SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Question No. 126

Senator Ludwig asked the following question at the hearing on 24 May 2005:

Criminal Justice visas:

a) Once the visa is recognised as necessary by the DPP to maintain the witness in the jurisdiction, is DIMIA approached - how is that facilitated?
b) If there is a successful outcome in terms of the prosecution, what happens to the criminal justice stay visa?
c) If the prosecution is unsuccessful and an appeal is pending, what happens?
d) If there is an unsuccessful prosecution, including the appeal process, what happens to the criminal justice stay visa at that point in time?
e) If the witness wishes to remain in Australia what happens from there?
f) Is that process handled with the DPP or is it handed back to the original arresting authority, the law enforcement authority, or DIMIA?

The answer to the honourable senator's question is as follows:

a) Once the CDPP recognises that a Criminal Justice Visa is necessary to either maintain in Australia or bring to Australia a witness the CDPP applies for the grant of a Criminal Justice Stay or Entry Visa and provides an undertaking to provide subsistence to that person during their presence in Australia. The application is sent to both the Attorney-General's Department and DIMIA with a request that the Attorney-General's Department issue a Criminal Justice Stay Certificate and that DIMIA issue a Criminal Justice Stay Visa.

b) Once the witness has completed giving evidence, the CDPP would make arrangements for the witness to return to their country and would request the Attorney-General's Department to cancel the Criminal Justice Certificate which would result in the cancellation of the Criminal Justice Visa.

c) The prosecution may have a right of appeal in relation to summary matters. If the CDPP wishes to appeal against an unsuccessful prosecution, the Criminal Justice Stay Visa will remain in place.

d) See (b).

e) After the cancellation of their Criminal Justice Visa if the witness wished to remain in Australia the witness would have to make an application to DIMIA for a visa to do so.

f) Should the witness make application to remain in Australia, the application would be determined by DIMIA.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Question No. 127

Senator Ludwig asked the following question at the hearing on 24 May 2005:

Question on Notice 130 ACS – Drug and drug precursor finds by Customs:

a) Have people been charged in relation to those offences and referred to the DPP?

b) What was the nature of the offence referred to?

c) How many charges have been referred?

d) How many people were involved?

The answer to the honourable senator's question is as follows:

a) –d)

Enquiries with the AFP have indicated that the AFP conducted 6 operations involving containers referred to in Question on Notice 130. These six operations involved 20 individuals and 37 charges were referred. The offences included a number involving the *Customs Act 1901* and the Criminal Code relating to importing a prohibited import, attempting to import a prohibited import and conspiracy to import a prohibited import, as well as importing a tier 1 good and state drug offences.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
CRIMTRAC

Question No. 128

Senator Ludwig asked the following question at the hearing on 23 May 2005:

a) What authorisation does Mr Palmer have to be able to receive 'law enforcement in-confidence' classified material?
b) How did he come by that?
c) Please provide a summary of what documents Mr Palmer has received.

The answer to the honourable senator's question is as follows:

a) Mr Palmer advised the CEO in a telephone call (before any meetings were held at CrimTrac) that he had been duly authorised to make inquiries on behalf of the Government in connection with his brief on the Cornelia Rau matter. Mr Palmer received the 'law enforcement in-confidence' material on a need-to-know basis as prescribed in the Commonwealth Protective Security Manual. (PSM).

b) The CEO CrimTrac was advised that this was conferred on Mr Palmer by the Minister for Immigration.

c) Mr Palmer received the following documents: a brief report on the results of an audit of the National Names Index plus some explanatory material, a report on the outcome of a search of the National Automated Fingerprint Identification System and a power point presentation on the differences between the Minimum Nationwide Person Profile and the National Names Index including some appropriate screen captures and general information.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
CRIMTRAC

Question No. 129

Senator Ludwig asked the following question at the hearing on 23 May 2005:

Please provide a summary of the report from CrimTrac submitted to the Palmer inquiry.

The answer to the honourable senator's question is as follows:

At a meeting at CrimTrac on 15 February, Mr Palmer saw a demonstration of the National Names Index (NNI). The improvements offered by CrimTrac's Minimum Nationwide Person Profile computer application were also demonstrated. (A similar presentation was given to Senator Ludwig at CrimTrac on 11 March, except Senator Ludwig's demonstration used fictitious test records.) Later that day, at Mr Palmer's request, a name-based search of the NAFIS was also conducted against names provided by Mr Palmer. The results of that search were provided by fax to Mr Palmer the same day.
In the following week, CrimTrac audited the NNI at Mr Palmer's request, trying to ascertain when a particular name was first entered on the NNI. CrimTrac produced and forwarded a report to him on 22 February. The report showed if and when (according to the NNI audit log) police searched for or accessed records for that name and other names Mr Palmer provided.

There was also a second meeting at CrimTrac on 15 April at which Mr Palmer and Mr Neil Comrie saw a demonstration of NNI and MNPP computer applications to illustrate differences in functionality.

Both Mr Palmer and Mr Pearsall were e-mailed general information on 20 April as a follow up to the second meeting.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
FAMILY COURT OF AUSTRALIA

Question No. 130

Senator Mason asked the following question at the hearing on 24 May 2005:

a) For each of the last four financial or calendar years for which this information is available:
   i. what was the average number of sick leave days taken per full-time equivalent employee;
   ii. what was the average number of days of unscheduled absence (encompassing all types of leave) taken per full-time equivalent employee.

b) Does the court collect, collate and analyse data about unscheduled absence and/or sick leave, for example, which days of the week that employees are away, reasons for absence, dates of absence, employee's age, gender, length of service and work unit location?

c) Does the court record the number and/or percentage of working days lost due to unscheduled absence and/or sick leave in its Annual Report?

d) Does the court record the cost of unscheduled absence and/or sick leave in annual financial statements?

The answer to the honourable senator's question is as follows:

a) For the last four calendar years full-time equivalent employees (FTE) of the Family Court of Australia have taken the following leave:

i) Average number of sick leave days taken per FTE per calendar year

2001	2002	2003	2004	Quarter 1 2005
7.2	7.4	8.0	8.8	1.55

ii) Average number of unscheduled absence days taken per FTE per calendar year

2001	2002	2003	2004	Quarter 1 2005
8.7	9.0	9.9	11.1	1.97

Unscheduled absence days incorporate days taken for sick leave, carer's leave, bereavement leave, religious or culturally significant days or events, and special circumstances (e.g. moving house).

Family Court sick leave was also recently addressed in Senate Question on Notice 436 (asked by Senator Mason). A response to this question was tabled on 10 May 2005 and it was advised that the average number of unscheduled personal leave days per FTE for the 2004 calendar year was 11.22 days. However, due to a recent transfer of some leave previously recorded as personal leave to compensation leave, the average number of unscheduled absences for 2004 has reduced to 11.1 days.

b) The Family Court's human resources information system collects data on unscheduled absences including dates employees are away and reasons for absence. The system also holds data for each employee covering age, gender, length of service and work unit location. The Court analyses this data on an aggregate unscheduled absences and trend basis, providing managers with monthly performance reports.

Supervisors discuss attendance issues with any employees exhibiting high levels and/or particular patterns of leave. Under the Court's Certified Agreement, an employee who has a pattern of absenteeism (e.g. absences linked to weekends or public holidays) can be required by their supervisor to provide reasonable supporting medical or other evidence to support future absences. Where such an arrangement is established it is reviewed with the employee within a six month period.

c) The number and/or percentage of workings days lost due to unscheduled leave and/or sick leave is not recorded in the Court's Annual Report.

d) The cost of unscheduled leave (including sick leave) is not explicitly itemised in the Court's Financial Statements but forms part of the *Wages and Salaries* expense reported in the Operating Expenses Note of the Court's Financial Statements.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
FEDERAL COURT OF AUSTRALIA

Question No. 131

Senator Ludwig asked the following question at the hearing on 24 May 2005:

How many applications, excluding native title, have taken longer than 18 months to finalise?

The answer to the honourable senator's question is as follows:

Of the 3,406 causes of action (excluding native title) finalised 1 July 2004 to 29 April 2005, 279 took longer than 18 months from the date of commencement to the date of finalisation.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
FEDERAL MAGISTRATES COURT

Question No. 132

Senator Kirk asked the following question at the hearing on 24 May 2005:

Please provide a breakdown of the backlog of migration matters before the Federal Magistrates Court.

The answer to the honourable senator's question is as follows:

The following table provides a breakdown of the backlog of migration matters in the period 1 July 2003 to 30 April 2005. The higher number of finalisations in the period 1 July 2004 to 30 April 2005 reflects the increased capacity available to the Court to handle migration matters as a consequence of the appointment of additional federal magistrates in the second half of 2004.

	Received	Finalised	Backlog
Backlog as at 30/6/03			893
2003-04	3,046	1,194	2,745
2004-05 (to 30 April)	2,067	2,294	2,518

Note:

A new computerised system was introduced in 2004-05 for the management of the Court's general federal law cases. The classifications in the new computer system are different to those that were in the old computer system. In addition during the migration of data, quality audits were carried out. This has resulted in differences between the data in this table and the data published in previous annual reports.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Output 1.3

Question No. 133

Senator Ludwig asked the following question at the hearing on 24 May 2005.

Please provide costings regarding the cost to industry to meet the Access to Premises Standard.

The answer to the honourable senator's question is as follows:

The costings are available in a draft Regulation Impact Statement (RIS) which was prepared with the draft Disability Standards for Access to Premises and released for public consultation in January 2004. The draft RIS is available at http://www.abcb.gov.au/index.cfm?fuseaction=DocumentView&DocumentID=98. A summary of the RIS is below.

DISABILITY DISCRIMINATION ACT (DDA)

DISABILITY STANDARDS FOR ACCESS TO PREMISES

Draft Regulation Impact Statement (Summary)
February 2004

AUSTRALIAN BUILDING CODES BOARD

The Executive Director
Australian Building Codes Board
PO Box 9839, Canberra City, 2601

OR

Ms Deborah Fleming – Project Manager
Phone: (02) 6213 6346
Facsimile: (02) 6213 7287
E-mail: Deborah.Fleming@abcb.gov.au

The report is also available in alternative formats from the address above and on the ABCB web site at http://www.abcb.gov.au .

Summary of findings in the Draft RIS on 'Proposals to formulate Disability Standards for Access to Premises and to amend the access provisions of the BCA'

1. RIS Development

Regulatory Impact Statement

As part of the development of Disability Standards for Access to Premises (Premises Standard) and amendments to the Building Code of Australia (BCA) a draft Regulation Impact Statement 2004 (RIS) has been developed to provide a cost benefit analysis of the proposed changes to the access provisions for buildings.

The RIS has been developed to assess the costs and benefits of the proposed changes. The methodology implemented in the RIS to assess the cost and benefits is on the basis of a comparison of the requirements contained in the proposed Premises Standard with the current BCA requirements.

This document is a summary of the discussion and the recommendations covered in the RIS. Specific comment has been sought in the RIS public comment process section in relation to the cost benefit analysis on specific parts of the proposal as well as more generally. Once the public consultation period has finished and all comments reviewed the draft RIS will be amended and become the final RIS.

2. Background

The Disability Discrimination Act

The Australian Government's Disability Discrimination Act 1992 (DDA) has been in effect since March 1993. The DDA prohibits discrimination against people with a disability or their associates in a range of areas, including transport, education, employment, accommodation and, most importantly for this discussion, premises to which the public is entitled to enter or use.

The DDA recognises that in certain circumstances, providing equitable access for people with a disability could cause 'unjustifiable hardship' for an owner or operator of premises. In such cases, the DDA does not require access to be provided.

The DDA is complaints-based (as opposed to compliance-based) legislation. To date, the intent and objectives of the DDA have not been supported by detailed technical requirements, so there is no clear way to ensure that a building complies with the DDA.

The Building Code of Australia

The BCA is developed and maintained by the Australian Building Codes Board (ABCB) on behalf of the Australian Government and the State and Territory Governments of Australia, each of whom have statutory responsibility for building control and regulation within their

jurisdiction. The BCA is a comprehensive statement of the performance and technical requirements relevant to the design and construction of buildings and other related structures. The BCA is therefore a national code, administered at a State and Territory government level.

The BCA contains specific provisions for access to and within buildings, for people with a disability. The BCA applies to building work on new and existing buildings.

The Problem

The need to review the relationship between the DDA and the BCA stems from the following:

1. The DDA contains intent and objectives but not the technical details of how to provide access for people with a disability;
2. The current technical requirements of the BCA are not considered to meet the intent and objectives of the DDA; and
3. The existence of two legislative requirements in relation to access for people with a disability to buildings, being the BCA and DDA, clearly gives rise to potential inconsistencies.

3. Development of Proposals

In April 2000, an amendment was made to the DDA to allow the Australian Government's Attorney-General to formulate Disability Standards for Access to Premises. Disability Standards will help to clarify accessibility requirements under the DDA. Similar Disability Standards for Accessible Public Transport already exist and the Disability Standards for Education are currently being developed.

The effect of a Premises Standard would be that owners and developers of buildings used by the public would be able to meet the objectives of the DDA (as they apply to buildings) by meeting the requirements of the Premises Standard. In the absence of a Premises Standard, people with a disability, building owners and developers would continue having to rely on the individual complaints mechanism of the DDA as the only means of defining compliance.

The ABCB was requested by the Australian Government to develop proposals for a revised BCA, to enable it to form the basis of a draft Premises Standard. The ABCB established the Building Access Policy Committee (BAPC) to recommend changes to the BCA, to consult widely with industry and the community, and to provide advice to the ABCB on access-related issues. The BAPC consists of organisations with an interest in the development of the Premises Standard. Through the BAPC and its Technical Working Group, the draft Premises Standard was developed with wide stakeholder input to achieve a negotiated set of proposals for public comment.

4. Options Considered

Apart from a market based approach, possible options beyond the development of a Premises Standard have not been considered in the RIS in recognition of the request made by the Australian Government to revise the BCA so that it could form the basis of the Premises Standard.

The RIS considers four options:

(i) Market based approach;
(ii) Premises Standard independent of the BCA;
(iii) Premises Standard and BCA aligned, but with less stringent requirements; and
(iv) Premises Standard and BCA aligned.

The arguments for and against these options are summarised as follows:

Market based option: This option would exclude the development of a Premises Standard and rely on market forces to provide access to buildings for people with a disability.

The existence of the DDA means that the broad legislative direction has already been set. The adoption of a market based approach is therefore outside the range of options able to be considered in detail by this exercise. The fact that there was sufficient justification for the DDA to be amended to allow for a Premises Standard reflects a failure in market forces.

Premises Standard independent of the BCA: This option would involve the development of a Premises Standard under the DDA and no alignment with the BCA. Arguments in favour of this option are that changes to the Standard can be implemented relatively quickly, independent of States and Territories having to agree to complementary BCA changes. The provisions can also be made more flexible by including 'non-building' solutions outside the scope of the current BCA. Arguments against this option are focussed on the loss of certainty and consistency both for the building industry, regulators, building owners and building users – a major outcome sought from the current project.

Premises Standard and BCA aligned, but with less stringent requirements: This option is to develop the Premises Standard without moving to the new variant of AS 1428.1 (Design for access and mobility) – thus avoiding the costs and benefits of moving to larger spatial dimensions. The Australian Standard, AS1428.1 - 2001 contains spatial dimensions based on 80th percentile wheelchairs, whilst the proposed new edition increases this to the 90th percentile. The arguments for staying with the 80th percentile value are that there will be fewer changes required to existing buildings and reduced loss of net lettable area in some new buildings. The arguments for adopting the 90th percentile value are that more people with a disability (particularly those with severe mobility disabilities) will benefit. This option may not be considered to meet the intent and objectives of the DDA.

Premises Standard and BCA aligned: This option involves the development of a Premises Standard and a revised BCA which will contain identical technical requirements

for access for people with a disability into buildings. This is considered by a wide range of stakeholders to be the most appropriate option for further consideration as it has the potential to address the problems raised above. A full analysis of this option has been undertaken and is summarised in the following sections.

5. Summary of proposals

This section provides a general description of the technical provisions of the Premises Standard and highlights the main differences between the proposed provisions and the existing BCA requirements for accessibility.

The requirements of the Premises Standard will apply to all new buildings and existing buildings undergoing new building work, or change of use which triggers a requirement for a building approval.

New buildings will be required to comply fully with the Premises Standard/revised BCA, however, in recognition of the fact that new work on existing buildings may involve technical difficulties or prohibitive costs to achieve full compliance with the Premises Standard/revised BCA, the Premises Standard will retain the current DDA provision for defences of unjustifiable hardship. This will apply to existing buildings only.

Following is a list of the major changes proposed to the BCA access provisions to enable them to form the basis of the Premises Standard.

1. Access requirements will apply for the first time to certain boarding houses, guest houses, hostels and dwellings used for short-term holiday accommodation.
2. Access requirements will apply for the first time to the entrance level and specified common areas of apartment buildings.
3. The ratio of accessible accommodation rooms in hotels and motels will be increased.
4. In commercial and industrial buildings (shops, offices, factories and warehouses), all levels will be required to be accessible, rather than just the entrance level and any other level served by a passenger lift or ramp.
5. Swimming pools used by the public will be required to be accessible for people with disabilities.
6. Restrictions will be placed on the use of threshold ramps as a means of making buildings or parts of buildings accessible.
7. All building entrances are to be made accessible in large buildings, with a requirement for at least 50% of entrances to be accessible in small buildings.
8. Space will be required at intervals along narrow corridors and at dead ends to allow for passing and turning.
9. Certain areas not requiring access for people with disabilities have been included.
10. The number of accessible car parking spaces provided in association with health clinics and day surgery premises has been doubled in line with the number currently required for other health care premises.
11. Hearing augmentation will be required in more areas of buildings and types of acceptable hearing augmentation devices have been specified.
12. The number of spaces in auditoria for wheelchair users will be increased and requirements will be specified for how these spaces are to be configured.

13. Ramps will be restricted to a maximum rise of 3.5 m and the length of landings on ramps will be increased.
14. Additional types of passenger lifting devices will be allowed and lifts will require additional accessible features.
15. Unisex accessible toilets will be required at each bank of male and female toilets.
16. Toilets suitable for use by ambulant persons with a disability will be required where 2 or more toilets are provided in a bank of toilets.
17. Spatial dimensions will be based on 90th percentile wheelchair dimensions, rather than the current 80th percentile dimensions.
18. Alternative configurations for car parking spaces will be specified.

6. Expected benefits

The analysis of the expected benefits of the proposed Premises Standard contained in the RIS is, to a substantial degree, qualitative. The benefits of the Premises Standard include both tangible and intangible aspects. While the tangible benefits are important, a major part of the justification for implementing the Premises Standard is intangible. The Premises Standard represents a substantial step toward achieving the rights of people with a disability to participate in all aspects of society. That is, it would be a major step forward in enabling people with a disability to participate in the whole range of work, leisure, social and cultural activities.

One tangible benefit is the likely increase in participation in employment for people with a disability due to the availability of more accessible workplaces. However, while such a benefit is certainly possible, it is subject to uncertainty in light of experience from the United States which has similar provisions.

Another potential benefit is the likely reduction in the costs of living for people with a disability that would result from the implementation of the Premises Standard.

Realisation of these benefits would not be felt in full for a number of years, as they are dependent on the stock of buildings becoming accessible over time.

If these benefits come to fruition, it will mean that the adoption of the Premises Standard has substantially improved the economic position of some of the most disadvantaged members of society and thus would be responsible for a significant and positive redistribution of income from within society. In other words, while the costs of the Premises Standard are widely distributed throughout society, the benefits accrue largely to people with a disability.

The codification of the DDA's general duty of non-discrimination in the context of premises should have an important impact in improving current compliance levels. It will increase certainty for people with a disability, building owners, and occupiers alike.

For people with a disability, the benefit of full compliance with BCA requirements is that they can be certain that new and upgraded buildings will meet the provisions that are mandated in the Premises Standard/revised BCA. Moreover, because specific requirements are mandated, people with a disability will have increased certainty about the degree of access that will be provided.

For building owners, the benefit is that compliance with the Premises Standard/ revised BCA will provide them with a high level of assurance that they will not be the subject of a successful complaint under the DDA and that they will therefore not risk being required to retrofit changes to their buildings. By extension, a potential source of dispute between clients and various building professionals (designers, builders, certifiers, etc) is also substantially reduced.

An additional source of benefits identified by several access experts is a reduction in accidents and, therefore, in associated health care costs and costs in terms of lost production. These safety-related benefits would accrue in respect of all building users, not just people with a disability.

7. Expected costs

Costs associated with the Premises Standard have been estimated by applying the proposed requirements to a set of 46 case study buildings developed in agreement with stakeholder representatives. The cost implications of each individual provision were estimated by a quantity surveyor. The total costs for each case study building were then mapped against Australian Bureau of Statistics (ABS) and building activity data to obtain estimates of aggregate annual cost impacts. This methodology therefore allows both the cost impacts on individual building types and cost impacts on the economy as a whole to be determined.

It should be noted that the unjustifiable hardship provisions of the DDA will still be available for existing buildings in some cases and therefore would have the potential to reduce cost impacts.

In new buildings it can be argued that cost impacts can be reduced by adopting more efficient designs so that accessibility is built-in rather than added on.

The exact quantification of costs is inherently difficult for a number of reasons, including the lack of correlation between the case studies, the classification systems used by the ABS and available building data. The ‘case study’ methodology also requires a number of assumptions to be made that have the potential to influence estimates. However, the case study methodology is considered an appropriate mechanism for estimating the magnitude of costs associated with the proposals and as a basis of seeking feedback on the accuracy of the costs identified.

The analysis shows that the cost impacts of the proposed Premises Standard vary substantially between building types and significantly between the construction new and existing buildings. For some larger buildings, cost impacts will potentially be quite small. For example, cost increases are estimated to be as low as 0.1% for large horizontal shopping centres. However, for some smaller buildings, cost increases could be significant depending on design options and topographical conditions. Among new buildings, two-storey restaurants and small two-storey offices are estimated to be potentially subject to construction cost increases of 41% and 63% respectively. Among renovated buildings, small single storey shops and two storey offices could experience construction cost increases of 60% or more.

The proportionate cost impacts of implementing the Premises Standard are, in many cases, greater in relation to upgrades or renovations of existing buildings than in relation to new buildings. This is consistent with findings in other countries that have implemented similar requirements.

The main cost drivers, in the cases in which the proportionate cost impacts of the Premises Standard are largest, are broadly similar for new buildings and renovations. For example, for two storey offices and restaurants, providing access to the upper floor is easily the largest single cost item. In relation to single storey holiday accommodation, the major cost items are accessible sanitary facilities and wider doorways. For small single-storey shops, the main costs are for provision of ramps and wider doorways.

8. Summary of benefit and cost scenarios – annual values

The estimated benefits and costs of compliance with the Premises Standard are summarised in the following table. The values stated for both costs and benefits must be considered in light of the inherent difficulties in quantifying intangible outcomes and the lack of substantive information and data on many aspects.

Table 1: Summary of quantified benefit scenarios – annual values

	Base case	**Upper bound**	**Lower bound**
Benefits			
Increased income	$150m	$300m	$0
Reduced costs of living	$969m	$1,163m	$510m
Total	$1,119m	$1,463m	$510m

Table 2: Summary of quantified cost scenarios – annual values

Costs	**Base case**	**Upper bound**	**Lower bound**
New Buildings	$694m	$694m	$376m
Renovations	$800m	$955m	$800m
Lost lettable space (renovations)	$312m	$312m	$312m
Total	$1,806m	$1,961m	$1,488m

The unquantified benefits expected to derive from the Premises Standard's adoption are also extremely significant and must be considered in addition to these quantified estimates. The unquantifiable benefits include access for the elderly and parents with prams as well as the potential for less reliance to be placed on carers.

The above tables compare benefits and costs in a "steady state" and do not acknowledge the fundamental issue of the different timing of the benefits and costs. The benefits would not be felt in full for a number of years as they are dependent on the stock of buildings becoming accessible over time.

By contrast, the costs estimated would be incurred from year one. For this reason, a Net Present Value analysis has been undertaken, using a 30-year time horizon and assuming a 15 year renovation cycle. Using the base case assumptions, the present value of the

costs of implementing the Premises Standard is $26.4 billion, while the present value of the benefits is $13.0 billion.

9. Closing Comments

From the alternate options considered in the RIS it is considered that the development of a Premises Standard and a revised and aligned BCA is the only option that will provide consistency and certainty for people with a disability, building owners and developers through the codification of the DDA.

The analysis has identified that the costs associated with the implementation of the Premises Standard and revised BCA outweigh the quantifiable benefits. However when considering the proposal, consideration should also be given to the unquantifiable benefits and the inherent difficulty in estimating costs. Respondents should not consider the merits of the proposal on the above figures in isolation.

The fact that both the estimated benefits and costs of implementing the Premises Standard are extremely substantial reflects the considerable non-compliance with the general duties of the DDA that persists after a decade of existence. The Premises Standard and revised BCA are an attempt to codify the intent and objectives of the DDA and hence pre-existing obligations. The Premises Standard and particularly the revised BCA introduce an enforcement regime that did not previously exist under the DDA.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INSOLVENCY AND TRUSTEE SERVICE AUSTRALIA

Question No. 134

Senator Ludwig asked the following question at the hearing on 23 May 2005:

The budget gives you $3.7 million to implement the cost recovery review, which is in the budget paper No.2 at page 11. How is that money going to be spent?

The answer to the honourable senator's question is as follows:

Implementation costs of $0.5 million and an equity injection of $1.7 million will be used in 2005-06 to develop and implement the proposed new cost recovery arrangements. Implementation costs cover the revision of forms and standard letters, revision and reprinting of a wide range of information pamphlets, changes to ITSA business processes and the training of staff and education of clients and stakeholders. The equity injection is needed to develop time recording and activity based costing, and lodgement and receipting systems necessary for the introduction of a comprehensive cost recovery regime. Additional ongoing (fiscal) costs of $0.5 million per annum over the next three financial years will be used to maintain the cost recovery regime. These additional costs will themselves be recovered from revised fees and charges.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INSOLVENCY AND TRUSTEE SERVICE AUSTRALIA

Question No. 135

Senator Ludwig asked the following question at the hearing on 23 May 2005:

What sort of remedial work has been done to ensure that internal fraud does not go unchecked?

The answer to the honourable senator's question is as follows:

During 2004 and into 2005, in addition to informing all ITSA employees about how, when ITSA acts on behalf of the Official Trustee in the administration of bankrupt estates, potential fraud risks can be minimised, a number of controls were developed and introduced. These included a new business rule and a revised best practice statement. Those instructions explain procedures for registration and admission of creditors' proofs of debt, the authorisation of payments from estate monies, and issue of reports to bankrupts about receipts and payments made. ITSA's Bankruptcy Regulation branch conducts complementary sample checks with creditors to verify amounts received in dividends.

In addition, audit reports are now available monthly to Official Receivers highlighting potential risks associated with matters such as payments to creditors and any changes to creditor payee details.

From July 2005, registered trustees will be required to reconcile payments made against amounts due in respect of the realisations charge and interest earned from trust monies. These reconciliation statements will be checked by ITSA to ensure that all payments made by trustees are accounted for. EFT payments to ITSA are also being encouraged.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION

Question No. 136

Senator Kirk asked the following question at the hearing on 24 May 2005:

1) For the Classification Board

2) For the Classification Review Board

a) How many films and computer games were considered in 2003-04 and 2004-05 to date?

b) How many decisions were made for both these years by:

i) films

ii) computer games and;

iii) videos.

Please include the numbers that were refused classification as well as those that were approved.

The answer to the honourable senator's question is as follows:

1. Classification Board

a) In 2003-04 the Classification Board made a total of 5088 classification decisions in relation to commercial applications for public exhibition films, films for sale or hire (videos, DVDs and enhanced CDs) and computer games. Of these, three computer games and 12 sale or hire films were classified RC (refused classification). No public exhibition films were classified RC during this reporting period.

For the 2004-05 year as at 20 June 2005 the Classification Board has made 6596 classification decisions in relation to commercial applications for public exhibition films, films for sale or hire (videos, DVDs and enhanced CDs) and computer games.

bi) In 2003-04 the Classification Board made 473 classification decisions in relation to public exhibition films.

For the 2004-05 year as at 20 June 2005 the Classification Board has made 410 classification decisions in relation to public exhibition films.

ii) In 2003-04 the Classification Board made 654 classification decisions in relation to computer games.

For the 2004-05 year as at 20 June 2005 the Classification Board has made 731 classification decisions in relation to computer games.

iii) In 2003-04 the Classification Board made 3961 classification decisions in relation to commercial films for sale or hire (videos, DVDs and enhanced CDs).

For the 2004-05 year as at 20 June 2005 the Classification Board has made 5455 classification decisions in relation to commercial films for sale or hire (videos, DVDs and enhanced CDs).

2. Classification Review Board

a) In 2003-04 the Classification Review Board made a total of eight decisions in relation to public exhibition films, films for sale or hire (videos, DVDs and enhanced CDs) and computer games. Of these items one was refused classification.

For the 2004-05 year as at 20 June 2005 the Classification Review Board has made 13 classification decisions in relation to public exhibition films, films for sale or hire (videos, DVDs and enhanced CDs) and computer games. Of these items one computer game and 2 sale or hire films have been classified RC (refused classification).

bi) In 2003-04 the Classification Review Board made seven classification decisions in relation to public exhibition films.

For the 2004-05 year as at 20 June 2005 the Classification Review Board has made eight classification decisions in relation to public exhibition films (includes one advertising exemption).

ii) In 2003-04 the Classification Review Board made one classification decision in relation to a computer game.

For the 2004-05 year as at 20 June 2005 the Classification Review Board has made one classification decision in relation to a computer game.

iii) In 2003-04 the Classification Review Board did not make any decisions in relation to commercial films for sale or hire (videos, DVDs and enhanced CDs).

For the 2004-05 year as at 20 June 2005 the Classification Review Board has made four classification decisions in relation to commercial films for sale or hire (videos, DVDs and enhanced CDs).

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION

Question No. 137

Senator McGauran asked the following question at the hearing on 24 May 2005:

a) Did the Board consider there was bondage in the film *9 Songs*?

b) Did the Review Board consider there was bondage in the film *9 Songs*?

c) Why is there a difference in the classifications?

The answer to the honourable senator's question is as follows:

a) In its report, the Classification Board notes that two scenes contain depictions of consensual sexual role-play which in the Board's view was not considered to be bondage.

b) In its report, the Review Board determined that these two scenes did constitute bondage.

c) Both the Board and the Review Board make decisions applying the same tools of the Classification Act, the National Classification Code and the relevant guidelines. The Boards are independent of each other.

As an independent merits review body, the Review Board meets in camera and makes a fresh classification decision upon receipt of an application for review. This Review Board decision replaces the original decision made by the Board.

The existence of such a review mechanism provides for new decisions to be made where a review of the material results in a different assessment.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION

Question No. 138

Senator McGauran asked the following question at the hearing on 24 May 2005:

a) Has artistic merit become the overriding factor in making classification decisions about movies such as *9 Songs*?

b) Is there a holistic consideration of the classification system in making decisions? Do you take account of the words “demeaning", "exploitation" etc. which are specified in the Act and the Code?

c) Is artistic merit being used as the excuse for classifying films containing offensive scenes that should otherwise be refused classification?

The answer to the honourable senator’s question is as follows:

a) No. The Boards consider each film in its entirety. Artistic merit is only one of the many considerations (including literary and educational merit) that must be taken into account in classification, and it is not the primary consideration.

b) Yes. Board members make classification decisions using the statutory framework of the national classification scheme which includes the application of the Classification Act, the National Classification Code and the classification guidelines. In applying these classification tools, Board members must consider the standards of morality, decency and propriety generally accepted by reasonable adults. They must also give effect as far as possible, to the Code principle that adults should be able to read, hear and see what they want.

There is no opportunity for Board members to make decisions other than by reference to the detailed criteria set out in the Classification Act, National Classification Code and the relevant Classification Guidelines.

c) No. There are various examples of films, arguably of artistic merit, that have been RC (Refused Classification).

All films submitted for classification are considered on their individual merits by the Board in accordance with the provisions of the Classification Act and the criteria set out in the Code and Guidelines.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 139

Senator Kirk asked the following question at the hearing on 24 May 2005:

Complaints – What is the progress on the 100 or so unresolved complaints?

The answer to the honourable senator's question is as follows:

The Office is currently closing 51% of complaints within one month, 64% within three months, 74% within 6 months, 88% within 12 months and 12% in more than 12 months. The time taken to resolve individual complaints will vary due to the level of complexity of a particular matter.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 140

Senator Kirk asked the following question at the hearing on 24 May 2005:

Please provide details of the nature of the 17,231 telephone hotline inquiries?

The answer to the honourable senator's question is as follows:

Table A: Telephone Enquires Summary by Issue (Financial Year to Date 1/07/04 - 30/04/05)

Issue Type	Number of Calls	Percentage of Calls
Privacy Generally	3362	19%
NPP 2.1 – disclosure	2491	14%
Misdirected calls received	1785	10%
Credit Reporting	1243	7%
Exemption – employee records	971	6%
NPP 6.1 – access (health information)	882	5%
IPP Commonwealth agencies	816	5%
NPP 1.1 – unnecessary collection	657	4%
Exemption – State & Local Government	648	4%
NPP 1.3 – notification of how information is to be used/disclosed	513	3%
General – Jurisdictional issues relating to the Private Sector Provisions	491	3%
NPP 4 – data security issues	487	3%
NPP 6.1 – access (non-health)	403	2%
NPP 2.1 – direct marketing	399	2%
Exemption – Small Business Operator	341	2%
Surveillance	270	2%
NPP 3 – data quality issues	220	1%
NPP 1.2 – unlawful / unfair collection	177	1%
NPP 2.1 – secondary purpose use of personal information (other than direct marketing)	164	1%
Spent Conviction	126	1%
NPP 2.1 – spam	114	1%
NPP 5 – openness - privacy statement	98	1%
NPP 1.5 – third party notice	92	1%

Issue Type	Number of Calls	Percentage of Calls
Tax File Numbers	71	0%
NPP 2.1 – health information	65	0%
NPP 10 – sensitive information collection	62	0%
NPP 6.4 – access charges /request fee	44	0%
IPP ACT Government agencies	42	0%
Exemption – journalism	40	0%
NPP 9 – transfer of personal information overseas	38	0%
Exemption – political	20	0%
NPP 8 – anonymity	16	0%
Data-matching	16	0%
Public Registers	16	0%
NPP 2.4 – Health services may disclose health information to persons responsible for individuals without capacity to consent.	14	0%
NPP 7.1 – agency identifier	12	0%
NPP 6.5 / 6.6 – steps to correct info	9	0%
NPP 1.4 – collection from 3rd party	7	0%
NPP 2.2 – note of use or disclosure	5	0%
NPP 2.5 – re: 2.4 definition of responsible person	1	0%
NPP 6.2 – evaluative material exception	1	0%
NPP 6.3 – use intermediary	1	0%
NPP 10.3 – public health / safety research	1	0%
Total	17231	100%

Key:
NPP = National Privacy Principles
IPP = Information Privacy Principles

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 141

Senator Kirk asked the following question at the hearing on 24 May 2005:

Please provide a summary of the major investigations completed in the last financial year.

The answer to the honourable senator's question is as follows:

In 2003-04 the Office received 1276 complaints, 66% of these complaints related to the National Privacy Principles (NPPs), 17% to the Information Privacy Principles (IPPs), 15% were Credit related complaints and 2% were categorised as 'Other'[1]. As well the Office undertook 38 Own Motion Investigations (OMIs). The Office publishes all determinations made by the Commissioner following investigation as well as de-identified case notes of other significant investigations under the NPPs and IPPs and other areas of the Office's jurisdiction.

Set out below is a summary of five determinations made by the Commissioner in 2003-04. As well, copies of the 17 case notes issued in 2003-04 are provided at Attachment A. Determinations and case notes are also available on the Office's website at www.privacy.gov.au/act/casenotes/index.html.

Determinations
During 2003-04 the Commissioner made five complaint determinations, four in relation to complaints about the NPPs and one in relation to an IPP complaint. The following is a summary of these investigations:

- Determinations 1, 2, 3, and 4 of 2004 related to a representative complaint lodged by the Tenants' Union of Queensland Inc (TU QLD) and others pursuant to s. 38 of the Privacy Act, that alleged that TICA Default Tenancy Control Pty Ltd (TICA), which operates one of Australia's largest tenancy databases, had breached the Privacy Act. The allegations concerned issues of access, accuracy, purpose and disclosure. The Commissioner found a number of the allegations substantiated, and others unsubstantiated. In summary, the Commissioner determined that TICA had:

  - breached NPP 6.4(b) by charging individuals an $11.00 fee to lodge a request for access to their personal information via mail
  - breached NPP 6.4(a) by charging individuals an excessive amount of $11.00 for access to their personal information via mail and $5.45 per minute for access via the telephone
  - to take some steps to ensure that the information it holds is accurate, complete and up-to-date, but that its practices did not satisfy the obligation imposed by NPPs 3, 6.5 and 6.6
  - breached NPP 4.2 by failing to take reasonable steps to destroy or de-identify personal information that is no longer needed for any purpose
  - breached NPP 1.5 by failing to take reasonable steps to ensure that individuals are made aware of the matters listed in NPP 1.3.

[1] The 'Other' category includes complaints relating to Spent Convictions, Tax File Numbers, Data-matching or Contracted Service Providers.

- Complaint Determination 5 of 2004 relates to an allegation that the ACT Department of Justice and Community Safety (JACS) disclosed personal information to the ACT Ombudsman (the Ombudsman) in the course of its investigation into a complaint made by an employee of JACS under the Public Interest Disclosure Act 1994 (ACT) (the PID Act).

  JACS did not dispute that the disclosure occurred, but did dispute the details of the information disclosed. JACS also argued that there were two applicable exceptions to IPP 11; IPP 11.1(a) and IPP 11.1(d).

  The Commissioner found that IPP 11.1(a) and IPP 11.1(d) would have permitted JACS to disclose some personal information about the complainant but not all. In particular he found that the complainant would not have been 'reasonably likely to be aware' of the extent of the disclosures and so the test in IPP 11.1(a) was not met and there had been a breach of IPP 11.1(a). He also found that while the general authorising provisions of the Ombudsman's Act 1989 and the PID Act authorised the disclosure of some personal information, they did not authorise disclosure of personal information where that was not relevant in the context in which the information was sought and so there was also a breach of IPP 11.1(d).

  In accordance with s. 52(1)(b)(i)(B) of the Privacy Act, the Commissioner found the complaint substantiated and declared that JACS should apologise to the complainant for disclosing the personal information that was not relevant to the Ombudsman's investigation of his PID complaint.

Case Notes for the 2003–04 Financial Year

Case Citation: *B v Credit Provider* [2004] PrivCmrA 15

Subject Heading: Payment default improperly listed on consumer credit file

Law: Section 18E(1)(b)(vi)(A) of the *Privacy Act 1988*.

Facts:
A credit provider listed a payment default for a specified amount on the complainant's consumer credit information file. The complainant alleged that they had never been 60 days overdue and that they had been denied credit because of the payment default and sought removal of the payment default and compensation.

Issues:

Section 18E(1)(b)(vi)(A) states that a credit reporting agency must not include personal information in an individual's consumer credit information file unless, amongst other things, the information is a record of credit provided by a credit provider to an individual, being credit in respect of which the individual is at least 60 days overdue in making a payment, including a payment that is wholly or partly a payment of interest.

The investigation focussed on establishing if any payment had been 60 days overdue. The Office asked the credit provider for details of payments due and received and also asked the credit provider to comment on copies of bank statements submitted by the complainant that suggested that payment was not 60 days overdue.

It became apparent that payments had been made from a business cheque account and that the credit provider had received the payments but initially could not establish for which account they were intended. Once the payments were identified the credit provider applied these to the complainant's credit card account and removed the payment default from the individual's consumer credit information file.

Outcome:
After investigation the credit provider removed the payment default since the complainant had not been 60 days overdue. The Office put the view to the complainant that their failure to properly identify their payments contributed to the problem. The Office advised that in the circumstances it considered the removal of the default listing as an adequate response to the matter. The complainant did not pursue the issue of compensation.

Under section 41(2)(a) of the Act, the Commissioner may decide not to investigate further an act or practice about which a complaint has been made if the Commissioner is satisfied that the respondent has dealt adequately with the complaint.

The Commissioner was of the view that by removing the payment default the credit provider had adequately dealt with the complaint. The complaint was closed on this basis.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *A v Private Sector Health Service Provider* [2004] PrivCmrA 14

Subject Heading: Excessive charge imposed for access to personal information (medical records)

Law: National Privacy Principle 6 in Schedule 3 of the Privacy Act 1988 (Cth)

Facts:
The complainant sought access to their personal information, medical records, held by a private sector health service provider, a doctor. After making the request, the complainant was advised that their complete medical file would be

available on payment of a fee. The invoice detailing the fee itemised the cost of access to include the provision of a legal report and photocopying the entire medical record.

The complainant wrote to the doctor indicating that they considered the fee an excessive access charge. The complainant had not requested the preparation of a medical report, but only a copy of their medical records.

Issues:

National Privacy Principle (NPP) 6 gives individuals a general right of access to information about them held by organisations. NPP 6.4 states an organisation must not charge an individual for lodging a request for access (NPP 6.4(b)) but may apply a charge that is not excessive to recover costs of making information available (NPP 6.4(a)).

The doctor denied that the access charge was excessive and claimed that they were entitled to charge for their time spent reviewing the complainant's notes. The doctor stated they spent in excess of two hours examining the relevant notes to ensure compliance with the Privacy Act. Further, the doctor advised that they spent time answering the complainant's letters and in legal consultation with the Australian Medical Association's (AMA's) legal team and their medical defence organisation.

The Commissioner had to consider if, in making access to the complainant's medical records conditional on payment for a medical report, the doctor had breached NPP 6.4(a). The Commissioner takes the view that access provided under NPP 6 should generally be provided in the form requested by the individual. In this case the complainant did not ask the doctor to write a report but simply to provide a copy of the information. In addition, the Commissioner does not consider it reasonable that charges incurred by an organisation in seeking advice about complying with its legal obligations under the Privacy Act be transferred to the individual seeking access.

Outcome:
In the course of the complaint the doctor wrote to the Commissioner and claimed that it was not their standard practice to provide an accompanying report when providing access to personal information under NPP 6. The doctor stated that patients are able to access their records without a report; in this case the invoice included an incorrect description for the service provided. The doctor claimed that the charge related to their time spent in dealing with the request for copies of the complainant's record (and not to the preparation of a report), contending that the time taken to prepare the records, excluding the time consulting with the AMA or medical defence organisation, was in excess of two hours.

However, the doctor also advised that after considering the matter further, they believed that by dealing with the matter personally, this could result in an excessive charge to the patient. Accordingly, the doctor advised that in future access requests would primarily be processed by secretarial staff however this would occur with the doctor's supervision to ensure that the access request was carefully considered. The doctor believed the photocopying charge, which included an element for administrative costs, was a reasonable charge under the circumstances. The doctor therefore reduced the original access charge by the amount which was unrelated to photocopying and administrative costs. This reduced the access charge by almost two thirds. The complainant was happy to pay the revised charge.

Under section 41(2)(a) of the Act, the Commissioner may decide not to investigate further an act or practice about which a complaint has been made if the Commissioner is satisfied that the respondent has dealt adequately with the complaint.

The Commissioner was of the view that by offering this revised charge for access and developing a new policy with respect to access requests in general, the doctor had adequately dealt with the complaint. The complaint was closed on the basis that it had been adequately dealt with.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *T v Commonwealth Agency* [2004] PrivCmrA 13

Subject Heading: Disclosure of personal information / declined to investigate on the basis that there was no breach

Law: Information Privacy Principle 11, section 41(1)(a) *Privacy Act 1988* (Cth)

Facts: The complainant's husband was undergoing a reassessment of an obligation to pay a third party entitlement. This process involved the respondent collecting the complainant's and her husband's personal information. The respondent then disclosed the complainant's and her husband's personal information to a third party involved in the procedure.

The complainant raised concerns regarding the disclosure of her personal information by the respondent to the third party without her knowledge or consent.

Issues: Information Privacy Principle 11 prohibits an agency from disclosing personal information, unless one of the five listed exceptions is met. Exception (d) in Information Privacy Principle 11 allows the disclosure of personal information if "the disclosure is required or authorised by or under law".

Section 41(1)(a) of the Act provides that the Commissioner may decide not to investigate, or not to investigate further an act or practice which is the subject of a complaint if the Commissioner is satisfied that the act or practice is not an interference with the privacy of an individual.

The respondent operates under a law which allows the disclosure of personal information in the circumstances outlined by the complainant. The law permits the disclosure so that the affected third party can make comment on the personal information supplied, which the agency uses to make decisions concerning financial obligations.

Outcome: Section 41(1)(a) of the Privacy Act gives the Commissioner a discretion to decline to investigate a complaint, where the act or practice is not an interference with the privacy of the individual. The Commissioner declined to investigate the complaint on the basis that there was no interference with privacy since the disclosure complained about was authorised by another law. Accordingly, the complaint was closed under section 41(1)(a) of the Privacy Act.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *P v Various Entities* [2004] PrivCmrA 12

Subject Heading: Improper use of personal information / declined to investigate on the basis that the complaint was lacking in substance

Law: National Privacy Principle 2 – Use *Privacy Act 1988* (Cth) and section 41(1)(d) *Privacy Act 1988* (Cth)

Facts: The complainant lodged a complaint about various medical treatments whilst undergoing medical care and the way the media and other professional bodies had been dealing with him.

Issues: National Privacy Principle (NPP) 2 sets out the general principle that an organisation must only use or disclose personal information for the primary purpose of collection. Use and disclosure for a secondary purpose is not allowed except where such use or disclosure falls within the exceptions listed in NPP 2.

On initial presentation of the complaint, the facts were unclear and the respondents were unknown, hence it was unclear which entities had improperly used the complainant's personal information. Further telephone follow up with the complainant failed to reveal privacy issues involving specified respondents. As there was no specific respondent, the Office could not open an investigation. However, the Office provided the complainant with information about the Victorian Privacy Commissioner's jurisdiction and that of the Office of the Health Services Commissioner, because these bodies appeared to be more relevant in the circumstances.

Outcome: Section 41(1)(d) of the Privacy Act provides the Commissioner with a discretion to decline to investigate a complaint where the complaint is frivolous, vexatious, misconceived or lacking in substance. The complaint was found to be lacking in substance since it was unclear who had allegedly misused the complainant's personal information. Accordingly the complaint was closed under section 41(1)(d) of the Privacy Act on the basis that the circumstances described by the complainant were lacking in substance.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *Y v Real Estate Agent* [2004] PrivCmrA 11

Subject Heading: Improper disclosure of rental arrears information to a third party.

Law: National Privacy Principle 2 in Schedule 3 of the *Privacy Act 1988* (Cth)

Facts: The complainant was party to a rental agreement with the respondent, a real estate agent. The respondent contacted a member of the complainant's family who did not reside with the complainant at the rental property, but whose telephone number was included on the complainant's rental file.

On contacting this third party, the respondent asked to speak with the complainant but was advised that the complainant was not there. The respondent then requested that the third party tell the complainant that she owed a number of weeks rent and that if the arrears were not paid immediately, an eviction notice would be sent.

The complainant, on becoming aware of this disclosure of her personal information wrote a letter of complaint to the respondent. The respondent replied with an apology letter which stated that the disclosure would not have occurred if the monies due had been paid on time.

Issues: National Privacy Principle 2 regulates the use and disclosure of personal information by organisations that are subject to the Act. Under National Privacy Principle 2, organisations may only use or disclose personal information for the primary purpose for which it was collected or where an exception applies; for example, where the individual has consented to the use or disclosure (National Privacy Principle 2.1(b)) or where the use or disclosure is related to the primary purpose of collection and within the individual's reasonable expectations (National Privacy Principle 2.1(a))

In this case it did not appear that any of the exceptions under National Privacy Principle 2 applied.

The respondent did not dispute that the complainant's personal information had been inappropriately disclosed to her family member. However, the respondent advised that it had taken steps to remedy the situation including sending a letter of apology to the complainant.

The complainant was not satisfied with the apology provided as it appeared to refer to her arrears as justification for the disclosure of her personal information.

The National Privacy Principles provide protection for individuals' personal information regardless of any existing dispute between the individual and the organisation holding the information. Accordingly, the Commissioner decided that a letter of apology in which the respondent referred to an unrelated dispute to justify its improper disclosure of the complainant's personal information, did not provide an adequate resolution to the complaint.

Outcome:
The respondent agreed to provide an additional apology letter to the complainant which did not make reference to the complainant's rental arrears. The complainant advised that she was satisfied with this response.

The Commissioner decided that the letter of apology, in addition to other steps taken by the respondent to prevent such disclosures from occurring again, provided an adequate resolution to the complaint. As such, the Commissioner closed the complaint as adequately dealt with under section 41(2)(a) of the Privacy Act.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *N v Internet Service Provider* [2004] PrivCmrA 10

Subject Heading: Disclosure of personal information as a result of failure to provide adequate security over personal information / declined to investigate on the basis that complainant did not complain to the respondent before making the complaint to the Commissioner.

Law: National Privacy Principle 2; National Privacy Principle 4; section 40(1A) of the Privacy Act 1988 (Cth)

Facts: The complainant separated from his wife and shortly afterwards left Australia to deal with business commitments overseas. He alleged that while he was out of the country his estranged wife contacted his internet service provider and accessed his internet account.

The complainant had recently changed the password on the account to ensure that unauthorised individuals would not be able to have access. Although the account was protected by a password the complainant alleged that his estranged wife was able after several attempts to obtain access to his account and the details on the account, for example about credit cards, were changed.

The complainant alleged that this meant: his account information was available to his estranged wife and her partner; he was denied access to personal and business emails; and that the email account was used to send defamatory messages.

The complainant had not advised that he had written to the internet service provider about the issue(s) he had raised or why it would not be appropriate for him to do so.

Issues: National Privacy Principle 2 provides that an organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless one or more of certain exceptions apply.

National Privacy Principle 4.1 provides that an organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

The complaint focused upon whether the internet service provider had taken reasonable steps to provide protection over the personal information it held and it if had improperly disclosed the complainant's personal information.

Outcome: Section 40(1A) of the Act does not allow the Commissioner to investigate a complaint if the complainant did not complain to the respondent before making the complaint to the Commissioner under section 36. However, the Commissioner may decide to investigate the complaint if he or she considers that it was not appropriate for the complainant to complain to the respondent.

The Commissioner also has a discretion under section 41(2)(b) of the Act not to investigate a complaint that has been made to the respondent if it has not had an adequate opportunity to deal with the complaint. The Commissioner takes the view that it is reasonable to allow a respondent a period of thirty days within which to deal with the complaint.

In this case the Commissioner declined to investigate the complaint under section 40(1A) of the Act. The complainant was advised to complain directly to the internet service provider in the first instance and if the organisation had not responded within thirty days the Commissioner would be pleased to reconsider the complaint.

To date, the complainant has not returned this matter to the Commissioner for reconsideration; this suggests that the complaint was resolved directly with the internet service provider.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *U v Major Banking Institution* [2004] PrivCmrA 9

Subject Heading: Disclosure of personal information and credit worthiness information / declined to investigate on the basis that the respondent had adequately dealt with the matter.

Law: National Privacy Principle 2.1; section 18N(1) and section 41(2)(a) of the Privacy Act 1988 (Cth)

Facts: A default notice regarding the complainant's overdue private bank account was disclosed by the respondent to the complainant's spouse, from whom she was separated. The complainant brought her concerns to the respondent's attention. The respondent wrote to the complainant stating that the error was caused by out-of-date information being

held on its database, and that it was at the time, unaware of the complainant's changed circumstances. The respondent apologised for the incident.The complainant was not happy with the outcome and wrote to this Office seeking compensation.

Issues: National Privacy Principle 2.1 provides that personal information collected for a primary purpose may only be used or disclosed for a secondary purpose if one of a number of exceptions in National Privacy Principle 2.1(a)-(h) applies. Section 18(N)(1) of the Act prohibits credit providers from disclosing information about individual's credit worthiness, credit standing or credit history to unauthorised third parties.

As the account was a private bank account, and the complainant's spouse from whom she was separated was never an account holder, it appeared that the respondent had breached National Privacy Principle 2.1 and section 18N(1) in disclosing information about the complainant's overdue account to the spouse.

Outcome: Although the complainant was seeking compensation for the actions of the respondent, in the view of the Office, the complainant had not substantiated a claim for compensation.

Where the Commissioner finds a breach of the Act, the compensation sought (which can include compensation for injury to the complainant's feelings or humiliation suffered) for the damage or loss suffered must be a direct result of the particular action that was a breach of the Act. An individual is usually only compensated for actual loss or damage rather than potential loss or damage (eg income not generated) unless it was reasonably foreseeable at the time of the breach that this future loss or damage would occur.

The complainant had not established a clear nexus between any loss suffered and the breach by the respondent which resulted in the account information being passed to the complainant's spouse, from whom she was separated.

The Commissioner has a discretion under section 41(2)(a) of the Act to decline to investigate a complaint where he or she is of the view that the respondent has adequately dealt with the complaint. In the absence of any supporting documentation as to why the complainant believed she was entitled to compensation, the Commissioner was of the opinion that an apology from the respondent was an appropriate response to the complaint.

Accordingly, the Commissioner declined to investigate the complaint pursuant to section 41(2)(a) of the Act, on the grounds that the respondent had adequately dealt with the matter.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *S v Various Commonwealth Agencies* [2004] PrivCmrA 8

Subject Heading: Access to and correction of personal information held by a Commonwealth government agency / declined to investigate on the basis that another law provided a more appropriate remedy

Law: Information Privacy Principle 6 and 7 and section 41(1)(f) Privacy Act 1988 (Cth)

Facts: The complainant sought to access and correct her personal information held by a number of Commonwealth government agencies. The complainant alleged that the Commonwealth government agencies concerned had, in a number of cases, refused to amend her records on her request.

Issues: Information Privacy Principle (IPP) 6 in the Privacy Act gives individuals the general right to access their personal information that is held in a record by a Commonwealth government agency. IPP 7 provides individuals with the general right to have this information updated or amended where it is inaccurate.

Both IPPs 6 and 7 are subject to the provisions of other Commonwealth laws, including the Freedom of Information Act 1982 (Cth). The latter also sets out more specific provisions regarding the way personal information held by a Commonwealth government agency may be accessed and also specifies some exceptions to the right of access and correction.

Further, under section 41(1)(f) of the Privacy Act, the Commissioner may decline to investigate a complaint where another Commonwealth, State or Territory law provides a more appropriate remedy for the act or practice that is the subject of the complaint.

Outcome: The complaint was declined under section 41(1)(f) of the Privacy Act on the basis that the matter would be more appropriately dealt with under the Freedom of Information Act 1982 (Cth).

The complainant was advised that issues regarding access to or correction of personal information held by Commonwealth government agencies should be directed in the first instance to the agency holding the personal information. Most agencies have a Freedom of Information officer who handles such matters. The complainant was also advised that complaints about the handling of Freedom of Information requests by agencies, including complaints regarding the refusal of a request for access or correction, should be referred to the Commonwealth Ombudsman or the Administrative Appeals Tribunal.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *R v Credit Provider* [2004] PrivCmrA 7

Subject Heading: Disputed consumer credit default listing / declined to investigate on the basis that the complaint was made more than twelve months after the complainant became aware of the act or practice.

Law: Section 18E(1)(b)(vi)(A), section 18E(1)(b)(vi)(B) and section 18E(8)(c)) of the Privacy Act 1988; paragraph 2.7 of the Credit Reporting Code of Conduct; section 41(1)(c) of the Privacy Act 1988

Facts: The complainant alleged that a credit provider listed an overdue account (a default) on her consumer credit file despite the fact that it had said that it would cease collection activity. The complainant claimed that the improperly listed default, which had been placed on her file almost four years earlier, had prevented her from obtaining credit and purchasing a home. The complainant sought compensation for financial loss she had suffered as a result the alleged breach of the Act.

Issues: The Privacy Act permits a credit reporting agency to list a default only if:

- the debt is at least 60 days overdue (section18E(1)(b)(vi)(A)) and;
- the credit provider has taken steps to recover part or all of the amount outstanding (section18E(1)(b)(vi)(B)); in particular, the credit provider must have sent a written notice to the last known address of the individual advising them of the overdue payment and requesting payment of the amount outstanding (paragraph 2.7 of the Credit Reporting Code of Conduct); and
- the credit provider has notified the individual that it may provide information to a credit reporting agency (section18E(8)(c)).

If a credit provider has reported an individual as overdue in relation to a debt and the individual subsequently pays the debt in full, the credit provider is required by section 18F(3) to inform the credit reporting agency that the individual is no longer overdue, and must do so as soon as practicable.

Outcome: Under section 41(1)(c) of the Act, the Privacy Commissioner may decide not to investigate a complaint about an act or practice if he or she is satisfied that the complaint was made more than twelve months after the complainant became aware of the act or practice.

It was evident from the information supplied by the complainant that she had brought this issue to the Commissioner's attention almost four years after she became aware of the default. It was likely that the evidence in this matter was stale and that key people would no longer be able to recollect the events that had occurred. Consequently, the Commissioner declined to investigate this complaint under section 41(1)(c) of the Act.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *Q v Real Estate Agent* [2004] PrivCmrA 6

Subject Heading: Improper collection of personal information from a third party / declined to investigate on the basis that the complaint was the subject of an application under another law and the subject-matter of the complaint was being dealt with adequately under that law.

Law: National Privacy Principle 1.4; National Privacy Principle 1.5; section 41(1)(e) of the Privacy Act 1988 (Cth)

Facts: Three individuals of the same sex were living in a rented flat managed by a real estate agent. The lease was jointly in the name of two of the occupants. Two of the individuals (one of whom was a lessee) were in a relationship. The lease permitted only two individuals to occupy the premises and the landlord's consent was required if anyone else wished to reside there. The estate agent issued the lessees with breach notices and proposed to increase the rent.

The complainants alleged that the real estate agent improperly acquired personal information about their living arrangements and about their sexuality from a third party rather than directly from them. The complainants also lodged complaints with the State equal opportunity authority (State authority) alleging discrimination on the basis of their living arrangements and sexual orientation.

Issues: National Privacy Principle 1.4 states that if it is reasonable and practicable to do so, an organisation must collect personal information about an individual only from that individual.

National Privacy Principle 1.5 states that if an organisation collects personal information about an individual from someone else, it must take reasonable steps to ensure that the individual is, or has been made, aware of the matters listed in subclause 1.3 except to the extent that making the individual aware of the matters would pose a serious threat to the life or health of any individual.

National Privacy Principle 1.3 lists the matters which an organisation must make the individual aware at or before the time of collection of personal information (or, if that is not practicable, as soon as practicable after collection).

Outcome: The Federal Privacy Commissioner has a discretion under section 41(1)(e) of the Act to decline to investigate a complaint where he, or she, is of the view that the complaint is the subject of an application under another State (Commonwealth or Territory) law and the subject-matter of the complaint has been, or is being, dealt with adequately under that law.

In this case, the individuals complained to the State authority about direct discrimination by the real estate agency on the basis of their living arrangements and sexual orientation. The complaint was being investigated by the State authority. For this reason the Commissioner decided, under section 41(1)(e) of the Act, that he would not investigate the complaint as the matter was the subject of an application under the State equal opportunity law and the matter was being dealt adequately with under that law.

Further, the Commissioner noted that the subject matter of the complaint was principally about discrimination and that the privacy issues raised about collection of information from a third party was peripheral to the central issue. The Commissioner was willing to consider opening an investigation into the privacy aspect of the complaint if the complainants were dissatisfied with the State authority's investigation.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *O v Credit Provider* [2004] PrivCmrA 5

Subject Heading: Compensation sought as a result of disputed consumer credit default listing / declined to investigate on the basis that the respondent had not had an adequate opportunity to deal with the complaint.

Law: Section 18E(1)(b)(vi)(A), section 18E(1)(b)(vi)(B) and section 18E(8)(c)) of the Privacy Act 1988 (Cth); paragraph 2.7 of the Credit Reporting Code of Conduct; section 41(2)(b) of the Privacy Act 1988 (Cth)

Facts: The complainant had devoted significant time and resources towards developing a business venture. A finance institution refused his application to finance the venture due to an overdue account (default) listed on his consumer credit file.

The complainant had no knowledge of the default and immediately notified the credit provider of the listing. The credit provider removed the default listing three weeks later.

Several months after the credit provider removed the payment default the complainant wrote to the Commissioner alleging that the credit provider had improperly listed the default and that he had suffered significant financial loss as a result and was seeking compensation on this basis. According to the complainant, he had paid the debt owed to the credit provider and was at no time sixty days in arrears. He alleged that the credit provider experienced a computer error and consequently listed the default.

Although the complainant had contacted the respondent and asked that it remove the default, the documents the complainant provided suggested that the respondent was not aware that the complainant was seeking compensation.

Issues: The Privacy Act permits a credit reporting agency to list a default only if:

- the debt is at least 60 days overdue (section18E(1)(b)(vi)(A)) and;
- the credit provider has taken steps to recover part or all of the amount outstanding (section18E(1)(b)(vi)(B)); in particular, the credit provider must have sent a written notice to the last known address of the individual advising them of the overdue payment and requesting payment of the amount outstanding (paragraph 2.7 of the Credit Reporting Code of Conduct); and
- the credit provider has notified the individual that it may provide information to a credit reporting agency (section 18E(8)(c)).

Outcome: Section 41(2)(b) of the Act, gives the Commissioner a discretion not to investigate, or not to investigate further, an act or practice about which a complaint has been made if he or she is satisfied that the complainant has complained to the respondent about the act or practice and the respondent has not yet had an adequate opportunity to deal with the complaint.

The complainant was contacted and confirmed that he had not advised the respondent of his compensation claim either verbally or in writing. The Commissioner's staff discussed the complaint handling process with the complainant and noted that the respondent was not aware that the complainant was seeking financial compensation. They suggested that it would be beneficial for the parties to attempt to resolve this matter before the Privacy Commissioner became involved. Both parties were happy to do this. For this reason the Commissioner declined to investigate this matter under section 41(2)(b) of the Act on the basis that the respondent had not yet had an adequate opportunity to deal with the compensation aspect of the complaint.

The complainant was informed that if he wished to pursue compensation under the Act he would have to make that request in writing to the respondent and give the respondent thirty days to respond before returning the complaint to the Commissioner. The Commissioner has not been asked to reconsider this complaint.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
June 2004

Case Citation: *X v Commonwealth Agency* [2004] PrivCmrA 4

Subject Heading: Disclosure of personal information: financial compensation not agreed

Law: Information Privacy Principle 11 in the *Privacy Act 1988* (Cth) (the Act)

Facts: The complainant was assisted at the counter by an employee of a Commonwealth Government Agency (the agency) who was also formerly related to the complainant. In the course of the transaction the complainant advised the agency that the complainant was expecting to receive money from a court settlement. The next day the complainant's ex-partner obtained a court order restraining the complainant from accessing that money. The complainant alleged that the agency's employee disclosed to the complainant's ex-partner that the complainant was to receive money from a court settlement.
Issues: Information Privacy Principle (IPP) 11 prohibits agencies from disclosing personal information to third parties unless certain circumstances exist, such as that the individual has consented to the disclosure or the disclosure is required or authorised by or under law. Following its investigation, the Office came to the view that, on the balance of probabilities, the agency's employee did disclose to the complainant's ex-partner that the complainant was to receive money from a court settlement and, as no relevant exception applied, that the agency had breached IPP 11.

Outcome: The agency did not accept that it disclosed the complainant's personal information, however it did agree to the Office conciliating a settlement since the complainant claimed to have suffered loss and damage.

Section 27(1)(a) of the Act provides for the Privacy Commissioner, where he or she considers it appropriate, 'to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the investigation'. If the matter can be settled by conciliation and the Commissioner is satisfied that the matter has been adequately dealt with he or she may decline to investigate the matter further under section 41(2)(a). The Office aims to assist the parties achieve a fair and reasonable outcome by conveying requests and offers between the parties. The Office also provides advice, including about the nature of settlements that have been reached in similar cases.

The Office negotiated at length with the parties but the complaint did not resolve by way of conciliation. The complainant wished to be in a position to pursue action against the agency in the courts. The Office ceased its investigation of the complaint under section 41(2)(a) of the Act.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER

MAY 2004

Case Citation: *H v Financial Institution A and B* [2004] PrivCmrA 3

Subject Heading: Disclosure of personal information collected prior to commencement of the National Privacy Principles.

Law: National Privacy Principle 2.1 and section 16C of the *Privacy Act 1988* (Cth).

Facts: In September 2003 financial institution A was joined as a respondent to an action in the District Court. A representative of the applicant to that action, financial institution B, filed an affidavit containing 13 portfolio valuations of its former clients which it alleged were obtained from financial institution A.

The portfolio valuation contained the name, address and financial details of the complainant. The complainant lodged a complaint with the Privacy Commissioner under section 36 of the Privacy Act alleging that there had been two improper disclosures of his personal information, firstly by financial institution A to financial institution B and secondly, by financial institution B into court.

Issues: National Privacy Principle 2.1 in the Act states that "An organisation must not use or disclose personal information about an individual for a purpose (the *secondary purpose*) other than the primary purpose of collection unless" an exception applies. This means that the use and disclosure of personal information is limited to the main reason for which it was collected, apart from a number of other limited circumstances, including where the individual gives consent to other uses and disclosures.

Section 16C(1A) of the Act states that National Privacy Principle 2 "applies only in relation to personal information collected after the commencement of this section". The National Privacy Principles and this section came into operation on 21 December 2001. Therefore, National Privacy Principle 2 does not apply to personal information collected before this date.

As it was not clear whether the Privacy Commissioner had the power to investigate the complaint, preliminary inquiries were undertaken under section 42 of the Act to ascertain the date when the personal information in the portfolio valuation was collected. The portfolio valuation was dated 15 December 2001 and the Office was satisfied that both financial institution A and financial institution B collected the information prior to 21 December 2001.

Outcome: Since National Privacy Principle 2 only applies to information collected after 21 December 2001, the disclosures by financial institution A and financial institution B did not come within the jurisdiction of the Privacy Commissioner. For this reason the Privacy Commissioner declined to investigate the complaint under section 41(1)(a) of the Act.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
February 2004

Case Citation: *O v Large Retail Organisation* [2004] PrivCmrA 2

Subject Heading: Disclosure of customer email addresses

Law: National Privacy Principle 2 and section 40(2) of the *Privacy Act 1988* (Cth)

Facts: The Office became aware that a large retail organisation had sent a marketing offer to some of its customers by email with the email addresses of hundreds of the organisation's customers contained in the 'copy to' field. The Commissioner decided to conduct an investigation into the potential interference with privacy under section 40(2) of the Privacy Act.

The investigation revealed that the organisation had experienced technical difficulties while sending the email and that an inexperienced IT support technician had suggested the solution was to split the addresses between the 'copy to' and the 'blind copy' fields. On becoming aware of the error, the organisation identified all customers affected and issued individual emails apologising for the error and in some instances it personally telephoned customers to discuss their concerns.

Issues: National Privacy Principle 2 sets the standards for organisations using or disclosing personal information for secondary purposes. Organisations may use or disclose personal information for the primary purpose for which the information was collected. They may also use or disclose it for secondary purposes in specified circumstances including where:

- the personal information is not sensitive and the use or disclosure is for a related purpose that the person would reasonably expect;
- the person has consented to the use or disclosure;
- the information is not sensitive and it is impracticable to gain the consent of the person, the use or disclosure is for the purpose of direct marketing and the person is provided with specified information and is given the opportunity to 'opt-out' of further offers.

In this case, the organisation agreed that none of the exceptions applied. This meant that the disclosure of customer details to other customers was a breach of National Privacy Principle 2.

Outcome:
In response to the Commissioner's investigation the organisation advised that it was taking a range of steps to resolve the issue and to prevent a reoccurrence of the problem. These included:

- reminding staff of the procedures when communicating with multiple customers, including seeking approval from a designated senior person and always using the 'blind copy' field for customer addresses;
- ensuring that suitably qualified technical support is always available to assist with queries; and
- developing a series of templates for emails to multiple recipients that make use of the automated recipient list process, removing the need to include multiple customers' email addresses within a single email.

The Commissioner was satisfied that the organisation had taken appropriate steps in the circumstances to rectify this situation and decided to close the investigation under section 41(2)(a) of the Privacy Act. The Commissioner commended the organisation on its prompt response to the problem.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
January 2004

Case Citation: *N v Private Insurer* [2004] PrivCmrA 1

Subject Heading: Unnecessary collection of personal information during claims process and broad privacy collection form

Law: National Privacy Principles 1.1 and 1.3 - collection

Facts: The Private Insurer required the (insured) complainant to sign a form that outlined its policy for the collection and disclosure of information for the purpose of assessing the claim. However, the complainant alleged that the form was too broad, in that it:

1. allowed for the collection of personal information from third parties that was not necessary for the determination of the claim;

2. allowed for the disclosure of personal information to types of organisations that were not made known to the individual;

3. was open-ended, with only one form required to be signed for the collection of information from any and all third parties.

Issues:

Issue One

National Privacy Principle 1.1 requires that "an organisation must not collect personal information unless the information is necessary for one or more of its functions or activities".

The form stated, "I authorise any medical attendant consulted by me or any hospital attended by me, to divulge to [Private Insurer] or any legal tribunal, any health or other information acquired with regard to myself."

Additionally, the Authority for the release of personal information on the form did not limit the scope of the information to be provided by third parties to that which would be relevant to the claim and did not limit the period within which the insurer would collect the information.

The above statements were not limited to personal information which would be relevant to the claim in question, and hence did not comply with National Privacy Principle 1.1.

Issue Two

National Privacy Principle 1.3(d) requires that the individual be made aware of "the organisations (or the types of organisations) to which the organisation usually discloses information of that kind…".

The form stated that "I understand that [Private Insurer] may be required to submit all documentation to a Mediator, Solicitor, Complaints Resolution Tribunal or Court or to any other person necessary for claims determination purposes including the Trustees of any Superannuation Plan".

It was questionable whether or not "to any other person necessary for claims determination purposes" adequately identified the type of organisation.

Issue Three

The complainant contended that the Private Insurer should be requesting specific consent forms to be signed by the individual authorising release of their personal information each time the Private Insurer needed to approach a third party to collect personal information. Whilst this approach would make the Private Insurer more accountable in its practices and provide for a more transparent approach to its business, there is no obligation under the National Privacy

Principles to adopt this in practice. This is closely related to the "bundled consent" issue that has been raised elsewhere by the Commissioner.

Under the National Privacy Principles, consent is needed to collect personal information where the information is sensitive information (which includes health information). However, consent is not required to collect sensitive information where the collection is "necessary for the establishment, exercise or defence of a legal or equitable claim" (National Privacy Principle 10.1(e)), as reflected in this case.

Outcome:

Issue One: The Private Insurer altered its form to comply with National Privacy Principle 1.1. It now states, "I hereby authorise and direct any medical attendant or other health professional consulted by me or any hospital attended by me, and any of the persons or organisations listed below, to provide to [Private Insurer], any health or other information about me which is necessary to properly assess my entitlement under this Policy or Plan…"

The form now also specifies that the authority for the release of personal information is valid only whilst the entitlement to a claim is assessed.

Issue Two: The Private Insurer removed the reference to submitting documentation to a Mediator, Solicitor, Complaints Resolution Tribunal or Court or to any other person necessary for claims determination purposes including the Trustees of any Superannuation Plan. Consent is not needed to make disclosures for primary purposes or secondary purposes where the secondary purpose is related to the primary purpose of collection and the individual would reasonably expect the organisation to disclose the information for that secondary purpose (NPP 2.1(a)). Consent is also not needed where the disclosure is required or authorised by or under law (NPP 2.1(g)).

Issue Three: No remedial action required.

The investigation was closed under s.41(2)(a) of the Privacy Act, on the grounds that the Private Insurer had adequately dealt with the matter.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
JANUARY 2004

Case Citation: *M v Commonwealth Agency* [2003] PrivCmrA 11

Subject Heading: Improper use and disclosure of personal information, accuracy of personal information and security of personal information

Law: Information Privacy Principles 4, 8, 9, 10 and 11.

Facts

The complainant worked for Agency A and, following an accident was pursuing a claim with a second agency, Agency B, responsible for providing assistance.

Disclosure of personal information to Agency B

In making the claim the complainant provided Agency B with a medical certificate and information to the effect that the condition was exacerbated by the employment with Agency A. Agency A also provided information from the complainant's doctor to Agency B and following a request from Agency B provided further information. The complainant alleged that Agency A was not authorised to disclose the medical or further information.

Security, use and accuracy of personal information in relation to employment matters

Agency A consists of several divisions and, in the course of implementing changes following a reallocation of budgets and resources, the personnel section sent the complainant's curriculum vitae (CV) to another division for that area to assess the complainant's eligibility for a vacancy within the area. The CV was five years old and the complainant alleged that it was not accurate, up to date or correct prior to use.

The complainant also alleged that the reference to the CV to assess suitability for the new position was a use of personal information for a purpose other than that for which it was collected and for which it was not relevant.

The personnel section transmitted the CV to the new division by facsimile and the complainant alleged that the CV was left unattended on the floor of an open area for four days.

Issues

Information Privacy Principle 11

Information Privacy Principle 11 requires that agencies only disclose personal information, other than to the individual concerned, if one or more of certain exceptions apply, including where the individual had consented to the disclosure of the information.

In this complaint the disclosures to Agency B were permitted by several exceptions. These were:

- 11.1(a) which permits disclosures where the individual would be reasonably likely to be aware that the information would be disclosed – the Commissioner considered that as the claim specifically included an element of damage caused by the employment situation the individual would be reasonably likely to be aware that information relevant to the claim would be disclosed to Agency B;

- 11.1(b) which permits disclosures with the consent of the individual concerned – the Commissioner considered consent was implied when the complainant signed a declaration authorising disclosures of information to other parties involved in the management of the injury and specifically mentioned that the injury was exacerbated by her employment; and

- 11.1(d) which permits disclosures which are authorised by law – Agency B's governing legislation provided an authorisation that meant that Agency A was "authorised by law" to provide the information Agency B requested.

Information Privacy Principle 8

Information Privacy Principle 8 requires agencies to take reasonable steps, before using personal information, to ensure that, for the purpose for which the information is to be used, it is accurate, up to date and complete.

While the CV was five years old, it was accurate at the time it was collected. Agency A also had information about the complainant's work over the period of employment and, in an interview prior to making a decision to move the complainant, provided an opportunity for the complainant to update the information the agency had about qualifications and experience and to provide any additional relevant information about her suitability for employment.

Information Privacy Principles 9 and 10

Information Privacy Principle 10 requires agencies to use personal information only for the purpose for which it was collected unless one or more of certain exceptions apply. Information Privacy Principle 9 requires agencies to use personal information only where it is relevant to the purpose for which it is being used.

The Commissioner took the view that the use of the personal information in the CV to assess qualifications and experience relevant to the position was a use for which the information was originally collected. It was also a use of the personal information for a relevant purpose.

Information Privacy Principle 4

IPP4 requires that an agency takes steps that are reasonable in the circumstances to ensure the personal information in a record is protected against loss, unauthorised access, use, modification, disclosure or other misuse.

While the personnel section sent the CV to a common facsimile in the new area, there was no evidence to show that it was left lying on the floor of an open area for four days. The agency has taken steps to ensure that, when personal information is provided to another area, the area is advised the information is being sent and that a person from the area will collect the information. It also apologised for any distress that may have been caused by any unwarranted delay when the requesting area failed to collect the CV immediately.

Outcome

The Office found no breach of Information Privacy Principles 8, 9, 10 and 11 and found that Agency A had dealt adequately with the security issue under Information Privacy Principles. The investigation was closed under section 41(1)(a) where there was no interference with privacy and under section 41(2)(a) where the respondent had dealt adequately with the allegation that the CV had been left unattended in a common area.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
SEPTEMBER 2003

Case Citation: *L v Commonwealth Agency* [2003] PrivCmrA 10

Subject Heading: Accuracy, security and disclosure of personal information

Law: Information Privacy Principles 4, 8 and 11

Facts:

The complainant's ex-wife had submitted an application, to an agency, which impacted on the complainant. The application included inaccurate personal information relating to the complainant, including an incorrect mailing address and other facts. The complainant was unaware that his ex-wife had made an application to the agency until approximately one year later, since the agency had been sending information to the complainant at an incorrect mailing address.

The complainant and his ex-wife were also involved in court proceedings. To support her case at these proceedings, the ex-wife used the complainant's personal information, including the amount he owed to the agency, which had previously been disclosed to her by the agency. Further, the agency's letter to the ex-wife containing this information had been addressed only "To Whom It May Concern".

The complainant also raised concerns relating to the security of his personal information held by the agency. The complainant had asked for a password to be used to identify him when contacting the agency. However, on numerous occasions when he called the agency, he was not asked for his password.

Issues:

Information Privacy Principle 8

IPP 8 requires that an agency check the accuracy of the personal information it holds in records and in doing so take into account the purpose for which the personal information will be used. Therefore, the issue for the Commissioner was whether or not the agency's use of the incorrect address and other facts was in breach of IPP 8. The agency's usual process in relation to the type of application submitted by the complainant's ex-wife involved minimal investigation. The agency was unable to indicate whether or not any checks had been made to verify the accuracy of the complainant's mailing address before use. Consequently, the Commissioner found the agency in breach of IPP 8 in respect to the incorrect mailing address.

However, the Commissioner did not find the agency in breach of IPP 8 in respect to the other incorrect facts. By virtue of the agency's legislation it is not required to conduct any inquiries or investigations into matters concerning the eligibility of an application and may act on the basis of the information contained in the application. Therefore, the Commissioner was unable to conclude that there was a breach of IPP 8 in this circumstance, in light of the agency's legislation.

Information Privacy Principle 11

IPP 11 places limits on an agency's ability to disclose personal information to a third party. In this case, the agency was entitled to disclose the complainant's personal information to his ex-wife. As such, the Commissioner did not find the agency in breach of IPP 11. However, the agency admitted the letter should not have been addressed "To Whom It May Concern". The agency provided the complainant's personal information directly to his ex-wife. Even if it had been addressed correctly, this would not have prevented the complainant's ex-wife from presenting it to the court or any other third party.

Information Privacy Principle 4

IPP 4 requires an agency to take reasonable security precautions to ensure that personal information contained in records it holds is protected against loss, unauthorised access, use, modification or disclosure. The complainant had been provided with a password to be used to identify him when contacting the agency. However, its computer systems did not prompt the agency employee receiving the call that a password had been provided to the complainant. Accordingly, the Commissioner found the agency in breach of IPP 4 since it was unable to implement its own security initiatives.

Outcome:

As a result of the investigation, the agency upgraded its computer systems to enable passwords to be used in practice. The front menu screen that an agency employee views when responding to a call from an individual now informs the agency employee that a password has been provided and that it needs to be asked for, before personal information is disclosed to the caller. The agency also paid the complainant $250 compensation for the use of an incorrect mailing address.

The investigation was closed under s.41(2)(a) of the Privacy Act, on the grounds that the agency had adequately dealt with the matter.

OFFICE OF THE FEDERAL PRIVACY COMMISSIONER
SEPTEMBER 2003

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 142

Senator Greig asked the following question at the hearing on 24 May 2005:

Can you give us some indication of the sorts of resources provided to the commission in an international comparison, in terms of funding and staffing for the privacy commission in Australia and comparable entities in, perhaps, the UK and the USA?

The answer to the honourable senator's question is as follows:

International Comparisons of Funding and Staffing

Country	Total Revenue	Approx. AUD Value	Staff Numbers
Australia Office of the Privacy Commissioner	$5,135,735		38 staff
Canada Office of the Privacy Commissioner	$11,092,291 [Canadian dollars]	$11,707,913	95 full time staff
Hong Kong Office of the Privacy Commissioner for Personal Data	$39,191,805 [Hong Kong dollars]	$6,631,253	39 staff
New Zealand Office of the Privacy Commissioner	$2,604,000 [NZ dollars]	$2,411,564	22 full time staff 5 part time
United Kingdom Information Commissioner's Office	£10,578,447 [British pounds]	$25,339,612	208 staff

Notes:

1. All figures in the table are approximates.
2. Conversion rates were calculated on 6 June 2005, using Oz Forex Foreign Exchange Services at www.ozforex.com.au
3. All figures come from the Annual Report of 2003/2004 of each respective country.
4. The United States does not have an agency equivalent to the Office of the Privacy Commissioner.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 143

Senator Lundy asked the following question on 24 May 2005:

a) Does the Office of the Privacy Commissioner receive a considerable number of complaints about tenancy databases?

b) What jurisdiction does the Privacy Commission have to look into and address these complaints?

c) Do the States also have some jurisdiction in dealing with tenancy databases?

d) Does the fact that each state and territory manage their own residential tenancy database become problematic for your office?

e) Do you think that this area could be better managed through uniform guidelines?

f) What would the Privacy Commission be looking for in appropriate national guidelines?

The answer to the honourable senator's question is as follows:

a) The Office of the Privacy Commissioner received 85 complaints regarding tenancy databases between 21 December 2001 and 30 April 2005.

b) Tenancy database providers, like many private sector organisations in Australia, must comply with the National Privacy Principles (NPPs) in the Privacy Act if they are an organisation as defined by the Act. The Commissioner can investigate alleged breaches of the Act by Tenancy Database organisations using the investigation powers within the Act.

c) It is the Office's current understanding that Queensland, New South Wales, South Australia, the Northern Territory and the Australian Capital Territory have legislation or regulations which apply in certain circumstances to the activities of tenancy databases.

d) The Office has not identified any significant problems in resolving complaints concerning tenancy databases as a result of any state or territory legislation relating to tenancy databases. The lack of consistency between the Privacy Act and state and territory legislation regulating tenancy databases was an issue raised in some submissions to the review of the private sector provisions of the Privacy Act. These submissions noted that this may impact negatively on both business and consumers.

e) As discussed in the Office's report on the review of the private sector provisions of the Privacy Act, there appear to be good policy reasons why there should be a national, and consistent approach to regulating tenancy data bases. In the absence of federal legislation or uniform, or at least consistent, state and territory legislation, a binding code made by the Office could be a solution. This would require the Australian Government to amend the Privacy Act to provide for a power to make such a code as recommended in the review report.

The issue of how to better regulate tenancy databases is currently being considered by a joint working party established by the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General. In its review report the Office also recommended that this work should be advanced as a matter of high priority.

f) Issues which would need to be considered as part of either a code or guidelines include:

- Limitations on the reasons for listing information
- Categories under which information can be listed
- How long information can be listed for
- What information can be listed
- Charges for accessing information
- Notification of individuals when they are listed.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 144

Senator Lundy asked the following question on 24 May 2005:

a) The Real Estate Institute of Australia have been advocating for a long time that the Privacy Commissioner should be driving guidelines to regulate Residential Tenancy Databases. Do you agree with their view?

b) Would the Office of the Privacy Commissioner have the resources to manage federal guidelines for Residential Tenancy Databases if the Federal Government gave you that control?

The answer to the honourable senator's question is as follows:

a) In the report on the review of the private sector provisions of the Privacy Act, the Office recommended that depending on the outcome of the joint working party established to look at tenancy data bases established by MCCA and COAG a binding code made by this Office might be a solution to the issues arising in relation to tenancy databases.

b) As with all privacy work that arises the Office assesses and prioritises its work and manages within its current resources to meet those priorities. However, should the Office be required to manage a binding code for residential tenancy databases this may require additional resources for the Office or a reallocation of priorities within existing resources.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 145

Senator Lundy asked the following question at the hearing on 24 May 2005:

a) Are you aware of the joint working group set up by the Ministerial Council of Consumer Affairs and led by the Attorney-General's Department on the issue of Residential Tenancy Databases?
b) Are you also aware that this working group was due to report in the first half of 2004?
c) Do you know why there is such a delay on that report being released?
d) Have you seen the report from this working group on this issue?
e) It was reported in February this year that the report was with the privacy commissioner's office for comment – have you commented on the report and handed it back to the Attorney-General?

The answer to the honourable senator's question is as follows:

a) Yes, the Office is a member of the working group.

b) As a member of the working group, the Office was advised of this timeframe.

c) As set out in the answer to QoN 241 the Attorney-General's Department advises that work on the residential tenancy database (RTD) report is continuing and that the recommendations in the Privacy Commissioner's report into the private sector privacy provisions of the *Privacy Act 1988*, relating to residential tenancy databases, have impacted on the options being developed in the RTD report. The Department also advises that it is currently working on a revised draft of the report for consideration by the Working Party in August 2005.

d) The Office was provided with the first draft of four chapters of the Report on 10 August 2004 and a further draft of Chapter 3 was received on 20 December 2004.

e) The Office provided comment to the working group on the first draft of four chapters of the report (received 10 August 2004) on 17 September 2004. Comments were also provided to the working group on a further draft of Chapter 3 (received 20 December 2004) on 10 February 2005.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 146

Senator Lundy asked the following question at the hearing on 24 May 2005:

Credit reporting complaints

a) Does your office receive complaints about issues with credit reporting? What is the nature of these complaints?

b) On average how many complaints would you receive regarding credit reporting on a yearly basis?

c) How many of these do you resolve?

d) In how many of these cases was it found that the default was inaccurate and deleted from the complainants file after the Privacy Commission intervention?

e) How long on average would it take for your office to resolve a credit reporting issue?

f) What is the reason for this time delay?

g) Is your agency resourced substantially to deal with credit reporting issues?

h) Do you set time limits of when cases must be heard and finalised?

The answer to the honourable senator's question is as follows:

a) Yes, the Office receives complaints about credit reporting, which the Privacy Commissioner regulates under Part IIIA of the Privacy Act.

In the 2003-04 financial year, 52% percent of the issues raised in credit reporting complaints closed involved disputed payment defaults. Complaints about payment defaults include situations whereby a debt did not exist, the payment default was listed before the credit was 60 days overdue and the complainant was not given adequate notice before the payment default was listed. In the same financial year, 18% of the issues raised in closed complaints involved inaccurate information on an individual's credit information file, 10% of the issues raised in closed complaints involved credit providers disclosing credit information to a third party when unauthorised to do so.

b) On average, over the last three years (1 June 2002 to 31 May 2005), the Office received approximately 212 complaints per year about credit reporting.

c) To give an indication of how complaints were resolved in the 2003-04 financial year, the Office closed 228 credit related complaints. After assessing a complaint, the Office will decline the complaint, make preliminary inquiries into the complaint or formally investigate the complaint. The Office closed these complaints after making an initial assessment, making preliminary inquiries or formally investigating. The following is a break-up of how these complaints were closed:

- 87 (38%) on the basis that the respondent had adequately dealt with the complaint.

- 66 (29%) either before formally investigating or after formally investigating, on the basis that there was no breach of the Privacy Act.

- 57 (25%) on the basis that the complainant had not first complained to the respondent or the respondent had not had an adequate opportunity to deal with the complaint.

- 13 (6%) because the complainant withdrew the complaint or were no longer contactable.

- 16 (7%) because the matter was outside the Office's jurisdiction.

Note that the number of reasons for closure (240) exceeds the number of closed complaints (228) as some cases were closed for more than one reason.

d) Of the 228 complaints closed in the 2003-04 financial year, 58 involved the removal of a disputed default. However, in approximately 10 of these cases the default was removed without the Office making preliminary enquiries or investigating the matter (usually the respondent had already removed the default). Therefore, approximately 48 complaints involved the removal of a disputed default after the Office had made preliminary inquiries into a complaint or investigated the complaint.

e) On average, the Office takes 99 working days or 5 months to close a matter involving credit reporting from the date we receive the matter.

f) The time taken to resolve a credit complaint includes the time taken to assess and respond to complaints by undertaking preliminary enquiries to establish if the matter comes within the Privacy Act's jurisdiction or if there has been a prima facie breach of the privacy principles, or to undertake an investigation if needed. In the latter cases, where the Office conducted an investigation before the matter was resolved, the complaint duration includes any period where the complaint was held without action in its 'queue'. Complaints are queued where there is no case officer available to undertake the investigation. Credit complaints may be allocated for immediate investigation if the complainant is suffering financial disadvantage.

g) Resources allocated to the Office are determined by the Government. The Office prioritises its workload within the allocated resources.

h) The Office does not set time limits of when cases must be heard and finalised. Factors that affect time frames include the complexity of the case and the availability of case officers. Apart from matters meeting criteria for urgent investigation, cases are handled in order of receipt.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 147

Senator Lundy asked the following question on 24 May 2005:

Advertising, promotion and education

a) How might someone from the general public find out about the Privacy Commission their role and their services?

b) Do you promote and advertise the fact that you can deal with inaccurate credit reporting?

c) Do most complainants come to you directly or have they been referred through credit restoration companies?

d) What systems/programs do you have in place to ensure that credit providers know their obligations under the Privacy Act?

e) Do you run any education or advertising campaigns with the key stakeholders? Please provide this response for the credit providers and the consumer.

The answer to the honourable senator's question is as follows:

a) The Office's main source of information for consumers is its web site, which includes detailed information about its complaints processes in eleven community languages as well as an interactive tool that a consumer can use to work out whether the Office is likely to be able to handle a complaint. The site also includes a range of information specifically targeted to consumers about the Privacy Act and their rights. Information for consumers is also available in hard copy brochures. The Office also has a poster that has been widely distributed to consumer organisations and which has information in eleven community languages that directs people to the Office's privacy information 1300 hotline number and its website. The Office regularly receives requests for this consumer information from a range of community organisations. The Office also holds meetings and round tables with consumer representatives, and makes presentations at consumer forums. The Office regularly responds to media requests from a range of sources and undertakes speeches and presentations.

b) The Office has no specifically targeted information on this matter. The Office relies on the methods outlined in the previous answer for letting people know about the Offices areas of responsibility. However, credit providers and credit reporting agencies have some requirements, as set out in Part 3 of the *Credit Reporting Code of Conduct and Explanatory Notes*, to provide individuals with notification of their right to complain to the Privacy Commissioner.

c) While the Office does not specifically collect referral information, we are aware of some complaints that are referred to the Office by Credit Restoration Companies.

d) The Office has no specially targeted programs for credit providers apart from those referred to below in e).

e) For consumers, see answer to question a). The Office's main source of information for credit providers and stakeholders generally is the web site. There is a special section for business and within that, a special section on credit reporting which includes information about Part IIIA of the Privacy Act, the credit reporting code of conduct, and has credit reporting determinations and fact sheets. When invited and possible the Office speaks at credit related functions.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 148

Senator Lundy asked the following question on 24 May 2005:

Credit reporting audit

I refer to information in your annual report detailing a credit information audit finalised in 2003-04. The audit drew on a number of issues in relation to credit reporting agencies and their compliance with credit reporting obligations in the privacy act.

a) What measures were put in place by the privacy commission to address these inefficiencies?

b) Has the situation improved in the industry?

The answer to the honourable senator's question is as follows:

a) When the Office conducts an audit, it makes recommendations to the auditee in relation to ways in which it can improve its handling of personal information having regard to the provisions of the Privacy Act.

In the audit in question, as is stated in the 2003-04 Annual Report the auditee accepted the majority of recommendations. Those that were not accepted were further discussed with the auditee in follow up meetings. Following these discussions the auditee agreed to some additional changes in practice, or decided to cease certain activities while it sought further advice. In respect of some recommendations the auditee did not accept the recommendations. In these cases the Office assessed the privacy risks in the practices in question and decided that it would consider the practices further if they were the subject of complaints from individuals.

b) The Office considers that the audit has improved the situation in the industry as the auditee has accepted the majority of the recommendations.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 149

Senator Lundy asked the following question on 24 May 2005:

Positive credit reporting

a) Please outline what constraints exist under the current privacy act to the imposition of positive credit reporting.

b) What changes would need to be made for positive crediting reporting to become sanctioned under state or federal statute?

c) What dangers do you see to the introduction of positive credit reporting?

The answer to the honourable senator's question is as follows:

a) The constraints that exist under the Privacy Act to the imposition of positive credit reporting are contained in Part IIIA of the Act. In particular, section 18E specifies the permitted contents of credit information files. The permitted contents are limited to matters such as:

- identifying information;
- details of applications for credit including the amount sought;
- details of requests by credit providers or mortgage or trade insurers for copies of credit reports for specific purposes including where a person has agreed to act as a guarantor;
- details of payments that are at least 60 days overdue where the credit provider has taken steps to recover the amount of credit outstanding;
- details of twice presented dishonoured cheques, court judgements or bankruptcy orders or details of serious credit infringements.

Generally speaking, section 18E would not permit the inclusion of details envisaged by positive credit reporting (depending on the model used) such as current balances on loans, or a person's payment record where payments have been made on time.

b) Part IIIA of the *Privacy Act 1988* regulates credit reporting in Australia. The Privacy Act does not currently permit positive credit reporting. Comprehensive legislative change to the Privacy Act would be required to permit positive credit reporting in Australia.

c) The Office has not undertaken any detailed research into positive credit reporting schemes.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

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Question No. 150

Senator Kirk asked the following question at the hearing on 24 May 2005:

How long does that process for appointment of members to the Classification Review Board take from the time it is advertised on the website through to the appointment of the new members?

The answer to the honourable senator's question is as follows:

In the case of the most recent recruitment process, advertisements were placed on the websites of the Attorney-General's Department and the Office of Film and Literature Classification on 25 October 2004, and appointments were made by the Governor-General on 22 April 2005, a period of six months.