies that are coming along that are going to continue to impinge on every aspect of health, and particularly health information. It is not going to be static. There are going to be new things coming along all the time, and the genetic testing is one.

**Ms ROXON**—Without any disrespect to your views on this, presumably when you say your organisation could live with that as a compromise we should take it that you have a very specific interest in the health area. The broader health consumer groups have expressed much wider concerns about other issues. That is, your organisation, rather than—

**Ms Lockwood**—Absolutely. I would expect that people like the Health Issues Centre have looked at this far more widely. Their views obviously would have a broader perspective than

ours. But we would not have too much trouble with what the Health Issues Centre has said, for example. We would tend to support that.

**Mr BILLSON**—I asked earlier—and you may have heard this—a question about natural remedies. Is that an issue in terms of treatment? I do not know enough about it, but I understand that people's karma is an issue in the way their treatment proceeds, and so on. Is that something that your organisation has addressed itself to in the context of what we have been talking about today? Where does that fit into that picture, so that you can shop around to other people?

**Ms Lockwood**—That is a difficult one, to be perfectly honest. Most of the people involved in treatment of breast cancer would choose alternative therapies at least at some stage during their process. So it is part of their overall treatment pattern. From that point of view you would expect them to be encompassed in some privacy access relationship. On the other hand, there are not very many controls over their activities already, so—

**Mr BILLSON**—I was just thinking about that team approach you were talking about before.

**Ms Lockwood**—The team approach with alternative therapies does not work particularly well in the medical profession, I hate to say. There are some that they embrace, but there are others of course that they do not embrace.

**Mr BILLSON**—Professional tensions.

**CHAIR**—I thank you very much for your submission and also for coming along and discussing it with us this afternoon. We appreciate that. I thank all of those in attendance.

Resolved (on motion by **Mr Billson**):

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

**Committee adjourned at 3.14 p.m.**