

The Parliament of the Commonwealth of Australia

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

EIGHTY-FOURTH REPORT

August 1988



A REPORT ON THE DISALLOWANCE OF CERTAIN  
FREEDOM OF INFORMATION REGULATIONS RELATING TO  
THE AUSTRALIAN BICENTENNIAL AUTHORITY



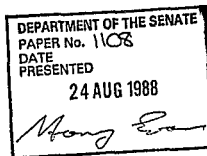
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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

THIRTY-FIFTH PARLIAMENT

Senator R. Collins (Chairman)

Senator B. Bishop (Deputy Chairman)

Senator P. J. Giles

Senator R. F. McMullan

Senator K. Patterson

Senator J. Stone

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979<sup>1</sup>)

The Committee scrutinises delegated legislation to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

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1. Sixty-fourth Report, March 1979, Parliamentary Paper  
No. 42/1979

## 1 INTRODUCTION

- 1.1 On 23 March 1988 the Chairman of the Senate Regulations and Ordinances Committee, Senator Bob Collins, gave notice in the Senate that, on the next day of sitting, he would move that regulation 3 of the Freedom of Information (Miscellaneous Provisions) Regulations (Amendment) (Statutory Rules 1987 No. 284) be disallowed.<sup>1</sup> Senator Collins made a statement to the chamber<sup>2</sup> in which he explained that for reasons of principle, and in accordance with its terms of reference for the scrutiny of delegated legislation, the Committee had agreed to recommend that the Senate pass a formal motion to disallow regulation 3. A formal motion is one that is moved and passed without debate. The Attorney-General, the Hon. Lionel Bowen, M.P., had previously informed the Committee that the government would not oppose the motion for disallowance. This was the first occasion since the Committee was established in 1932 that a disallowance motion moved on the Committee's behalf had been passed as a formal motion. It was also the first disallowance motion actually moved on behalf of the Committee since August 1971.
- 1.2 Regulation 3 of the regulations in question had the effect of deleting the Australian Bicentennial Authority (the ABA or the Authority) from the schedule of prescribed bodies subject to the Freedom of Information Act 1982 (the FOI Act). The Committee considered that the name of the ABA should remain in the schedule of prescribed bodies so that the Authority would, prima facie, remain subject to the FOI Act.

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1. Senate, Journals, 23 March 1988, page 583.

2. Senate Hansard, 23 March 1988, page 1154. The full text of Senator Collins' statement appears in appendix 11.



- 1.3 On 24 March 1988 Senator Collins' motion of disallowance on behalf of the Committee was put and passed as a formal motion and regulation 3 was disallowed.<sup>3</sup> By virtue of subsection 48(7) of the Acts Interpretation Act 1901 disallowance of regulation 3 had the effect of reviving the regulation that had been repealed. The name of the ABA was thereby restored to the list of bodies subject to the FOI Act.
- 1.4 The purpose of this report is to document the background to, and the outcome of, this action by the Committee and the Senate.

## 2 THE REGULATION

- 2.1 Section 11 of the Freedom of Information Act 1982 provides that, subject to the Act, every person has a legally enforceable right to obtain access to a document of an agency other than an exempt document. Subsection 4(1) of the Act defines "agency" to include a "prescribed authority". A "prescribed authority" is defined in the same subsection as including a body -

declared by the regulations to be ...a prescribed authority for the purposes of this Act, being... an incorporated company or association over which the Commonwealth is in a position to exercise control.

The Freedom of Information (Miscellaneous Provisions) Regulations (Statutory Rules 1982 No. 323) (the principal regulations) were made on 23 November 1982 and gazetted on 30 November 1982. Regulation 3 declared the bodies listed in schedule 1 to be prescribed authorities. The Australian Bicentennial Authority appeared at the top of that list as a body subject to the FOI Act. Thus, since 1982 it was

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3. Senate Hansard, 24 March 1988, page 1238; Senate, Journals, 24 March 1988, page 591; Commonwealth of Australia Gazette, No. GN11, 30 March 1988.

considered that individuals possessed freedom of information rights regarding the documents of the ABA.

2.2 The principal regulations were amended in December 1983, June 1985, December 1985 and March 1986<sup>4</sup> but no change was made to the status of the ABA as a body subject to the FOI Act. No attempt was made to remove or qualify what had been assumed by successive governments to be a right of access to eligible ABA documents.

2.3 The Freedom of Information (Miscellaneous Provisions) Regulations (Amendment) was made by the Attorney-General, the Hon. Lionel Bowen, M.P., on 11 December 1987 and gazetted to come into affect on 17 December 1987. The Senate rose at the end of the Budget Sittings on 18 December 1987. The regulations were not tabled in the Senate until 17 February 1988. Regulation 3 deleted the name of the ABA from the schedule of bodies subject to the FOI Act. The explanatory statement noted that the ABA had been omitted from the schedule -

because it is a company which cannot be declared to be a prescribed authority by regulation within the terms of subsection 4(1) of the (FOI) Act, as the Commonwealth is not 'in a position to exercise control' over the Authority.

2.4 The question whether this was an accurate statement of the legal position was central to the difference of opinion between the Committee and the Attorney-General, and led directly to the motion of disallowance. Believing that it was an accurate assessment, the Attorney-General considered that the principal regulations, in so far as they referred to the ABA, were invalid ab initio. The ABA could never in law have been a "prescribed authority" and, therefore, disallowance of regulation 3 was an act devoid of legal substance. The Committee was less certain, though inclined to the view that a court could well regard a number of

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4. Statutory Rules 1983 No. 338, 1985 No. 106, 1985 No. 348 and 1986 No. 45.

relevant provisions in the Australian Bicentennial Authority Act 1980 (the ABA Act) as conferring on the Commonwealth a sufficient degree of "control" in the circumstances of this case. Thus, the Committee was inclined to consider that the regulation referring to the ABA was valid. Therefore, disallowance of its repeal would revive what may always have been a valid prescription of the Authority, thereby preserving the application of the FOI Act.

### 3 INITIAL ADVICE TO THE COMMITTEE

3.1 The Committee's Principles, which are its terms of reference, require it to ensure, inter alia, that delegated legislation -

- (a) is in accordance with its enabling statute, and
- (b) does not trespass unduly on personal rights and liberties.

Applying these Principles to the regulations the Committee's acting legal adviser, Professor Dennis Pearce of the Faculty of Law in the Australian National University, provided the Committee with a written opinion advising that there should be a close examination of the legal justification given in the explanatory statement for the removal of the ABA from the scope of the FOI Act.<sup>5</sup> Professor Pearce was of the view that, on the face of the ABA Act itself, the Commonwealth could exercise a range of prima facie important controls over the Authority which cumulatively might constitute "control" of a sufficient degree and quality for the purposes of prescription under the FOI Act.

3.2 Acting on this advice, at its first meeting of the Autumn Sittings on 18 February 1988, the Committee agreed to write

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5. Professor Pearce's advice dated 4 January 1988 appears in appendix 3 of this report.

to the Attorney-General requesting a fuller explanation for his decision to remove the ABA from the scope of the FOI Act. The Committee was concerned that a regulation which removed rights that had long been assumed to exist, had come into force just a few days before the commencement of 1988, the year that would be the centre-point of the Authority's existence and the focus of much of its expenditure over the preceding seven and a half years.

- 3.3 Before describing in greater detail the legal basis of the Committee's concern about the regulation it is necessary to refer briefly to certain matters which had arisen after it had been made, but prior to the Committee's formal consideration of it on 18 February 1988.

#### 4 PUBLIC COMMENTS ABOUT THE REGULATION

- 4.1 On 7 January 1988 the press carried reports that a number of parliamentarians had publicly expressed reservations about a regulation which appeared to exempt the ABA from the scope of the FOI Act.<sup>6</sup> These reports referred to legal opinions prepared within the Attorney-General's Departments which concluded that, although the Commonwealth could exercise various powers with respect to the ABA, it did not "control the Authority" in that it did not "control" the majority of votes at general meetings of the Authority. Taking into account a decision of the Victorian Supreme Court<sup>7</sup> the Attorney-General's Department considered that control over voting power was the proper legal test to apply in determining whether control existed for the purposes of the FOI Act.

- 4.2 However, a further press report on 29 January 1988 referred to possible differences of opinion existing at a senior

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6. Age, 7 January 1988, page 3; Australian, 7 January 1988, page 2; Canberra Times, 7 January 1988, page 1.

7. Equiticorp Industries Ltd v ACI International Ltd (1987) V.R. 485

level within the Attorney-General's Department about the applicability of this test to the ABA.<sup>8</sup>

- 4.3 On 15 February 1988 the Prime Minister, the Hon. R.J.L. Hawke, M.P., issued a statement to the media announcing that the government would amend the ABA Act early in the 1988 Autumn Sittings of Parliament to ensure that the Authority was unequivocally subject to the FOI Act and the Ombudsman and Archives Acts.<sup>9</sup> Referring to the legal opinions given by the Attorney-General's Department, the Prime Minister's statement noted that -

The Government has decided to put the entire matter beyond doubt once and for all, by amending the ABA Act specifically to bring the ABA under the FOI, Ombudsman and Archives Act.

- 4.4 It was against this background, therefore, that the Committee commenced its scrutiny of the regulation on 18 February 1988 and decided to request further information from the Attorney-General.

#### 5 THE COMMITTEE'S CORRESPONDENCE TO THE ATTORNEY-GENERAL

- 5.1 In its first letter to the Attorney-General, of 19 February 1988, the Committee sought an explanation of his view that the ABA was not subject to a requisite degree of government control for the purposes of the FOI Act. The Committee drew the Attorney's attention to a number of points which it regarded as important in considering this issue.<sup>10</sup>
- 5.2 During the second reading speech on the ABA Bill in 1980 the then Attorney-General, Senator the Hon. Peter Durack, said -

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8. Canberra Times, 29 January 1988, page 3.

9. The Prime Minister's media release appears in appendix 7 of this Report.

10. The Committee's first letter to the Attorney-General, 19 February 1988; see appendix 8 of this Report.

This Bill, together with the memorandum and articles of association of the Authority, provides an arrangement which confers upon the Authority an appropriate degree of autonomy and flexibility to enable it to operate in a business-like way, yet at the same time provides for its accountability to the Parliament through the Minister for Administrative Services, who may give directions as to the policies the Authority is to follow. The Auditor-General will audit the Authority's accounts and any appropriation by the Parliament for purposes of the Authority will be subject to the usual parliamentary scrutiny.<sup>11</sup>

- 5.3 The Committee considered that the legal significance of this ministerial power to give directions as to policies, expressly acknowledged in the Parliament, called for particularly careful appraisal in determining whether the Authority was subject to sufficient government control for FOI Act purposes.
- 5.4 This was however, only one of a number of significant "controlling" powers.
- 5.5 Section 5 of the ABA Act stated that the board of directors of the Authority was required to furnish to the Minister such reports as the Minister requested on matters concerning the promotion of the objects of the Authority. Under section 6 of the Act the Authority was required to promote its objects and exercise its powers in accordance with written policy directions given to the board by the Minister. Subsection 7(2) provided that the Prime Minister could, at any time, in writing, terminate the appointment of the Chairman of the Authority on 6 months notice. Under section 10 money could be appropriated by Parliament for the purposes of the Authority and the Minister for Finance could give directions as to the amount, and time of payment, of that money. Under section 11 the ABA was required to prepare estimates of receipts and expenditure in such form as the Minister directed and as often as the

11. Senate Hansard, 31 March 1980, page 1216

Minister directed and the Authority could not engage in any expenditure other than in accordance with estimates approved by the Minister. Under subsection 12(2) any of the ABA's money, not immediately required for expenditure, could not be invested other than in a bank or a Commonwealth security without the approval of the Treasurer. Under section 14 the ABA could not borrow money without the approval of the Treasurer. Under section 21 the Minister could direct that the Authority be voluntarily wound-up where he or she was of the opinion that, for any reason, this is necessary or desirable.

5.6 The Committee, in the first instance, looked upon these powers as a formidable array of potential government controls over important aspects of the Authority's existence and activities.

5.7 The Committee was aware of the Prime Minister's stated intention to amend the ABA Act expressly to make the Authority subject to the FOI Act. However, the Committee had reservations whether, without more, that proposed course of action would be adequate to meet the requirements of principle in protecting rights to freedom of information in this case. The Committee expressed its concern that -

As long as Parliament and people await the passage of the amending Act foreshadowed by the Prime Minister the regulations descheduling the ABA will remain in force and there will be no enforceable legal right to freedom of information... While there may be some residual doubt whether prescription of the ABA can, as a matter of law, make the Authority subject to the Act, there can be no doubt whatever that as long as the Authority is not prescribed it is definitely not subject to the Act. Provided it is prescribed, it is a matter of legal interpretation for the Administrative Appeals Tribunal or a matter of law for the Federal Court or the High Court whether the FOI Act can apply to a prescribed ABA. In this case the benefit of any official doubts about the validity of prescription should be resolved decisively in favour of rights to

freedom of information.<sup>12</sup>

- 5.8 The Attorney-General was invited urgently to consider making new regulations to restore the ABA to its previous position as a prescribed authority.

## 6 THE LEGAL VIEW FROM THE ATTORNEY-GENERAL'S DEPARTMENT

### First legal opinion

- 6.1 The Attorney-General replied to the Committee on 11 March 1988 attaching to his letter copies of relevant legal opinions which had been prepared by his Department, as well as a departmental briefing note and legal opinion he had received on 2 February 1988 from the acting Deputy Secretary of his Department.<sup>13</sup> This response from the Attorney-General provided the following information about the ABA and the FOI Act.

- 6.2 On 1 May 1986 an officer in the Attorney-General's Department advised the Auditor-General that the ABA was not subject to the efficiency audit provisions of the Audit Act 1901 because the Authority could not be regarded as a company over which the Commonwealth was in a position to exercise control. In a memorandum dated 20 May 1986 an officer in the Department of the Prime Minister and Cabinet enquired of the Attorney-General's Department whether similar reasoning applied to the question of the applicability of the FOI Act to the ABA.

- 6.3 Advice dated 28 November 1986 given to the Department by the Attorney-General's Department, argued that the test of "control" as used in financial legislation was not

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12. Committee's letter to the Attorney-General, 19 February 1988, page 5; see appendix 8.

13. These papers appear in appendices 1, 2, 6 and 9 of this report. Part of the briefing note entitled "Policy Considerations" was deleted prior to its receipt by the Committee.



appropriate to the concept of "control" used in the relevant provisions of the Audit Act. Under that Act a more appropriate test was thought to be "control of administration of the company". Similarly, since the purpose of the FOI Act was to give public rights of access to information about the administration of government departments, the same test of government "control of administration" should apply in determining whether the FOI Act applied to a particular body.

- 6.4 Under the Authority's articles of association, the twenty-member board of directors included 10 directors appointed by the Commonwealth and 2 appointed by the Prime Minister. Although these appointees would constitute a majority of the directors, the Attorney-General's Department considered that, since it could not be assumed that such appointees would act in accordance with the Commonwealth's directions, the Commonwealth was not legally in a position to exercise control for the purposes of the FOI Act. It was also considered that the other powers conferred on the Commonwealth by the ABA Act (see paragraph 5.5 above) would not be sufficient to enable the Commonwealth to control the daily administration of the Authority. The first opinion concluded that the Commonwealth could not exercise the requisite degree of control over the ABA for the purposes of the FOI Act and the regulations purporting to prescribe the Authority as subject to that Act were, therefore, invalid.

#### Second Legal Opinion

- 6.5 A second opinion, dated 1 May 1987, provided by the Attorney-General's Department to the Secretary of the Department of Prime Minister and Cabinet looked in more detail at the legal issues.
- 6.6 This second opinion referred to the decision of the Victorian Supreme Court in Equiticorp Industries Ltd. v.

ACI International Ltd.<sup>14</sup> and two High Court decisions elucidating the meaning of the concept of control of a company, namely W. P. Keighery Pty. Ltd. v. Federal Commissioner of Taxation<sup>15</sup> and Federal Commissioner of Taxation v. Sidney Williams (Holdings) Ltd.<sup>16</sup> In their joint judgement in the former case Dixon, C.J., Kitto and Taylor, J.J. said (at page 85) -

A power in a person to provide shareholders with an incentive or inducement to exercise their voting power as that person may wish is not aptly described as making the company capable of being controlled by that person. The person must be able to dictate the decisions of the general meeting, through a preponderance of voting power which either is vested in him or is subject to his command.

- 6.7 In the Sidney Williams Case, the same judges referred to control of a company in terms of a present ability to secure the passing of a resolution at a general meeting of the company (see page 111 of the judgement). In the Full Victorian Supreme Court in the Equiticorp Case Murphy, Fullagar and Gobbo, J.J. said that -

... the voting control is that to be exercised by the majority of votes at a general meeting.

- 6.8 Thus, in terms of what the second opinion referred to as "conventional company law", to determine whether the ABA was a prescribed authority for the purposes of the FOI Act the essential test was the existence or otherwise of an enforceable and immediately existing right to control a majority of the votes at a general meeting of the Authority. In October 1986 the Authority had 55 members of whom 14 were associated in some way with the Commonwealth Government. Clearly then, even if these 14 votes could be directed by the Commonwealth, they could not exercise

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14. (1987) V.R. 485.

15. (1957) 100 C.L.R. 66.

16. (1957) 100 C.L.R. 95.

control of the Authority through a general meeting.

- 6.9 The constitution of the Authority as a company limited by guarantee appeared to imply an intention that company law concepts should be adopted in order to understand the legal nature of the Authority. Nevertheless, the second opinion briefly addressed the question whether, for the purposes of the application of the FOI Act to a body which had statutory characteristics grafted on to it, the term "control" could properly be construed in a broader way than had been the case in company law decisions.
- 6.10 Under the Authority's articles of association, the board of directors were responsible for day to day management of the Authority and could exercise such powers as were not mandated by the articles to be exercised by the Authority in its general meetings. Such powers could, however, be limited by regulations prescribed by the Authority in the general meetings. The directors' powers to make by-laws for the control, administration and management of the Authority's operations were likewise subject to repeal or amendment by a majority of the members of the Authority in the general meetings. Thus, the members at a general meeting retained the power to limit the directors' actions. Since the Commonwealth could not control the general meeting of members the fact that it could possibly have exercised control over a majority of the board did not amount to an adequate degree of control.
- 6.11 The second opinion noted that the board of directors had substantial "influence" over the operations of the Authority. However, under company law, all directors are bound by a primary fiduciary obligation to act in the best interests of their company, an obligation which overrides all other interests. Furthermore, the memorandum and the articles of association conferred no power on the Commonwealth in relation to the tenure of Commonwealth-appointed directors. Indeed, the power to dismiss directors resided solely with the general meeting

without the involvement of those who appointed such directors. A desire on the part of the Commonwealth to influence the 12 Commonwealth-appointed directors to act in the Commonwealth's interests therefore lacked any power or sanction to ensure compliance.

- 6.12 The second opinion also looked very briefly at the question whether the Commonwealth was in a position to exercise a requisite degree of control other than in terms of voting power at a general meeting. The Authority was constituted as a co-operative endeavour between the Commonwealth and the States. This was an arrangement suggestive of an intention to avoid Commonwealth control as such. Sections 6, 10, 12, 13, 14 and 21 of the ABA Act did contain provisions enabling the Commonwealth to "influence" the Authority in various ways<sup>17</sup> (see also paragraph 5.5 above). However, the opinion concluded that -

such provisions fall well short of conferring control on the Commonwealth in any sense comparable to that exercisable by a general meeting of a company.

- 6.13 There was no further analysis of why this conclusion was adopted, nor was there any evaluation of the significance and purpose of the statutory powers.
- 6.14 The second opinion, therefore, strongly confirmed the first opinion that the ABA did not fall within the definition of a prescribed authority, since it was not a body over which the Commonwealth was in a position to exercise "control" as that expression was used in the context of the FOI Act.

### Third Legal Opinion

- 6.15 A third, shorter, assessment of the legal position was provided to the Attorney-General in a departmental briefing

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17. Second legal opinion, para. 19, page 6; see appendix 2.

note from the acting Deputy Secretary of the Department.<sup>18</sup> This note referred briefly to the fact that legal opinions had concluded that the regulatory prescription of the ABA for FOI Act purposes was invalid. The noted explained that -

The opportunity was taken, as part of a larger 'tidying up' exercise late last year (in the context of revision of regulations to take account of administrative changes), to omit the ABA from the list of bodies applied by the 1982 regulations... At the time, this was seen by the Justice and Administrative Law Division (of the Attorney-General's Department) as a technical correction. It is now clear that insufficient attention was given to the policy implications. There has been considerable criticism of the apparent removal of the ABA from the scope of the FOI Act.

- 6.16 The acting Deputy Secretary agreed with the advice previously given that the Commonwealth was not in a position to control the ABA. He noted that it might be argued that previous advice had failed to give proper weight to provisions in the ABA Act enabling the Commonwealth to exercise a considerable degree of "influence" over the ABA. He opined, however, that the key consideration was the unique composition of the membership and board of the Authority which included the Prime Minister, the Deputy Prime Minister, the Leader and Deputy Leader of the Opposition, the Premier and Opposition Leader from each State and their Northern Territory counterparts. In his view it was clear that the ABA was not structured to give effect to the wishes of the executive government of the Commonwealth since it was an inter-governmental and bipartisan body. He added -

I doubt whether a court would uphold an argument that it (the ABA) is subject to Commonwealth control. I add that I think it unlikely that the Commonwealth would wish, as a matter of policy, to argue that it

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18. Departmental briefing note, dated 28 January 1988; see appendix 6.

controlled the ABA.

- 6.17 This briefing note was acknowledged by the Attorney-General on 2 February 1988. The Prime Minister's Press Release, announcing that a Bill would address any legal uncertainty in the matter, was issued on 15 February 1988.

Comment on the legal opinions

- 6.18 It may be observed that this third opinion, like its predecessor, did not evaluate the purpose or significance of the powers which Parliament had conferred on the Commonwealth vis-a-vis the Authority. There are two other important legal points to note.

- 6.19 Firstly, in the W. P. Keighery Case the court stated -

The controlling authority of a company is its general meeting, and accordingly it has always been recognised in the cases in this Court... that the only way in which a company can be controlled, in the relevant sense of the word, is by the carrying of a resolution at a general meeting.<sup>19</sup> (emphasis added)

- 6.20 The court's reference to the "relevant sense of the word" controlled, echoed statements that had been put in argument by Barwick QC who said -

What is sought by the statute (the Income Tax and Social Services Contribution Assessment Act) is a quality of the company and the only way the company can be controlled in the relevant sense is through the shareholding.<sup>20</sup> (emphasis added)

- 6.21 Clearly "control" of an organisation can be exercised in different ways. The court here recognised that it was ascribing to the word control a particular, contextual meaning. It cannot be certain that a court would ascribe the same meaning to the word control in the context of the

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19. W. P. Keighery v Federal Commissioner of Taxation (1956-57) 100 C.L.R. 66 at 84.

20. op.cit. at 80.

FOI Act.

- 6.22 Secondly, in the Equiticorp Case the court was dealing with the Foreign Takeovers Act 1975, paragraph 9(1)(a) which defined a person with a "controlling interest" in a corporation as a person "in a position to control not less than 15 per centum of the voting power in the corporation". The court stated that -

...when one speaks of a company capable of being controlled in terms of voting power, or, to use the language of s.9(1), of being in position to control a certain voting power, one looks for an enforceable and presently and immediately existing right enabling the voting power to be controlled. It must be more than control in certain eventualities. In addition, the voting control is that to be exercised by the majority of votes at a general meeting...

We are accordingly of the opinion that, in order to be in a position to control voting power, there must be an enforceable and immediately exercisable right to exercise control of the requisite voting power...<sup>21</sup>

- 6.23 Faced with a legal argument from the Executive which seeks to justify the loss of personal rights and liberties, the Committee has always paid particular regard to any reasonable legal rebuttal which might challenge and detract from such justification. The authorities cited in the legal opinions supplied to the Committee were by no means on all fours with the case of the ABA and the FOI Act.

7 **THE COMMITTEE'S SECOND LETTER TO THE ATTORNEY-GENERAL**

- 7.1 At its meeting on 17 March 1988 the Committee considered the Attorney-General's letter and attachments of 11 March 1988. While acknowledging the quality of the advice on which the Attorney had acted in making the regulations, the

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21. Equiticorp Industries v A.C.I. International (1987)  
V.R. 485 at 489 and 492.

Committee remained unconvinced.<sup>22</sup> In the Committee's view the argument in favour of the legal invalidity of the original prescription was by no means compelling. It should be appreciated that the Committee was not attempting to function as a court adjudicating on a matter of law. Rather the Committee saw itself as an agent of Parliament evaluating the legal and technical wisdom of the Executive making use of delegated legislative power in a particular way.

7.2 Since the initial prescription in 1982 it had been the Commonwealth's opinion that the FOI Act applied to the Authority. For several years the Department of Prime Minister and Cabinet, the Attorney-General's Department, the Administrative Appeals Tribunal and the Australian Bicentennial Authority itself, had all acted in good faith in reliance on that view. Many assumptions of a legal and policy nature, and several years of practical operation of the legislation lay behind the official view. All of this had to be taken into account by the Committee in assessing the accuracy, comprehensiveness and strength of the most recent legal opinions challenging the earlier view, particularly as the recent opinions regarded the ABA as if it were essentially an ordinary company without significant statutory dimensions.

7.3 Although doubts about the applicability of the FOI Act to the ABA had been raised as early as 20 May 1986, the amending regulations deleting the name of the Authority from the principal regulations were not made until 11 December 1987, some 18 months later, at which time it was considered that it would be "misleading to allow the regulations to continue to purport to prescribe the ABA as a (prescribed) authority".<sup>23</sup>

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22. Committee's letter to the Attorney-General, 22 March 1988, See appendix 10.

23. Attorney-General's letter to the Committee, 11 March 1988, page 1; see appendix 9.



- 7.4 The Committee was concerned that none of the three official legal opinions looked closely at the powers conferred on the courts by the ABA Act, preferring to concentrate on the exclusive and unqualified application of company law concepts and legal precedents to what was clearly a hybrid body. None of the entities referred to by the courts in the decisions that had been cited on the meaning of "control" was a body subject to an Act of Parliament which conferred a wide range of directive powers on government.
- 7.5 In the Committee's opinion the question whether these statutory powers amounted to a requisite degree of control had been dealt with in a less than satisfactory way. Those powers and discretions appeared to be a source of considerable potential control over many aspects of the Authority's existence and operations, yet the Attorney-General's Department had made no detailed analysis of how or why they fell "well short of conferring control on the Commonwealth in any sense comparable to that exercisable by a general meeting of a company".<sup>24</sup>
- 7.6 On the contrary it struck the Committee that the power to give policy directions which had to be obeyed, the power to appoint a majority of the directors, the power to terminate the Chairmen's appointment on 6 months notice, the power to issue directions for the expenditure of money, and the power to prevent expenditure other than in accordance with approved estimates, amounted to a formidable array of potential controls which called for expert appraisal of their purpose and significance before the standard company law test of control should have been accepted with its consequences for freedom of information rights.
- 7.7 In the final analysis the Committee did not contend that the legal opinions supplied by the Attorney-General's Department were wrong in law. In the Committee's view,

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24. Second legal opinion, page 6; see appendix 2.

since they did not address all of the relevant legal issues, they were not a reliable justification for the regulatory move from a situation where the existence of important rights was possibly arguable, to a situation where the absence of those rights was absolutely beyond doubt. It was for this reason, therefore, that the Committee informed the Attorney-General that it was -

...reluctant to accept without question the view that the FOI Act does not in law apply to the ABA. The Committee considers that this matter is fraught with real doubts and ultimately the legal question may be definitively determined only by a court.<sup>25</sup>

- 7.8 Although remedial legislation had been foreshadowed by the Prime Minister, until it was introduced and passed by Parliament freedom of information rights would not exist with respect to the ABA. It was not known when the relevant Bill would be introduced or when it would be passed, assented to or come into operation. In these circumstances the appropriate course of action was to return to the status quo by means of the immediate disallowance of regulation 3. This would enable the courts, in any appropriate case arising before the legislation was in force, to determine whether, as a matter of law, the FOI Act applied to the Authority. The Committee, therefore, informed the Attorney-General that it proposed to move for the disallowance of regulation 3 in order to revive the previous repealed regulation. This would restore the name of the Authority to the list of prescribed bodies.

- 7.9 The Committee's letter to the Attorney-General concluded -

The Committee will seek to have the disallowance motion moved as a formal motion without debate on the basis that its action is totally non-political, bipartisan, and

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25. Committee's letter to Attorney-General, 22 March 1988, page 2; see appendix 10.

based on an issue of principle...<sup>26</sup>

8      **FORMAL MOTION OF DISALLOWANCE**

8.1      On 23 March 1988 the Chairman of the Committee, Senator Collins, gave notice that on the next day of sitting he would move for the disallowance of regulation 3. The Chairman made a detailed statement to the chamber in which he referred to the Committee's wish that the motion be accepted and passed by the Senate as a formal motion.<sup>27</sup>

8.2      On 24 March 1988 the Committee's motion of disallowance was passed as a formal motion without debate.

9      **JUSTIFICATIONS FOR THE COMMITTEE'S ACTION**

9.1      In taking the most unusual steps it did to deal with the Freedom of Information Regulations, the Committee was influenced by a number of important considerations.

(a)      The right to freedom of information is quite properly regarded as one of the most important rights in modern administrative law. It reduces the tendency toward secrecy in executive action and motivation, and it provides a mechanism for public access to the details of administrative decision-making. If information is a source of power, then the absence of a right to information is, in effect, a denial of the right to hold such power to account.

(b)      Whatever will be the final judgements about the role and effectiveness of the Australian Bicentennial Authority, it is a most significant public body, responsible for the planning and staging of a major commemoration of the Australian Bicentennial in 1988.

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26. Op. cit.

27. The full text of the Chairman's statement is set out in appendix 11.

It will be so viewed by historians and commentators assessing the meaning of, and response to, the bicentennial of European settlement on this continent.

- (c) If the documents of such a body were not subject to the FOI Act this would be an unusual and disturbing exemption from the principle of freedom of information. Between 1982 and 1986 the regulations which prescribed the ABA as a body subject to the FOI Act were changed four times without altering the status of the Authority as a prescribed body.
  
- (d) Although doubts about the legality of that prescription were raised in May 1986, regulations ending the Authority's prescription were not made until 11 December 1987, only a short time before the commencement of the Australian bicentennial year. They were gazetted in the Commonwealth of Australia Gazette on 17 December 1987 and thereby became public for the first time. The Senate rose for the summer recess on 18 December 1987. From the outset, the Committee was troubled by the timing of this sequence of events.
  
- (e) The name of the Authority was removed from the schedule "as part of a larger 'tidying up' exercise" and "insufficient attention was given to the policy implications".<sup>28</sup> Over a period of some 18 months there was at the very least a surprising failure within the Attorney-General's Department to grasp the significance for personal rights and liberties of the advice prepared in November 1986 and confirmed in May 1987 that freedom of information rights did not, and had never, existed. There also appears to have been a most unusual breakdown in communication between the Attorney-General's Department and the Department of

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28. Departmental briefing note from the acting Deputy Secretary, Attorney-General's Department to the Attorney-General, 28 January 1988; see appendix 6.

the Prime Minister and Cabinet (the Department responsible for the ABA). If it was consulted, it is surprising that that the Prime Minister's Department did not immediately recognise the significance for personal rights and liberties of using regulations to proclaim, within days of the commencement of the bicentennial year, that the ABA was not and never had been legally subject to the FOI Act.

- (f) If the ABA was a body which could not legally be prescribed for the purposes of the FOI Act, there was no compelling legal reason for the name to be removed from the list of prescribed bodies. In a non-controversial case it is, of course, wise to make new regulations to correct an error and avoid confusion. The Committee is uncertain, though, as to what further action, if any, was proposed or contemplated when the decision was taken to remove the name of the ABA from the regulations. The explanatory statement gave no indication that a remedial Bill would be prepared to ensure that the Authority remained subject to the FOI Act. In his letter to the Committee of 11 March 1988, the Attorney-General pointed out that "it was considered that it would be misleading to allow the regulations to continue to purport to prescribe the ABA as an Authority". Nevertheless, if a remedial Bill had been part of the legal thinking at the time it was decided to deschedule the ABA, then the extent to which the regulations could have misled anyone would have been minimal to say the least. On the other hand it may have been that no remedial legislation was proposed or contemplated.

- (g) The Committee was concerned that the legal opinions produced in the Attorney-General's Department did not evaluate the purpose or significance of the range of powers conferred on the Commonwealth and its Ministers by the ABA Act. These powers were purposeful and

prima facie, significant. They had no parallel in conventional company law. In the absence of any detailed legal assessment of their implications from the Attorney-General's legal experts, the Committee was faced with two opposing arguments. On the one hand, the concept of control as employed in the Freedom of Information Act could be construed as a concept identical in every respect to that used in company law. On the other hand, the controls conferred on the Commonwealth by the ABA Act could well have reflected an intention that the Commonwealth remain "in control" of numerous general and particular aspects of the Authority's existence and operations. These competing views were not satisfactorily evaluated in any of the three legal opinions produced by the Attorney-General's Department.

- (h) Although in his media release the Prime Minister promised that remedial legislation would expressly make the ABA subject to the FOI Act in order to remove any residual doubts about the matter, the Committee was unable to accept this gesture, important though it was, as a sufficiently complete or expeditious answer to its concern about the removal of arguably existing rights. The Committee was in no position to predict when such a Bill would pass through both Houses of Parliament, competing for time with other important legislation in a full legislative programme. The voluntary agreement of the ABA to respond to FOI Act requests (announced by the Prime Minister in his media release) was no proper substitute for a legal obligation to so respond.
- (i) Prior to the regulations in question there was a strong possibility that freedom of information rights did exist as a matter of law and these could and would have been protected, if necessary, by the Administrative Appeals Tribunal, the Federal Court or the High Court. However, as Senator Collins pointed

out in his statement to the Senate -

(t)he latest regulations, by indisputably removing such rights that might have existed have, in effect, removed the right of the courts to decide whether they did exist. In place of that judicial right is substituted the opinion of the Attorney-General's Department that under the present law no such right can exist in this instance.<sup>29</sup>

- (j) The Committee has always regarded disallowance of any delegated legislation on its initiative as an act of last resort, a drastic remedy to be resorted to only when a Minister refuses to accommodate the Committee's concerns about the effects which subordinate laws may have on the rights of people or Parliament. In this instance the Committee proceeded with its disallowance motion because the Attorney-General was unwilling to make new regulations prescribing the ABA.
- (k) In the final analysis the Committee recognised that the issue of the applicability of the FOI Act involved extremely difficult legal questions about which there was no definitive opinion or recommendation that could be followed. However, the Committee had no doubt about the nature of the role which it considered it should play, and which it knew the Senate would expect it to play, in dealing with this matter. As Senator Collins said in the Senate -

Although the Authority's undertaking, given through the Prime Minister, to respond to freedom of information requests is commendable, and although the remedial bill is on its way, the Committee's approach to such situations has always been that the rights, where they exist, are best protected by good laws and strong courts rather than by administrative promises, no matter how certain it is that these promises will be acted upon. The Committee cannot foresee

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29. Senate Hansard 23 March 1988, page 1155; see appendix 11.

the future. We cannot guarantee the future course of events regarding the proposed Bill. We cannot underwrite what I am sure are the undoubted bona fides of the Authority. We simply cannot say that, regardless of the nature of any particular freedom of information request submitted to it for an essentially voluntary response, the Authority will unfailingly respond in the way the law would otherwise oblige it to respond. It probably will, but the Committee cannot give such a guarantee, and principle requires that the best possible guarantee should be given. That guarantee is the guarantee of the law as interpreted and applied by the courts.

All the dictates of principled action in the cause of preserving personal rights point to the desirability of disallowing regulation 3 in order to restore the status quo until the Prime Minister's remedial legislation is in place...

The Committee is anxious, in a bipartisan spirit, to remain above the politics of this situation. A remedial Bill will, hopefully, very soon make this statement and tomorrow's disallowance merely a matter of history. But until then, the Regulations and Ordinances Committee must act in defence of the principle that the right to freedom of information about the affairs of the Authority should be a legal and enforceable right as far as the law as applied by the courts will allow. That was the situation until Regulation 3 was made. Disallowance will return us to that preferable situation while we wait for the legislation.<sup>30</sup>

10 CONCLUSION

- 10.1 An amendment to the Australian Bicentennial Authority Act 1980 to provide expressly that it was subject to the Freedom of Information Act was included in the Statute Law (Miscellaneous Provisions) Act 1988 which received the Royal Assent on 3 June 1988 and came into operation on 1 July 1988.

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30. Senate Hansard, 23 March 1988, page 1155-1156; see appendix 11.



- 10.2 The Committee's action in moving the motion of disallowance of regulation 3 of the Freedom of Information (Miscellaneous Provisions) Regulations, and the Senate's response in passing that motion without the need for any debate, will provide a useful guideline for Ministers, policy advisers and legal drafters whenever it is proposed in future to amend delegated legislation to make it clear that assumed rights do not in fact exist. The Committee will not lightly accept that delegated legislation may be used to remove purportedly doubtful rights before their validity is clarified by a court, or confirmed by an Act of Parliament.
- 10.3 The Committee acknowledges, with thanks, the cooperative spirit shown to it by the Attorney-General, the Hon. Lionel Bowen, M.P., during its scrutiny of regulation 3 of the regulations.

Bob Collins  
Chairman

August 1988



ATTORNEY GENERAL'S DEPARTMENT

ROBERT GARRAN, OFFICES  
NATIONAL CIRCUIT  
BARTON, ACT 2600  
PLEASE QUOTE JA86/7169  
YOUR REF

26 November 1986

The Secretary,  
Department of Prime Minister  
and Cabinet,  
Edmund Barton Building,  
BARTON. A.C.T. 2600

Attention : Ms A. Clendinning

Australian Bicentennial Authority - Freedom of Information 1982

I refer to your memorandum dated 20 May 1986 requesting advice whether the Australian Bicentennial Authority (ABA) is subject to the provisions of the Freedom of Information Act 1982 (FOI Act). I apologize for the delay in providing this advice.

2. In your memorandum you refer to an advice dated 1 May 1986 given by me to the Auditor-General to the effect that the ABA is not subject to the provisions of the Audit Act 1901 in respect of the efficiency audit provisions of that Act. In that advice I concluded that the ABA could not now be regarded as a "company over which the Commonwealth is in a position to exercise control". You now ask whether this reasoning also applies to the question whether the ABA is subject to the FOI Act.

3. In essence the FOI Act applies in respect of a document in the possession of an agency. An agency is defined in s.4(1) of the FOI Act as a Department or a prescribed authority. A "prescribed authority" so far as relevant is defined as -

"(a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment, other than -

(i) an incorporated company or association ..."

"(b) any other body, whether incorporated or unincorporated, declared by the regulations to be a prescribed authority for the purposes of this Act, being -

- (i) a body established by the Governor-General or by a Minister; or
- (ii) an incorporated company or association over which the Commonwealth is in a position to exercise control;"

4. The ABA was established as a company limited by guarantee under the A.C.T. Companies Ordinance 1962 on 21 January 1980. It therefore does not come within the terms of paragraph (a) of the definition.

5. Regulation 3 and Schedule 1 of the Freedom of Information (Miscellaneous Provisions) Regulations declare the ABA to be a prescribed authority for the purposes of paragraph (b) of the definition of "prescribed authority". For this regulation to be currently valid it would be necessary to show that the ABA was a body that came within the terms of paragraph (b) of the definition. As the ABA was established under the Companies Ordinance it clearly does not come within the terms of sub-paragraph (b)(i). To be a "prescribed authority" the ABA therefore must be an incorporated company "over which the Commonwealth is in a position to exercise control".

6. In my memorandum in respect of the Audit Act, I said that the test of control used in financial legislation was not appropriate to the concept when used in the Audit Act. A more appropriate test was a test of control of administration of the company. The purpose behind the FOI Act is to give to members of the public rights of access to official documents of the Government of the Commonwealth and of its agencies. This purpose is related to the administration of Departments and authorities and therefore a test of control of administration of the company would seem applicable in an FOI context also.

7. Article 31 of the Articles of Association of the ABA sets the composition of the Board of Directors at 20 being:

- (i) the Chairman of the ABA;
- (ii) 10 directors appointed by the Commonwealth of whom -
  - (a) 2 are appointed as representatives of the ACT;
  - (b) 1 is appointed as a representative of the Northern Territory; and
  - (c) 1 is an Aboriginal Australian;
- (iii) 1 director appointed by each State Government and the Northern Territory;
- (iv) 1 director appointed by the Prime Minister; and
- (v) 1 director appointed by the Leader of the Opposition.

8. The Commonwealth and Prime Minister's appointees constitute a majority of the Board of Directors. However, for the Commonwealth to be in a position to exercise control over the Board there would need to be an assumption made that those appointees are subject to Commonwealth direction and are expected to reflect the Commonwealth's view. This is an assumption that cannot be made with confidence. It can I think be more confidently assumed that at least appointees representing the ACT and the Northern Territory and the Aboriginal Australian appointee act independently and are not subject to Commonwealth direction. Consequently, I do not think that the Commonwealth is in a position to exercise control over the ABA for the purposes of paragraph (b) of the definition of "prescribed authority" in the FOI Act.

9. The Australian Bicentennial Authority Act 1980 (ABA Act) gives the Commonwealth substantial powers in relation to a number of areas of the ABA's activities. Under the ABA Act the ABA is subject to Ministerial and Parliamentary control in relation to the promotion of its objects, the exercise of its powers and the application of moneys. The ABA Act also affects such matters as staffing of the ABA; reports made by the ABA and the appointment of the Chairman. However, for the purposes of the definition of "prescribed authority" this would not be sufficient to give the Commonwealth the requisite control over the ABA as the ABA Act does not enable the Commonwealth to control the ABA in its daily administration and the specific performance of its functions. For example, the power under s.6 of the ABA Act for the Minister to give directions is limited to directions as to policy and does not extend to a direction to take specific action.

10. Therefore, as the Commonwealth is not in a position to exercise control over the ABA, the regulations currently prescribing the ABA for the purposes of the definition of "prescribed authority" are not valid.

11. In your memorandum you also refer to the Ombudsman Act. In my memorandum to you dated 2 May 1986 I advised that a previous opinion (dated 16 April 1982) to the effect that the Commonwealth was in a position to exercise control over the ABA for the purposes of the Ombudsman Act, could no longer stand. The reasoning set out in my memorandum in respect of the Audit Act and in this memorandum also applies to the Ombudsman Act.

12. If you wish to discuss this matter further, please contact Phillip White on 71 9676.

(P. WHITE)  
for Secretary

FEDERAL CROWN OFFICES  
FEDERAL CIRCUIT  
PART 14.1.2000FILE NO. DJEJ86/7169  
V. 1.1

URGENT

1 May 1987

The Secretary,  
Department of Prime Minister  
and Cabinet,  
Edmund Barton Building,  
BARTON. A.C.T. 2600

Application of Freedom of Information (FOI) Act to Australian  
Bicentennial Authority

I refer to my advice to you on this matter dated 28 November 1986. As indicated by telephone, I have given additional consideration to the question and, although the result of my advice remains unchanged, I wish here to amplify my reasons.

2. The central issue is whether, in terms of the definition of "prescribed authority" in s.4(1) of the FOI Act, the Commonwealth is "in a position to exercise control" of the Australian Bicentennial Authority ("the Authority").

3. The nature of control was considered by the Full Court of the Supreme Court of Victoria in its judgment handed down on 18 December 1986 in Equiticorp Industries Ltd v A.C.I. International Ltd (No. CL 64, unreported). That Court had particular regard to two High Court decisions concerning the control of a company: WP Keighery Pty Ltd v Federal Commissioner of Taxation (1957) 100 CLR 66 and Federal Commissioner of Taxation v Sidney Williams Holdings Ltd (1957) 100 CLR 95.

4. Keighery's case established that mere influence over shareholders did not amount to control. It was said in the joint judgment of Dixon, C.J., Kitto and Taylor, JJ. at p.85:

"A power in a person to provide shareholders with an incentive or inducement to exercise their voting power as that person may wish is not aptly described as making the company capable of being controlled by that person. The person must be able to dictate the decisions of the general meeting, through a preponderance of voting power which either is vested in him or is subject to his command".

5. The joint judgment then dealt with the argument that "capable of being controlled" is satisfied by a possibility or a potentiality of being controlled, and went on to say at p.86:

"But to describe a company as capable of being controlled by a person or group of persons is to attribute to that person or group a presently existing power of control".

and at p.87:

"..... 'capable of being controlled' connotes the existence of either one person whose enforceable and immediately exercisable rights enable him to control, or a number of persons whose enforceable and immediately exercisable rights enable them, if they act in concert, to control".

In the Sidney William's case, Dixon, C.J., Kitto and Taylor, JJ. said at p. 111:

"If it cannot be said of a company on the last day of the year of income that seven persons (or fewer) are presently able to control the company, in the sense of securing the passing of a resolution at a general meeting, the company cannot be described as capable on that day of being controlled by one person or by persons not more than seven in number".

6. Having regard to these authorities, the Full Victorian Supreme Court in Equiticorp concluded (per Murphy, Fullagar and Gobbo JJ. at p.8 of the judgment):

"The above authorities lend strong support to the proposition that when one speaks of a company capable of being controlled in terms of voting power, or ..... of being in a position to control a certain voting power, one looks for an enforceable and presently and immediately existing right enabling the voting power to be controlled. It must be more than control in certain eventualities. In addition, the voting control is that to be exercised by the majority of votes at a general meeting. See Mendes v Commissioner of Probate Duties (1956) 122 CLR 152; Inland Revenue Commissioner v Bibby & Sons (1945) 1 All ER 667; Barclays Bank Ltd v I.P.C. (1961) ACT 509."

(see also p.13 of the judgment).

7. It follows that, in determining whether the Commonwealth is in a position to exercise control of the Authority in terms of conventional company law, it is necessary to determine whether the Commonwealth has an enforceable and immediately existing right to control a majority of votes at a general meeting of the Authority. This issue is considered at paragraphs 10 and 11 below. You will see that I conclude that the Commonwealth does not have such power.

8. A question also arises as to whether the control test is intended to be broader in the FOI Act than in company law. Given that the test is used in the definition in s.4(1) only in relation to an 'incorporated company or association' I am inclined to think that this is not the case. Nevertheless, the FOI Act is, of its nature, arguably intended to have wide application and the Authority itself is an organisation having unusual and non-commercial purposes and functions. Therefore, whilst recognising that constitution of the Authority as a company implies an intention to adopt the relevant legal framework for its operations, I have also considered whether the Commonwealth might be said to control the Authority through its appointment of a majority of directors. I conclude that it cannot, even on such a broad view, be said to so control the Authority (paragraphs 12 to 17).

9. Finally, I consider whether there is otherwise anything in the Australian Bicentennial Authority Act 1980 (the Act) or elsewhere which alters the abovementioned conclusions. Again, my answer is in the negative (paragraphs 18 to 20).

Whether the Commonwealth is in a position to exercise control through its membership of the Authority

10. The Authority is incorporated as a company limited by guarantee. A company limited by guarantee is a company formed on the principle of the liability of its members being limited by the memorandum of association to the amount the members undertake to contribute to the property of the company in the event that it is wound up. Such a company does not have a share capital.

11. Article 3 of the Articles of Association of the Authority sets out who are the members of the Authority. As at 2 October 1986 there were 55 members of whom only 14 were members of or held offices associated directly with the Commonwealth Government. Even if it were assumed that the Commonwealth could dictate the votes of these 14 members, the number of votes involved would clearly fall well short of placing the Commonwealth in a position to exercise control of the Authority through a General Meeting. In this regard I note that Article 22 provides for each member to have one vote at a meeting of members of the Authority.

Whether the Commonwealth may be in a position to exercise control through appointment of directors

12. Under the Articles, the board of directors is responsible for the day to day management of the Authority. Article 38 provides that the directors may exercise all such powers, authorities and discretions as under the Articles are not required to be exercised by the Authority in general meeting. This power can be limited by any regulations prescribed by the Authority in general meeting, although regulations cannot retrospectively invalidate any previously valid act of the directors.

13. Article 68 gives the directors power to make by-laws necessary or desirable for the proper control, administration and management of the Authority's operations. However, such by-laws are subject to repeal or amendment by the Authority in general meeting.

14. The members therefore have the power to limit the directors' actions prospectively and, as mentioned earlier, the Commonwealth cannot control the general meeting of members. Nevertheless it is arguable that the board of directors has a very substantial influence over the operations of the Authority.

15. As mentioned in my advice of 28 November 1986, the Commonwealth, at least in a broad sense, appoints 12 of the 20 members of the board of directors of the Authority. Ten of the 12 are appointed by "the Commonwealth". The Chairman and another director are appointed by the Prime Minister. Of the 10 appointed by the Commonwealth, Article 31(3) provides that -

- (a) two shall be appointed as representatives of the Australian Capital Territory;
- (b) one shall be appointed as a representative of the Northern Territory;
- (c) one shall be an Aboriginal Australian".

Article 31(5) provides that the (ordinary) member appointed by the Prime Minister "shall be drawn from the senators and members of the Parliament of the Commonwealth".

16. It might be argued that Commonwealth-appointed directors would feel obliged as such appointees to act in what they perceived to be the interests of the Commonwealth. There are, however, a number of important considerations that point strongly in the direction of Commonwealth-appointed directors being independent of Commonwealth control:

- the position of directors under company law is that they have a primary obligation to act in the best interests of the company; the obligation is fiduciary in nature and directors would be in breach of that obligation if they acted in accordance with interests which conflicted with the best interests of the company without warrant for so doing derived from the Memorandum and Articles or legislative provision;

- with the possible exception of the directors appointed "as representatives of" the ACT and the NT, the Aboriginal Australian and the members appointed by the Prime Minister, there is nothing in the Memorandum and Articles or the Act to suggest that Commonwealth appointees should act otherwise than in accordance with the interests of the



Authority; even if it is assumed that there is an implication to be drawn that these other 6 directors should act in the interests of their respective constituencies or appointers (in the case of the Prime Minister's appointees) rather than the interests of the company, those interests would not necessarily equate with those of the Commonwealth except perhaps in the case of the Prime Minister's appointees;

the Memorandum and Articles do not confer any power on the Commonwealth in relation to the tenure of Commonwealth-appointed directors -

- disqualification of directors under article 45 is dependent upon the objective ascertainment or happening of certain facts and circumstances not involving any discretion on the part of the Commonwealth;
- the power to dismiss directors resides with the general meeting without involvement of appointers (article 34). As previously discussed, the Commonwealth is not in a position to control a general meeting;

as explained above, the powers of directors over day-to-day management of the authority are subject to regulation by the members in general meeting:

by analogy with the High Court's judgment in Keighery's case (see above), a power in the Commonwealth to provide directors with an incentive or inducement to vote in a particular way would not amount to power to control their votes.

17. In the light of the above considerations, it seems to me that, if the Commonwealth were to seek to influence the 12 Commonwealth-appointed directors to act in accordance with the Commonwealth's interests or wishes on a particular point, its lack of any coercive power over the directors, and in particular its inability to cause the termination of appointment or the dismissal of any director, would mean that compliance with its wishes would be fortuitous rather than as the result of a capacity to control those directors.

Whether the Commonwealth is otherwise in a position to exercise control

18. The Authority is a company incorporated under the Companies Act 1981 and there is nothing in that Act which would place the Commonwealth in a controlling position. Indeed this situation is to be expected given the way in which the Authority has been constituted as a co-operative arrangement between the Commonwealth and States.

19. The Australian Bicentennial Authority Act 1980 certainly contains provisions enabling the Commonwealth to influence the Authority in various ways, particularly:

- s.6 - enables the Minister to give policy directions to the Authority, but these would not extend to directions to take specific action.
- s.10 - Minister for Finance may give directions as to manner of payment to the Authority of funds appropriated by Parliament.
- s.12, - Minister and Treasurer have powers to regulate  
13, 14 application, investment and borrowing of monies by Authority.
- s.21 - Minister may direct winding up of Authority.

20. In my view, however, such provisions fall well short of conferring control on the Commonwealth in any sense comparable to that exercisable by a general meeting of a company. Nor have I been able to find any combination of these legislative powers with the Commonwealth's powers, direct or indirect, under the Memorandum and Articles which would place it in a position to exercise control over the Authority.

#### Conclusion

21. I accordingly confirm, with the above amplification, my advice of 28 November 1986 that the Australian Bicentennial Authority does not fall within the definition of "prescribed authority" in the FOI Act.

22. I am reinforced in this conclusion on noting that neither the legislation nor the Memorandum and Articles suggest any overall intention that the Commonwealth should control the Authority. Active voices in its management are given to other interests and, in particular, there is an important level of participation by the States and persons from the major political parties.

23. I enclose for your information, having regard to your responsibility for the Authority, a copy of my advice of today's date to the Australian Archives concerning application of the Archives Act to the Authority.



(R. BELL)  
for Secretary

4 January 1988

Freedom of Information (Miscellaneous Provisions) Regulations  
(SR 284/1987)

The effect of these regulations is to remove the Australian Bicentennial Authority from the bodies subject to the operation of the Freedom of Information Act 1982. The ABA was initially declared in 1982 to be a body falling within the extended range of prescribed authorities to which the FOI Act applies and its status as such was reconfirmed when the relevant schedule to the Regulations was remade in 1983 and 1985. To come within this description, it is necessary that it be an incorporated company over which the Commonwealth is in a position to exercise control (Freedom of Information Act 1982, s 4(1), definition of "prescribed authority", sub-para (b)(ii). Presumably the view must have been taken in 1982 and subsequently that the Commonwealth was in such a position. This is not surprising. Under s 6 of the Australian Bicentennial Authority Act 1980 the Authority is to promote its objects and exercise its powers in accordance with any directions with respect to the policies it is to follow given to it by the Minister. Under s 10 the Authority is dependent for its finances on moneys appropriated by the Parliament. Its investments and borrowings are controlled (ss 12-14). It can be wound up at any time by the Minister (s2). These provisions seem to me to indicate that the Commonwealth can exercise a great deal of control over the Authority. Presumably in the past this was thought to be the case thereby justifying the inclusion of the Authority in the Regulations. However, the explanatory memorandum accompanying the Statutory Rules gives as the reason for the deletion of the ABA from the Regulations that the Commonwealth is not in a position to exercise control over it. It seems to me that the Committee is entitled to a fuller explanation than this assertion. I suggest that it seek advice as to why it is now thought that the ABA cannot be prescribed and what the government sees is the effect of the sections of the ABA Act referred to above.



Statutory Rules 1987 No. 284<sup>1</sup>

## Freedom of Information (Miscellaneous Provisions) Regulations<sup>2</sup> (Amendment)

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulations under the *Freedom of Information Act 1982*.

Dated 11 December 1987.

N. M. STEPHEN  
Governor-General

By His Excellency's Command,

LIONEL BOWEN  
Attorney-General

### Principal Regulations

1. In these Regulations, "Principal Regulations" means the Freedom of Information (Miscellaneous Provisions) Regulations.

Prescribed requirements concerning the furnishing of information pursuant to subsection 93 (2) of the Act

2. Regulation 6 of the Principal Regulations is amended by omitting from paragraph (a) "month" (wherever occurring) and substituting "quarter".

### Schedule 1

3. Schedule 1 to the Principal Regulations is amended:

- (a) by omitting:  
"Australian Bicentennial Authority"; and
- (b) by omitting:  
"Australian Institute of Sport".

2 *Freedom of Information (Miscellaneous Provisions) 1987 No. 284*

## Schedule 2

4. Schedule 2 to the Principal Regulations is repealed and the following Schedule substituted:

SCHEDULE 2		
PRINCIPAL OFFICES IN RESPECT OF PRESCRIBED AUTHORITIES		
Column 1 Item No.	Column 2 Prescribed authority	Column 3 Office
1	Academic Salaries Tribunal	Secretary
2	ACTION Liaison Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
3	Administrative Appeals Tribunal	Registrar
4	Agents Board of the Australian Capital Territory	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
5	Anglo-Australian Telescope Board	Secretary
6	Apprenticeship Board of the Australian Capital Territory	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
7	Architects Board	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
8	Australia-Japan Foundation	Executive Director
9	Australian Apple and Pear Corporation	Deputy General Manager
10	Australian Broadcasting Corporation	Managing Director
11	Australian Bureau of Statistics	Australian Statistician
12	Australian Canned Fruit Corporation	General Manager
13	Australian Capital Territory Arts Development Board	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
14	Australian Capital Territory Children's Advisory Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
15	Australian Capital Territory Co-ordinating Committee for the National Tree Programme	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
16	Australian Capital Territory Fire Brigade	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
17	Australian Capital Territory Gaming and Liquor Authority	Chief Executive
18	Australian Capital Territory Heritage Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
19	Australian Capital Territory International Youth Year Co-ordinating Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories

Regulation 4

## SCHEDULE 2—continued

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Office
20	Australian Capital Territory Schools Authority	Chief Education Officer
21	Australian Capital Territory Sport and Fitness Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
22	Australian Capital Territory Third Party Insurance Premiums Advisory Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
23	Australian Centre for International Agricultural Research	Director
24	Australian Conciliation and Arbitration Commission	Industrial Registrar
25	Australian Customs Service	Comptroller-General of Customs
26	Australian Dried Fruits Corporation	General Manager and Secretary
27	Australian Drug Evaluation Committee	Secretary to the Department of Community Services and Health
28	Australian Electoral Commission	Electoral Commissioner
29	Australian Federal Police	Commissioner of Police
30	Australian Film Commission	Chief Executive
31	Australian Film, Television and Radio School	Director
32	Australian Government Solicitor	Secretary to the Attorney-General's Department
33	Australian Heritage Commission	Director
34	Australian Honey Board	Manager-Secretary
35	Australian Industrial Court	Industrial Registrar
36	Australian Institute of Aboriginal Studies	Principal
37	Australian Institute of Anatomy	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories.
38	Australian Institute of Criminology	Director
39	Australian Institute of Family Studies	Director
40	Australian Institute of Marine Science	Secretary
41	Australian Institute of Multicultural Affairs	Director
42	Australian Institute of Sport	Director of the Institute
43	Australian Maritime College	Principal
44	Australian Meat and Livestock Corporation	Managing Director
45	Australian National Gallery	Director
46	Australian National University	Vice-Chancellor
47	Australian Postal Commission	Managing Director
48	Australian Science and Technology Council	Secretary
49	Australian Sports Commission	General Manager
50	Australian Telecommunications Commission	Managing Director
51	Australian Tobacco Board	Secretary-Manager
52	Australian Tourist Commission	General Manager
53	Australian Trade Commission	Managing Director

## 4 Freedom of Information (Miscellaneous Provisions) 1987 No. 284

## SCHEDULE 2—continued

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Office
54	Australian Trade Union Training Authority	National Director
55	Australian War Memorial	Director
56	Australian Wine and Brandy Corporation	General Manager
57	Board of Management for Defence Aerospace	Secretary to the Department of Defence
58	Board of Management for Munitions	Secretary to the Department of Defence
59	Building and Construction Industry Long Service Leave Board	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
60	Building Review Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
61	Building Standards Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
62	Bureau of Meteorology	Director
63	Bush Fire Council	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
64	Canberra College of Advanced Education	Principal
65	Canberra Development Board	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
66	Canberra Public Cemeteries Trust	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
67	Canberra Public Library Service Advisory Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
68	Canberra Retail Markets Trust	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
69	Canberra Theatre Trust	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
70	Central Trade Committee Blacksmithing Trades	Secretary to the Department of Industrial Relations
71	Central Trade Committee Boiler-making Trades	Secretary to the Department of Industrial Relations
72	Central Trade Committee Boot Trades	Secretary to the Department of Industrial Relations
73	Central Trade Committee Electrical Trades	Secretary to the Department of Industrial Relations
74	Central Trade Committee Engineering Trades	Secretary to the Department of Industrial Relations
75	Central Trade Committee Sheet-metal Trades	Secretary to the Department of Industrial Relations
76	Coal Industry Tribunal	Secretary

## SCHEDULE 2—continued

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Office
105	Land Commissioner	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
106	Lanyon Restoration and Acquisitions Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
107	Law Reform Commission	Secretary and Director of Research
108	Legal Aid Commission (A.C.T.)	President
109	Legal Aid Committees	Chief Executive Officer of the Legal Aid Commission (A.C.T.)
110	Legal Aid Consultative Committee	Chief Executive Officer of the Legal Aid Commission (A.C.T.)
111	Local Trades Committees Blacksmithing Trades	Secretary to the Department of Industrial Relations
112	Local Trades Committees Boilermaking Trades	Secretary to the Department of Industrial Relations
113	Local Trades Committees Boot Trades	Secretary to the Department of Industrial Relations
114	Local Trades Committees Electrical Trades	Secretary to the Department of Industrial Relations
115	Local Trades Committees Engineering Trades	Secretary to the Department of Industrial Relations
116	Local Trades Committees Sheetmetal Trades	Secretary to the Department of Industrial Relations
117	Magistrates Court established under the <i>Magistrates Court Ordinance 1930</i> of the Australian Capital Territory	Clerk of the Magistrates Court
118	Marine Council	Secretary to the Department of Transport and Communications
119	Medical Benefits Advisory Committee	Secretary to the Department of Community Services and Health
120	Medical Benefits (Dental Practitioners) Advisory Committee	Secretary to the Department of Community Services and Health
121	Medical Benefits (Dental Practitioners) Appeal Committee	Secretary to the Department of Community Services and Health
122	Medical Services Committee of Inquiry for New South Wales (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health
123	Medical Services Committee of Inquiry for Queensland (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health
124	Medical Services Committee of Inquiry for South Australia (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health
125	Medical Services Committee of Inquiry for Tasmania (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health



## SCHEDULE 2—continued

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Office
105	Land Commissioner	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
106	Lanyon Restoration and Acquisitions Committee	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
107	Law Reform Commission	Secretary and Director of Research
108	Legal Aid Commission (A.C.T.)	President
109	Legal Aid Committees	Chief Executive Officer of the Legal Aid Commission. (A.C.T.)
110	Legal Aid Consultative Committee	Chief Executive Officer of the Legal Aid Commission (A.C.T.)
111	Local Trades Committees Blacksmithing Trades	Secretary to the Department of Industrial Relations
112	Local Trades Committees Boilermaking Trades	Secretary to the Department of Industrial Relations
113	Local Trades Committees Boot Trades	Secretary to the Department of Industrial Relations
114	Local Trades Committees Electrical Trades	Secretary to the Department of Industrial Relations
115	Local Trades Committees Engineering Trades	Secretary to the Department of Industrial Relations
116	Local Trades Committees Sheetmetal Trades	Secretary to the Department of Industrial Relations
117	Magistrates Court established under the <i>Magistrates Court Ordinance 1930</i> of the Australian Capital Territory	Clerk of the Magistrates Court
118	Marine Council	Secretary to the Department of Transport and Communications
119	Medical Benefits Advisory Committee	Secretary to the Department of Community Services and Health
120	Medical Benefits (Dental Practitioners) Advisory Committee	Secretary to the Department of Community Services and Health
121	Medical Benefits (Dental Practitioners) Appeal Committee	Secretary to the Department of Community Services and Health
122	Medical Services Committee of Inquiry for New South Wales (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health
123	Medical Services Committee of Inquiry for Queensland (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health
124	Medical Services Committee of Inquiry for South Australia (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health
125	Medical Services Committee of Inquiry for Tasmania (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health

## SCHEDULE 2—continued

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Office
126	Medical Services Committee of Inquiry for Victoria (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health
127	Medical Services Committee of Inquiry for Western Australia (established under the <i>Health Insurance Act 1973</i> )	Secretary to the Department of Community Services and Health
128	Medical Services Committee of Inquiry for New South Wales (established under the <i>National Health Act 1953</i> )	Secretary to the Department of Community Services and Health
129	Medical Services Committee of Inquiry for Queensland (established under the <i>National Health Act 1953</i> )	Secretary to the Department of Community Services and Health
130	Medical Services Committee of Inquiry for South Australia (established under the <i>National Health Act 1953</i> )	Secretary to the Department of Community Services and Health
131	Medical Services Committee of Inquiry for Tasmania (established under the <i>National Health Act 1953</i> )	Secretary to the Department of Community Services and Health
132	Medical Services Committee of Inquiry for Victoria (established under the <i>National Health Act 1953</i> )	Secretary to the Department of Community Services and Health
133	Medical Services Committee of Inquiry for Western Australia (established under the <i>National Health Act 1953</i> )	Secretary to the Department of Community Services and Health
134	Medical Services Review Tribunals	Secretary to the Department of Community Services and Health
135	Museum of Australia	Executive Secretary
136	National Advisory Committee on the Commonwealth Employment Service	Secretary to the Department of Employment, Education and Training
137	National Library of Australia	Director-General
138	National Media Liaison Service	Head
139	National Standards Commission	Executive Director
140	National Tuberculosis Advisory Council	Secretary to the Department of Community Services and Health
141	Nursing Homes Advisory Committee for New South Wales	Secretary to the Department of Community Services and Health
142	Nursing Homes Advisory Committee for Queensland	Secretary to the Department of Community Services and Health
143	Nursing Homes Advisory Committee for South Australia	Secretary to the Department of Community Services and Health
144	Nursing Homes Advisory Committee for Tasmania	Secretary to the Department of Community Services and Health
145	Nursing Homes Advisory Committee for Victoria	Secretary to the Department of Community Services and Health

## 8 Freedom of Information (Miscellaneous Provisions) 1987 No. 284

## SCHEDULE 2—continued

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Office
146	Nursing Homes Advisory Committee for Western Australia	Secretary to the Department of Community Services and Health
147	Nursing Homes Fees Review Committee of Inquiry for New South Wales	Secretary to the Department of Community Services and Health
148	Nursing Homes Fees Review Committee of Inquiry for Queensland	Secretary to the Department of Community Services and Health
149	Nursing Homes Fees Review Committee of Inquiry for South Australia	Secretary to the Department of Community Services and Health
150	Nursing Homes Fees Review Committee of Inquiry for Tasmania	Secretary to the Department of Community Services and Health
151	Nursing Homes Fees Review Committee of Inquiry for Victoria	Secretary to the Department of Community Services and Health
152	Nursing Homes Fees Review Committee of Inquiry for Western Australia	Secretary to the Department of Community Services and Health
153	Office of Parliamentary Counsel	First Parliamentary Counsel
154	Official Trustee in Bankruptcy	Inspector-General in Bankruptcy
155	Optometrical Services Committee of Inquiry	Secretary to the Department of Community Services and Health
156	Optometrical Services Review Tribunal	Secretary to the Department of Community Services and Health
157	Overseas Telecommunications Commission (Australia)	Managing Director
158	Parliament House Construction Authority	Chief Executive
159	Parole Board of the Australian Capital Territory	Secretary
160	Patent Office	Commissioner of Patents
161	Pharmaceutical Benefits Advisory Committee	Secretary to the Department of Community Services and Health
162	Pharmaceutical Benefits Remuneration Tribunal	Secretary
163	Pharmaceutical Services Committee of Inquiry for New South Wales	Secretary to the Department of Community Services and Health
164	Pharmaceutical Services Committee of Inquiry for Queensland	Secretary to the Department of Community Services and Health
165	Pharmaceutical Services Committee of Inquiry for South Australia	Secretary to the Department of Community Services and Health
166	Pharmaceutical Services Committee of Inquiry for Tasmania	Secretary to the Department of Community Services and Health
167	Pharmaceutical Services Committee of Inquiry for Victoria	Secretary to the Department of Community Services and Health
168	Pharmaceutical Services Committee of Inquiry for Western Australia	Secretary to the Department of Community Services and Health
169	Plumbers, Drainers and Gasfitters Board	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
170	Registration Committees	Secretary to the Department of Community Services and Health
171	Remuneration Tribunal	Secretary

## SCHEDULE 2—continued

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Office
172	Reserve Bank of Australia	Governor
173	Review Committees	Chief Executive Officer of the Legal Aid Commission (A.C.T.)
174	Road Safety Council of the Australian Capital Territory Inc.	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
175	Royal Australian Air Force Veterans' Residences Trust	Secretary
176	Security Appeals Tribunal	Registrar
177	Special Broadcasting Service	Executive Director
178	Specialist Recognition Advisory Committee of Inquiry for New South Wales	Secretary to the Department of Community Services and Health
179	Specialist Recognition Advisory Committee of Inquiry for Queensland	Secretary to the Department of Community Services and Health
180	Specialist Recognition Advisory Committee of Inquiry for South Australia	Secretary to the Department of Community Services and Health
181	Specialist Recognition Advisory Committee of Inquiry for Tasmania	Secretary to the Department of Community Services and Health
182	Specialist Recognition Advisory Committee of Inquiry for Victoria	Secretary to the Department of Community Services and Health
183	Specialist Recognition Advisory Committee of Inquiry for Western Australia	Secretary to the Department of Community Services and Health
184	Specialist Recognition Appeal Committee	Secretary to the Department of Community Services and Health
185	Student Assistance Review Tribunals	Secretary to the Department of Employment, Education and Training
186	Supreme Court of the Australian Capital Territory	Registrar
187	Surveyors Board of the Australian Capital Territory	Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories
188	Tax Agents Board of Victoria	Secretary
189	Therapeutic Goods Advisory Committee	Secretary to the Department of Community Services and Health
190	Therapeutic Goods Standards Committee	Secretary to the Department of Community Services and Health
191	Trade Marks Office	Commissioner of Patents
192	Trade Practices Tribunal	Registrar
193	Trustees of the Royal Australian Air Force Welfare Trust Fund	Secretary

## Schedule 3

5. Schedule 3 to the Principal Regulations is repealed and the following Schedule substituted:

10 *Freedom of Information (Miscellaneous Provisions) 1987 No. 284*

## SCHEDULE 3

Regulation 5

## RESPONSIBLE MINISTERS IN RESPECT OF PRESCRIBED AUTHORITIES

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Minister
1	ACTION Liaison Committee	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
2	Australian Capital Territory Arts Development Board	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
3	Australian Capital Territory Children's Advisory Committee	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
4	Australian Capital Territory Co-ordinating Committee for the National Tree Programme	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
5	Australian Capital Territory Heritage Committee	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
6	Australian Capital Territory International Youth Year Co-ordinating Committee	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
7	Australian Capital Territory Sport and Fitness Committee	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
8	Australian Capital Territory Third Party Insurance Premiums Advisory Committee	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
9	Australian Conciliation and Arbitration Commission	Minister of State for Industrial Relations
10	Australian Industrial Court	Attorney-General
11	Canberra Development Board	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
12	Canberra Public Library Service Advisory Committee	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
13	Coal Industry Tribunal	Minister of State for Industrial Relations
14	Commonwealth Accommodation and Catering Services Limited	Minister of State for Administrative Services
15	Coroner's Court established under the <i>Coroners Ordinance 1956</i> of the Australian Capital Territory	Attorney-General
16	Deputy Industrial Registrars	Minister of State for Industrial Relations
17	Family Court of Australia	Attorney-General
18	Federal Court of Australia	Attorney-General
19	Federal Court of Bankruptcy	Attorney-General
20	Flight Crew Officers Industrial Tribunal	Minister of State for Industrial Relations
21	High Court of Australia	Attorney-General
22	Industrial Registrar	Minister of State for Industrial Relations
23	Lanyon Restoration and Acquisitions Committee	Minister of State for the Arts, Sport, the Environment, Tourism and Territories

## SCHEDULE 3—continued

Column 1 Item No.	Column 2 Prescribed authority	Column 3 Minister
24	Magistrates Court established under the <i>Magistrates Court Ordinance 1930</i> of the Australian Capital Territory	Attorney-General
25	National Media Liaison Service	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
26	Road Safety Council of the Australian Capital Territory Inc.	Minister of State for the Arts, Sport, the Environment, Tourism and Territories
27	Supreme Court of the Australian Capital Territory	Attorney-General

## NOTES

1. Notified in the *Commonwealth of Australia Gazette* on 17 December 1987.
2. Statutory Rules 1982 No. 323 as amended by 1983 No. 338; 1985 Nos. 106 and 348, 1986 No. 45.

EXPLANATORY STATEMENT

Statutory Rules 1987 Nos. 284  
Issued by the Authority of the Attorney-General

FREEDOM OF INFORMATION ACT 1982: FREEDOM OF INFORMATION  
 (MISCELLANEOUS PROVISIONS) REGULATIONS (AMENDMENT) ~~AND FREEDOM~~  
~~OF INFORMATION (ADDRESSES) REGULATIONS (REPEAL)~~

These regulations:

- (1) amend the Freedom of Information (Miscellaneous Provisions) Regulations; and
- (2) repeal the Freedom of Information (Addresses) Regulations.

Section 94 of the Act empowers the Governor-General to make Regulations prescribing all matters that are necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subsection 33(3) of the Acts Interpretation Act 1901 provides that, unless the contrary intention appears, a power conferred by an Act to make a Regulation is to be construed as including a power to repeal the Regulation.

(1) Freedom of Information (Miscellaneous Provisions) Regulations (Amendment)

Section 93 of the Act provides for the prescription of requirements concerning the provision by agencies of statistical information relating to the Freedom of Information Act 1982. Paragraph 6(a) in the Freedom of Information (Miscellaneous Provisions) Regulations used to provide that information which is required to be furnished monthly shall be furnished not later than 21 days after the end of the month. Under a recent simplification of reporting requirements, monthly reporting has been replaced by quarterly reporting. The Regulations amend paragraph 6(a) to replace the references to months with references to quarters.

Section 4 of the Act is an interpretation provision and subsection 4(1) includes definitions of the expressions "prescribed authority", "principal officer", and "responsible Minister".

The definition of "prescribed authority" in subsection 4(1) is in wide terms so as to bring all statutory bodies and other agencies performing functions of the Commonwealth Government within the scope of the Act. Included in the definition are persons performing the duties of an office established by an

- 2 -

enactment, bodies established for a public purpose in accordance with an enactment and other bodies, declared by the Regulations to be prescribed authorities, being bodies established by the Governor-General or by a Minister, or over which the Commonwealth can exercise control. Schedule 1 to the Regulations lists bodies in this last category of prescribed authorities.

The "principal officer" of an agency is, in the case of a Department, the Secretary to the Department. In the case of a prescribed authority, the "principal officer" is the person constituting the authority, the person entitled to preside at a meeting of the authority, or the person holding an office declared in the Regulations to be the principal office. Schedule 2 to the Regulations lists all the offices declared as principal offices.

The "responsible Minister" of an agency is the Minister administering the Department or, in the case of a prescribed authority established by an enactment, the Minister administering the enactment. For all other prescribed authorities, it is necessary to declare a Minister to be the responsible Minister. Schedule 3 to the Regulations lists the responsible Ministers for this last category of prescribed authorities.

The amendments to the Freedom of Information (Miscellaneous Provisions) Regulations have updated the three Schedules to take account of changes in administrative arrangements, and certain other developments since the Regulations were last amended in 1986.

Notes on the Regulations are attached.

(2) Freedom of Information (Addresses) Regulations (Repeal)

The Freedom of Information (Addresses) Regulations ("the Addresses Regulations") were made pursuant to paragraph 19(1)(c) of the Freedom of Information Act 1982 as originally enacted, and set out in Schedules a list of addresses of agencies and Ministers to which requests made pursuant to the Act might be posted or delivered. These Regulations were made redundant by section 10 of the Freedom of Information Amendment Act 1983 which amended section 19 to establish a system of notifying the "appropriate address" of an agency or Minister in the Gazette or the Commonwealth Government Directory.

The new Regulation repeals the Addresses Regulations.



## ATTACHMENT

NOTES ON REGULATIONSFreedom of Information (Miscellaneous Provisions) Regulations (Amendment)Regulation 1 - Principal Regulations

Regulation 1 provides that the expression "Principal Regulations" means the Freedom of Information (Miscellaneous Provisions) Regulations.

Regulation 2 - Amendment of Regulation 6

Regulation 2 substitutes in Regulation 6 of the Principal Regulations the word "quarter" for "month" so as to accord with recently simplified administrative procedures, whereby agencies and Ministers provide quarterly rather than monthly statistical returns.

Regulation 3 - Schedule 1

Regulation 3 omits from Schedule 1 the references to the Australian Bicentennial Authority and the Australian Institute of Sport.

The Authority has been omitted because it is a company which cannot be declared to be a prescribed authority by regulation within the terms of sub-section 4(1) of the Act, as the Commonwealth is not "in a position to exercise control" over the Authority.

The Institute was formerly a company but is now a statutory authority by virtue of the Australian Institute of Sport Act 1986. It therefore falls within paragraph (a) of the definition of "prescribed authority" in subsection 4(1) of the Act, and does not need to be declared a "prescribed authority" by regulation.

Regulation 4 - Schedule 2

Regulation 4 repeals Schedule 2 and substitutes a new Schedule 2 which reflects changes in administrative arrangements and the creation, abolition or variation in the names of certain prescribed authorities and/or their principal offices.

Regulation 5 - Schedule 3

Regulation 5 repeals Schedule 3 and substitutes a new Schedule 3 which reflects changes in administrative arrangements and the creation, abolition or variation in names of certain prescribed authorities and/or their responsible Ministers.

## ATTORNEY-GENERAL'S DEPARTMENT

CANBERRA

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JA/86/7169

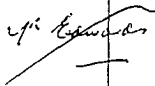
Application of Freedom of Information Act 1982 to  
Australian Bicentennial Authority (ABA)Attorney-GeneralIssue

To inform you of difficulties that have arisen in relation to the application of the FOI Act to the Australian Bicentennial Authority (ABA) and of the proposed solution.

Background

2. The ABA is established as a company limited by guarantee. The FOI Act does not apply to it directly. Section 4(1)(b) of the FOI Act (copy at Attachment A) enables regulations to be made applying the Act to "an incorporated company over which the Commonwealth is in a position to exercise control". In 1982, regulations were made applying the FOI Act to a number of bodies including the ABA (copy at Attachment B). Subsequently, the Department advised that the Commonwealth was not in a position to exercise control over the ABA (copy advices at Attachments C and D). The effect of the advice, if correct, is that the 1982 regulations purporting to apply the FOI Act to the ABA were beyond power. The opportunity was taken, as part of a larger "tidying up" exercise late last year (in the context of revision of regulations to take account of administrative changes), to omit the ABA from the list of bodies applied by the 1982 regulations (copy of amending regulations at Attachment E). At the time, this was seen by the Justice and Administrative Law Division as a technical correction. It is now clear that insufficient attention was given to the policy implications.

3. There has been considerable criticism of the apparent removal of the ABA from the scope of the FOI Act. It is reported that the Opposition may move for disallowance of the regulations. Copies of press clippings are at Attachment F.



Legal considerations

4. I have reviewed the advice which led to the change. I think the advice was probably correct. The conclusion, that the Commonwealth is not in a position to exercise control over the ABA, was reached primarily on the basis of the control test applied in the company law context, namely, whether the Commonwealth is in a position to carry an ordinary resolution at a general meeting of the company although other aspects were considered. It is arguable that the advice gave insufficient weight to provisions of the Australian Bicentennial Authority Act 1980 (the ABA Act - copy at Attachment G) which enable the Commonwealth to exercise a considerable degree of influence over the ABA (e.g. s. 11, which requires the ABA Board to submit estimates to the Minister and prohibits the ABA from expending its moneys otherwise than in accordance with estimates approved by the Minister). However, the key consideration, as I see it, is the unique composition of the membership and Board of the ABA. Its members include, at the Commonwealth level, not only the Prime Minister and the Deputy Prime Minister but also the Leader and Deputy Leader of the Opposition. Other members include the Premier and Opposition Leader from each State and their Northern Territory counterparts. The Board consists of 20 directors, 10 of whom are appointed by the Commonwealth. Two (including the Chairman) are appointed by the Prime Minister. Of the 10 appointed by the Commonwealth, 2 are representatives of the A.C.T., one a representative of the Northern Territory and one an Aboriginal Australian. The remaining 8 are appointed by the States, the Northern Territory and the Leader of the Opposition. Thus, the ABA is not structured to give effect to the wishes of the Executive Government of the Commonwealth. Rather, it is an inter-governmental and bipartisan body. I doubt whether a court would uphold an argument that it is subject to Commonwealth control. I add that I think it unlikely that the Commonwealth would wish, as a matter of policy, to argue that it controlled the ABA.

5. I mention that regulations were also made applying the Ombudsman Act to the ABA. The relevant part of the Ombudsman Act is identical with s. 4(1)(b) of the FOI Act. No action has been taken to repeal those regulations.

Policy considerations

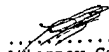


(Ernst Willheim)  
Acting Deputy Secretary

28 January 1988

Noted.

Action Officer - Ernst Willheim  
(71 9008)



.....  
Attorney-General

2/3/88

**PRIME MINISTER**

FOR MEDIA .

15 FEBRUARY 1988

The Government will amend the Australian Bicentennial Authority Act early in the Autumn Sitzings of Parliament to ensure that the Australian Bicentennial Authority (ABA) is subject to the Freedom of Information (FOI), Ombudsman and Archives Acts.

Recent Opposition allegations that the Government is attempting to hide something by exempting the ABA from the coverage of the FOI Act are completely without foundation. The simple fact is that a regulation was passed last December which arose from an Attorney-General's Department opinion that an earlier regulation subjecting the ABA to the FOI Act was invalid.

The Government has decided to put the entire matter beyond doubt once and for all, by amending the ABA Act specifically to bring the ABA under the FOI, Ombudsman and Archives Acts. This course has the full support of the Authority which has not sought exemption from these Acts. It has responded and will continue to respond to requests as though the FOI Act applied.

COMMONWEALTH  
PARLIAMENTARY LIBRARY  
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PARLIAMENT OF AUSTRALIA · THE SENATE  
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

1/0 -2

19 February 1988

The Hon. Lionel Bowen, M.P.  
Attorney-General  
Parliament House  
CANBERRA A.C.T. 2600

Dear Attorney-General,

At its meeting on 18 February 1988, the Committee considered the Freedom of Information (Miscellaneous Provisions) Regulations (Amendment) (being Statutory Rules 1987 No. 284, tabled in the Senate on 17 February 1988). These regulations, effective from the 17 December 1987, removed the Australian Bicentennial Authority (ABA) from the list of prescribed bodies subject to the Freedom of Information Act (FOI Act). In his media statement of 15 February 1988, the Prime Minister indicated that the Government proposed to amend the Australian Bicentennial Authority Act (ABA Act) to ensure that the ABA is, inter alia, subject to the FOI Act. The Committee seeks your advice on certain aspects of the regulations and what is proposed.

Since 1982 the ABA has been regarded as being subject to the FOI Act. In that year Statutory Rules 1982 No. 323 declared the Authority to be a prescribed authority. This declaration was repeated in Statutory Rules 1983 No. 338, 1985 No. 106, 1985 No. 348 and, by implication, in Statutory Rules 1986 No. 45. A "prescribed authority" is defined in subsection 4(1) of the FOI Act as

- (a) a body corporate, or an unincorporated body established for a public purpose by, or in accordance with the provisions of, an enactment, other than
  - (i) an incorporated company or association;
  - (ii)-(vi) (certain defined or named bodies);
- (b) any other body, whether incorporated or unincorporated, declared by the regulations to be a prescribed authority for the purposes of this Act, being
  - (i) ...or

- (ii) an incorporated company or association over which the Commonwealth is in a position to exercise control;

Subsection 4(1) of the FOI Act also defines "agency" to mean "a prescribed authority". Section 11 of that Act provides that, subject to the Act,

...every person has a legally enforceable right to obtain access in accordance with this Act to -

- (a) a document of an agency, other than an exempt document; or
- (b) ...

Presumably the critical question in 1982, when the ABA purportedly became subject to the FOI Act, was whether the Authority was subject to the requisite degree of "control" by the Commonwealth.

The Committee has noted from the Second Reading Speech on the Bill the following statement by the then Attorney-General:

The purpose of this Bill is to identify the status and role of the Australian Bicentennial Authority and guarantee its autonomy and continuity until its intended winding-up on or before 30 June 1990.

...

The Authority is registered as a company, limited by guarantee under the Australian Capital Territory Companies Ordinance 1962.

...

This Bill, together with the memorandum and articles of association of the Authority, provides an arrangement which confers upon the Authority an appropriate degree of autonomy and flexibility to enable it to operate in a business like way, yet at the same time provides for its accountability to the Parliament through the Minister for Administrative Services, who may give directions as to the policies the Authority is to follow.

(Senator P. Durack, Senate Hansard, 31 March 1980, page 1215-1216)

The Committee has also noted that section 5 of the ABA Act requires that the Board of Directors of the Authority shall furnish to the Minister such reports as the Minister requests on matters concerning the promotion of the objects of the Authority. Section 6 of the Act provides that the Authority shall promote

its objects and exercise its powers in accordance with such written policy directions as may be given to the Board by the Minister. Subsection 7(2) provides that the Prime Minister may, at any time, in writing, terminate the appointment of the Chairman of the Authority on 6 months notice. Under section 10 money may be appropriated by Parliament for the purposes of the Authority and the Minister for Finance may give directions as to the amount, and time of payment, of that money. Under Section 11 the ABA must prepare estimates of receipts and expenditure in such form as the Minister directs and as often as the Minister directs and the Authority may not engage in any expenditure other than in accordance with estimates of expenditure approved by the Minister. Under subsection 12(2) any of the ABA's money not immediately required for expenditure may not be invested other than in a bank or a Commonwealth security without the approval of the Treasurer. Under section 14 the ABA may not borrow money without the approval of the Treasurer. Under section 21 the Minister may direct that the Authority be voluntarily wound up where he or she is of the opinion that for any reason this is necessary or desirable.

Regulation 3 of the regulations currently before the Committee has the effect, inter alia, of removing the ABA from the list of prescribed bodies to which the FOI Act applies. The explanatory statement accompanying the regulations states that

The Authority has been omitted because it is a company which cannot be declared to be a prescribed authority by regulation within the terms of subsection 4(1) of the Act, as the Commonwealth is not "in a position to exercise control" over the Authority. (Note to regulation 3.)

The Committee is acquainted with the decision in Egicorp Industries Ltd v ACI International Ltd [1987] V.R. 485 where the Full Court of the Victorian Supreme Court, at page 492, said

We are ...of the opinion that, in order to be in a position to control voting power, there must be an enforceable and immediately exercisable right to exercise control of the requisite voting power at the relevant time... (emphasis added)

This principle was enunciated and applied in the case which, inter alia, turned on the meaning of the expression "foreign person", a phrase defined in the Foreign Takeovers Act 1975 as a corporation in which a foreign person holds a controlling interest. That expression was defined as a substantial interest which in turn was defined in terms of the position occupied by a person who is in a position to control a minimum percentage of the voting power.



Since the regulations are presently in force and presently subject to scrutiny by the Committee in accordance with its Principles, it would be very helpful if you could let the Committee know the legal basis for the decision to remove the ABA from the real or apparent scope of the FOI Act. The background to this decision is not properly elucidated in the explanatory statement. As you know, over the past year the Committee has been persuading Ministers to improve the overall quality of the explanatory documents which accompany delegated legislative instruments to the Parliament for general approval, to the Committee for scrutiny or to the courts and tribunals adjudicating disputes. The Committee takes the view that in this case the explanatory documents should have given a fuller explanation. It is undoubtedly a matter of considerable significance when regulations effect the real or apparent removal from the application of the FOI Act of an important body like the ABA, only a few days before the commencement of the centrepiece of that body's existence, namely the bicentennial year.

Your cooperation in explaining the legal background to the decision would be much appreciated by the Committee.

The Committee has also noted the media release from the Prime Minister, dated 15 February 1988, in which it is stated that

The Government will amend the Australian Bicentennial Authority Act early in the Autumn Sittings of Parliament to ensure that the Australian Bicentennial Authority (ABA) is subject to the Freedom of Information (FOI), Ombudsman and Archives Acts.

...a regulation was passed last December which arose from an Attorney-General's Department opinion that an earlier regulation subjecting the ABA to the FOI Act was invalid.

The Government has decided to put the entire matter beyond doubt once and for all, by amending the ABA Act specifically to bring the ABA under the FOI, Ombudsman and Archives Acts. This course has the full support of the Authority which has not sought exemption from these Acts. It has responded and will continue to respond to requests as though the FOI Act applied.

As you will appreciate, the Committee's interest in all of this does not arise from any concern for, or criticism of, the policy aspects of this delegated legislation. The nature of the Committee's approach to scrutiny has been aptly summarised by a former Chairman who reported to the Senate that

It should be stressed, however, that the Committee itself assiduously avoids questioning the policy or merits of delegated legislation. Its task is one of technical scrutiny in which it examines the justice, the fairness or the propriety of the way in which regulatory measures are determined and imposed. Properly limited by its narrow remit, it does not look for the political acceptability of the policy being pursued. That is the province of the Parliament itself. Rather the Committee looks for wisdom, fairness, justice and restraint in the regulatory procedures to be followed in achieving that policy. The Committee is concerned with the justice and propriety of ways and means. (Senator B. Cooney, Senate Hansard, 4 June 1987, page 3528)

The Committee has some reservations whether, without more, the proposed course of action will be adequate to meet the requirements of principle in protecting rights to freedom of information. As long as Parliament and people await the passage of the amending Act foreshadowed by the Prime Minister the regulations descheduling the ABA will remain in force and there will be no enforceable legal right to freedom of information in this case. As a parliamentary body required to apply principles of liberty and propriety to subordinate laws the Committee must take the principled view notwithstanding the fact that, as the Prime Minister has noted, the ABA "has responded and will continue to respond to requests as though the FOI Act applied".

Since the drafting, settling, introduction, passage and proclamation of a suitable amending Act may take some considerable time the Committee respectfully suggests that it may be appropriate in the meantime for new regulations to be made expressly restoring the ABA to the schedule of prescribed bodies subject to the FOI Act. While there may be some residual doubt whether prescription of the ABA can, as a matter of law, make the Authority subject to the Act, there can be no doubt whatever that as long as the Authority is not prescribed it is definitely not subject to the Act. Provided it is prescribed, it is a matter of legal interpretation for the Administrative Appeals Tribunal or a matter of law for the Federal Court or the High Court whether the FOI Act can apply to a prescribed ABA. In this case the benefit of any official doubts about the validity of prescription should be resolved decisively in favour of rights to freedom of information.

Although the situation is far from ideal, from the point of view of principle prescription of the Authority is a more protective course of action than reliance on voluntary compliance pending the passage of the proposed amendments to the Act. A mere repeal of the "offending" regulations will not, of course, restore the Authority to the Schedule. New regulations should urgently restore the ABA to the list of prescribed bodies. An alternative proposal, of course, is disallowance of the regulations by the

Senate either by resolution after debate or by effluxion of time. By virtue of subsection 48(7) of the Acts Interpretation Act disallowance would have the effect of reviving, from the date of such disallowance, the repealed regulations which prescribed the ABA. As with the use of an amending Act, deemed disallowance by effluxion of time under subsection 48(5) of the Acts Interpretation Act, would not be a realistic solution because of the length of time which must elapse during which legal rights to freedom of information would remain legally extinguished.

The Committee would be grateful if you would let it have your views on whether a new regulation will urgently be made restoring the ABA to the list of prescribed bodies.

Yours sincerely,



Bob Collins )  
Chairman



DEPUTY PRIME MINISTER  
ATTORNEY-GENERAL  
PARLIAMENT HOUSE  
CANBERRA A.C.T. 2600

87/15526/3:RF  
88/808:BK

11 MAR 1988

Dear Bob,

I refer to your letter of 19 February 1988 concerning the Freedom of Information (Miscellaneous Provisions) Regulations (Amendment) (SR 1987 No.284) which, inter alia, removed the Australian Bicentennial Authority (ABA) from the list of prescribed authorities subject to the Freedom of Information Act (FOI Act).

You ask whether a new regulation will be made restoring the ABA to the list of prescribed bodies. I understand the Committee to favour that course on the basis that-

- . if there is legal doubt as to the validity of such prescription, the doubt should be resolved in favour of the rights of the public; and
- . notwithstanding the Prime Minister's announcement that the ABA Act would be amended to make the ABA clearly subject to FOI, Ombudsman and Archives legislation, it may be some time before the amendments are made and come into effect.

The Committee also asked for an explanation of the legal background to the Government's decision to remove the ABA from prescription by regulation.

In November 1986 my Department advised the Department of the Prime Minister and Cabinet that there was no power under the FOI Act to prescribe the ABA as a prescribed authority for the purposes of that Act since the Commonwealth was not in a position to exercise control over the ABA. That advice went on to say that the relevant regulation made in 1982 under the FOI Act was accordingly invalid in that respect.

The issue was further considered in early 1987 and the initial advice was confirmed in a memorandum dated 1 May 1987. Copies of those advices are attached.

Against this background, it was considered that it would be misleading to allow the regulations to continue to purport to prescribe the ABA as an authority. A convenient opportunity to correct the situation arose late last year when the relevant regulations were amended to take account of the changes to administrative arrangements which were made in July 1987. The ABA was accordingly removed from prescription by the amending regulations to which you referred. In the light

of subsequent public discussion of the matter, the advice was again reviewed in January 1988 by a senior officer of the Department who advised me that it was probably correct. I also attach for your information a copy of the relevant parts of the minute to me dated 28 January 1988 communicating that legal advice.

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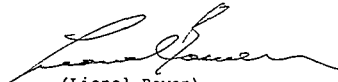
The Government subsequently decided that, to put the matter beyond doubt, the ABA Act should be amended to make the ABA subject to the FOI, Archives and Ombudsman Acts. As you are aware, the Prime Minister announced on 15 February 1988 that amendments to achieve these changes would be introduced early in the Autumn sittings of Parliament.

Amendments to give effect to this decision have been included in the Statute Law (Miscellaneous Provisions) (SLMP) Bill 1988 which the Government plans to introduce into the House of Representatives very shortly.

In view of the imminent introduction of the amending legislation, I do not think that any good purpose would be served by the remaking of the regulation prescribing the ABA for the purposes of the FOI Act. This conclusion is reinforced by the advice that the regulation was probably invalid. As regards the Committee's concerns that failure to re-prescribe the ABA might adversely affect the rights of the public, the very small number of FOI requests received by the ABA (except during a period of controversy in 1984/85), considered together with the ABA's policy of responding to any requests that it receives consistently with the purposes of the FOI Act, suggests that the public would not be disadvantaged pending passage of the foreshadowed amendment. (There were 23 requests for access in 1984-85, but only 9 subsequent requests have been made to the ABA, none of which was current as at 26 February 1988.)

For the same reasons, the Government does not see the need for disallowance of the Regulations. However, if the Committee were to recommend disallowance notwithstanding the considerations discussed above, the disallowance would not, on the advice the Government has received, have the legal effect of applying the FOI Act to the ABA. The Government would not, however, wish to oppose any such disallowance in view of the proposals to bring the ABA under the FOI Act by amending the ABA Act. I am here assuming that any motion for disallowance would be confined to regulation 3 of SR 1987 No. 284. Any proposal to disallow the whole of the regulations would, of course, have effects going well beyond the application of the FOI Act to the ABA.

Yours sincerely,



(Lionel Bowen)

Senator R. Collins  
Chairman  
Standing Committee on Regulations  
and Ordinances  
Parliament House  
CANBERRA ACT 2600



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PARLIAMENT OF AUSTRALIA · THE SENATE  
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES 1/0/4-2

22 March 1988

The Hon. Lionel Bowen, M.P.  
Attorney-General  
Parliament House  
CANBERRA A.C.T. 2600

Dear Attorney-General,

At its meeting on 17 March 1988 the Committee considered your letter of 11 March 1988 concerning the Freedom of Information (Miscellaneous Provisions) Regulations (Amendment) (S.R. 1987 No. 284). Thank you for giving the Committee such a detailed and helpful response and for enclosing relevant extracts from your Department's legal advisings about the validity of the regulations.

The Committee has given very careful consideration to your views that the Australian Bicentennial Authority (ABA or the Authority) is not, as a matter of law, subject to the Freedom of Information Act 1982 (FOI Act). While respecting the quality of the legal advice on which that view is based, the Committee has come to the conclusion that the issue is not beyond doubt. There are a number of reasons for the Committee's reservations.

Since 1982 it had been assumed that the FOI Act applied to the Authority, and the Department of Prime Minister and Cabinet, the Attorney-General's Department, the Australian Bicentennial Authority itself and the Administrative Appeals Tribunal have all acted in good faith on that assumption. While the Committee recognises that there is no concept of waiver or estoppel that can validate delegated legislation that is legally invalid, the fact that the official presumption concerning the applicability of the FOI Act to the ABA has endured and been acted upon for so long must raise some legitimate doubts about the strength of recent opinions which now suggest the contrary.

As reported in the press, (Canberra Times, 2 January 1988, page 3, and I emphasise that qualification), there is, or at least there has been, within your own Department a degree of uncertainty about this issue among lawyers of considerable learning and long experience in advising governments.

As far as the Committee is aware from the advice you have given it, doubts about the applicability of the FOI Act were raised at least as early as 20 May 1986 (memorandum to the Attorney-General's Department, referred to in your Department's advice dated 28 November 1986, JA 86/7769). However no declaratory action by way of removal of the Authority from the relevant regulations was taken until 11 December 1987 when the Governor-General made the regulations now under consideration.

The Committee has some concerns about the adequacy, in the relevant legal opinions, of the analysis of those provisions in the ABA Act which empower the Commonwealth to "control" many aspects of the ABA's functioning. In the authorities cited to support the view that the FOI Act does not apply to the ABA, none of the business entities which generated the judicial discussions about the meaning of "control" was a body subject to an Act of Parliament conferring on government a wide range of powers and discretions.

For all of these reasons the Committee is reluctant to accept without question the view that the FOI Act does not in law apply to the ABA. The Committee considers that this matter is fraught with real doubts and ultimately the legal question may be definitively determined only by a court.

However, as the Committee stressed in its letter to you of 19 February 1988, while there may be some doubt about the state of the law, there can be no doubt whatsoever that in the absence of prescription the ABA is unquestionably beyond the reach of the rights conferred by the FOI Act, notwithstanding the Authority's voluntary agreement to respond to FOI requests. The Committee traditionally acts on the grounds of principle to protect rights by endeavouring to ensure that the certainty of the law secures those rights. While acknowledging that in this case there seems to be a degree of uncertainty whether the previous regulations operated to confer freedom of information rights, the certainty which their repeal has produced is the certainty that there are now no such rights at all. As a matter of principle the Committee cannot accept that this situation should be allowed to subsist for longer than is absolutely necessary to remedy the matter. In this case, although remedial legislation is foreshadowed, the immediate disallowance of regulation 3 will allow a return to the status quo and thereby restore to the courts the right to say, if necessary, that the FOI Act does apply to the Australian Bicentennial Authority and that individuals do have full and unequivocal freedom of information rights as a matter of law.

The Committee proposes to move in the Senate for the disallowance of regulation 3 of the regulations. Disallowance of a regulation which repeals in part another regulation, has the effect of reviving the regulation that was repealed as if the repealing regulation had not been made (subsection 48(7) Acts

Interpretation Act 1901). The Committee has noted that the Government will not oppose such a motion. Thank you for giving that assurance. The Committee will seek to have the disallowance motion moved as a formal motion without debate on the basis that its action is totally non-political, bipartisan and based on an issue of principle, and that debate on the substantive issues of the whole episode concerning the FOI regulations may occur if necessary, when the remedial Bill foreshadowed by the Prime Minister is brought before the Senate.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Bob Collins', with a long horizontal flourish extending to the right. The signature is written over a large, faint circular mark.

Bob Collins  
Chairman



1154 SENATE 23 March 1988

## FREEDOM OF INFORMATION

## Notice of Motion

Senator COLLINS (Northern Territory)—I give notice that, on the next day of sitting, I shall move:

That Regulation 3 of the Freedom of Information (Miscellaneous Provisions) Regulations (Amendment), as contained in Statutory Rules 1987 No. 234 and made under the Freedom of Information Act 1982, be disallowed.

I seek leave to make a statement.

Leave granted.

Senator COLLINS—I hope that honourable senators have noted that I removed the usual word 'short' from that request so that later I am not accused of misleading the Senate.

I have given notice that tomorrow I will move that regulation 3 in the Freedom of Information (Miscellaneous Provisions (Amendments)) Regulations be disallowed. When I move it, I hope the Senate will accept this motion as a formal motion. The Committee, on a bipartisan basis and for reasons of principle, has agreed to take this extremely unusual, if not unique, course of action. The Attorney-General, Mr Lionel Bowen, has assured the Committee that the Government will not oppose the Committee's motion of disallowance.

Mr Deputy President, the background to this matter is relatively straightforward. In December last year certain freedom of information regulations were made, one of which which removed the Australian Bicentennial Authority from the schedule of bodies to which the Freedom of Information Act applied. As honourable senators will know, this matter has been the subject of

political comment and criticism outside the chamber. However, the Committee is not concerned with, nor is it acting in response to, any political issue arising from this regulation. On 4 January this year the Committee's own legal adviser, Professor Dennis Pearce, now the Commonwealth Ombudsman, alerted the Committee to the possibility that the regulation infringed the Committee's bipartisan scrutiny principles concerning personal rights and liberties. The Committee has corresponded with the Attorney-General about the effects of the regulation and has concluded that it should be disallowed.

Regulation 3 has the effect of repealing part of the schedule which is part of the earlier regulation that prescribed the Authority as a body made subject to the Freedom of Information Act. Under the Acts Interpretation Act disallowance of a regulation that repeals a part of an earlier regulation will have the effect of reviving that repealed part as if it had never been repealed. It is precisely this return to the status quo that the Committee, as a matter of principle, seeks to achieve at the earliest possible opportunity with the cooperation of the Senate and with the assurance of the Attorney-General that the motion will not be opposed.

I will shortly seek leave to table the Committee's correspondence on this matter so that interested senators can apprise themselves of the facts before tomorrow. However, I wish briefly to explain the central issue of principle as the Committee understands it. In May 1986 the Attorney-General's Department gave the Auditor-General advice that the Audit Act did not apply to the Australian Bicentennial Authority because the Authority could not be regarded as "a company over which the Commonwealth is in a position to exercise control". That was the legal test to be satisfied before the Audit Act could apply. A few weeks later the Department of Prime Minister and Cabinet asked the Attorney-General's Department whether the same reasoning applied to the question whether the Australian Bicentennial Authority was a company subject to Commonwealth control for the purposes of the Freedom of Information Act.

I interpose here that the Australian Bicentennial Authority is a company limited by guarantee and the Freedom of Information Act applies to a company only if the Commonwealth Government is in a position to exercise 'control' over it and it is a body prescribed by the regulations. In November 1986 the Attorney-General's Department advised that the same reasoning was indeed relevant and therefore the Freedom of Informa-

tion Act did not apply to the Authority. In May 1987 a further opinion was sent to the Department of Prime Minister and Cabinet confirming this advice. Late last year, in the light of these opinions and as part of a larger idying up exercise, freedom of information regulations were made which, among other things, omitted the Authority from the schedule listing the prescribed bodies subject to the Freedom of Information Act.

The kernel of the legal opinions produced by the Attorney-General's Department was that although the Commonwealth Government made certain appointments to the board of the Authority, and although it had other general powers of direction, it was not in a position to 'control' the general meeting of the members of the company and legal precedents had held that nothing less than this is what 'control'—that is, Legal control—amounts to. The Committee does not necessarily suggest simply that that legal opinion was or is wrong. The Committee has taken the view that the question whether the Freedom of Information Act is, as a matter of law, capable of applying to the Australian Bicentennial Authority, is a very complex issue which only the courts could finally determine. The Committee considers that many factors combine to cloud and obscure the clarity of this entire issue.

The Freedom of Information Act has long been thought to apply to the Authority. Indeed, between 1982 and 1986 the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Administrative Appeals Tribunal and the Australian Bicentennial Authority itself have all assumed that the Act applied to the Authority. The Australian Bicentennial Authority Act gives the Commonwealth a very wide range of very large powers over policy directions and finances of the Authority. None of the leading cases which have discussed the concept of control of a company has dealt with the kind of hybrid company that the Authority is by virtue of the statutory powers which to some degree the Government can exercise legally to regulate and control its activities. None of these points was addressed to the Committee's satisfaction in the advising given by the Attorney-General's Department.

For all these reasons, the Committee was reluctant to accept that the opinions about the non-applicability of the Freedom of Information Act were definitive and unassailable. Furthermore, there have been reports in the Press that, even within the Attorney-General's Department

itself, doubts were entertained at a high level about the uncertainty of the state of law on this matter. What has happened, though, is that regulation 3, by repealing the earlier references to the Authority, has placed it absolutely beyond doubt that the Freedom of Information Act does not now apply.

Although the Prime Minister (Mr Hawke) has foreshadowed a Bill to remedy this situation, and although the Authority itself has undertaken to respond to freedom of information requests as if it is legally bound to do so, the Committee has taken the view that it is wrong in principle for delegated legislation to be used to place beyond doubt that important rights do not exist. Prior to regulation 3, there was a strong possibility that freedom of information rights did exist as a matter of law and these could and would have been protected, if necessary, by the Administrative Appeals Tribunal, the Federal Court of Australia or the High Court of Australia. However, the latest regulations, by indisputably removing such rights that might have existed, have, in effect, removed the right of the courts to decide whether they did exist. In place of that judicial right is substituted the opinion of the Attorney-General's Department that under the present law no such right can exist in this instance.

Although the Authority's undertaking, given through the Prime Minister, to respond to freedom of information requests is commendable, and although the remedial Bill is on its way, the Committee's approach to such situations has always been that the rights, where they exist, are best protected by good laws and strong courts rather than by administrative promises, no matter how certain it is that these promises will be acted upon. The Committee cannot foresee the future. We cannot guarantee the future course of events regarding the proposed Bill. We cannot underwrite what I am sure are the undoubted bona fides of the Authority. We simply cannot say that, regardless of the nature of any particular freedom of information request submitted to it for an essentially voluntary response, the Authority will unfailingly respond in the way the law would otherwise oblige it to respond. It probably will, but the Committee cannot give such a guarantee, and principle requires that the best possible guarantee should be given. That guarantee is the guarantee of the law as interpreted and applied by the courts.

All the dictates of principled action in the cause of preserving personal rights point to the desirability of disallowing regulation 3 in order

to restore the status quo until the Prime Minister's remedial legislation is in place, as I am certain it very soon will be. Honourable senators will have an opportunity to debate in full whatever aspects of this matter they wish to debate in a political context when that legislation is before the Senate. I stress that to explain why, in order to preserve the principles upon which this Committee operates, I would like this matter to be treated tomorrow as a formal motion. There will be ample opportunity to debate this issue fully when the Bill is before the Senate.

I would ask honourable senators to give serious consideration to this statement, to the correspondence that I will table and to the Committee's traditional bipartisan and non-political role when tomorrow I move that the motion to disallow regulation 3 be passed as a formal motion. The issue of principle is clear. Of course, because it must have confidence in its own legal opinions, the Government will not oppose the motion, believing that, as a matter of law, the Freedom of Information Act cannot apply to the Australian Bicentennial Authority, regardless of the fate of regulation 3. That is the Government's prerogative. The Committee is simply less confident and we are compelled to act on the basis of principles that have guided the Committee's actions in difficult decisions for over 56 years.

The Committee is anxious, in a bipartisan spirit, to remain above the politics of this situation. A remedial Bill will, hopefully, very soon make this statement and tomorrow's disallowance merely a matter of history. But until then, the Regulations and Ordinance Committee must act in defence of the principle that the right to freedom of information about the affairs of the Authority should be a legal and enforceable right as far as the law as applied by the courts will allow. That was the situation until regulation 3 was made. Disallowance will return us to that preferable situation while we wait for the legislation. The early passage of the remedial Bill will produce the ideal, long-term solution to any remaining legal doubts in this matter. I seek leave to table the Committee's correspondence and a copy of this statement for the information of honourable senators.

Leave granted.

**Senator BISHOP** (New South Wales) (10.31)—by leave—I wish to speak in my capacity as Deputy Chairman of the Senate Standing Committee on Regulations and Ordinances. As honourable senators know, the Committee is a bipartisan committee. We engage in a strictly

technical scrutiny of delegated legislation to protect the rights of individuals, and the proprieties of parliamentary government, from erosion by Executive law-making. We do not debate the merits of regulations. Members of the Committee, by long established tradition, do not use the Committee for the purpose of political point-scoring while acting for or on behalf of the Committee.

We have examined these freedom of information (FOI) regulations which removed the Australian Bicentennial Authority from the schedule of bodies subject to the Freedom of Information Act. We have examined the Attorney-General's legal opinions which suggest that the Commonwealth does not have a sufficient degree of power over the Authority to make it a body subject to Commonwealth control. That control is the legal test for the applicability of the Freedom of Information Act.

The Committee doubts however that in all the circumstances, if the Authority's name had been left in the schedule, a court would have decided that the FOI Act did not apply to the body. The matter is not beyond doubt because under the Australian Bicentennial Authority Act the Commonwealth Government has a number of quite strategic and direct statutory powers over the Authority. It is open to argument that the Attorney-General's Department has not given these statutory powers their proper weight in determining the legal meaning of the word control in the context of this particular legislation.

In a situation of such doubt, the Committee prefers, as a matter of principle, to leave it up to the courts to determine, if necessary, whether the Freedom of Information Act applies to the Australian Bicentennial Authority. Regulation 3 removes from the courts any right to decide whether the Act applies because it expressly and unequivocally removes the Authority from the scope of the Freedom of Information Act. Previously it was thought that individuals had a clear, justifiable, right to freedom of information regarding the Authority. Doubts were raised about that proposition. Now by virtue of the regulation there are no legal rights whatsoever. Disallowance of regulation 3 will revive the previous regulation and restore the status quo pending the passage of a Bill to place the entire matter beyond doubt by providing that the FOI Act does unquestionably apply.

The Committee has acted in good faith and in a non-political way which is as it should be. However, nothing I have said precludes a polit-

ical scrutiny of this matter by this chamber—at this time or when the remedial Bill is introduced.

Senator LEWIS (Victoria)—by leave—I congratulate all members of the Standing Committee on Regulations and Ordinances on the action they have taken. Clearly, this Committee is living up to the highest traditions established many years ago in its bipartisan approach and, as its Chairman and Deputy Chairman have said, its non-political role. I am sure that former Senators Wood and Wright on our side of politics and former Senator Cavanagh on the Labor side would be delighted if they could hear the words—and indeed they may well have done so—expressed here today by the Chairman and Deputy Chairman of the Committee. As a former Chairman and Deputy Chairman of the Committee, I recognise the courageous action of the Chairman and Government senators. It is not easy to approach one's executive with a bipartisan, non-political approach to a matter in which one believes the rights of the citizen may be being interfered with. That is especially difficult for members of the Australian Labor Party because of its strict Caucus rules. This courageous action by Government senators demonstrates that this Committee is probably the most powerful Committee of this Parliament—and, I suspect, of any legislative chamber in the world—in protecting the rights of all Australians. I thank the Committee for its actions.

Senator STONE (Queensland—Leader of the National Party of Australia)—by leave—As a member of the Standing Committee on Regulations and Ordinances, I wish to express my total support for the view stated on this matter both by its Chairman, Senator Collins, and its Deputy Chairman, Senator Bishop.

1238 SENATE 24 March 1988

#### FREEDOM OF INFORMATION

Motion (by Senator Collins) agreed to:

That Regulation 3 of the Freedom of Information (Miscellaneous Provisions) Regulations (Amendment), as contained in Statutory Rules 1987 No. 284 and made under the Freedom of Information Act 1982, be disallowed.



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PARLIAMENT OF AUSTRALIA • THE SENATE  
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

1/0-2

21 April 1988

The Hon. Lionel Bowen, M.P.  
Attorney-General  
Parliament House  
CANBERRA A.C.T. 2600

Dear Attorney-General,

As you know, on 24 March 1988 the Senate, on the basis of a formal motion moved on behalf of the Committee, disallowed regulation 3 of the Freedom of Information (Miscellaneous Provisions) Regulations (Amendments) (S.R. 1987 No. 284).

In recommending this course of action, it was the Committee's intention to ensure that secondary legislation did not remove such rights as might legally exist to freedom of information about the affairs of the Australian Bicentennial Authority, pending the passage of primary legislation to place those rights on a clear and certain footing.

Your attitude of cooperation, and concern to assist the Committee with its scrutiny, notwithstanding our differences of view about the issue, was not unnoticed by the Committee and we thank you for it. As is the usual practice on those very rare occasions when a disallowance motion is moved by the Committee, we will in due course table a Report on our scrutiny of the regulations.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Bob Collins', written over a large, stylized flourish that extends across the page.

Bob Collins  
Chairman

**SCHEDULE 1—continued**

***Australian Bicentennial Authority Act 1980***

**After section 15:**

Insert the following sections:

**Application of Archives Act**

“15A. The Authority shall be deemed to be an authority of the Commonwealth for the purposes of the *Archives Act 1983*.

**Application of Freedom of Information Act**

“15B. The Authority shall be deemed to be a prescribed authority for the purposes of the *Freedom of Information Act 1982*.

**Application of Ombudsman Act**

“15C. The Authority shall be deemed to be a prescribed authority for the purposes of the *Ombudsman Act 1976*.”