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Australian Institute of Private Detectives

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The Privacy Commissioner
P O Box 5218
Sydney NSW 2001

Dear Commissioner,

We thank you for your request to the Institute as a Stakeholder and as requested please find below our submissions.

Review of the Privacy Amendment (Private Sector) Act

We note that the Attorney General, Philip Ruddock on 12 August 2004 issued the terms of reference to the Privacy Commissioner in relation to the review of the private sector provisions and in particular we note that he asked the Privacy Commissioner to consider the degree to which the private sector provisions meet their objectives being:-

a) To establish a single comprehensive National scheme providing through codes adopted by private sector organizations and National privacy principles, for the appropriate collection, holding, use, correction, disclosure and transfer of personal information by those organizations and,

b) To do so in a way that:-

1) Meets international concerns and Australia's international obligations regarding to privacy;

2) Recognises individuals' interests in protecting their privacy, and

3) Recognises the important human rights and social interests that compete with privacy, including the general desirability of the freeflow of information (through the media and otherwise) and the right of business to achieve its objectives efficiently.

Recognising that certain aspects of the privacy sector provisions are currently, or have recently extensively been, the subject of a separate review, the Privacy Commissioner exclude reviews of:-

i) Genetic information
ii) Employee records
iii) Children's privacy, and
iv) Electoral roll information under related exemption for political acts and practices.

We note that nowhere specifically within the terms of reference does the Attorney-General indicate to the Privacy Commissioner to look at concerns in relation to privacy and, in particular, the private sector privacy provisions in relation to matters and/or potential matters before the courts and Tribunals. However we note that in:-

1. Meets International Concerns of Australia's International Obligations Relating to Privacy

We will now cover the above as we believe this might have some relevance to the matters as mentioned above in relation to matters and/or potential matters before the Courts and Tribunals.

We consider, as an example, Australia's International obligations relating to privacy, and we refer to the International Covenant of Civil Political Rights.

BACKGROUND

We would like to initiate this submission with some background information from the Institutes position.

The Institute's main concern is in relation to Enforcement Bodies 6(1). as depicted in the Privacy Act 1988 **Annexure 1**

We wrote a letter of request to the Privacy Commissioner from the Australian Institute of Private Detectives which was sent on 15/5/02 asking the following:- **Annexure 2**

> **"Our members have asked if you could confirm to us in writing as to whether Real Estate agents are prohibited from disclosing information to private investigators on behalf of their clients for matters or potential matters before the Courts or Tribunals".**

We also include in there that:- We noticed in the Human Rights and Equal Opportunity Commission Act 1986 Schedule 2 which is the International Covenant on Civil and Political Rights, Article 14.1 states

> **"All persons shall be equal before the courts and tribunals"**

and Article 17 states

> **1, No-one shall be subjected to arbitrary or unlawful interference with his privacy family, home or correspondence nor to unlawful attacks on His Honour and reputation,**
> **2, Everyone has the right to the protection of the law against such interference or attacks.**

We received a reply to that letter dated 18 September 2002 and without quoting the full content of the letter, we would merely quote a particular section which we believe is relevant. **Annexure 3**

> **"Under NPP2 information may also be disclosed for certain law enforcement activities (including preparation for or conduct of proceedings for a court or tribunal or implementation of the orders of a court or tribunal carried out by or on behalf of an enforcement body NPP2.1(h). Enforcement bodies are defined in the Act Section 6(1). They are government bodies with a range of lawful enforcement and public revenue functions. Private investigators or debt collection organisations are not enforcement bodies as defined in the Act. Unless a private investigator is acting on behalf of an enforcement body, organizations cannot disclose information to them under this part of NPP2**

And further:-

> **Generally NPP 2.1 (f) would not allow an organization such as a real estate agent to disclose personal information to a private investigator or debt collector trying to locate a person on behalf of someone else as the principle is written in a way that indicates that the suspected unlawful activity ordinarily relates to the operations of the organization.**

This is the catalyst for our submission in that when we informed the then Privacy Commissioner of the provisions of the International Covenant of Civil and Political Rights in our letter it was completely ignored, when he should have been aware of the decision in the **Ah Hin Tenoh.** case handed down by the High Court on 7/4/95. **Annexure 14**

We would refer to the Information Sheet 7, 2001 Unlawful Activity and Law Enforcement guidelines issued by the Privacy Commissioners office see **Annexure 4.**

This expands on NPP2 and reinforces the principle that the only people to have access to information for matters before the courts and tribunals are enforcement bodies to the exclusion of all other people including certified private investigators.

The above in effect supports our argument that we are denied information on behalf of our clients for matters or potential matters before the Courts and Tribunals.

We would refer to Date of Protection Act 1998 in the United Kingdom. **Annexure 5.**

DATA PROTECTION ACT 1998 IN THE UNITED KINGDOM

PART 1V, EXEMPTIONS
Disclosures required by law or made in connection with legal proceedings.

35, (1) Personal data are exempt from the non-disclosure provisions where the disclosure is acquired by or under any enactment by any rule of law or by the order of the Court.

(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary -

(a) For the purpose of or in connection with any proceedings (including prospective legal proceedings), or,

(b) For the purpose of obtaining legal advice

Or is necessary or is otherwise necessary for the purpose of establishing, exercising or defending legal rights.

As can be seen from the above it is obvious that the UK government has taken into account the requirements of the various directives from the EU as well as the **International Covenant of Civil and Political rights**, and probably the **Universal Declaration of human Rights.**

We enclose below various Acts and directives that we consider are important to this review

THE UNITED STATES DRIVERS PRIVACY PROTECTION ACT OF 1994

We would also refer to Clause 2721 in the United States Drivers Privacy Protection Act of 1994 in the United States Section 2721 **Annexure 6.**

1. Disclosure is permitted for use "by any government agency" or by "any private person or entity acting on behalf of a Federal, State or local agency in carrying out its functions

(8) For use by any licensed Private Investigative Agency or licensed security, service or any purpose submitted under this sub-section.

(b) Permissible uses

(4) For use in connection with any civil, criminal, administrative or arbitral proceeding in any Federal, State or Local Court or agency or before any self-regulatory body including the service or process, investigation in anticipation of litigation and the execution or enforcement of judgements and orders or pursuant to an order of the Federal, State or Local Court.

We also refer to the Justice & Home Affairs Charter Fundamental Rights.
Annexure 7.

EUROPA JUSTICE AND HOME AFFAIRS CHARTER OF FUNDAMENTAL RIGHTS

We note the following:-

Chapter II- Freedoms

Article 8

Protection of personal data

1, Everyone has the right to the protection of personal data concerning him or her.
2, Such data must be processed fairly for specific purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3, Compliance with these rules shall be subject to control by an independent authority.

Annexure 8

Chapter III – Equality

Article 20

Equality Before the law

Everyone is equal before the law

Annexure 9

Chapter VI – Justice

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice

Article 48

Presumption of innocence and right of defence

1, Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2, Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

No one shall be liable to be tried or punished again in criminal proceedings for which he or she has already been finally acquitted or convicted within the Union in accordance with the law

We now refer to the Human and Constitutional Rights, South Africa. **Annexure 10**

HUMAN AND CONSTITUTIONAL RIGHTS SOUTH AFRICA

Article 32(1)

Access to Information South African

(a) everyone has a right of access to any information held by the State
(b) any information that is held by another person that is required for the exercise or protection of any rights.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state

We would refer to the Universal Declaration of Human Rights to which Australia is a signatory. **Annexure 11**

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in respect of brotherhood.

Article 7

All are equal before the law and entitled without any discrimination to equal protection against any discrimination, in violation of this declaration and against any incitement to such discrimination.

Article 10

Everyone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him

Article 12

No one should be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to a protection of the law against such interference or attacks.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

We would also refer to the International Covenant on Civil & Political rights.
Annexure 12

Preamble

The States Parties to the present Covenant.

Considering that, in accordance with the principles proclaimed in the charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Recognizing that these rights derive from the inherent dignity of the human person.

Recognizing that, in accordance with the Universal Declaration of Human rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

Agree upon the following articles:

Article 14.1

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 17

1. **No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.**
2. **Everyone has the right to the protection of the law against such interference or attacks.**

We would refer to the second reading speech by Mr. Darryl Williams, Federal Attorney-General, of the Privacy Amendment Private Sector Bill 2000 second reading, see **Annexure 13**

PRIVACY AMENDMENT (PRIVATE SECTOR) BILL, 2000. SECOND READING

The Attorney-General gives an explanation as to why the Bill should be enacted and we refer to page1 paragraph 2 column 1:-

The Bill is about confidence building. It is about giving consumers confidence in Australian business practices. It is about giving business confidence in a more level playing field. It is about giving the international community confidence that personal information sent to Australia will be stored safely and handled properly.

Page1 paragraph 3 column 2:-

The Bill draws on the 1980 OECD guidelines for the Protection of Privacy and Trans-border Flows of Personal Data which represent a consensus among our major trading partners on the basic principles that ought to be built into privacy regulation. It will also implement certain obligations

under Article 17 of the International Covenant on Civil and Political Rights.

Page 3 paragraph 5 column 2

The national privacy principles recognized the operation of state and territory legislation and the common law. For example, while the principles provide for a right of access to personal information held about an individual, they also contemplate a situation in which that access may be denied if this denial is required or authorised by law

Page 4 paragraph 3 column 1

It is widely acknowledged that the right to privacy is not an absolute right. Like all rights the individual's right to privacy must be balanced against the range of other community and public interests. The objects clause of the Bill highlights this need for a balanced approach. The structure and principles underlying the legislation as well as a limited range of express exemptions, ensure that the Bill represents an appropriate and workable balance. The Bill is not applied for example to information collected for personal, family or household affairs.

It is our contention that the Privacy Act does **NOT** deliver level a laying field as it excludes certified private investigators and members of the public who are preparing matters or potential matters before the Courts and Tribunals, on behalf of clients, from access to information. Whereas the law enforcement agencies under enforcement bodies **6(1)** are exempt and they are the only people that can access that information. This of course excludes those small businesses whose turnover does not exceed three million dollars.

The general acceptance of the Private Sector Amendment additions to the Privacy Act have been interpreted and accepted by the private firms that all information must be protected and must never be released, irrespective of whether there are other potential rights to have access to that information. We have found that nearly everybody is ignorant of the fact that they must disclose information in a life and death situation or a medical emergency.

People associated with the legal profession have said one has the right to issue a subpoena. The great difficulty is that you have to have a proceeding to issue a subpoena, and you have to have some basis for an action and if you can't find the person, you can't serve the subpoena, because you're limited by privacy from finding the person, you cannot commence the proceedings, so it makes it extremely difficult right from the start.

It can be seen from the above that they all have an area of authority for the protection of personal data. However, they all have the basics of equality before the law and a right to a fair trial in various forms. It is our submission that the existing Federal Privacy Act only contains a section in relation to the protection of privacy but

excludes totally the right of any individual to have access to information for matters or potential matters before the courts and Tribunal other than through an enforcement agency, we would point out that it would be most unlikely and, as history has shown, that enforcement bodies would be most extremely reluctant to being in the position of prosecuting someone in the criminal jurisdiction as an example, to provide information to them for their defense. It goes totally contrary to the role that the enforcement bodies see themselves as protectors of the public rights.

Without the right of a defendant, particularly in the criminal jurisdiction to have access to information in the public and private sectors then we cannot say that the person has been granted the right to a fair trial.

Often a controversial issue is whether an international covenant is enforceable under Australian law. The concept has always been that unless it is enshrined in domestic law then it is not enforceable. However that was overturned by the High Court in the Minister for Education and Ethnic Affairs v Ah Hin Toeh on 7.4.95,

HIGH COURT CASES

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS
V
AH HIN TEOH 7/4/95

It is our contention as a second avenue that the International Covenant of Civil and Political Rights to which Australia is a signatory affords certified private investigators the right to have access to information on behalf of their client to gather evidence and information for matters and potential matters to place before the courts and tribunals– we refer to the Ah Hin Teoh case **Annexure 14** where the High Court said:-

> **34. Junior counsel for the appellant contended that a convention ratified by Australia but not incorporated into our law could never give rise to a legitimate expectation. No persuasive reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention do not form part of our law are a less than compelling reason – legitimate expectations are not equated to rules or principles of law. Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act (17), particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention (18) and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be**

> **aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.**

It is our understanding that the indications are that any convention or covenant means all of its provisions and not just a specific section that might suit the particular department that has been tasked to draw up the specific legislation on behalf of the relevant minister. A selected Article such as the Attorney General did in his second reading speech in referring to Article 17. **Annexure 13.** In effect what the legislation has done is precluded any individual and private investigators acting on behalf of clients to access information in the private sector but allows all law enforcement agencies to do so which is we believe extremely discriminatory.

We would draw your attention in our submission to the failure of the executive government of this country to take into account Article 14 of the International Covenant of Civil and Political Rights but rely upon a specific Section 17 to ensure the passage of the Private Sector Amendment legislation through Parliament. This we believe is contrary to the findings of the High Court in the Ah Hin Teoh case.

LEETH AND KRUGER CASES

We understand that the High Court has ruled in the *Leeth* **Annexure 15** and the *Kruger* **Annexure 16** cases that basically the Constitution does not say that we have the right to equal justice. The Leeth case was in fact about sentencing matters for a Federal offence which may vary from State to State, that was lost and the Kruger case was brought in the Northern Territory in relation to the seeking of special leave to appeal and that was turned down.

Under the heading in the Kruger case **"Due Process of Law and the Judicial Power"** page 24 their Honours said the following:-

> **Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament.**

However, since the founding fathers made the statement, it was obviously their intention that our rights should be protected, otherwise, they would never have mentioned that those rights were available under common law but it would appear in the present time that the High Court has ruled that statute law can override common law, and we now perhaps see that the rights under common law, that the founding fathers believed that we would have had, have now been eroded by statute law taking away some of those common law rights.

And further page 30:-

> **In any event, the convention has not at any time formed part of any Australian domestic law. As was recently pointed out in *Minister for Immigration and Ethnic Affairs and Teoh,* it is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless these**

provisions have been validly incorporated into our municipal law by statute. Where such provisions have not been incorporated they cannot operate as a direct source of individual rights and obligations. However, because of a presumption that the legislature intends to give effect to Australia's obligations under international law, where a statute or subordinate legislation is ambiguous it should be construed in accordance with those obligations, particularly where they are undertaken in a treaty to which Australia is a party. Such a construction is not, however, required by the presumption where the obligations arise only under a treaty and the legislation in question was enacted before the treaty, as is the situation in the present case.

FEDERAL COURT CASES

Al MASRI V MINISTER FOR IMMIGRATION 15/4/03

The Al Masri case **Annexure 17** before the Full Bench of the Federal Court was on the basis of Article 9 of the International Covenant of Civil and Political Rights where the Federal Immigration Minister wanted to deport Al Masri on the basis that he wasn't a legal immigrant and they kept him in jail.

We would refer to Article 9 of the International Covenant of Civil and Legal Rights provides:

1, Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

> **5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.**

With the leave of the court the Human Rights and Equal Opportunity Commissioner submitted in paragraph 47:-

> **HREOC further submitted that the implied limitation upon the power to detain suggested by the trial judge was also supported by general principles of statutory construction derived from international law. With respect to international law, it was said that it was a long established principle that a statute should be interpreted and applied, to the extent that its language allowed, in a manner that was consistent with established rules of international law and with Australia's treaty obligations. The Commission argued that ss 196 (1)(a) and 198 of the Act should therefore be construed consistently with the rights conferred by the *International Covenant on civil and political rights.* It submitted that the construction of the Act advanced by the Minister that the only limit on the power to detain was the requirement that *bona fide* efforts be made to remove an unlawful non citizen as soon as practical would be inconsistent with *the International Covenant on Civil and Political Rights.***

The matter went further in Masri and we will not quote all the things that we think are relevant however, we note the following:

CONSTRUCTION IN ACCORDANCE WITH INTERNATIONAL OBLIGATIONS

Paragraph 138

> **In our joint reasons for judgement in VFAD we said that we were fortified in our conclusion about the construction of Section 196(3) of the Act by reference to the principle that s 196 should, as far as the language permits, permitted be interpreted and applied in a manner consistent with established rules of international law and in a manner which accords with Australia's treaty obligations (at [114]). We referred to statements of the principle in *Polities v The Commonwealth* 1945 70 CLR 60 per Latham CJ at 68-69 Dixon J at 77 and Williams J at 80-81. *Minister of Immigration and Ethic Affairs v Toeh* 1995 183 CLR 273 per Mason CJ & Dean J at 287.**

Paragraph 139

> **Australia is a party to the *International Covenant on Civil and Political Rights* (the ICCPR) having ratified on 13 August 1980. Australia has thus undertaken an obligation under Article 2(2) to "take necessary steps in accordance with its constitutional processes and with the provisions of the present covenant to adopt**

such legislative or other measures as may be necessary to give effect to the rights recognized by the present covenant".
The relevance of the provisions under consideration in the present appeal is clear since they were enacted subsequent to Australia's ratification of the ICCPR – See per Dawson J in Kruger at 71.

Paragraph 140

Although not incorporated into domestic law, the nature and the subject matter of the ICCPR the universal recognition of the inherent dignity of the human person (recited in its preamble) as the source on which human rights are derived, and the reference to and relevance of its principles in domestic law gives the ICCPR a special significance in the application of the principle statutory construction now being considered. As to the ICCPR and domestic law, see *Crimes (Torture) Act* 1988 (Cth) ss 3(1) and (2). *Evidence Act* 1995 (Cth) s 138(3)(f). *Australian Law Reform Act* 1996 (Cth) ss 24(1) and (2). *Human Rights and Equality Opportunity Commission Act* 1986 (Cth) ss 3, 11 Schedule 2. *Disability Discrimination Act* 1992 (Cth) s 12(8).

Paragraph 142

The question for consideration is whether submitted by HREOC the construction of the mandatory detention provisions contended for by the Minister should be rejected because, so construed, the legislation would authorize and require detention that is in truth arbitrary, contrary to the right under Art 9(1) not to be subjected to arbitrary detention. A further question is whether the construction contended for is contrary to Australia's obligations under Art 9(4) in that it does not satisfy the requirements of necessity and proportionality and it avoids the requirement that a State not detain a person beyond the period for which it can provide appropriate justification. HREOC's submission was that the construction preferred by the trial judge which did not have those consequences and which was permitted by the language of the legislation, should therefore be preferred.

STATE ACTS

NSW PRIVACYAND PERSONAL INFORMATION PROTECTION ACT 1998

Annexure 18

This Act also has an exemption clause as follows

Division 3 - Specific exemptions from principles

22 Operation of Division

Nothing in this Division authorises a public sector agency to do any thing that it is otherwise prohibited from doing.

23 Exemptions relating to law enforcement and related matters

(1) A law enforcement agency is not required to comply with section 9 if compliance by the agency would prejudice the agency's law enforcement functions.

(2) A public sector agency (whether or not a law enforcement agency) is not required to comply with section 9 if the information concerned is collected in connection with proceedings (whether or not actually commenced) before any court or tribunal.

(3) A public sector agency (whether or not a law enforcement agency) is not required to comply with section 10 if the information concerned is collected for law enforcement purposes. However, this subsection does not remove any protection provided by any other law in relation to the rights of accused persons or persons suspected of having committed an offence.

(4) A public sector agency (whether or not a law enforcement agency) is not required to comply with section 17 if the use of the information concerned for a purpose other than the purpose for which it was collected is reasonably necessary for law enforcement purposes or for the protection of the public revenue.

(5) A public sector agency (whether or not a law enforcement agency) is not required to comply with section 18 if the disclosure of the information concerned:

(a) is made in connection with proceedings for an offence or for law enforcement purposes (including the exercising of functions under or in connection with the *Confiscation of Proceeds of Crime Act 1989* or the *Criminal Assets Recovery Act 1990*), or

(b) is to a law enforcement agency (or such other person or organisation as may be prescribed by the regulations) for the purposes of ascertaining the whereabouts of an individual who has been reported to a police officer as a missing person, or

(c) is authorised or required by subpoena or by search warrant or other statutory instrument, or

(d) is reasonably necessary:

(i) for the protection of the public revenue, or

(ii) in order to investigate an offence where there are reasonable grounds to believe that an offence may have been committed.

(6) Nothing in subsection (5) requires a public sector agency to disclose personal information to another person or body if the agency is entitled to refuse to disclose the information in the absence of a subpoena, warrant or other lawful requirement.

(7) A public sector agency (whether or not a law enforcement agency) is not required to comply with section 19 if the disclosure

of the information concerned is reasonably necessary for the purposes of law enforcement in circumstances where there are reasonable grounds to believe that an offence may have been, or may be, committed.

24 Exemptions relating to investigative agencies

(1) An investigative agency is not required to comply with section 9 or 10 if compliance with those sections might detrimentally affect (or prevent the proper exercise of) the agency's complaint handling functions or any of its investigative functions.
(2) An investigative agency is not required to comply with section 17 if the use of the information concerned for a purpose other than the purpose for which it was collected is reasonably necessary in order to enable the agency to exercise its complaint handling functions or any of its investigative functions.
(3) An investigative agency is not required to comply with section 18 if the information concerned is disclosed to another investigative agency.
(4) The exemptions provided by subsections (1)-(3) extend to any public sector agency, or public sector official, who is investigating or otherwise handling a complaint or other matter that could be referred or made to an investigative agency, or that has been referred from or made by an investigative agency.
(5) The exemptions provided by subsections (1)-(3) extend to the Department of Local Government, or any officer of that Department, who is investigating or otherwise handling (formally or informally) a complaint or other matter even though it is or may be the subject of a right of appeal conferred by or under an Act.
(6) The Ombudsman's Office is not required to comply with section 9 or 10.
(7) An investigative agency is not required to comply with section 12 (a).

25 Exemptions where non-compliance is lawfully authorised or required

A public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18 or 19 if:
(a) the agency is lawfully authorised or required not to comply with the principle concerned, or
(b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the *State Records Act 1998*).

26 Other exemptions where non-compliance would benefit the individual concerned

(1) A public sector agency is not required to comply with section 9 or 10 if compliance by the agency would, in the circumstances,

prejudice the interests of the individual to whom the information relates.

(2) A public sector agency is not required to comply with section 10, 18 or 19 if the individual to whom the information relates has expressly consented to the agency not complying with the principle concerned.

27 Specific exemptions (ICAC, Police Service, PIC, Inspector of PIC and Inspector's staff and NSW Crime Commission)

(1) Despite any other provision of this Act, the Independent Commission Against Corruption, the Police Service, the Police Integrity Commission, the Inspector of the Police Integrity Commission, the staff of the Inspector of the Police Integrity Commission and the New South Wales Crime Commission are not required to comply with the information protection principles.

(2) However, the information protection principles do apply to the Independent Commission Against Corruption, the Police Service, the Police Integrity Commission, the Inspector of the Police Integrity Commission, the staff of the Inspector of the Police Integrity Commission and the New South Wales Crime Commission in connection with the exercise of their administrative and educative functions.

28 Other exemptions

(1) The Ombudsman's Office, Health Care Complaints Commission, Anti-Discrimination Board and Guardianship Board are not required to comply with section 19.

(2) A public sector agency is not required to comply with section 19 if, in the case of health related information and in circumstances where the consent of the individual to whom the information relates cannot reasonably be obtained, the disclosure is made by an authorised person to another authorised person involved in the care or treatment of the individual. An authorised person is a medical practitioner, health worker, or other official or employee providing health or community services, who is employed or engaged by a public sector agency.

(3) Nothing in section 17, 18 or 19 prevents or restricts the disclosure of information:

(a) by a public sector agency to another public sector agency under the administration of the same Minister if the disclosure is for the purposes of informing that Minister about any matter within that administration, or

(b) by a public sector agency to any public sector agency under the administration of the Premier if the disclosure is for the purposes of informing the Premier about any matter.

Investigative Agency, Laws Enforcement Agency, Public Sector Agency and Public Sector official are listed below:-

Investigative Agency means any of the following:

(a) the Ombudsman's Office,
(b) the Independent Commission Against Corruption,
(c) the Police Integrity Commission,
(c1) the Inspector of the Police Integrity Commission and any staff of the Inspector,
d)
(e) the Health Care Complaints Commission,
(f) the office of Legal Services Commissioner,
(g) a person or body prescribed by the regulations for the purposes of this definition.

Law Enforcement Agency means any of the following:

(a) the Police Service, or the police force of another State or a Territory,
(b) the New South Wales Crime Commission,
(c) the Australian Federal Police,
(d) the National Crime Authority,
(e) the Director of Public Prosecutions of New South Wales, of another State or a Territory, or of the Commonwealth,
(f) the Department of Corrective Services,
(g) the Department of Juvenile Justice,
(h) a person or body prescribed by the regulations for the purposes of this definition

Public Sector Agency means any of the following:

(a) a government department or the Education Teaching Service,
(b) a statutory body representing the Crown,
(c) a declared authority under the Public Sector Management Act *1988* ,
(d) a person or body in relation to whom, or to whose functions, an account is kept of administration or working expenses, if the account:
(i) is part of the accounts prepared under the Public Finance and Audit Act 1983 , or
(ii) is required by or under any Act to be audited by the Auditor-General, or
(iii) is an account with respect to which the Auditor-General has powers under any law, or
(iv) is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister of the Crown,
(e) the Police Service,
(f) a local government authority,

(g) a person or body that:

(i) provides data services (being services relating to the collection, processing, disclosure or use of personal information or that provide for access to such information) for or on behalf of a body referred to in paragraph (a)-(f) of this definition, or that receives funding from any such body in connection with providing data services, and

(ii) is prescribed by the regulations for the purposes of this definition,

but does not include a State owned corporation.

Public Sector Official means any of the following:

(a) a person appointed by the Governor, or a Minister, to a statutory office,

(b) a judicial officer within the meaning of the *Judicial Officers Act 1986* ,

(c) a person employed in the Public Service, the Education Teaching Service or the Police Service,

(d) a local government councillor or a person employed by a local government authority,

(e) a person who is an officer of the Legislative Council or Legislative Assembly or who is employed by (or who is under the control of) the President of the Legislative Council or the Speaker of the Legislative Assembly, or both,

(f) a person who is employed or engaged by:

(i) a public sector agency, or

(ii) a person referred to in paragraph (a)-(e),

(g) a person who acts for or on behalf of, or in the place of, or as deputy or delegate of, a public sector agency or person referred to in paragraph (a)-(e).

VICTORIAN INFORMATION PRIVACY ACT 2000

Annexure 19

The **Victorian Information Privacy Act 2000** also has an exemption clause which is listed below:-

Division 2 Exemptions

10 Courts, tribunals, etc.

Nothing in this Act or in any IPP applies in respect of the collection, holding, management, use, disclosure or transfer of personal information—

(a) in relation to its or his or her judicial or quasi-judicial functions, by—

(i) a court or tribunal; or

(ii) the holder of a judicial or quasi-judicial office or other office pertaining to a court or tribunal in his or her capacity as the holder of that office; or

(b) in relation to those matters which relate to the judicial or quasi-judicial functions of the court or tribunal, by—

(i) a registry or other office of a court or tribunal; or

(ii) the staff of such a registry or other office in their capacity as members of that staff.

1 Publicly-available information

(1) Nothing in this Act or in any IPP applies to a document containing personal information, or to the personal information contained in a document, that is—

(a) a generally available publication; or

(b) kept in a library, art gallery or museum for the purposes of reference, study or exhibition; or

(c) a public record under the control of the Keeper of Public Records that is available for public inspection in accordance with the Public Records Act 1973; or

(d) archives within the meaning of the Copyright Act 1968 of the Commonwealth.

(2) Sub-section (1) does not take away from section 16(4) which imposes duties on a public sector agency or a Council in administering a public register.

12 Freedom of Information Act 1982

Nothing in IPP 6 or any applicable code of practice modifying the application of IPP 6 or prescribing how IPP 6 is to be applied or complied with applies to-

(a) a document containing personal information, or to the personal information contained in a document, that is—

(i) a document of an agency within the meaning of the Freedom of Information Act 1982; or

(ii) an official document of a Minister within the meaning of that Act—

and access can only be granted to that document or information, and that information can only be corrected, in accordance with the procedures set out in, and in the form required or permitted by, that Act; or

(b) document containing personal information, or to the personal information contained in a document, to which access would not be granted under the Freedom of Information Act 1982 because of section 6 of that Act.

13 Law enforcement

It is not necessary for a law enforcement agency to comply with IPP 1.3 to 1.5, 2.1, 6.1 to 6.8, 7.1 to 7.4, 9.1 or 10.1 if it believes on reasonable grounds that the non-compliance is necessary—

(a) for the purposes of one or more of its, or any other law enforcement agency's, law enforcement functions or activities; or

(b) for the enforcement of laws relating to the confiscation of the proceeds of crime; or

(c) in connection with the conduct of proceedings commenced, or about to be commenced, in any court or tribunal; or

(d) in the case of the police force of Victoria, for the purposes of its community policing functions.

In both NSW and Victorian Privacy legislation there is no access for certified private investigators acting on behalf of their clients or members of the public generally in either the criminal or civil jurisdictions from being able to gather information to be able to be placed before the courts or tribunals. This delivers a very one sided and distorted case before the courts and tribunals as only one side has access to information.

It appears that both the states and the federal legislations all deny the public and certified private investigators access to information so that the courts do not hear all the evidence not merely one side.

REVIEWS

DOES CHAPTER III OF THE CONSTITUTION PROTECT SUBSTANTIVE AS WELL AS PROCEDURAL RIGHTS?

(Australian Bar review 2001)

Annexure 20

Justice McHugh

Page 235 (2001) 21 Australian Bar review.

A number of high court decisions concerning Ch III of the constitution indicate that it guarantees the protection of procedural due process rights. However, the question as to whether more substantive rights are similarly entrenched has yet to be conclusively determined. This article addresses that question with reference to three particular substantive rights that have been put forward as potentially enshrined by Ch III. An analysis of the judicial responses to the possibility of Ch III guaranteeing those rights suggests that the judicial power of the commonwealth should not

generally be held to include substantive rights. Nevertheless, implications protective of personal liberty may arguably be drawn from the conception of Ch III as an "insulated, self-contained universe of judicial power".

We have selected the specific sections as detailed below as we thought that they might apply to our particular circumstances.

GRADUAL ACCEPTANCE THAT CH III PROTECTS DUE PROCESS RIGHTS

Page 238

> But there are some procedural rights in CH III that cannot be abolished or restricted. In *Re Tracey: ex parte Ryan*, Deane J said, correctly in my opinion, that s 71 is "the constitution's only general guarantee of due process". In *Leeth v Commonwealth*, Mason CJ and myself also said:
>
> > **It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.**

And further:

> Instead the weight of judicial opinion, in the last 15 years, supports the judgment of Brennan, Deane, and Dawson JJ in *Chu Kheng Lim v Minister for Immigration.* Their Honours said that the Commonwealth legislative power does not extend:
>
> > **To the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.**
>
> Thus Gaudron J in *Re Nolan: Ex Parte Young*, emphasized that the protection of Ch III gives to the judicial process includes:
>
> > **Open and public inquiries (subject to limited exceptions), the applications of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts**

And further:

> If these statements are right, the power of parliament to interfere with traditional procedural rights is narrower than once was assumed to be the case. I think it is likely that the view of Deane J will ultimately gain wide

acceptance. Judicial power is vested in courts exercising federal jurisdiction to promote the supremacy of the law over arbitrary power. Any law that might weaken the supremacy of the law in the administration of justice is suspect. For such a law to be valid, it must at least be justified as a reasonably proportionate means of implementing some other legitimate object within the constitutional powers of the parliament. Professor Zines must be right when he says that:

> **At least one test for determining the limits on legislative power arising from Ch III is surely whether the statutory provision impairs the due administration of justice.**

As it happens, certain procedural and substantive rights can now be taken as constitutionally protected and judicially protected.

Page 240:

IMPLIED RIGHT TO LEGAL REPRESENTATION

One important example of a due process right recognised as protected by Ch III is the right to legal representation in certain situations. In *Dietrich v R,* our court reaffirmed that a court has power to stay proceedings in a criminal case where an unfair trial might otherwise result. That power extends to a case where an indigent accused is charged with a serious offence and, through no personal fault, is unable to obtain legal representation. It cannot be doubted that Ch III protects the right to stay proceedings where the accused is unable to get legal representation to meet a serious criminal charge. That is because the right to a fair trial is entrenched in that Chapter, as Deane and Gaudron JJ, in separate judgments pointed out in *Dietrich*

Once it is accepted that the Constitution guarantees the right of a fair trial, it must follow that Ch III also protects litigants from legislative and other acts that might compromise the fairness of any civil or criminal trial in federal jurisdiction. In that regard, it is important to bear in mind that fairness ‘‘transcends the content of more particularised legal rules and principles” It ‘‘provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal [and civil] law”.

The constitutional right to a fair trial in federal jurisdiction must also mean that there are constitutionally entrenched rights to an unbiased hearing, to obtain a stay of proceedings of a criminal charge where there has been unfair delay in prosecuting the charge and to obtain a permanent or temporary stay of proceedings where there has been prejudicial publicity” or a contempt of court that could affect the jury’s verdict. No doubt there are many more constitutional rights that flow from the constitutional right to a fair trial. As Mason CJ and I pointed out in *Dietrich* ‘‘[t]here has been no judicial attempt to list exhaustively the attributes of a fair trial’’. We pointed out, however, that “various international instruments and express declarations of rights . . . have attempted to define, albeit broadly, some of the attributes of a fair trial”. The rights recognised in those instruments and declarations may well become, if they re not now, guaranteed by Ch III’s grant of judicial power.

Page 241-242:

MORE CONTROVERSIAL:- WHETHER SUBSTANTIVE RIGHTS ARE PROTECTED BY CH III

The foregoing discussion shows that the right to procedural due process is now guaranteed by Ch Ill of the Constitution Are more substantive rights, often enshrined in the constitutions of other countries, similarly entrenched? Professor Winterton has, pointed out that such rights could include criminal process rights, such as freedom from unreasonable search and seizure,
freedom from detention by police or official questioning and the privilege against self—incrimination. They might even include other civil and political rights, such as freedom of communicationand the right to equal treatment by the law. In the *Builders Labourers* case, Murphy J asserted that many of the great principles of human rights stated in the English constitutional instruments (the Magna Carta, the Declaration of Rights and the Bill of Rights1688) such as those which require observance of due process, and disfavour cruel and unusual punishment'' are embedded in the Constitution.

Paragraph 3

The judgment of Deane and Toohey JJ in *Leeth v Commonwealth* provides the major premise for the conclusion that Ch III protects substantive due process rights generally, Their Honours said:

> **The doctrine of legal equality is, to a significant extent, explicit in the constitution's separation of judicial power…[I]n Ch III's exclusive vesting of the judicial power of the commonwealth in the "courts" which it designates, there is implicit a requirement that those "courts" exhibit…the essential requirements of the curial process, including the obligation to act judicially. At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.**

The above paper by Justice McHugh is his view but it certainly gives some indication that each case will be looked at on its merits and that there could be some possibility that we could be successful in an application to challenge the validity of the unfairness and biased Privacy Act.

The thought that a person in Australia is denied the right to equality before the law, the right to natural justice, the right to a fair trial and the right to the due process of the law in being able to access information so that the courts can hear all the evidence from both sides, is repugnant and flies in the face of all international standards and acceptability.

PFEIFFER, LANGE, THE COMMON LAW OF THE CONSTITUTION AND THE CONSTITUTIONAL RIGHT TO NATURAL JUSTICE.

(Australian Bar review 2000)

Annexure 21

By Patrick Keyzer
Senior lecturer, Faculty of law, University of Technology, Sydney.

We have selected some specific sections that are listed below as we believe that they go to the heart of our submission in relation to the ability of a person as well as a private investigator acting on behalf of a client for matters or potential matters before the courts and tribunals.

Page 89-90 paragraph 5

Pfeiffer v Rogerson Annexure 22 is a significant decision for resolving these tensions in the courts jurisprudence, but it is also an important decision for the way it treats the relationship between the common law and the Commonwealth Constitution. In **Lange v Australian Broadcasting Corporation, Annexure 23** the High Court overturned its own recent majority judgments on constitutionally protected free speech on the basis that the common law must conform with the constitution. The court said:

> **The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the constitution cannot be at odds.**

In *Pfeiffer,* the applicant argued inter alia that the common law principles of choice of law in tort should be adapted to the Constitution, in accordance with the principle in Lange. The application and confirmation of this principle and the High Court's willingness to overturn its recent decisions on tile basis of fresh insights into the meaning of the Constitution in *Pfeiffer* naturally gives rise to the question: are there any other parts of the common law ripe for reform in accordance with this approach? In this article I argue that the court's approach in *Lange* and *Pfeiffer* combined with swelling support in statements of a number of members of the court, may lead to the development of a constitutional right to natural justice.

NATURAL JUSTICE AND THE COMMON LAW

Page 92-94 paragraph 2

Over the last 10 or so years, members of the High Court have drawn a number of implications from the separation of judicial power. Leaving aside those statements of judges who have asserted the existence of an implied constitutional right to a fair trial, or an implied constitutional right to equal justice, a constitutionally-protected right to natural justice might have already emerged from a knitting together of the following statements:

1. **First, while Ch III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action, the enforcement of a legal decision may only be made in the exercise of judicial power. That principle**

reserves to the courts the power to review every exercise of legal power.

2. **Second, Parliament may not direct a Ch III court as to the manner and outcome of the exercise of its jurisdiction. The duty of a court to act impartially is inconsistent with the acceptance of instructions from the legislature to find or not to find a fact or otherwise to exercise judicial power in a particular way. This principle applies in all cases, but the point has been emphasised in criminal cases, where it has been said that the adjudgment and punishment of criminal guilt are powers exclusive to the judicature. That function appertains exclusively to and could not be excluded from the judicial power of the Commonwealth.**

3. **Third, in any case, civil or criminal, Ch III courts may only act in accordance with the requirements of natural justice. Courts may not be required or authorised to proceed in a manner that does ensure the right, of a party to meet the case made against them. Judicial power most be exercised in accordance with judicial process. A law that requires or authorises a court in which the judicial power of the Commonwealth is vested to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power is invalid.**

Assuming that these propositions are correct, and given that the High Court has evinced a willingness to overturn its recent decisions in a number of areas (with *Pfeiffer* and *Lange* being notable examples), it may now he possible to argue that a constitutionally-protected right to natural justice has emerged. Its ambit would depend on the circumstances of the case, but its dimensions might match the requirements nominated by Gaudron J in *Nicholas v R*

> **Consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorized to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of law to facts determined in accordance with rules and procedures which truly permit the facts to he ascertained and, in the case of criminal proceedings, the determination of guilt or innocence means of a fair trial according to law.**

In the above matters namely the papers by Justice McHugh "**Does Ch III of the Constitution protect substantive as well as procedural rights",** and by Patrick Keyzer, "**Pfeiffer, Lange, the common law of the Constitution and the Constitutional right to natural justice",** quoted above.

These were basics that we should also rely upon to support our case to have access to information so that we would be on an equal footing with the police who were on the opposite side and that certified private investigators would be able to properly prepare

a case for the defense on behalf of our clients. This will have the effect of balancing the scales of justice, as it should be in a democracy.

Looking at the situation on a reality basis under the **Privacy Act, enforcement bodies 6(1),** there seems to be a very large imbalance as the law enforcement bodies have access to all information in both the private and public sectors whereas the public and certified private investigators acting on behalf of their clients do not have any access to information in the public and private sectors. This goes counter to the proposition that not only must justice be done, but it must be seen to be done, without access to information justice does not seem to be done. It is also contrary to acceptable international standards.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In the criminal justice context the most important articles of the European Convention on Human Rights (the Convention) are Articles 5, 6 and 7.

Article 6 guarantees the right to a fair trial. This includes the right to a public trial within a reasonable time. Additionally, specific rights given to people being prosecuted for a criminal charge include:

- **The right to be presumed innocent.**
- **The right to be informed of the case against you in a language you understand.**
- **Enough time and facilities to prepare your defence.**
- **The right to defend yourself and to be legally represented, free of charge, when this is in the 'interests of justice'.**
- **Ensure that prosecution witnesses attend and can be cross-examined, and to call defence witnesses on the same terms.**
- **Have an interpreter, if necessary, free of charge.**

Article 5 guarantees that you cannot be deprived of your liberty, except where the correct legal procedure has been followed and in specified circumstances. These include where someone has been convicted of an offence and given a prison sentence and where someone is detained in order to bring them before a court once they have been charged.

If you are arrested, you must be informed promptly of the reason for your arrest. If you are charged and held in custody you must be brought before a court promptly. If you are remanded in custody pending trial, you must be tried within a reasonable time. Where you are not detained for the purposes of punishment (e.g. if you are a life prisoner who has served their tariff or a psychiatric patient detained under the Mental Health Act 1983) you are entitled to have your detention reviewed periodically by an independent tribunal.
Article 7 guarantees that you cannot be punished for something that was not an offence at the time you did it or given a sentence which is more than the maximum that applied at the time you committed the offence.

UK LAW ON EQUALITY AND DISCRIMINATION

The extracts below were taken from the Internet and are an outline of the Act

The United Kingdom (UK) has specific legislation on equality that outlaws discrimination and provides a mechanism for individuals to lodge complaints when they experience unlawful discrimination. Currently, there is direct legislation dealing with discrimination on the grounds of sex, race and disability that applies in a number of fields, including employment, education, housing and the provision of goods and services.

Currently, there is no direct legislation dealing with discrimination on the grounds of age, religion or sexual orientation. However, with effect from December 2003, new regulations came into force which make specific provision outlawing discrimination on grounds of religion and sexual orientation in the employment and education fields. Draft regulations on age discrimination were introduced in 2003. The regulations will be presented to Parliament in 2004 and are expected to come into force on 1 October 2006.

The Human Rights Act 1998 (HRA), which incorporates the rights contained in the European Convention of Human Rights (the Convention) into UK law, is also relevant in challenging discrimination. However, unlike UK equality legislation, the HRA can only be enforced directly against public bodies, such as the police or a local authority and private bodies exercising public functions. Courts and tribunals are themselves public bodies and must interpret and apply legislation in a way that is compatible with the Convention. Moreover, it is possible to rely on the Convention in any court or tribunal proceedings, including for example proceedings in an Employment Tribunal. Article 14 of the Convention prohibits discrimination on many grounds including sex, race, religion, political opinion as well as 'any other status'. 'Other status' has been interpreted broadly to cover, for example, marital status, sexuality, prisoners and would more than likely cover disability.

Article 14 is not a free standing guarantee of equal treatment or a prohibition on discrimination more generally. Rather, it prohibits discrimination in respect of access to other Convention rights and is intended to guarantee equality before the law of the Convention. Article 14 must be used in combination with one or more of the other Articles in the Convention. The other right need not have been breached, but the facts complained of must at least come within the ambit of the substantive right. By way of example, men who have been widowed have used Article 14, together with Protocol 1, Article 1 (protection of property rights) to argue that benefits which were paid to women when their husbands died should also be paid to men when their wives died. They were able to use Article 1 Protocol 1 because benefits can sometimes count as property for the purposes of this Article.

It is only differences in treatment of people in analogous situations which falls within Article 14 and thus far the European Court of Human Rights (ECHR) has interpreted this condition quite strictly. However, there is no requirement that the difference in treatment has caused a detriment to the complainant.

Discrimination can be justified with reference to the aims and effects of the measure complained of, and to whether there is a reasonable relationship of proportionality between the means used and the aims to be achieved. There are a number of areas

where the ECHR has recognised that it will take very weighty reasons to justify discriminatory measures. These areas include sex and race, but not sexual orientation or disability as yet.

See also Article 14, **THE HUMAN RIGHTS ACT 1998**: AN OVERVIEW

Equality Bodies

Under each of the existing discrimination Acts separate equality commissions have been established:

- **Commission for Racial Equality.**
- **Disability Rights Commission.**
- **Equal Opportunities Commission**.

In October 2003, the government announced plans for a single equality body for Britain. The proposed body has a working title of the Commission for Equality and Human Rights (CEHR).

It is envisaged that the CEHR will be responsible for tackling all forms of discrimination and ensuring all equality laws are enforced, including new laws dealing with discrimination on the grounds of age, religion and belief, and sexual orientation. Promotion of human rights will also be included within the CEHR's remit.

A government taskforce has been formed to determine how the body should function. At this stage, there is no clear timeframe for when the CEHR will become operational. It is expected, however, that the existing equality commissions will continue until at least 2006.

COMMUNITY POLL 1999

Prior to the NSW State election in March 1999 the Australian Institute of Private Detectives commissioned a poll to be undertaken in 6 marginal seats, the results that were elicited were amazing to say the least, such as:- **Annexure 24**

		Yes	**No**
Q	**Do you believe that all people in NSW should be treated equally before the law?**	**97%**	**3%**
Q	**Do you think that you should be able to access that information for your defence?**	**94%**	**6%**
Q	**Do you believe that Private Investigators Should be qualified?**	**95%**	**4%**
Q	**Would you support properly trained, Independent investigators investigating Complaints against police officers?**	**90%**	**8%**

Q	**Would you support properly trained Independent investigators investigating Criminal matters on behalf of the police?**	**69%**	**29%**

Although the poll was carried out in NSW there is no doubt that the figures would be applicable in all other states as it is obvious that the vast majority of the people in Australia are of the mind that everybody is entitled to a fair go and that includes matters before the courts and tribunals.

The benefits of having properly trained private investigators are many including government departments being able to have an independent investigations done thus removing any potential claims of complaints being covered up by departments and the public would be able to have total confidence of the proper handling of complaints. Additional information to the current poll is on our web site. www.aipd.org
This might also apply to other area's such as State and Territory police forces outsourcing some investigations and complaints against police officers thus leaving the police to investigate serious criminal matters.

GENERAL ROLE OF PRIVATE INVESTIGATORS THAT SUPPORT OUR SUBMISSIONS TO HAVE ACCESS TO INFORMATION

Although it is perceived by, we suppose the bureaucracy and the political arena, that private investigators may well be at the lower end of the social scale, and are insignificant in their position and role. Yet we all watch hundreds of movies depicting the chronicles of Private Detectives (PI's) ie Magnum PI, Marlow PI etc.

Members of the Australian Institute of Private Detectives also act in a number of roles particularly in private investigation work, for instance in relation to workers compensation and third party injury cases, as well as commercial areas such as process serving and debt collection and the repossession of goods and/or services.

We estimate that the number of our clients for which are industry acts on behalf of amounts in excess of 80,000 and the volume of business would be in the region of $80m annually.

From the experience of the members of the Institute, we can say that prior to instituting legal proceedings, that the work of Private Inquiry and Commercial Agents, who are members of the Institute, includes investigative work preparatory to the institution of legal proceedings, or preparatory to defending legal proceedings. Such work is necessary in order to enable clients to decide whether they should institute legal proceedings, or to enable them to identify defences to legal action being mounted against them. Such work will include the identification of potential defendants and witnesses, the gathering of physical evidence, such as documents, the measurements of incident scenes and the photographic recording of evidence and incident scenes. It will also include the taking of witness statements.

By reason of the experience of our members we can say that prior to instituting legal proceedings most litigants require to identify what has actually occurred and the

identity of potential defendants and often while court proceeds, including preliminary discovery may assist, in many instances the court processes will not be sufficient to enable the client's legal advisors to provide appropriate and adequate advice as to whether legal proceedings should be instituted and if so, what form those proceedings should take and in what jurisdiction they should be instituted.

For example, where a client believes it's intellectual property is being misappropriated, preliminary discovery will not assist until it is determined whether the property is in fact being misappropriated, and in order to identify this, investigations may be required which involve requests to IT suppliers and technology carriers which require them to disclose personal information of their customers. If court proceedings were to be resorted to, then in our experience the party responsible for any misappropriation would be warned and would simply relocate their operations.

In the case of a relatively straightforward motor vehicle collision, the identification of potential witnesses may be crucial, yet that may again require third parties to disclose personal details of their employees to investigators. In the case of motor vehicle collisions and industrial incidents resulting in injuries, it is our experience that reliance upon the police or other authorities, such as New South Wales Work Cover Authority, to provide information that will enable a party to make appropriate decisions as to instituting, or defending, litigation, will often leave the party with insufficient, or incomplete, information as those enforcement bodies simply do not command sufficient resources to enable full investigations in all matters and, in any event, they do not act on behalf of private individuals under the Privacy Act 1988.

Where there has been a major incident, such as the Thredbo landslide or the January 2003 Bushfires in Canberra, a Coronial Inquest may be held and there will be investigations by bodies such as New South Wales Work Cover Authority, the fire authorities and the police. Such bodies are, we understand, **'enforcement bodies' 6(1)** within the **Privacy Act 1988**, however those entities will not be investigating the incident on behalf of the persons who were injured in the incident, such as property owners and fire victims and our members having been involved in numerous coronial investigations into similar disasters we can say that in each instance additional investigations on behalf of our members clients were necessary in order for their interests to be fully protected.

The identification of potential witnesses and potentially exculpatory evidence, such as photographic evidence and evidence gained from the interrogation of computer and security systems, is, in our experience, crucial in many criminal prosecutions.

Our members have been involved in several thousand criminal prosecutions and in each one of these our clients would have been unable to mount an appropriate and full defence to the charges preferred against him, or her, without the assistance of our investigations as potentially exculpatory evidence would simply not have been identified and obtained. For example, potential witnesses who may provide exculpatory evidence are often, in our experience, only identified as the result of considerable investigation which will often require the disclosure by third parties of personal information concerning their employees.

It is our experience that our members are regularly engaged by property owners and other commercial entities to locate debtors in order that legal proceedings for the recovery of outstanding fees, such as rent, may be commenced. In order to locate

such persons a number of different potential sources of information may have to be resorted to.

These may include employers, past employers and real estate agents, however the disclosure of the addresses of debtors by Real Estate Agents and employers would be disclosure of personal information concerning the debtors and it is our understanding that such disclosure is now proscribed by the Privacy Act 1988. **Annexures 2 and 3**

ELECTORAL ROLL

We note in an article in the Sun-Herald dated August 1st 2004 page 16, voting roles off limits by Philip Hudson, **Annexure 25**. It states here in that article that debt collectors and direct marketers will no longer be able to buy a copy of the electoral role after Federal Parliament banned the sale and commercial use of the role. The change was recommended by the Australian Electoral Commission backed by the Commonwealth Auditor General and Federal Privacy Commissioner and received unanimous support from the Parliamentary committee. It is most extraordinary to take away the right of a person to collect the money that might be rightfully owed to them or to have the matter tested in court and subject to a judicial decision. The following we believe is very interesting:-

BAD DEBTS

The tax statistics tabled in Parliament, which have been extracted, see **Annexure 26**, illustrate the following:

According to figures obtained from the Taxation Statistics available on the ATO's website, the statistics for the 1996/1997 financial year show that 11,734 partnerships wrote off bad debts totalling $127,046,188. In the 2001/2002 financial year, 10,979 partnerships wrote off bad debts totalling $155,886,879. This equates to an average of $10,827 in 1996/1997 compared to $14,199 in 2001/2002 per partnership.

We now refer to the same category for companies. In 1996/1997, 33,535 companies wrote off bad debts totalling $1,792,354,893. In 2001/2002, 40,086 companies wrote off $5,823,415,533. This equates to averages of $53,447 compared to $145,273 per company for the 1996/1997 & 2001/2002 financial years respectively. It should be noted that over the six year period covered, a total of **$22,370,070,873 (that's $22.37 BILLION**) has been written off by companies alone. **Annexure 27**.

We now come to a most extraordinary situation, ie; as a result of these bad debts, companies and partnerships have been able to claim a deduction for these bad debts – not only as a tax deduction, but thus also reducing the amount of Company Tax payable to the Government (or Tax Department) in some instances. In addition, during the 2001/2002 financial year alone, **$582 million (YES, MILLION)** from companies alone was **NOT** collected in the form of GST which would have flowed back to both State and Federal governments. How can the Government afford this?

We were unable to locate on the government Web site any statistics for the financial years prior to 1996.

Members of the public have commented to us that because of the Privacy Act it has now become legal to commit fraud with out being caught or punished. Another disturbing or unintended consequence of the Privacy Act is that to open a Bank account one has to produce documents that total 100 points, however the Banks have no ability to check the validity of documents such as drivers licence, Medicare card, birth certificate, credit card, citizenship certificate and passport. This opens the door for the possibility for people to open accounts in false names for fraud purposes or for money laundering. We are aware that driving licences are probably state matters and as above there is Privacy legislation in Victoria an NSW, but other states and territories have adopted the federal Privacy Act as their own.

EQUALITY AND A FAIR TRIAL

Without the right of a defendant, particularly in the criminal jurisdiction to have access to information in the public and private sectors then we cannot say that the person has been granted the right to a fair trial.

We would refer to **Annexure 28** of an article in the Sydney Morning Herald on weekend December 11/12 page 4 **"Budget savings discount fair trial says DPP"**.

This refers to **Nicholas Cowdrey QC, Director of Public Prosecutions and he writes in his annual report that the government has exempted police and corrective services from budget cuts but forced his and other departments to run down their services.**

Mr. Cowdrey writes in his annual report for Parliament "government has effectively quarantined the use of police, corrective services department from the worse impact of budget cuts", however it has cut severely the Attorney-General's Department (which operates the courts and associated services) my office (which prosecutes) and the Legal Aid Commission (which does most of the defense work in serious crime). The clear message is that a fair trial in a timely manner is <u>NOT</u> a core business of government. All it needs are police to arrest and charge people and prisons in which to confine them.

We can only support wholeheartedly the proposition by Mr Cowdrey that people are being denied a fair trial. This is the experience from our members who find it extremely difficult when briefed to investigate matters on behalf of the defense, that they are prohibited by the public sector and the private sector and particularly a lot of small businesses and this also refers to matters in the civil jurisdiction, where we are required and instructed by lawyers to seek information to see whether there is any potential for a matter to go before the courts.

Small companies say to us and our members that they cannot give us any information because of the Privacy Act. Question: Which Privacy Act, the Federal or State? The Privacy Act, well do you have a turnover in excess of $3m, no well then you don't come under the confines of the Federal Privacy Act and therefore you're entitled to give us information, well its our policy not to give out any information, company policy that's it so we are again denied and our clients are denied, the right to access information for matters or potential matters before the courts and Tribunals.

It is our submission that this prohibition be immediately lifted in the interests of small businesses who would rely upon the cash flow to keep them afloat or the ability of them to have the matter tested in the court for the recovery of such monies or otherwise. At the moment they are currently prohibited from doing so because they are effectively denied the right to find the people to initiate the due process of law by having the matter tested in court.

TAX DEDUCTIONS

Before an amount can be written off for tax purposes – a company must show that they have taken every possible step to recover the outstanding debt. This necessitates the use of private investigators and commercial agents, the amounts estimated to be involved in debt collection by our industry are in the vicinity of $15 billion. This is thought to be on the conservative side, a copy of the taxation ruling under Taxation Administration Act 1953 is enclosed. **Annexure 29**

It is our experience that almost all investigations of the kind as referred to above would involve the seeking out from third parties of information which is deemed to be personal information within the Privacy Act, so that now the disclosure of that type of information is proscribed. It is our belief that without access to that information parties will in many instances be unable to appropriately make decisions about commencing or defending legal proceedings and will be unable to properly maintain or defend such proceedings.

Our members have been involved in numerous investigations relating to litigation or potential litigation since the Privacy Amendment Bill 2000 was passed in 2000 and came into effect on 21 December 2001. In our experience the third party is conscious of the provisions of the Privacy Act and are refusing to disclose personal information.

Since December 2001 we have had in our capacity as directors of the Australian Institute of Private Detectives, a number of discussions with members of the Institute and it is our belief that wherever there is an approach by members to obtain personal information, there is now a refusal by third parties to supply it, even where that information has been sought in relation to litigation or potential litigation, although they are not covered by the provisions of the Privacy Act 1988, they simply say that it is company policy thus denying our members access to information that is needed for matters and potential matters before the Courts and Tribunals.

EXEMPTION AND NEW LEGISLATION

Directors of the Institute had a meeting with the Attorney General, Darryl Williams on 14 November 2002 where we voiced our concerns in a submission to him. We received a letter in reply. **Annexure 30**

We believe that the above supports our submission to the Privacy Commissioner for an exemption, or perhaps advice to the Attorney-General that the Privacy Act should be amended and in particular to **Section 6(1)** Enforcement Bodies for the exclusion of private investigators. An exemption to collect personal information for the purpose of actual and anticipated legal proceedings.

We would like to add here that again in our submission to the Attorney-General dated 14 November 2002 we suggested that because of the complete mess that the Private Investigation industry is in various states of Australia, that a common legislative framework for Private Investigators be implemented to overcome the difficulty of operating under a different regulating regime for Private Investigators of each state and territory.

We still support that scheme and the reason for it is this; whilst we agree and we support Privacy legislation, our only objection being that it is too wide and takes away the right of a person to equality and fairness before the law, whilst we expressed our opinion to Mr. Darryl Williams, the then Attorney-General in 2002 that it would be in some respects unconscionable for every private investigator to have access to information 'willy nilly'.

We defined that and as an example, under a common framework of legislation there should be a body such as the Australian Institute of Private Detectives that would administer and report to Parliament on the Private Investigation industry (including the commercial and debt collecting area) in a similar fashion as the Law Society administers the Legal Practitioner's Act, it would be self funded by the members and because our industry understands itself, it will be able to properly administer both from a training and the conduct by way of policy, be able to administer and oversee the Private Investigation industry.

It is our contention and submission that under new Federal legislation for Private Investigators, there be two types of Private Investigators. There should be the main contractor and the subcontractor. The main contractor would have one nominated person who will be probity checked who will have access to information in the public sector. But this access would only be through the Australian Institute of Private Detectives computer database and every access that was made would be recorded on that computer database for audit purposes and that each Private Investigator would have to have Professional Indemnity insurance, so that where a breach was made and under the provisions of the (Federal Private Investigators Act), a determination by the executive of the Institute or by a court of law, that professional misconduct by way of a breach of the Privacy Act had taken place, then the Professional Indemnity insurer would come in and the aggrieved party could seek retribution from the Professional Indemnity insurer for a breach of his privacy and be properly recompensed for such a breach.

There would be no need for subcontractors to have access to information as that information would be supplied by the main contractor. This would reduce the number of people who would have access through the AIPD's computer database to access information.

It was our contention in our meeting in November 2002 with Darryl Williams that any amendments to the Federal Privacy Act should be in concert with a new Private Investigators Act. We already have on our website, www.aipd.com.au a draft Bill which currently relates to legislation through the NSW Parliament that can very quickly and easily be adapted to Federal legislation. We would suggest that such a framework be used in any consideration of Federal legislation.

INTERNATIONAL EXEMPTIONS FOR MATTERS BEFORE COURTS

The overwhelming evidence and legislation internationally is that exemptions are available and are in place for matters before the Courts and Tribunals, however in Australia this seems to be omitted from the Federal Privacy legislation and therefore the only people who are, as we understand, able to access information are **enforcement bodies 6(1)** but nobody can access information for matters in the civil and criminal jurisdiction on behalf of defendants or prosecutions, defendants in the criminal jurisdiction and prosecutions and defendants in the civil jurisdiction.

PUBLIC POLL

Whilst the public from a number of points of view have been asked, no doubt many times do you think that your personal and private information should be liberally or freely accessed by anybody, the answer of course would be no. And in light of that the Institute conducted a survey in March 1999 in 6 marginal seats in NSW and we **Annexure 24**

This brings us to a further additional benefits and potential assistance to the government in that if private investigators (properly qualified) and certified practicing investigators under Commonwealth legislation would in effect be duty bound to pass any information to relevant Federal government bodies in the National interests and security.

We would envisage that our members in the industry would be of great assistance both in the financial reporting and other areas where our members investigate and would be able to assist in uncovering corporate and international fraud by being able to work together with Federal agencies, for the protection of revenue and national security for Australia.

We are mindful that access to electoral information is exempt from the provisions of the terms of reference as issued by Phillip Ruddock, Attorney-General, we felt that to include it was very relevant in relation to the information that we have supplied in relation to the bad debts and the ability of a person to be able to have the right to endeavour to recover through the process of law, monies that they believed were duly owed to them to maintain their cash flow and viability of the company and thus preserve the wages and the employment of their employees.

We believe that the above information that we have supplied supports b (iii) of the terms of reference;

> **Recognises important human rights and social interests, that compete with privacy including the general desire of a free flow of information (through the media and otherwise) and the right of business to achieve its objective sufficiently".**

We included the information in relation to the electoral roll, the location of people to institute proceedings for the potential recovery of monies alleged owed through companies and partnerships.

We also believe that from the social and human rights interests, that information should be available to Private Investigators for matters or potential matters before the Courts and Tribunals under that term of reference. Not only for business to achieve its objective efficiently but in relation to matters before courts where a wrong may well have been done and residents of Australia should have the right to have that wrong tested in court and for any potential, and the writing of those wrongs through the judicial process.

OH&S LEGISLATION

Under current Privacy Legislation Private Investigators are denied access to vital information such as Criminal Records, which therefore puts them in a position contrary and in direct breach of OH&S Laws. In particular the ability to carry out efficient Risk Assessment and Risk Management thus also effecting responsibilities under Duty of Care. We refer to the following web pages;
http://www.nohsc.gov.au/SmallBusiness/BusinessEntryPoint/laws/keys/#top
http://www.nohsc.gov.au/SmallBusiness/BusinessEntryPoint/laws/dutycare/#top
http://www.nohsc.gov.au/SmallBusiness/BusinessEntryPoint/hazards/#top
http://www.nohsc.gov.au/SmallBusiness/BusinessEntryPoint/hazards/what/#top
http://www.nohsc.gov.au/SmallBusiness/BusinessEntryPoint/hazards/risks/#top

What we are saying simply is that the people of Australia and certified private investigators acting on behalf of their clients are denied the right to access information for matters and potential matters before the Courts and Tribunals. Our submission is vital to all the people in Australia as we believe that enforcement bodies **6(1)** of the Act will eventually affect almost every citizen at some time in the future.

POTENTIAL LEGAL ARGUMENTS

We believe that the following will at some time have to be asked of the courts and it would be a sad tragedy if someone was incarcerated in prison, who was innocent, and he or she had been denied a fair and equal trial due to the lack of access to information that would have proved their innocence.

It is a sad state of affairs when the presumption of innocence is replaced by the presumption of guilt which is what appears to be the position that currently exists due to the inability of certified private investigators not being able to properly access information that might be vital to a defense case.

1. **Is there a provision prohibiting equality before the law in the Constitution?**

2. **Is there a prohibition in the Constitution preventing a person or certified private investigators acting on their behalf from having a fair trial i.e. being able to have access to information so that the Court may hear <u>ALL</u> of the evidence from both sides, as opposed to only hearing the evidence**

from one side as currently exists at the moment under the Federal Privacy legislation?

3. **Is there a prohibition under the Constitution prohibiting natural justice to citizens or the obtaining of natural justice on their behalf by certified private investigators getting access to information to enable a client and/or a citizen of Australia the right to natural justice?**

4. **Is there a prohibition within the Constitution prohibiting certified private investigators acting on behalf of their clients from being subject to the due process of law?**

5. **Does the constitution say that the government has the right to legislate to deny the people and certified private investigators acting as agents for their clients to have access to information for matters and potential matters before the courts and tribunals?**

6. **Does the constitution give to the government the right to legislate that privacy can override the common law rights for equality before the law, the right to a fair trial, the right to natural justice and the right to the due process of the law?**

7. **Have our common law rights been eroded since the framers of the constitution were content to have confidence in the common law protecting our rights? Have these rights been eroded by Statute law overriding common law?**

8. **Was it the intention of the Attorney-General in tabling the Privacy Amendment (Private Sector) Bill 2000 on the 12th April 2000 to take away the access to information in the public and private sectors from the public and certified practising investigators acting on behalf of themselves and clients for matters and potential matters before the courts and tribunals?**

It is our contention that if the Constitution does not say that we (the people) are not equal before the law, then it must follow that we are equal before the law. The omission of private investigators under **enforcement bodies 6(1)** of the **Privacy Act 1988** will have the effect or the perceived effect of seeing that justice is not being done nor is it seen to be done.

We contend that if there is no equality before the law then it must follow that no one is entitled to a fair trial nor are they entitled to natural justice nor to the due process of the law. This is the only conclusion that can be drawn by not being equal before the law as they are all directly related to one another

Mr Howard, the Prime Minister has said on many occasions that everybody is equal before the courts and that Dr Hollingsworth the ex-Governor General was denied "Natural Justice", it appears that this is the Policy of the Coalition Party as the government of the day, however it appears that the government in spite of the High Court ruling in the Leeth and Kruger cases has decided to do nothing although the High Court said that:-

Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament.

We apologise for the presumptuousness in the above submission but when you have, as private investigators have to tell distraught clients, that we cannot help them as we are prohibited from accessing information to assist in their case due to the Privacy Act.

The implications of the legislation are that Private Investigators would be in breach of the privacy provisions to do the job properly for their clients. To properly assist a client, Private investigators would have to go outside the guidelines.

The Act prohibits private Investigators from doing their job properly. The general reaction from clients when advised that Private Investigators are not able to obtain certain information is that they will find someone who is able to do so. Clients/ Politicians/Lawyers have the expectations that Private Investigators have access to certain information, in addition there are certain information access anomalies state by state. Some clients also have more access than Private Investigators (e.g. Banks have access to births, deaths & marriages in NSW, VIC, QLD but not in other states or territories, but solicitors have access to RTA records for motor vehicle accidents in NSW).

It is interesting to note that the Federal Government is now proposing uniform legislation for public universities. This supports our proposal for federal legislation in relation to the Private Investigation industry as per the letter from Daryl Williams QC. **Annexure 30**

We hope that the above information will assist in your review and we are more than prepared to attend for further discussions if you feel that it might be of assistance.

We have no objection to this submission being posted on your web page and we advise that the hard copy together with 30 Annexures will be delivered separately

Yours faithfully,

John Bracey.
21/12/04.

Attachments.