The earlier pieces of the "New Administrative Law" were not political dynamite. They righted wrongs; they made it less likely mistakes would be repeated; they sensitised government to needs and demands; but ordinarily they did not do political damage, and when they did it was inadvertent and usually minor. Information is more interwoven with power than that, and quite different considerations fuel the open government movement. Mr Curtis's paper touches on these questions and much else. The paper contains a great many valuable insights into both the history and the current content of open government in Australia. It has been a rewarding paper to read, and it has set the seminar off on an admirable sound foundation.

Sir CLARRIE HARDERS*

My first and quite unnecessary comment is that if anyone can speak with authority about Freedom of Information ("FOI") in Australia and about the origins of the Commonwealth's Freedom of Information Act in particular it surely is Mr Lindsay Curtis. I recall many of the events of 1973 onwards into 1979 when I retired from the Public Service. Especially I recall the long haul that was commenced in 1973 with the assistance of Mr Tony Mondello, the legal adviser to the United States Civil Service Commission, and that eventually reached fruition in 1982 with the passage of the FOI Act. All through that period Lindsay Curtis was more closely associated than any other public servant with the project. He has given us the benefit of that experience in an interesting, able and fluent paper.

My second and equally obvious comment is that the FOI Act is here to stay. Lindsay Curtis has said we are undergoing a revolution. I believe the revolution has already taken place. Some of us may find it rather difficult to live with the consequences. I do not, however, see any really substantial alterations being made to the Act one way or the other. That is something that just has to be recognised. There is no point in knocking one's head against a brick wall. The fact of the matter is that governments did not in the past sufficiently practise freedom of information. To take just one illustration — it was not until 1979 that the Commonwealth Attorney-General's Department, often referred to as one of the first Departments of State created in 1901, published an Annual Report. I blush as I say this, and I blush even more when I add that the Report was not published until after I had retired. At least, however, I had had a large part in its preparation as my successor kindly acknowledged in the Foreword.

Mr Curtis has said[1] that what began as a simple concept has resulted in a very complex piece of legislation. It is indeed a very complex piece of legislation. A few months ago I was asked by the law firm with which I am now associated to give a talk on the Act to the firm's partners and solicitors. I found

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[1] L Curtis, "Freedom of Information in Australia" (1983) 14 FL Rev 5, 23.

it a very difficult task even though I could claim some background to what the Act contained. It was not easy to give a readily understandable account of the Act's operation — and bear in mind that my talk was concerned principally with the treatment in the Act of documents relating to business affairs.

I refer now to the Appendix to the paper where figures are given of requests received in the first four months of the operation of the Act, namely, from December 1982 to March 1983. Lindsay Curtis has made the point that it is much too early to make any sort of appraisal of the impact that the Act has had. For that to be done we shall have to await the Minister's first report as required by s 93 of the Act, though I am not clear whether that first report is to cover the year ending 30 June 1983 or the year ending 30 June 1984. However it is already clear that the so-called client-oriented agencies have received nearly two-thirds of the requests for access to information. Though I must not dwell too much on the past I say to myself what a pity it is that Departments did not practise freedom of information in earlier times.

A further observation regarding the Appendix is that the particulars provided make only minor reference to agencies doing business with the business world. The Department of Industry and Commerce, for example, is near the bottom of the list. The Department of Trade is not mentioned at all, nor is the Trade Practices Commission. According to Angela Bowne in the *Business Review Weekly*[2] of a few weeks ago the Trade Practices Commission had to the end of March received only three requests. Moreover, when someone from the office in which I now do a little work from time to time called the Commission last week and asked to speak to the FOI Section the caller was told that there had been such a Section but that it had been disbanded for lack of business.

In the United States on the other hand it appears that the predominant users of the FOI Act are the business establishments. I ask myself again why is it that in Australia business requests are at the bottom of the list. Is it because of the greater protection that the Commonwealth Act gives to business information that has been communicated to the Government or is there still a fear on the part of business that the protection remains inadequate? The Confederation of Australian Industry, the Australian Industry Development Association and the Australian Chamber of Commerce have been working on a submission to the Government about access to business documents. One thing that may be of concern to the world of business is that, while the Act provides for consultation with a company whose documents have been requested, nevertheless the obligation to consult is not absolute. Also, it appears that where access has been granted to a business document and there has been consultation there is a right to apply to the AAT for review of the decision but that there is no such right where consultation has not taken place.

As to other users of the Act it would seem that, with one notable exception, journalists are not at this stage using the Act to any great extent. Again this appears to be unlike the position in the United States. In Australia there are other means of access to information, principally through the medium of the leak, authorised or unauthorised. Perhaps there should at some point of time

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[2] "Business Slow To Exploit New Act", in *Business Review Weekly*, (April 23-29 1983) 28 at 29.

be a seminar on the leaking of government information. May I here simply make the observation that I believe that political leaders do the Public Service and the community at large a great disservice when they say that public servants are justified in leaking information in certain circumstances.

Now, a few words on the origins of the proposal for an FOI Act. The origins, as Mr Curtis says, are to be found in the Labor Party platform for the 1972 election that led to the formation of the first Whitlam Government. The initiative for the proposal clearly enough came from the then Leader of the Opposition in the Senate (later Attorney-General and now Justice of the High Court) Senator Lionel Murphy. In 1973 I was to discover the Attorney-General's fondness for United States ideas and precedents and you will discern that in legislation, including the Trade Practices Act 1974 (Cth), introduced during his term of office. Mr Curtis has referred[3] to the departure from FOI policy when public servants were summoned to appear before the Senate in July 1975 in connection with the debate on certain proposed loans of continuing memory. By that time Senator Murphy had become Mr Justice Murphy and it is interesting to speculate on the course that events might have taken had he had at the critical time been the Leader of the Government in the Senate. In that capacity and as Attorney-General, he had pioneered the FOI legislation. Mr Whitlam's view was that the great debate about the loans matter was one for Parliament and that Ministers should be responsible to the people through the Parliament. To use his own words of 9 July 1975 — "through this Parliament Ministers are responsible to the people" — and he proceeded to table departmental papers covering nearly forty pages of Hansard in fine print. When departmental officials were summoned a few days later to give evidence to the Senate he directed them not to answer and in this followed the course adopted by Sir Robert Menzies on an earlier occasion. I was one of the public servants called to the bar of the Senate. I took no objection to the Prime Minister's direction and I had none. Perhaps that reflected my view of the role and responsibility of Ministers and of the Parliament where the elected representatives of the people sit. To the extent that the FOI Act makes inroads on that system I had qualms as a public servant, and I still have qualms, about the direction that the Act, in some respects, has taken. There has in recent years been a noticeable weakening of the old concepts of ministerial responsibility and a weakening also of the role of members of Parliament. This has been commented upon by persons of standing in the community. Their views deserve attention.

Professor Gordon Reid was, I think, among the first to deplore the development. Mr Justice Michael Kirby is another. I mention also the former Governor-General, Sir Zelman Cowen, the comments of Emeritus Professor Geoffrey Sawer (in a recent *Canberra Times* article[4]) and Sir Ninian Stephen's comments at this seminar. It is a subject to which a great deal of discussion can and should be directed, including discussion of features of the FOI Act. I refer particularly to the treatment in the Act of various classes of documents, Cabinet documents and internal working documents among them. If time had permitted I would have liked to say something about the internal working documents but that is best left to the discussion of Mr Peter Bayne's paper in

[3] *Supra* n 1, 11.
[4] (18 May 1983) 2.

which he deals in depth with the system of exemptions and the role of the Document Review Tribunal.[5] As Lindsay Curtis has pointed out, the functions of that Tribunal are to be placed with the AAT. The change does not affect the point that Judges are, unwisely in my view, being made a regular part of the Executive decision-making process. It makes no difference — indeed it only exacerbates the situation — that the function of the Judges is only to make a recommendation to the Minister. It seems to me that this cannot be relished by the Judges whose normal function is to decide cases. At the same time, a Minister can be placed in an invidious position if he disagrees with a person having the standing of a Judge.

I wonder also whether there may not be a tendency for the backbench members of Parliament to leave it to the Judges to be the stirrers, except in the more dramatic situations (for example, the so-called spy flights over South-West Tasmania). I doubt that it is enough to say that political and governmental life is these days too complicated for matters concerning government administration to be dealt with through the parliamentary system. A better answer would be to increase the number of members. As Professor Reid has pointed out at this seminar the size of the Parliament in 1978 (188 members) with a population of 14.1 million differs only marginally from its size in 1949 (181 members) when the population was only 8 million.

There is, in addition, a strong case for providing an opposition, and members generally, with an increase in staff. I well recall that a newly-appointed Attorney-General invariably commented on the assistance available to him as Minister compared with that available in opposition. Ample space should be available in that fine new building we now see rising higher on Capital Hill. Members, however, should be given the opportunity to be seen and heard publicly more often, preferably through the televising of certain proceedings, in particular Question Time. Television need not follow the pattern of broadcasting with the House of Representatives and the Senate taking turns but should be available to catch the significant Parliamentary events. I have noticed that Professor Sawer put a question mark against the idea in his recent *Canberra Times* article. My own thought nevertheless is that it has merit and I believe consideration is being given to it in Parliamentary quarters.

May I commend to you the excellent paper Mr Lindsay Curtis has presented.

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[5] P Bayne, "Exemptions under the Freedom of Information Act 1982" (1983) 14 FL Rev 67.