(1) ORDER PROHIBITING PUBLICATION OF THE NAMES, ADDRESSES, OR OTHER DETAILS WHICH MIGHT LEAD TO THE IDENTIFICATION OF CANCER SOCIETY CLIENTS OR THEIR FAMILY MEMBERS, OTHER THAN PLAINTIFF WHOSE ADDRESS ONLY IS NOT TO BE PUBLISHED

(2) ORDER PROHIBITING PUBLICATION OF THE NAMES, ADDRESSES, OR OTHER DETAILS WHICH MIGHT LEAD TO THE IDENTIFICATION OF NATURALWEAR CLIENTS

(3) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR TRIBUNAL

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2023] NZHRRT 35**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 030/2019
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**CHERYL CHRISTINE HORRELL**
	PLAINTIFF
AND	**BANYAN PACIFIC CAPITAL LIMITED TRADING AS NATURALWEAR**
	FIRST DEFENDANT
AND	**NWSI LIMITED TRADING AS NATURALWEAR**
	SECOND DEFENDANT

AT CHRISTCHURCH

BEFORE:
Ms MG Coleman, Deputy Chairperson
Ms WV Gilchrist, Member
Ms ST Scott QSM, Member

REPRESENTATION:
Ms CC Horrell in person
Mr R Brady, Director of Naturalwear, for first and second defendants

DATE OF HEARING: **30-31 March, 1 April 2021**

DATE OF DECISION: **31 October 2023**

(REDACTED) DECISION OF TRIBUNAL[1]

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[1] This decision is to be cited as *Horrell v Banyan Pacific Capital Ltd* [2023] NZHRRT 35. (Due to publication restrictions, the names and/or addresses of Naturalwear and Cancer Society clients referred to in this decision have been anonymised or redacted.)

OVERVIEW OF CLAIM

[1] Cheryl Horrell is a breast cancer survivor. She received her cancer diagnosis over 35 years ago, the treatment for which included a mastectomy.

[2] Ms Horrell purchased a number of breast prostheses through the Canterbury-West Coast Division of the New Zealand Cancer Society (Cancer Society), which offered this service for a number of years until, in 2016, it decided to discontinue it.

[3] In October 2018, Ms Horrell received direct marketing in her mailbox from Naturalwear, which is a retailer of breast prostheses. Naturalwear was the trading name for Banyan Pacific Capital Ltd (Banyan).

[4] Ms Horrell alleged that Naturalwear was able to send this marketing material to her because it had collected her health information in breach of rr 1 to 4 of the Health Information Privacy Code 1994 (the HIPC)[2] and that its use in direct marketing also breached the HIPC, r 10.

[5] Ms Horrell argued that Naturalwear had wrongly collected her health information in two separate ways from her Cancer Society purchases. First, it collected her warranty card which she said it had no right to hold. Secondly, she claimed that her health information was taken from the Cancer Society database which she claimed had been unlawfully acquired by Naturalwear.

[6] Prior to the hearing, Richard Brady, who represented Naturalwear, sought to substitute NWSI Ltd for Banyan as the defendant in the proceeding. He said that following a restructure, two new companies were created, NWNI Ltd and NWSI Ltd. These companies both used the trading name Naturalwear, with NWSI Ltd being the South Island retailer.

[7] Ms Horrell objected to the substitution as she was concerned this would enable the avoidance of liability for the privacy breach. No documents were filed to show that NWSI Ltd had assumed the liabilities of Banyan. To accommodate the current trading position and Ms Horrell's concerns, both NWSI Ltd and Banyan are named defendants and, in this decision, Naturalwear is used to refer to both Banyan and NWSI Ltd, as applicable.

[8] Naturalwear accepted that it breached r 10 of the HIPC by using Ms Horrell's health information for marketing purposes, but said it collected that information from a warranty card sent to Medivex Healthcare Ltd (Medivex) by the Cancer Society and not from the Cancer Society database.

[9] Medivex is an importer and distributor of breast prostheses. It supplies its products to a number of retailers, including to Naturalwear and the Cancer Society (when it was offering its retail service). Mr Brady is the sole director of Banyan, NWSI Ltd, and Medivex.

THE ISSUES

[10] For Ms Horrell to succeed in her claim she must first establish that one of the HIPC rules has been breached.[3] If she is able to do so, she must then also establish that

[2] The Health Information Privacy Code 1994 has now been replaced by a new Code promulgated in 2020. The Privacy Act 1993 (Privacy Act) has been repealed and replaced with the Privacy Act 2020. However, all references to "the Privacy Act" and "the HIPC" in this decision are those in operation at the time of the alleged privacy breach which are those in the 1993 Act and the 1994 Code.

[3] See Privacy Act 1993, s 66(1)(a).

her privacy has been interfered with by Naturalwear by showing that she has suffered one or more of the kinds of harm set out in the Privacy Act 1993 (the Privacy Act), s 66(1)(b). It is only once both a breach of HIPC rules and harm have been established that the Tribunal can consider whether it would be appropriate to grant a remedy.

[11] It is not in dispute that the information used for the direct marketing in issue was Ms Horrell's health information as defined by the HIPC, cl 4(1). Nor is it in dispute that Naturalwear was a health agency as defined in cl 4(2).

[12] It is also not in dispute that Naturalwear breached r 10 of the HIPC. This breach was acknowledged by Naturalwear in its statement of reply to the claim. Nor, by the end of the hearing, was it in dispute that the breach of r 10 had resulted in an interference with Ms Horrell's privacy, and Mr Brady accepted that a small award of damages would be appropriate.

[13] Further, it is also not in dispute that Naturalwear held a copy of Ms Horrell's warranty card, which had been shared with Naturalwear by Medivex. However, the source of the health information used for direct marketing is in dispute. Ms Horrell's position is that it came from the Cancer Society database while Mr Brady's position was that it came from her warranty card which had been sent to Medivex by the Cancer Society.

[14] Mr Brady accepted that if Medivex was not entitled to share the warranty cards it held with Naturalwear, then Naturalwear had breached the HIPC collection rules as well as r 10. He also accepted that if the Tribunal were to find that the information had been collected from the Cancer Society database Ms Horrell's health information had been collected inconsistently with HIPC rules.

[15] The issues therefore fall under four headings:

> **[15.1]** Was the source of Ms Horrell's health information used by Naturalwear for direct marketing Ms Horrell's warranty card, or was it the Cancer Society database?
>
> **[15.2]** Did Naturalwear breach any of the collection rules set out in rr 1 to 4 of the HIPC?
>
> **[15.3]** If there was a breach of the collection rules, did that breach (or breaches) result in an interference with Ms Horrell's privacy?
>
> **[15.4]** If there has been an interference with privacy, either through a breach of the collection rules or the already acknowledged interference with privacy arising out of the breach of r 10, what is the appropriate remedy (if any)?

WHAT WAS THE SOURCE OF MS HORRELL'S HEALTH INFORMATION USED BY NATURALWEAR FOR DIRECT MARKETING TO HER?

[16] Given the factual dispute as to whether the health information used for the direct marketing was acquired from the Cancer Society database or from Ms Horrell's warranty card, it is important to set out in some detail the evidence of both parties on that question.

Evidence of Cheryl Horrell

[17] Ms Horrell's evidence was that in the second week of October 2018 she received a flyer from Naturalwear in her letterbox. It was A4 size, folded in half with her name and address printed electronically at the top of the page. There was no envelope, stamp or postmark which led Ms Horrell to assume it had been hand delivered. The flyer was

addressed to Cheryl Horrell at [redacted], Christchurch, and advised that Naturalwear was offering a prosthetic fitting service in Christchurch and that Addie [Adrienne Harrison] was available for home visits.

[18] Following receipt of the Naturalwear flyer, Ms Horrell said she phoned Ms Harrison to ask how the company knew that she had had breast cancer. According to Ms Horrell, Ms Harrison claimed not to know the answer to that question but gave Ms Horrell the phone number of Naturalwear's head office for her to make further inquiries.

[19] Ms Horrell said she then rang Naturalwear's head office. Her evidence was that the woman who answered the phone responded angrily stating that the issue had been sorted ages ago. Ms Horrell said that the woman gave a range of excuses as to why she received the marketing material, including that Naturalwear was an approved provider for the Ministry of Health from which Ms Horrell understood that its approved provider status explained how Naturalwear had her records.

[20] Ms Horrell also said she contacted the Cancer Society and was told that Ms Harrison had taken a copy of its breast cancer records when she left its employment and that the Cancer Society had notified the Privacy Commissioner of its concerns.

[21] Ms Horrell then engaged in correspondence with Naturalwear. In a letter dated 1 November 2018, Ms Horrell recounted the conversation with the staff member and indicated that she was dissatisfied with the response about how her personal information had been obtained. Ms Horrell also advised Naturalwear that after receiving a number of conflicting and unsatisfactory responses from staff she had contacted both the Cancer Society and the Privacy Commissioner. After receiving no reply to her letter of 1 November 2018, she sent a follow-up email to Naturalwear on 29 November 2018 requesting a response.

[22] On 3 December 2018, Mr Brady responded in an email sent from a Medivex email address. He advised Ms Horrell that her name would have been added to its customer database after purchasing either an Amoena or Silima brand of prosthesis via the Cancer Society. The email further said that "[w]arranty cards of customer purchases of those products had been registered with the manufacturer hence how we obtained your name".

[23] After receiving that email, Ms Horrell contacted the manufacturers of Amoena and Silima products inquiring whether those companies sent warranty card information to Medivex. Both advised her that they did not.

[24] Ms Horrell also told the Tribunal that she had received an earlier advertising pamphlet from Naturalwear in late 2016 but, due to the effects of a recent head injury, she did not make a complaint at that time.

Evidence of Elizabeth Chesterman

[25] Extensive evidence was also given by Elizabeth Chesterman, the Chief Executive of the Canterbury-West Coast division of the Cancer Society about the Cancer Society's exit from its breast prosthesis retail and fitting service in October 2016 as well as the concerns she held that its database had been acquired (and used) by Naturalwear without permission.

[26] In that evidence Ms Chesterman referred to an approach to her by Ms Harrison in April 2016 regarding a proposal which had been put to Ms Harrison by Mr Brady. The proposal was that Medivex/Naturalwear would employ Ms Harrison part-time if the Cancer Society would continue to offer her a compatible part-time role. In return, it was proposed that Medivex/Naturalwear would rent the fitting room at the Cancer Society and provide a commercial service on its behalf. Ms Chesterman said that she emailed Mr Brady on 7 June 2016 to advise the proposal was not acceptable, primarily because any service offered by Naturalwear needed to be independent from the Cancer Society. Ms Chesterman further said she advised Mr Brady that the Cancer Society had been reviewing the delivery of its prothesis service and would be receptive to exiting that service if there were a guaranteed acceptable community alternative for its clients.

[27] Following the decision by the Cancer Society to exit its prothesis service, Ms Harrison accepted a position with Naturalwear. She resigned from the Cancer Society on 17 August 2016, with that resignation taking effect from 7 October 2016.

[28] In the lead-up to the Cancer Society exiting its retail business, Ms Chesterman said there were several discussions held with both Mr Brady and Ms Harrison regarding access to Cancer Society client records. Ms Chesterman further said that following the Cancer Society's decision to quit its breast prothesis fitting service Mr Brady again requested access to the Cancer Society database so that Naturalwear (on behalf of the Cancer Society) could notify the Cancer Society's clients of its exit from the prosthesis fitting role. Ms Chesterman said that the request was firmly declined, at which point she reiterated the Cancer Society's position which was that only the Cancer Society would have contact with its clients to ensure their total confidentiality and privacy. Ms Chesterman also said that this position was reinforced with Ms Harrison on numerous occasions.

[29] Up until the Cancer Society decided to exit its retail service, Ms Chesterman said the details of clients using that service were recorded on a simple hardcopy index card system. Ms Chesterman said it was necessary to create a database so that the clients could be notified of the exit. All clients who had received services from 2012 onwards were included on the database, including Ms Horrell. Ms Chesterman said a "dummy" name, "Amanda Birch", was inserted for mail monitoring purposes. The address for Amanda Birch was that of Amanda Derrick, a Cancer Society employee.

[30] Ms Chesterman said that the compilation of the database was undertaken by Ms Harrison and two other employees, one of whom was Amanda Derrick. According to Ms Chesterman, sometime after mid-August 2016 she asked Ms Derrick to take control of the database that was being separately worked on by Ms Derrick, Ms Harrison and the third staff member, and which ultimately involved merging all entries into a single spreadsheet. It was only at this final stage that the dummy entry for Amanda Birch was added to the database.

[31] On 23 September 2016, the Cancer Society sent a letter to its clients on this database, advising them that it was exiting its breast prothesis fitting service.

[32] In her evidence Ms Chesterman spoke about an incident which occurred on 28 September 2016, shortly before Ms Harrison's final day and shortly after the 23 September 2016 letter was sent out. Ms Chesterman said that Ms Harrison had been trying to sort the spreadsheet but was doing it incorrectly which resulted in a misalignment of the columns. Ms Harrison sought assistance from another staff member and the problem was resolved. On learning about the episode Ms Chesterman became concerned as there was no apparent reason for Ms Harrison to be accessing or

manipulating the completed database and instructed Ms Derrick to remove the database from a common computer drive to a secure drive.

[33] On Thursday 26 January 2017, Ms Chesterman was alerted to the fact that Naturalwear had sent a letter to Amanda Birch (Amanda Derrick) advertising its services, announcing Ms Harrison's appointment to Naturalwear, and offering former Cancer Society clients a discount voucher. Ms Chesterman said that Amanda Birch/Derrick's details could only have come from the database records because she was not an actual client but the fictional quality control entry. She had never been diagnosed with cancer, had never purchased a breast prosthesis, had never completed a warranty card, and had never made a Ministry of Health claim.

[34] Ms Chesterman's evidence was that the only way in which Naturalwear could have known the names and addresses of the former Cancer Society clients to whom letters were sent was through Ms Harrison.

[35] On 30 January 2017, Ms Chesterman instigated a search of all electronic files and emails sent from the Cancer Society to Medivex, Mr Brady or Ms Harrison in the period between August and October 2016. This search did not indicate any data had been transferred but Ms Chesterman further said the search could not identify data transferred via a personal email account accessed from the Cancer Society computer system or data transferred onto an external device.

[36] At that same time Ms Chesterman said that other former clients of the Cancer Society rang her to advise that they had received letters also. Some of those clients advised they had also received an earlier letter from Naturalwear in December 2016 prior to Christmas.

[37] Amanda Derrick did not receive the December 2016 letter. Ms Chesterman believes the reason for this was that the name and address of Amanda Birch had been added only at the very final stages of the completion of the database and that an earlier iteration of the Cancer Society database was used for the first mailout by Naturalwear in December 2016.

[38] Ms Chesterman said that although she only had first-hand knowledge of five women who received the January 2017 Naturalwear letter, she decided that it was necessary for the Cancer Society to send out a further letter advising the Cancer Society's former clients of its concern that their names and addresses had been illegally accessed. This letter was sent on 3 February 2017. The Cancer Society also advised the Offices of the Privacy and Health and Disability Commissioners, as well as the Ministry of Health of the suspected breach.

[39] Following the receipt by Cancer Society clients of the 3 February 2017 letter, the Cancer Society received numerous calls about people concerned about the breach and the explanations given to them after they contacted Naturalwear. Ms Chesterman said that she took notes of her conversations with these callers at the time the conversations took place, which she used when preparing her witness statement.

[40] That aspect of her evidence is set out below as it was filed originally in her written witness statement which she later read into the record. The written statement more

transparently identifies the spelling mistakes which were duplicated by Naturalwear in its marketing.[4]

…

2. A B received a letter from Naturalwear, along with two other women she knows (C D and E F deceased) at the same time. A told me she was concerned how Naturalwear had obtained her details so contacted the Naturalwear Auckland Office telephone number (0800 612 612) and was told by someone at that office that "the Cancer Society had sold their data base to Medivex/Naturalwear".

3. A B has supplied me with a copy of the letter she received from Naturalwear and it contains the identical details as recorded on our spreadsheet, including errors. Her name is spelt incorrectly as "[redacted]" and her address has a lower case "l" in the word Lane. These mistakes are not replicated in the Cancer Society's hard copy card record system, and I therefore believe that these were the result of a data entry mistake at the time of compiling the spreadsheet. It is also unlikely that A would have written her name and address incorrectly on any Warranty Card.

4. An entry on our spreadsheet records the name GH GH, instead of GH I (on our card system) or GH J (married name). Interestingly, G J told me that she received the Naturalwear letter addressed to GH GH, which she has forwarded to the Cancer Society. I believe this is a data entry mistake on the Cancer Society's part and is unlikely to have been recorded by G J on her Warranty Card or the Ministry of Health's subsidy claim forms, if that had been the source of Naturalwear's data.

5. In addition, on the Cancer Society's data base, G's address is incorrectly recorded as [redacted] road (lower case "r") and the letter from Naturalwear received by G contains the same error.

6. K L told me that she called the Auckland 0800 number for *Naturalwear*, regarding the letter from *Naturalwear* sent to her sister-in-law, M L. M no longer lives in New Zealand. K said that she was told by Debbie at *Naturalwear* that the company had been *"given the data base by the Cancer Society"*. This is not true.

7. Another client, N O, told me that she had contacted the Cancer Society, the Ministry of Health and *Naturalwear,* demanding information on the source of her name. N told me that she was told by Debbie that it came from the Amoena Breast Form Warranty Cards. When she said this was not ethical and she would be taking it further, Debbie from *Naturalwear* said *"it would be a shame if it went further and that if N did she would be denying their service to many other women in New Zealand".*

8. P Q, a client on our data base told me she also received a letter from Naturalwear, contacted them asking how her name had been obtained and was told it was from the Amoena Warranty. P told me she was seriously concerned about this, so contacted Amoena (Australia) Joy.Magee@amoena.com and was informed by email (copy forwarded to the Cancer Society for our records) that they had no record of her details and are very clear that the warranty names must not be used for any other purpose other than proof of purchase for warranty claims made within a two year period. I understand that P did not purchase Amoena products which is why she is not on the Amoena warranty system.

9. During a phone call I had with Addie Harrison on Thursday 9 February she told me that the details were sourced from the Amoena Warranty cards. I asked her how this could explain women purchasing an Anita product from another company, *Breast Care Products*? She told me she wasn't sure, but that Medivex used to sell Anita prostheses, however a search I conducted on the internet revealed *Breast Care Products* were established in June 2010 (prior to our 2012 cut- off date for our spreadsheet).

10. G J told me she made face to face contact with Addie Harrison on Friday 10 February 2016. This was after my phone call conversation with Addie the previous day. G told me that [sic] was told by Addie that *Naturalwear* had obtained the client names from the Ministry of Health.

[4] Italics and underlining in the original.

> 11. R S advised the Cancer Society that she had talked directly to Addie Harrison and asked about the source of her name. She told me that Addie cried on the telephone and said she had no knowledge of any of the issues she had raised.
>
> 12 T U told me that on 13 February 2017 she telephoned the *Naturalwear* Auckland office and was informed that her name was sourced from the Amoena warranty cards.
>
> 13. V W telephoned the Cancer Society on 13 February 2017 to advise that his wife, X, had died three years ago and he was most distressed to have received mail from both *Naturalwear* and the Cancer Society. He told the Cancer Society that he had phoned Addie earlier and she had told him that X's name came from suppliers in Melbourne and Germany.

[41] Ms Chesterman added by way of summary:[5]

> By the time communication ceased with Richard Brady in May 2017 the Cancer Society was aware of at least thirty women who had received unsolicited letters from *Naturalwear*. Eight of these women had purchased non *Medivex/Naturalwear* products, so their names could not have been sourced from warranty cards held by *Naturalwear.* Two of these women are deceased. In addition, the plaintiff, Cheryl Horrell, has since come forward … the address on both the Cancer Society's data-base spreadsheet and on the letter she received from *Naturalwear* bear the same error – [redacted] rather than its correct spelling of [redacted]. The Cancer Society had entered this incorrectly into their spreadsheet, and a likely explanation is that it was transposed with this error from the Cancer Society's spreadsheet to *Naturalwear's* data base. It is very unlikely that Ms Horrell would have spelt her own street name incorrectly on warranty information purportedly held by *Naturalwear*.

[42] In light of Ms Chesterman's concerns that Naturalwear had somehow obtained the names and addresses of Cancer Society clients, in February 2017 Ms Chesterman engaged the services of Mike Kyne, from Kyne Management Services, to investigate the privacy breach.

[43] Ms Chesterman said there were a series of communications between Mr Kyne and Mr Brady between early February 2017 and May 2017. She referred in her evidence to discussions taking place both in person and by email. Ms Chesterman said that despite the Cancer Society's evidence being presented to Mr Brady, he maintained the position that the Cancer Society database had not been acquired by Naturalwear, and that the information used for marketing came via 120 Cancer Society customers' warranty cards held by Medivex. However, Ms Chesterman also referred to a letter dated 13 April 2017 from Mr Brady to Mr Kyne. In that letter Mr Brady said:

> We accept there may be a few names on the Naturalwear database that must have come from the Cancer Society list somehow. I can not [sic] speculate how this happened, yet I understand this [is] a small number – perhaps 5 – when compared to the overall database of 700-800 names.

[44] Ms Chesterman's evidence was that communication continued until 19 May 2017 when the parties met face to face at the Cancer Society in Christchurch. A letter dated 8 June 2017 sent by Ms Chesterman to Mr Brady indicated there were differing interpretations of the outcome of that meeting and that the Cancer Society reserved the right to take whatever steps it considered necessary to protect its integrity and the confidentiality of its clients.

[45] According to Ms Chesterman, the Cancer Society reluctantly made a decision not to pursue the matter in the courts due to the cost involved and from a desire not to re-traumatise and publicise the status of its clients.

[5] Italics and underlining in the original.

Evidence of Richard Brady

[46] Mr Brady's evidence was that the names and addresses of Cancer Society clients had come from warranty cards that had been sent to Medivex as the importer and distributor of prosthetic products. Warranty cards contained two parts. The first part was the customer or client copy which was given to the customer when a purchase was made. The other part was the store copy which was supposed to be retained by the retailer.

[47] Mr Brady said that the store copy part of the warranty was received by Medivex when exchanges or refunds were requested. He also said that on other occasions the store copy warranty card, which was supposed to be kept by the retailer, was received by Medivex on an unsolicited basis. He accepted this was not normal practice but did occur. His estimate was that it occurred in only 5 to 10 per cent of cases. Mr Brady accepted that Ms Harrison had sent store copies of warranty cards to Medivex shortly before she left the Cancer Society but said this would not have amounted to any more than 10. He was not able to advise whose warranty cards were sent by Ms Harrison.

[48] Mr Brady's evidence was that Medivex had held around 120 store copy warranty cards that belonged to former customers of the Cancer Society which were used by Naturalwear for marketing purposes. Mr Brady said that only these women were sent the marketing letters by Naturalwear. Mr Brady further said that as there was no evidence that a mail out to the 700–900 names on the Cancer Society database ever took place, the health information for direct marketing to former Cancer Society clients must have come from store copy warranty cards not from the database.

[49] Mr Brady said that after his discussions with the Cancer Society in 2017, at its request he shredded all warranty cards held by Medivex and Naturalwear for the approximately 120 former Cancer Society clients on its database, and also removed all other references to those clients from all business (including computer) records. The shredding of the warranty cards was the reason, Mr Brady said, that Naturalwear was unable to produce the warranty cards as evidence of the replication of the spelling errors.

[50] Mr Brady accepted that Ms Horrell's information was not removed from the database as part of that process although he said that the warranty card would have been destroyed.

[51] In the lead-up to the hearing, Mr Brady sought the services of an IT specialist to investigate if any of the cards remained stored on the computer system of Naturalwear and/or Medivex and provided scanned versions of part of 33 warranty cards retrieved as part of Naturalwear's evidence. This included a scanned copy of Ms Horrell's warranty card.

[52] Mr Brady did not ask the IT specialist to locate copies of the 120 letters he claimed were sent to former Cancer Society clients. Nor did he ask the IT specialist to locate the deleted version of the database used to send out those letters. Mr Brady's reason for not doing so was that once he had located scanned versions of the store copy of the warranty cards, he felt he had what he considered was critical for his case. Mr Brady said that cost was an issue and he wanted to ensure that any money spent on the forensic investigation of his computer records provided value to Naturalwear. Mr Brady said that $1,000 had been spent on this exercise before he called it to a halt.

[53] Mr Brady accepted that the warranty card he held for Ms Horrell did not replicate the spelling error in the marketing letter sent to her. The warranty card had her street address spelt as "[redacted]", whereas the marketing material was addressed to

Ms Horrell at "[redacted]", the same spelling of her address as on the Cancer Society database. Mr Brady's explanation for Ms Horrell's address being spelt identically in the marketing material and in the Cancer Society database was that the same human error was made when the warranty card information was typed into Naturalwear's database.

[54] Mr Brady's explanation of the other identical spelling errors referred to by Ms Chesterman, the spelling of A B's name as "[redacted]" and Ms J's first name GH being repeated as her family name instead of her actual family name J, were also human errors despite accepting that the mistake made in the case of Ms J was an unusual one.

[55] In relation to the letter sent to the dummy (quality control) entry in the name of Amanda Birch, Mr Brady speculated in his closing submissions that a bogus warranty card in Amanda Birch's name was sent to Naturalwear to "entrap" it. This was denied by Ms Chesterman, who said that she did not instruct anyone to do so and that no one would have taken this step without it being directed by her.

[56] Mr Brady undertook a comparison between the spelling of names and addresses on the 33 warranty cards Naturalwear provided as part of its evidence and those same names on the Cancer Society database. That exercise demonstrated that while the spelling of some of the names and addresses were the same, approximately half, including that of Ms Horrell, were not. The differences included Naturalwear holding warranty cards for former Cancer Society clients that were not on the Cancer Society's database, along with differences in the spelling of names and/or addresses between the warranty card information and the Cancer Society database.

[57] Mr Brady said this demonstrated that errors were common and submitted that it was possible that the now destroyed warranty cards contained the same information as the Cancer Society database or that the same errors were made when transcribing information from the warranty cards to Naturalwear's database as were made by the Cancer Society when compiling its database from its index card system. Mr Brady submitted this exercise supported Naturalwear's claim that the names and addresses it used to compile its database for direct marketing were sourced from warranty cards and not the Cancer Society database.

[58] Mr Brady also denied the suggestion put to him by Ms Horrell that Naturalwear had improperly received a copy of her warranty card from Ms Harrison. He said that it was either received in error or was sent to Naturalwear because Ms Horrell was dissatisfied with her fitting at the Cancer Society, and the Cancer Society inquired about replacement products.

[59] Ms Horrell asked Mr Brady why Ms Harrison had not been called to give evidence. Mr Brady's reason for not doing so was that Ms Harrison was busy doing her job and that as he was privy to how the warranty cards had been handled, he did not consider her evidence would have added significantly to the hearing.

[60] In relation to his comment in the letter to Mr Kyne (referred to above at [43]) that a few of the names on Naturalwear's database must have come from the Cancer Society list, Mr Brady said that he made the comment because of the dummy client, Amanda Birch, receiving a letter but also said he should not have made it. He said that at that stage he did not have the copies of the warranty cards that he now has which he submitted demonstrated the letters were sent based on information from warranty cards.

[61] In response to questioning from the Tribunal, Mr Brady gave further evidence about his discussions with the Cancer Society and Mr Kyne arising out of the Cancer Society's

concern that Naturalwear had improperly accessed its database. Mr Brady said that he had shown Ms Chesterman and Mr Kyne a couple of warranty cards, although he did not challenge Ms Chesterman's evidence that she was not shown any warranty cards. He further said that it never occurred to him to show them all of the warranty cards or to show them his database of former Cancer Society clients to establish the match between it and the warranty cards Naturalwear held.

[62] This is somewhat surprising given the seriousness of the allegations being levelled at Naturalwear by the Cancer Society, not to mention the potential reputation damage as evidenced by the 100 plus angry callers whom Mr Brady said phoned Naturalwear following their receipt of the letter from the Cancer Society. However, Mr Brady said that the lack of specific details from the Cancer Society during this time meant it was difficult to address the complaints. He described the process as "like shooting at ghosts".

What was the source of Ms Horrell's personal health information?

[63] The Tribunal was presented with two options as to the source of Ms Horrell's health information that was used by Naturalwear for direct marketing purposes. Either it came from the database, or it came from her warranty card.

[64] We accept that Medivex was sent the store copy part of warranty cards when there were requests for refunds or replacements of faulty products. We also accept Medivex could have been sent copies of warranty cards in error, although on Mr Brady's own evidence this number was small. We further accept that Ms Horrell's warranty card was sent to Medivex.

[65] We do not accept, however, Mr Brady's primary contention that if Naturalwear can produce Ms Horrell's warranty card then we must accept its position, that all the information used for direct marketing came from warranty cards. Mr Brady's evidence that warranty card information was used for direct marketing does not exclude information from other sources also being used for that purpose as well.

[66] Mr Brady further submitted that the Tribunal is not able to reach a factual finding that the source of the health information was the Cancer Society database because Naturalwear had shredded the warranty cards it held at the request of the Cancer Society, meaning that Naturalwear now is unable to establish the warranty cards as the source of Ms Horrell's marketing material.

[67] That submission mistakes the standard of proof that applies in this case. Ms Horrell does not have to prove her case beyond reasonable doubt. The question we must consider is whether it is more likely than not that the Cancer Society database was the source of Ms Horrell's health information used for marketing. If there is cogent, credible evidence that this was the case, the Tribunal is entitled to so find.

[68] In our view there is evidence which demonstrates that some information was taken from the Cancer Society database.

[69] First, there is the direct marketing to Amanda Birch, the dummy entry entered into the Cancer Society database for quality control mail monitoring purposes. As noted earlier, the address for Amanda Birch was that of Amanda Derrick who worked for the Cancer Society and who was responsible for the compilation of the Cancer Society database. As Amanda Birch is fictitious no warranty card for prosthetic purchases would ever have been received by Medivex or Naturalwear in the name of Amanda Birch.

[70] Mr Brady's explanation for the receipt of the marketing letter from Naturalwear by Ms Derrick (in the name of Amanda Birch) was that the Cancer Society had sent a warranty card in Amanda Birch's name to "entrap" Naturalwear because the Cancer Society harboured suspicions about Naturalwear and Ms Harrison.

[71] There was no evidence that such a warranty card was sent, but there was unchallenged evidence that it did not. Ms Chesterman said that she did not authorise the sending of the warranty card in the name of Amanda Birch to Medivex and that no one would have sent it without a direction from her to do so. Further, had the Cancer Society harboured suspicions about Naturalwear or Ms Harrison at that point, the Cancer Society would not have included information about Naturalwear's services (as one of four alternative suppliers) in its mailout on 23 September 2016 in which it advised its clients that it was exiting its retail business. We also note Mr Brady's initial acceptance in his letter of 13 April 2017 to Mr Kyne that a few of the names must have come from the Cancer Society database somehow.

[72] For these reasons, we are unpersuaded that a false warranty card was sent. Instead, we find that the source information for the marketing letter sent in the name of Amanda Birch to Ms Derrick's address was from the Cancer Society database.

[73] Mr Brady accepted that Ms Horrell's warranty card had her address spelt correctly. His explanation for the misspelling in Naturalwear's marketing letter was that there had been a transcription error and that it was simply a coincidence that her address in Naturalwear's marketing letter replicated the address errors in the Cancer Society database.

[74] We accept that transcription errors occurred when the Cancer Society compiled its database. We also accept as possible that coincidental errors could have been made by Naturalwear, as Mr Brady invited us to. However, we must decide this case based not on what might have occurred but on the evidence before the Tribunal, and whether that evidence satisfies us on the civil (balance of probabilities) standard that Ms Horrell's health information came from the Cancer Society database.

[75] Part of that evidence demonstrates that the address information for the marketing letter sent to Ms Derrick in the name of Amanda Birch came from the Cancer Society database. We also consider that the name error in G J's case, where her first names were repeated instead of her first name being followed by her family name, is an unusual error to have been made coincidentally (as Mr Brady accepted) especially when made by two separate organisations from different source data, being the warranty card in the case of Naturalwear, and the index card system in the case of the Cancer Society. While we accept as theoretically possible that there was a warranty card in the name of GH GH, there is no evidence to support that contention. We also note that the Naturalwear invoice dated 10 February 2017, which was provided by Mr Brady as evidence of G J being a Naturalwear customer, was correctly addressed to G J, not GH GH. Given that the Amanda Birch information can only have come from the Cancer Society database, we find that it is more likely than not that G J's details were also sourced from that database.

[76] It is against that background that we need to consider the source of Ms Horrell's health information.

[77] The flyer addressed to Ms Horrell contained the same errors as in the Cancer Society database. In contrast, her warranty card contained the correct spelling of her address. Given that Ms J's and Ms Birch's (Derrick's) address information was sourced

from the Cancer Society database, we find it more likely that this too was the source of Ms Horrell's address.

[78] In reaching this conclusion we expressly make no finding that the whole of the Cancer Society database was taken, either in hard copy or electronic form. There was no evidence before the Tribunal that would support such a determination. Ms Chesterman acknowledged that the investigation she initiated did not indicate the database had been downloaded and we accept Mr Brady's submission there was no evidence that Naturalwear sent out more than 120 promotional letters to former Cancer Society customers.

[79] We also stop short of finding who was responsible for collecting Ms Horrell's health information from the Cancer Society database and stop short of finding that Mr Brady was aware that information from that database had been used by Naturalwear for marketing.

[80] We turn now to consider whether there has been a breach of the HIPC collection rules.

WAS THERE A BREACH OF THE COLLECTION RULES?

The collection rules

[81] Rules 1 to 4 of the HIPC govern the collection of health information by health agencies:

[81.1] Rule 1 deals with the purpose for which information is collected;

[81.2] Rule 2 deals with the source of any health information collected and also requires an agency to collect health information from the individual concerned unless one or more of the stated exceptions apply;

[81.3] Rule 3 deals with transparency of the collection of health information; and

[81.4] Rule 4 deals the manner of collection of health information.

[82] In broad terms, these rules, which also reflect Information Privacy Principles (IPPs) 1 to 4, give effect to the Collection Limitation Principle in the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (the OECD Guidelines),[6] which reads:

> **Collection Limitation Principle**
>
> 7 There should be limits to the collection of personal data and such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

[83] As the Tribunal has noted in other cases, given that the purpose of the Privacy Act as set out in the long title to the Act is to promote and protect individual privacy in general accordance with the OECD Guidelines, exceptions to the Collection Limitation Principle are to be as few as possible.[7]

[6] The OECD Guidelines were adopted by OECD member countries in September 1980. See, for example, Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at [3.2].
[7] See, for example, *Holmes v Housing New Zealand Corporation* [2014] NZHRRT 54 at [74].

[84] The term "collect" is defined in the Privacy Act, s 2, to exclude "unsolicited information" but is not limited in any other way. Applying the OECD Guidelines, the Tribunal has concluded that "collect" must be given a broad and purposive meaning of "gathering together, the seeking of or the acquisition of personal information".[8] In contrast, "unsolicited" is to be given a narrow definition and will be limited to information which comes into the possession of an agency in circumstances where it has taken no active steps to acquire or record that information.[9]

[85] While we have found that the information used by Naturalwear for marketing to Ms Horrell came from the Cancer Society database, Mr Brady acknowledged that Medivex had also shared Ms Horrell's warranty card with Naturalwear. Therefore, two potential breaches of the HIPC collection rules arise.

[86] In relation to the former, Mr Brady accepted that were the Tribunal to find that the source of Ms Horrell's health information was the Cancer Society database, the rules would have been breached. In relation to the latter, Mr Brady accepted that if sharing of health information was not permitted between Medivex and Naturalwear, Naturalwear had collected that information contrary to the rules.

[87] We deal with the second issue, the sharing of information by related companies, first. Further, in fairness to Mr Brady as a lay litigant, we then also consider whether there has been a breach of the HIPC collection rules, rather than rely on his concession which came only during the late stages of the hearing.

Sharing information by related companies

[88] Mr Brady accepted that Medivex and Naturalwear were separate agencies but suggested that as "related" companies, as that term is understood under the Companies Act 1993 (the Companies Act), Naturalwear and Medivex are entitled to share information including, in the particular circumstances of this case, warranty card information.

[89] A related company is defined in s 2(3) of Companies Act as follows:

> In this Act, a company is related to another company if—
>
> (a) the other company is its holding company or subsidiary; or
>
> (b) more than half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, are held by the other company and companies related to that other company (whether directly or indirectly, but other than in a fiduciary capacity); or
>
> (c) more than half of the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, of each of them are held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or
>
> (d) the businesses of the companies have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable; or
>
> (e) there is another company to which both companies are related;—
>
> and related company has a corresponding meaning.

[8] *Armfield v Naughton* [2014] NZHRRT 48 at [44].
[9] *Armfield*, above n 8, at [44].

[90] There was sufficient evidence before us to conclude that Medivex and Naturalwear were related companies.

[91] Companies Office records reveal that Naturalwear and Medivex have shareholding in common. Mr Brady was the sole director of both companies, Naturalwear and Medivex shared premises, and although Naturalwear and Medivex had separate customer databases they shared a computer system. Further, staff from both Medivex and Naturalwear compiled the database that Naturalwear used for its direct marketing to Cancer Society clients. The evidence also included correspondence before the Tribunal between the Cancer Society and Mr Brady which was sent to and from Medivex, not Naturalwear, even though it was about Naturalwear's actions. Mr Brady also responded to Ms Horrell's complaint about Naturalwear from a Medivex email address.

[92] None of that evidence, however, displaces the fact that even related companies are separate agencies and Mr Brady did not seek to argue otherwise.

[93] Agency is defined in s 2(1)(a) of the Privacy Act as:

> [A]ny person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector; and, for the avoidance of doubt, includes a department.

[94] This means that if this were a case involving IPPs rather than HIPC rules, Naturalwear would need to bring itself within one of the exceptions set out in IPP 1 to 4 to avoid a breach of those collection principles.

[95] It is not different under the HIPC. The definition of health agency in cl 4(2) does not include related companies within the definition of a health agency and, as in the case of the Privacy Act, there is no reason to read in such an expanded definition. This is particularly so given the confidential and sensitive nature of health information.

Was there a breach of Rule 1?

[96] Rule 1 of the HIPC states:

> **Rule 1**
>
> **Purpose of Collection of Health Information**
>
> Health information must not be collected by any health agency unless:
>
> (a) the information is collected for a lawful purpose connected with a function or activity of the health agency; and
>
> (b) the collection of the information is necessary for that purpose.

[97] Marketing is a lawful purpose connected with a function of a health agency such as Naturalwear which is engaged in retailing breast protheses and provides an associated fitting service. The question is whether it is necessary for it to collect information from former clients of the Cancer Society for this purpose. "Necessary" in this context is to be understood as "needed or required in the circumstances, rather than being merely desirable or expedient".[10]

[10] See *Tan v New Zealand Police* [2016] NZHRRT 32 at [77].

[98] Ms Horrell accepted that marketing was a lawful purpose but argued that advertising the services of Naturalwear could have occurred in other ways such as through newspaper advertisements, meaning it was not necessary to collect her information at all.

[99] Mr Brady, on the other hand, defined the purpose more narrowly as direct marketing to a particular person, meaning that it would always be necessary to collect their health information first in order to undertake such marketing.

[100] In our view, the purpose cannot be defined so narrowly that the issue of necessity effectively results in only one answer. This would be inconsistent with the purpose of the Privacy Act as set out in the long title which is to promote and protect individual privacy in accordance with the OECD Guidelines which emphasise the importance of consent by the individual concerned to the collection of their data. To suggest that consent could be sidestepped for commercial convenience is not consistent with the OECD Guidelines, and therefore inconsistent with the principles underpinning the Privacy Act itself. It would undoubtedly be expedient for Naturalwear to be able to collect information from the Cancer Society database or from Medivex but that is not the meaning to be given to "necessary" in r 1 of the HIPC.

[101] We agree with Ms Horrell that it was not necessary for Naturalwear to collect from either the Cancer Society or from Medivex to market its services to prospective customers. We find that r 1 was breached.

Was there a breach of rule 2?

[102] Rule 2 of the HIPC states:

Rule 2

Source of Health Information

(1) Where a health agency collects health information, the health agency must collect the information directly from the individual concerned.

(2) It is not necessary for a health agency to comply with subrule (1) if the agency believes on reasonable grounds:

(a) that the individual concerned authorises collection of the information from someone else having been made aware of the matters set out in subrule 3(1);

(b) that the individual is unable to give his or her authority and the health agency having made the individual's representative aware of the matters set out in subrule 3(1) collects the information from the representative or the representative authorises collection from someone else;

(c) that compliance would:
(i) prejudice the interests of the individual concerned;
(ii) prejudice the purposes of collection; or
(iii) prejudice the safety of any individual;

(d) that compliance is not reasonably practicable in the circumstances of the particular case;

(e) that the collection is for the purpose of assembling a family or genetic history of an individual and is collected directly from that individual;

(f) that the information is publicly available information;

(g) that the information:
(i) will not be used in a form in which the individual concerned is identified;

(ii) will be used for statistical purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or

(iii) will be used for research purposes (for which approval by an ethics committee, if required, has been given) and will not be published in a form that could reasonably be expected to identify the individual concerned;

(h) that non-compliance is necessary:

(i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences;

(ii) for the protection of the public revenue; or

(iii) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or

(i) that the collection is in accordance with an authority granted under section 54 of the Act.

[103] Ms Horrell said that whether Naturalwear took the information from the database or from warranty cards, it was not collected from her and should have been.

[104] Initially Mr Brady argued that Naturalwear had reasonable grounds for believing that compliance was not reasonably practicable in the circumstances, thus falling within the exception set out in r 2(2)(d). He submitted it was not possible for Naturalwear to collect the information from the individuals themselves until they found out from Medivex who those individuals were. Again, there is a circularity of approach, and it cannot be the case that the rule could be circumvented in that way. Mr Brady also accepted in response to questions from the Tribunal that his position was inconsistent with the principles that underpinned the Privacy Act.

[105] In any event, this argument only applies to the situation where information came from warranty cards. We have found that Ms Horrell's health information came from the Cancer Society database. Mr Brady concedes that if the Tribunal finds information has been collected from the Cancer Society database, Ms Horrell's health information had been collected inconsistently with the HIPC.

[106] We find that the collection of information from the Cancer Society database and the sharing of warranty cards have both breached r 2 of the HIPC.

Was there a breach of rule 3?

[107] As noted earlier, r 3 of the HIPC is designed to ensure the transparency of the collection of health information. Rule 3 states:

Rule 3

Collection of Health Information from Individual

(1) Where a health agency collects health information directly from the individual concerned, or from the individual's representative, the health agency must take such steps as are, in the circumstances, reasonable to ensure that the individual concerned (and the representative if collection is from the representative) is aware of:

(a) the fact that the information is being collected;

(b) the purpose for which the information is being collected;

(c) the intended recipients of the information;

(d) the name and address of:

(i) the health agency that is collecting the information; and

(ii) the agency that will hold the information;

(e) whether or not the supply of the information is voluntary or mandatory and if mandatory the particular law under which it is required;

(f) the consequences (if any) for that individual if all or any part of the requested information is not provided; and

(g) the rights of access to, and correction of, health information provided by rules 6 and 7.

(2) The steps referred to in subrule (1) must be taken before the information is collected or, if that is not practicable, as soon as practicable after it is collected.

[108] In our view, r 3 is not engaged as it is predicated on information being collected directly from the individual concerned, which was not the case here.

Was there a breach of rule 4?

[109] Rule 4 of the HIPC governs the manner of collection. It provides that:

Rule 4

Manner of Collection of Health Information

Health information must not be collected by a health agency:

(a) by unlawful means; or

(b) by means that, in the circumstances of the case:

(i) are unfair; or

(ii) intrude to an unreasonable extent upon the personal affairs of the individual concerned.

[110] Knowledge and consent are important considerations in determining whether health information has been collected by unfair means. In this case, Ms Horrell neither knew her health information was being collected by Naturalwear nor did she consent to it. Ultimately, however, what amounts to collection by unfair means is context dependent.[11]

[111] One of the issues in *Harder v Proceedings Commissioner,*[12] was whether the taping of a phone conversation between a lawyer and the other party in a civil proceeding was unfair. The Complaints Review Tribunal (CRT) held that it was, basing this conclusion on the perceived power imbalance between a lay litigant and a lawyer. The High Court upheld the CRT's finding of unfairness on the basis that taping the conversation represented a breach of professional standards. However, the Court of Appeal disagreed that taping the conversation meant the personal information was collected unfairly. It considered that it must have been anticipated that a record of the conversation would be made and that a recording provided the most accurate record of it. In reaching this decision it found that the primary purpose of the prohibition against unfair collection was to prevent people being induced into supplying personal information they would not otherwise have supplied, which it said did not arise on the facts of that case.[13]

[112] While that may suggest that IPP 4 (or as in this case the HIPC, r 4) only applies where someone is induced to supply personal information by means which are unfair, we do not read that decision to limit the application of IPP 4 to those circumstances. As the Tribunal noted in *Lehmann v Canwest Radioworks Ltd,*[14] *Harder* was concerned with harm to the person who supplied the information, not harm caused to the person who was the subject of the information. We agree with the Tribunal in *Lehmann* that the Court of Appeal

[11] *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 (CA) at [32] and [34].
[12] *Harder*, above n 11.
[13] At [31]–[33].
[14] *Lehmann v Canwest Radioworks Ltd* [2006] NZHRRT 35 at [73].

did not intend to exclude from consideration any harm suffered by the subject of the information.

[113] Medivex permitted the collection of health information by Naturalwear because of the closeness of the association between the two companies. The decision to disclose and collect respectively was made by Mr Brady in his capacity as the director of both companies. Mr Brady acknowledged that other retailers would not have been provided with the same information that Naturalwear was permitted to collect from Medivex. Because of the closely held nature of the two companies the decision to collect the information was in effect a secret one, and in this sense the collection was surreptitious. The fact that Ms Horrell was not induced to provide the information does not detract from our view that it was nevertheless collected by unfair means. The fact that the information collected was highly sensitive health information which was used for commercial gain also supports the finding that r 4 of the HIPC has been breached.

[114] Similarly, we also find that the means by which Ms Horrell's health information was collected from the Cancer Society database was unfair and in breach of r 4. While we have stopped short of finding how and by whom the information was taken, it was highly sensitive information that was clearly collected clandestinely without the knowledge of the Cancer Society from which it was uplifted.

[115] Having found this breach of r 4, it is unnecessary to deal with Ms Horrell's argument that it was collected unlawfully.

Breach of r 10 accepted by Naturalwear

[116] Naturalwear accepted right from the outset that it had breached r 10 of the HIPC. That rule prohibits health information collected for one purpose being used for any other purpose unless the agency believes on reasonable grounds that one of the exceptions set out in r 10 applies.

Rule 10

Limits on Use of Health Information

(1) A health agency that holds health information obtained in connection with one purpose must not use the information for any other purpose unless the health agency believes on reasonable grounds:

(a) that the use of the information for that other purpose is authorised by:

(i) the individual concerned; or
(ii) the individual's representative where the individual is unable to give his or her authority under this rule;

(b) that the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained;

(c) that the source of the information is a publicly available publication [and that, in the circumstances of the case, it would not be unfair or unreasonable to use the information];

(d) that the use of the information for that other purpose is necessary to prevent or lessen a serious […] threat to:

(i) public health or public safety; or
(ii) the life or health of the individual concerned or another individual;

(e) that the information:

(i) is used in a form in which the individual concerned is not identified;

(ii) is used for statistical purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or

(iii) is used for research purposes (for which approval by an ethics committee, if required, has been given) and will not be published in a form that could reasonably be expected to identify the individual concerned;

(f) that non-compliance is necessary:

(i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or

(ii) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation);

(g) that the use of the information is in accordance with an authority granted under section 54 of the Act.

[117] It does not matter for the purposes of the r 10 breach whether the information came from warranty cards or the Cancer Society database. Mr Brady did not suggest any of the exceptions set out in r 10 applied in either case. We agree that on any view of the facts there has also been a breach of this rule.

HAS THERE BEEN AN INTERFERENCE WITH MS HORRELL'S PRIVACY?

[118] As noted earlier in this decision, the Tribunal only has jurisdiction to grant a remedy if Ms Horrell is also able to establish that these breaches of the HIPC have interfered with her privacy.

[119] What amounts to an interference with privacy is set out in s 66(1) of the Privacy Act.

66 Interference with privacy

(1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—

(a) in relation to that individual,—

(i) the action breaches an information privacy principle; or

(ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or

(iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or

(iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or

(iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and

(b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—

(i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or

(ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or

(iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

[120] This section requires Ms Horrell first to establish that there has been a breach of HIPC rules by Naturalwear, thus meeting the requirement of s 66(1)(a). We have found she has done so. She must then also establish that one or more of the thresholds set out in s 66(1)(b) has been met, and that the breach of the HIPC rules was a material factor in the harm she suffered.

[121] In this case, the focus is on s 66(1)(b)(iii), being whether the breach of the HIPC rules has resulted in significant humiliation, significant loss of dignity or significant injury to feelings.

[122] What is encompassed within the concept of injury to feelings was described by the Tribunal in *Director of Proceedings v O'Neill,*[15] in the following terms:

> [29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. … However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[123] The requisite causal link between the breach of the IPPs and the harm caused by it was discussed in *Taylor v Orcon Ltd*:[16]

> [61] … [A] plaintiff claiming an interference with privacy must show the defendant's act or omission was a contributing cause in the sense that it constituted a material cause. The concept of materiality denotes that the act or omission must have had (or may have) a real influence on the occurrence (or possible occurrence) of the particular form of harm. The act or omission must make (or may make) more than a de minimis or trivial contribution to the occurrence (or possible occurrence) of the loss. It is not necessary for the cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. No form of words will ultimately provide an automatic answer to what is essentially a broad judgment.

[124] That approach applies equally to the HIPC rules.

[125] In her evidence, Ms Horrell spoke of how she felt following her receipt of Naturalwear's flyer. She said she found it incomprehensible that a company that imports artificial breasts for women who have had mastectomies would hunt down their information to send them advertising and would wake in the night thinking about it. Ms Horrell said it caused her to relive some of the trauma from the early period following her cancer diagnosis where she thought she was going to die and had a recurring nightmare about people demanding that she show her prosthesis which is then handed around a group of people for examination.

[126] Ms Horrell also gave evidence more generally about her views about receiving direct marketing in her mailbox. She said that she has an "Addressed Mail Only" sign on her letterbox and a sticker on her front door turning away all salespeople and door-to-door representatives, including those promoting religion, charity, and politics. Ms Horrell said she had very clear boundaries about who she is and how she lives her life and that part of the principles by which she lives is to strongly object to being pursued by marketers of any kind.

[127] Ms Horrell further referred to the impact of her interactions with Naturalwear following receipt of its direct marketing. She said she felt she was given the "run around" by Naturalwear staff when she asked them how they got her name and address. She also

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[15] *Director of Proceedings v O'Neill* [2001] NZAR 59 (HC).
[16] *Taylor v Orcon Ltd* [2015] NZHRRT 15, (2015) 10 HRNZ 458 at [61].

felt that she was fed a mix of lies and red herrings which made her angry and upset and that she was treated with hostility by Naturalwear staff.

[128] Ms Horrell was also critical of the fact that Naturalwear had not deleted her details from its records in 2017 after concerns were raised by the Cancer Society, which led to her receiving a second pamphlet in 2018. She said that she is meticulous with the safe keeping of her records and that it was devastating to discover her private health information had fallen into the wrong hands. She said that Naturalwear should have acknowledged what it had done without excuse at the outset and left her to get on with her life. Had it done so, she said that she would have withdrawn her complaint. Instead, she said she has experienced ongoing humiliation and trauma.

[129] Ms Horrell's evidence of the impact on her can perhaps be summed up in the following passage from her evidence:

> Not only was Naturalwear uninvited, unwelcome and intruding into my life, it went on to minimise the breach of my privacy. The receipt of inappropriate advertising was traumatic but the realisation that the company had collected my breast cancer information without my knowledge or consent was devastating. When Naturalwear staff responded to my queries with inappropriate statements and conflicting explanations, I felt it was shutting down my questions.

Conclusion on interference with privacy

[130] Ms Horrell has satisfied the Tribunal that she suffered significant injury to her feelings through the collection of her highly personal health information and its use by Naturalwear to market its products and services to her. We also accept Ms Horrell's evidence of her interactions with Naturalwear staff following her receipt of the marketing flyer and are also satisfied that this added to her distress.

REMEDIES

[131] Having found an interference with privacy, we now consider the question of remedies. The remedies that may be granted are those set out in the s 85 of the Privacy Act:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
>
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
>
> (c) damages in accordance with section 88:
>
> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
>
> (e) such other relief as the Tribunal thinks fit.
>
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.

(3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).

(4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[132] Section 88(1) provides for three specific types of damages:

88 Damages

(1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:

(a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:

(b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:

(c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

[133] In deciding what (if any) remedy to grant, the Tribunal is required under s 85(4) to consider the conduct of Naturalwear.

Remedies sought

[134] Ms Horrell originally sought $10,000 in damages but she later increased this to $20,000. She did so in response to the way in which she perceived Naturalwear conducted the litigation which she said wore her down and increased her levels of stress. Ms Horrell described the additional $10,000 as punitive damages for providing a copy of her warranty card which Naturalwear had previously claimed to have destroyed and for restructuring the business so that Naturalwear became the trading name of a different company which she said was to escape the jurisdiction of the Tribunal. She also said the additional sum better reflected the amount of time she had spent on the case as well as the cost of materials such as toner for printing documents. Ms Horrell asked that the punitive damages be paid to the Cancer Society in recognition of the trauma and distress caused to its clients and staff.

[135] In addition to the claimed damages against Naturalwear, Ms Horrell claimed $1,500 for a new prosthesis and bras to support the prosthesis. She also wanted Ms Harrison to be fined $100, with the fine to be paid to her former employer, the Cancer Society.

[136] In its statement of reply Naturalwear said that it had acknowledged its mistake in using health information for direct marketing and that it had taken steps to ensure it would not happen again. This included privacy training for its staff and implementing the other recommendations made by the Ministry of Health and the Privacy Commissioner. It also rejected the accusation that its response was insincere and that it had failed to take its privacy obligations seriously. It said it had already responded to her initial requests to apologise and to remove all her details from its records. In relation to the claimed damages, the payment for $1,500 for a new prosthesis and bras was labelled as opportunistic by Naturalwear as no claim had been made previously that the fitting or product had been substandard.

[137] Naturalwear's initial position was that no sum for humiliation and distress should be paid given that Naturalwear carried out all of Ms Horrell's requests made at the time. However, it adopted a revised position at the conclusion of the hearing. In his closing submissions Mr Brady acknowledged that sending the letter offering Naturalwear's service to Ms Horrell was utterly wrong. He accepted it was a breach of her privacy and unreservedly apologised to her for the obvious stress caused by it. Mr Brady also said that he admired and respected Ms Horrell's courage in continuing with the claim and for the strength she had shown in pursuing it.

[138] Mr Brady believed that damages of $2,500 for emotional harm fairly recognised the emotional hurt and pain caused to Ms Horrell by sending her the marketing letter, and that a further sum of $500 was justified to meet her actual costs in preparing the bundle of documents and other similar costs. He also confirmed that Naturalwear would not seek costs against Ms Horrell even if the judgment went in its favour. Mr Brady rejected the notion that punitive damages were warranted, as he did not consider Naturalwear's conduct was outrageous in any way, repeating his earlier denial of any wrongdoing in relation to the Cancer Society database.

Damages

[139] The general principles relating to the assessment of damages for humiliation, loss of dignity and injury to feelings under the Privacy Act, s 88(1)(c), were set out in *Hammond v Credit Union Baywide*.[17] Of particular relevance to the current assessment are the following principles:

> **[139.1]** The award of damages is to compensate the plaintiff rather than to punish the defendant, although the conduct of the defendant may be a relevant factor in the assessment of the quantum of damages awarded.
>
> **[139.2]** Where it is found for the purposes of s 66(1)(b)(iii) that there has been an interference with privacy it follows that the threshold for awarding compensatory damages has been met. This is because that subsection (set out above at [119]) requires the plaintiff to establish significant humiliation, significant loss of dignity or significant injury to feelings.
>
> **[139.3]** The nature of the assessment required by s 88(1)(c) means there is a subjective element to any assessment to which the personality of the aggrieved person is relevant.
>
> **[139.4]** The award of damages must adequately compensate the aggrieved individual for the harm suffered.

[140] Having found an interference with privacy on the basis that Ms Horrell experienced significant humiliation, distress and injury to feelings, it follows that the threshold for an award of damages under s 88(1)(c) has been met. However, as will be seen from the principles identified in *Hammond* and from s 88 more broadly, we do not have the jurisdiction to fine Ms Harrison even if we were to find that she had improperly taken information from the Cancer Society database, which we have stopped short of doing. We further agree with Mr Brady that there was no basis to award damages to cover the cost of a 3D-printed breast prosthesis and bras. Nor does the Tribunal have the jurisdiction to award punitive damages. Nevertheless, as we have discussed, the Tribunal is required

[17] *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [170].

under s 85(4) of the Privacy Act to take the conduct of Naturalwear into account when deciding what, if any, remedy to grant.

[141] In relation to Naturalwear's conduct, Ms Horrell argued that had Naturalwear deleted all her information from its records after the Cancer Society raised its concerns with it, she would not have received the subsequent marketing. For its part, Naturalwear argued that it responded in good faith to Ms Horrell's privacy complaint by apologising and by destroying her warranty card and removing her details from its records.

[142] Mr Brady also pointed to the privacy training undertaken by Naturalwear's staff. While we accept that Naturalwear's staff did receive privacy training, Mr Brady remained unaware that sharing personal information between Naturalwear and Medivex would breach the Privacy Act, indicating that a better understanding of the operation of the privacy principles within the organisation is still required.

[143] We can understand that Ms Horrell may have felt that the apology provided at the time of her complaint to the Office of the Privacy Commissioner was not wholly genuine. That said, in our view Mr Brady's apology to Ms Horrell at the hearing was without reservation and demonstrated an understanding of the impact on her perhaps not earlier appreciated. However, it came very late in the piece. We also accept that from the outset Naturalwear acknowledged the breach of r 10, although it consistently argued right up until the final afternoon of the hearing that no damages should follow.

[144] For these reasons we do not consider that the actions of Naturalwear warrant a reduction in the quantum of damages that would otherwise be awarded.

[145] On the other hand, we do not consider that damages should be increased because of the way that Naturalwear conducted itself during the course of the proceedings. Naturalwear is entitled to pursue its defence which, while ultimately unsuccessful, did not unnecessarily lengthen the proceeding.

[146] As to the level of damages appropriate in this case, three bands have been identified by the Tribunal as a rough guide to the level of damages that may be awarded for the kind of emotional harm encompassed by s 88(1)(c). In *Hammond* awards of up to $10,000 were identified as appropriate for harm at the less serious end, with awards in the middle band ranging from $10,000 to $50,000, and awards of over that amount for the most serious cases.[18]

[147] While we acknowledge Ms Horrell's vulnerability as a cancer survivor and accept that there could well have been distress caused to her by having to relive some of her earlier experiences, we had no independent evidence before us of this kind of harm or the degree of its impact. Based on the evidence we had, it is our view that the principal emotional harm experienced by Ms Horrell was one of outrage and anger. Put simply, Ms Horrell was incensed that Naturalwear would try to make money out of her misfortune, that it held her warranty card when it was not entitled to have it, and that it used information from an organisation such as the Cancer Society for commercial gain.

[148] In our view, the circumstances justify an award of damages of $10,000, which is at the junction between bands one and two.

[149] The damages are awarded jointly and severally against the defendants. How the defendants meet that award is a matter for them.

[18] *Hammond*, above n17, at [176].

Declaration

[150] Ms Horrell did not seek a declaration that there has been an interference with her privacy. Nevertheless, where there has been an interference with privacy a declaration of interference with privacy will ordinarily follow.[19]

[151] We see no reason in this case not to make such an order.

COSTS

[152] Because Ms Horrell represented herself, the only costs she is entitled to recover are the disbursements she incurred in bringing her case.[20]

[153] Ms Horrell bore the costs of preparing the common bundle but did not quantify the costs involved other than to mention using two toner cartridges.

[154] Mr Brady submitted that costs of $500 would be appropriate were she to succeed in her claim.

[155] We award that amount.

NON-PUBLICATION ORDERS

[156] Interim non-publication orders were made to protect from publication the names and any other identifying details of Cancer Society clients (other than Ms Horrell) and their family members who were referred to in the evidence filed in the proceeding. The same order was made in relation to customers of Naturalwear.

[157] The interim orders also prevented a search of the Tribunal's file without the prior permission of the Chairperson or a Deputy Chairperson.

[158] The question now is whether the interim orders should be made permanent.

Criteria and approach to non-publication orders

[159] The Tribunal's jurisdiction to make a final non-publication order is governed by s 107 of the Human Rights Act 1993.

[160] Section 107(1) provides every hearing of the Tribunal must be held in public, although the Tribunal may make non-publication orders under s 107(3) if "satisfied that it is desirable to do so".

[161] The Tribunal's approach to non-publication orders and the "desirable" threshold is set out in *Waxman v Pal (Application for Non-Publication Orders)*[21] and *Director of Proceedings v Brooks (Application for Final Non-Publication Orders).*[22] The Tribunal summarised its approach to s 107 in *Waxman* as follows:

> [66] In summary (and at the risk of some repetition) the following principle points (they are not intended to be exhaustive) should be kept in mind when interpreting and applying s 107(1) and (3) of the Human Rights Act. It is these points which will assist the determination whether the Tribunal is satisfied that it is "desirable" to make a suppression order:

[19] See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [107]-[108].
[20] See *Scarborough v Kelly Services (NZ) Ltd (Costs)* [2016] NZHRRT 3 at [8.1].
[21] *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4.
[22] *Director of Proceedings v Brooks (Application for Final Non-Publication Orders)* [2019] NZHRRT 33.

> [66.1] The stipulation in s 107(1) that every hearing of the Tribunal be held in public is an express acknowledgement of the principle of open justice, a principle fundamental to the common law system of civil and criminal justice. The principle means not only that judicial proceedings should be held in open court, accessible to the public, but also media representatives should be free to provide fair and accurate reports of what occurs in court.
>
> [66.2] There are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. This is recognised by s 107(1), (2) and (3) of the Act.
>
> [66.3] The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one.
>
> [66.4] In deciding whether it is satisfied that it is desirable to make a suppression order the Tribunal must consider:
>
> > [66.4.1] Whether there is some material before the Tribunal to show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.
> >
> > [66.4.2] Whether the order is reasonably necessary to secure the proper administration of justice in proceedings before it. The phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.
> >
> > [66.4.3] Whether the suppression order sought is clear in its terms and does no more than is necessary to achieve the due administration of justice.

[162] As any non-publication order made by the Tribunal is a limit on the right to freedom of expression guaranteed by s 14 of the New Zealand Bill of Rights Act 1990 it must be a reasonable limit under s 5 of that Act. Whether or not a non-publication order is a reasonable limit on freedom of expression will depend on the circumstances of the particular case.[23]

[163] As endorsed by the High Court in *JM v Human Rights Review Tribunal* (*JM*),[24] a two-step approach is required. The first step is the evaluative exercise by the Tribunal so that it can be satisfied that a non-publication order is desirable. If that threshold is satisfied, it then needs to consider whether it should exercise its discretion to make a non-publication order.

[164] Both parties supported the interim orders in this case being made final.

Should final orders be made?

[165] The evidence led by Ms Horrell referred to clients of the Cancer Society who were not parties to this proceeding and in some instances to family members of those clients. The evidence identifies these clients as having had breast cancer and in some instances the clients have died. Mr Brady also led evidence that identified clients of Naturalwear.

[166] Other than Ms Horrell, none of the people referred to in this evidence are parties to the proceeding and it is likely that most, if not all, were unaware of the proceeding and that some of their health information and other personal details formed part of the evidence in this case. It is unnecessary for this information to be made public to understand the Tribunal's decision as it can be provided in an anonymised form. Further, there is no public interest in doing so.

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[23] See *Marshall v IDEA Services Ltd (Application for Interim Non-Publication Orders)* [2019] NZHRRT 52 at [16.2].
[24] *JM v Human Rights Review Tribunal* [2023] NZHC 228 at [84]–[85].

[167] In these circumstances, and given the highly sensitive nature of the information, we are satisfied it is desirable that the intended effect of the interim orders in relation to the non-publication of identifying details of Cancer Society and Naturalwear clients and family members be made final. For the same reasons, we exercise our discretion to make final orders in this case.

[168] The non-publication orders do not extend to Ms Horrell other than in relation to her address. At the hearing, it was discussed whether some of her health information, other than her status as a cancer survivor and former customer of the Cancer Society, should be the subject of a non-publication order. However, applying the two-step test articulated in *JM*, we are not satisfied it would be desirable to do so. The extent of that further information is limited, and it provides context for why Ms Horrell did not complain initially when direct marketing first took place and for the award of damages we have made.

Search of the Tribunal file

[169] There is no specific statutory rule allowing access to Tribunal documents. The Tribunal does, however, draw on High Court practice and specifically the Senior Courts (Access to Court Documents) Rules 2017.[25]

[170] In recognition of the principle of open justice and the freedom to seek information, r 11 provides that any person may ask to access any document. Rule 11 also requires that when an application is made the request must be given to the parties or their lawyers (unless impractical to do so).

[171] As discussed, there is no public interest in sensitive health information about clients of Naturalwear and the Cancer Society becoming public. Further because an order requiring leave to search the Tribunal's file provides a procedural restriction only, there is a limited impact only on principles of open justice. Accordingly, the Tribunal is satisfied that it is desirable to issue an order preventing the search of the Tribunal file without leave of the Chairperson or the Tribunal.

[172] We therefore make a permanent order restricting access to the Tribunal's file without leave.

DECISION OF THE TRIBUNAL AND FORMAL ORDERS

[173] In conclusion, the Tribunal is satisfied on the balance of probabilities that the actions of Naturalwear interfered with the privacy of Ms Horrell and makes the following orders:

> **[173.1]** A declaration under s 85(1)(a) of the Privacy Act 1993 that Naturalwear interfered with Ms Horrell's privacy in the way it collected her health information and then used that information to market its services to her.
>
> **[173.2]** The defendants, jointly and severally, are to pay Ms Horrell the sum of $10,000 for injury to feelings under s 85(1)(c) of the Privacy Act 1993.
>
> **[173.3]** The defendants, jointly and severally, are to pay Ms Horrell the sum of $500 in costs under s 85(2) of the Privacy Act 1993.

[25] See *A v Van Wijk (Access to File)* [2019] NZHRRT 12 at [11].

[173.4] Pursuant to s 107(3)(b) of the Human Rights Act 1993 the Tribunal makes final orders that:

[173.4.1] There is to be no publication of the names, addresses, or other details which might lead to the identification of Cancer Society clients or their family members referred to in this decision or in any of the evidence before the Tribunal, other than the plaintiff whose address only is not to be published.

[173.4.2] There is to be no publication of the names, addresses, or other details which might lead to the identification of Naturalwear clients referred to in this decision or in any of the evidence before the Tribunal.

[173.4.3] There is to be no search of the Tribunal file without leave of the Chairperson or the Tribunal after first allowing the parties the opportunity to be heard on any such request.

.....	.....	.....
Ms MG Coleman	**Ms WV Gilchrist**	**Ms ST Scott QSM**
Deputy Chairperson	**Member**	**Member**