



Decision and Reasons for Decision

Note: This decision was overturned on appeal to QCAT. See *City North Infrastructure Pty Ltd v Information Commissioner* [2010] QCATA 060 Judge Fleur Kingham"

Application Number: 220004

Applicant: Mr G Davis

Respondent: City North Infrastructure Pty Ltd

Decision Date: 31 March 2010

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - access application made to state government owned company incorporated under *Corporations Act 2001* (Cth) - whether the company is a 'public authority' under section 16(1)(a)(ii) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. City North Infrastructure Pty Ltd (**CNI**) falls within the definition of 'public authority' in section 16(1)(a)(ii) of the *Right to Information Act 2009* (Qld) (**RTI Act**).
2. CNI's decision that it is an entity to which the RTI Act does not apply is set aside and substituted with the decision that CNI is an 'agency' to which access applications can be made under the RTI Act.

Background

3. In 2006 the Queensland Government established five 'special purpose vehicles' (**SPVs**) to help deliver infrastructure projects, including the respondent in this review, City North Infrastructure Pty Ltd (**CNI**).¹ SPVs are small *Corporations Act 2001* (Cth) (**Corporations Act**) proprietary limited companies.²
4. CNI is wholly owned by the Queensland Government and was registered under the Corporations Act on 22 December 2006.³
5. CNI represents the State and communities of Queensland on major infrastructure projects, including the procurement, delivery and contract management phase of Airport Link, Northern Busway (Windsor to Kedron) and Airport Roundabout projects on behalf of the State Government.⁴
6. Individual shareholders in CNI have been issued shares held in trust on behalf of the Department of Infrastructure and Planning (**DIP**), Department of Transport and Main Roads (**DTMR**) and Queensland Treasury Holdings Pty Ltd (**QTH**). CNI has a Board of Directors composed of four Queensland State Government employees and one independent director.⁵
7. On 31 July 2009 the applicant made an application under the RTI Act (**Access Application**) to CNI seeking access to a document described as Borehole Log APL06 (**Document in Issue**).
8. In a meeting at CNI's offices on 31 July 2009 CNI informed the applicant that it is not subject to the RTI Act because it is a Corporations Act company.
9. On 3 August 2009, the applicant applied to the Office of the Information Commissioner (**OIC**) for external review in relation to CNI's response to his Access Application (**External Review Application**).
10. By letter to the applicant dated 11 August 2009 (**CNI Response**), Mr David Lynch, Chief Executive Officer, CNI, returned the \$38.00 application fee and Access Application to the applicant and confirmed that:

¹ Department of Infrastructure and Planning Guidelines: *Governance Framework for Infrastructure Delivery Special Purpose Vehicles*, page 3, <http://www.dip.qld.gov.au/tools/special-purpose-vehicle-governance-framework-and-toolkit.html> (**DIP SPV Guidelines**).

² Page 3 of DIP SPV Guidelines.

³ CNI Annual Report 2008-2009, page 16, <http://www.dip.qld.gov.au/publications/special-purpose-vehicle-annual-reports.html> (**CNI Annual Report**).

⁴ CNI Annual Report, page 3.

⁵ CNI Annual Report, page 16.

- the Document in Issue is not held by CNI
- the applicant could contact Thiess John Holland to arrange a technical briefing on matters discovered in the bore investigation
- as indicated in the 31 July 2009 meeting, CNI is a Corporations Act company, and is therefore, not subject to the RTI Act.

Reviewable decision

11. As set out in paragraph 8, upon receipt of the access application, CNI informed the Applicant that it was not subject to the RTI Act. In my view, this constituted a decision by CNI, though not in accordance with the processes set out in the RTI Act, that the access application was outside the scope of the RTI Act because CNI is an entity to which the RTI Act does not apply.⁶
12. A decision that an access application is outside the scope of the RTI Act is a 'reviewable decision' under schedule 5 of the RTI Act.⁷

Steps taken in the external review process

13. Following receipt of the external review application, staff of the OIC conducted preliminary research into the corporate status of CNI to assist in determining whether or not I have the power to conduct this external review.
14. On 26 August 2009, the OIC obtained an historical extract for CNI through ASIC (**ASIC Extract**).
15. By letter dated 16 September 2009, Acting Assistant Commissioner Jefferies wrote⁸ to Mr David Lynch, Chief Executive Officer of CNI, to:
 - inform CNI that the OIC was conducting preliminary inquiries in relation to the application of the RTI Act to CNI
 - set out preliminary research conducted by the OIC as to the application of the RTI Act to CNI
 - invite CNI to provide the OIC with written submissions explaining:
 - whether CNI was formed pursuant to Queensland Treasury Corporation's (**QTC**) powers under the *Queensland Treasury Corporation Act 1998* (Qld) (**QTC Act**)⁹
 - if CNI was not formed under QTC's statutory powers, under what authority it was formed
 - CNI's position on the application of section 16(1)(a)(ii) of the RTI Act to CNI
 - any reasons why CNI believes it is not subject to the RTI Act.
16. On 30 September 2009, CNI provided submissions in response to Acting Assistant Commissioner Jefferies' correspondence dated 16 September 2009 (**First CNI Submission**). In the First CNI Submission, CNI submitted that:
 - CNI was not formed by QTC under its statutory powers in the QTC Act

⁶ Section 32(1)(b) of the RTI Act.

⁷ See item (a) of the definition of 'reviewable decision'.

⁸ On the basis of the Information Commissioner's power in section 98(1) of the RTI Act to make preliminary inquiries in relation to an external review application.

⁹ Particularly section 22(2)(a) of the QTC Act.

- CNI was formed by the Queensland state government through the agency of the Coordinator General¹⁰
 - CNI was established under the Corporations Act, not a Queensland Act as required under section 16(1)(a)(ii) of the RTI Act¹¹
 - in accordance with statutory construction and settled legal principle, CNI is not a 'public authority' under section 16(1)(a)(ii) of the RTI Act and is therefore, not subject to the RTI Act.
17. In the First CNI Submission, CNI also indicated that the information sought by the applicant may be contained in an Environmental Impact Statement (**EIS**) that is available on CNI's website.¹²
18. On 1 October 2009, OIC informed the applicant that:
- OIC had received the First CNI Submission and would proceed to consider the submission in the context of the jurisdictional point raised in this review
 - CNI's view was that the Document in Issue may be available on the EIS on CNI's website.
19. On 5 October 2009, the applicant confirmed with OIC that the Document in Issue was not contained in the EIS on CNI's website.
20. On 6 October 2009, CNI provided OIC with further correspondence to correct a factual error in the First CNI Submission.¹³
21. On 19 October 2009, the applicant informed OIC that he had obtained a copy of the Document in Issue from Brisbane City Council. The applicant confirmed that despite obtaining access to the Document in Issue, he nevertheless, wanted to proceed with the external review in relation to the jurisdictional issue. The applicant submitted that the Information Commissioner's finding on this issue would determine whether or not he would proceed to make further access applications to CNI under the RTI Act.
22. On 21 October 2009, OIC asked CNI to provide a copy of the CNI Constitution referred to in the First CNI Submission. CNI forwarded a copy to OIC by email later that day.
23. By letter dated 30 November 2009, Acting Assistant Commissioner Jefferies informed CNI of her preliminary view (**Preliminary View**) that:
- CNI was established by government¹⁴
 - the executive government caused the establishment of CNI in accordance with the process provided for in the *Financial Administration and Audit Act 1977* (Qld) (**FAAA**)¹⁵
 - CNI was established by government for a public purpose in terms of managing a significant infrastructure development project which is for public use

¹⁰ Within what is now the Department of Infrastructure and Planning (**DIP**)

¹¹ CNI relied on section 6(1) of the *Acts Interpretation Act 1954* (Qld) which defines 'Act' to mean an Act of the Queensland Parliament.

¹² The link provided by CNI was http://www.airportlinkeis.com/OtherLinks/EIS/pdfs/Vol3-TechPapers/02_Groundwater.pdf

¹³ The factual error related to the shareholding of Queensland Treasury Holdings Pty Ltd in CNI. In any event, it does not affect the findings I have made in this decision.

¹⁴ As accepted by CNI in paragraph 12 of the First CNI Submission

¹⁵ The FAAA was the relevant legislation in force at the time CNI was established. The FAAA has since been repealed and replaced by the *Financial Accountability Act 2009* (Qld).

- CNI is, on the basis of the above, a 'public authority' under section 16(a)(ii) of the RTI Act and therefore, the Information Commissioner has jurisdiction to conduct this review.
24. On 3 December 2009, CNI requested further reasons for the Preliminary View (**Further Reasons**). On 8 December 2009, OIC informed CNI that it would provide Further Reasons for the Preliminary View by 15 December 2009.
25. By letter dated 15 December 2009, Acting Assistant Commissioner Jefferies:
- provided CNI with Further Reasons for the Preliminary View
 - requested CNI's submissions in response by 15 January 2010.
26. By email dated 15 January 2010, CNI provided submissions in response to the Preliminary View (**Second CNI Submission**). In the Second CNI Submission, CNI contended that:
- CNI was established under the Corporations Act and not any other Act
 - therefore, CNI cannot be a public authority for the purpose of section 16(1)(a)(ii) of the RTI Act.
27. On 3 February 2010, OIC asked CNI if it would agree to OIC providing a copy of the Second CNI Submission to the applicant.
28. On 4 February 2010, CNI confirmed that it would not consent to a copy of the Second CNI Submission being sent to the applicant.
29. On 22 February 2010, the applicant sent an email to OIC inquiring as to the status of this external review and seeking advice as to when the matter would be finalised.
30. On 3 March 2010, Acting Assistant Commissioner Jefferies informed the applicant that the OIC was in the process of considering CNI's submissions in the context of the jurisdictional issue raised in this review and would seek to finalise the matter as soon as possible.
31. On 17 March 2010, the applicant provided submissions in support of his contention that CNI is subject to the RTI Act (**Applicant's Submission**). Primarily, the applicant submitted that CNI, as a wholly owned Queensland state government company, should be subject to the RTI Act for reasons of transparency and accountability.
32. In making my decision in this review, I have considered the following:
- the Access Application and External Review Application
 - the CNI Response, First CNI Submission and Second CNI Submission and CNI's Constitution
 - Applicant's Submission
 - records of telephone conversations between staff of the OIC and the applicant held during the course of this review
 - records of telephone conversations between staff of the OIC and CNI's legal representatives held during the course of this review
 - relevant provisions of the RTI Act, Repealed FOI Act, AI Act, FAAA and other legislation as identified in the reasons for this decision
 - previous decisions of the Information Commissioner of Queensland as identified in the reasons for this decision

- CNI Annual Reports for 2008-2009 and 2007-2008
- DIP SPV Guidelines
- ASIC Extract
- Ministerial media statement titled *Government seeks private partner for Airport Link toll road* dated 26 February 2007 (**Media Release 1**)¹⁶
- Ministerial media statement titled *Search narrows for private partner to build Qld's biggest transport projects* dated 6 June 2007 (**Media Release 2**)¹⁷
- relevant information contained on CNI, DIP and Queensland Treasury websites
- Queensland Treasury publication titled *Guidelines for the Formation, Acquisition and Post Approval Monitoring of Companies*, published September 2005 (**Treasury Company Guidelines**)¹⁸
- relevant sections of *The Right to Information: Reviewing Queensland Freedom of Information Act*, Report of FOI Independent Review Panel published June 2008 (**Solomon Report**)¹⁹
- relevant sections of the Queensland Government Response to the Solomon Report released August 2008 (**Government Response**)²⁰.

Relevant legislation

33. In this review, the following sections of the RTI Act are relevant:

- section 3 – Object of the Act
- section 14 – Meaning of agency
- section 16 – Meaning of public authority.

34. Sections of the *Acts Interpretation Act 1954* (Qld) (**AI Act**) are also relevant, including:

- section 6 – References to Act
- section 14A – Interpretation best achieving Act's purpose
- section 14B – Use of extrinsic material in interpretation
- section 36 – Meaning of commonly used words and expressions

35. Certain provisions of the FAAA²¹ are also relevant in this review, including:

- section 6 – Property in public moneys and public property
- section 40C – No-one other than Treasurer may invest or otherwise lend an amount
- section 44 – Formation of companies by department etc. requires Treasurer's approval.

36. All of the above sections are reproduced in the Appendix to this decision.

¹⁶ Available at <http://statements.cabinet.qld.gov.au/MMS/index.aspx>

¹⁷ Available at <http://statements.cabinet.qld.gov.au/MMS/index.aspx>

¹⁸ Available at <http://www.treasury.qld.gov.au/office/knowledge/docs/company-acquisition/index.shtml>.

¹⁹ Available at http://www.foireview.qld.gov.au/documents_for_download/FOI-review-report-10062008.pdf

²⁰ Available at http://www.thepremier.qld.gov.au/library/pdf/initiatives/foi_review/Right_to_Information.pdf

²¹ As those sections appeared in the relevant version of the FAAA, Reprint 7C, in force from 16 June 2006 to 31 December 2006.

Submissions

Respondent's submissions

37. In this review, CNI accepts²² that:

- CNI is not an entity expressly declared to be an 'entity to which the RTI Act does not apply' within the meaning of section 17 and schedule 2 of the RTI Act
- CNI is not a department, local government, GOC or a subsidiary of a GOC for the purposes of the RTI Act
- the RTI Act will only apply to CNI if CNI is a 'public authority' within the meaning of section 16(1)(a)(ii) of the RTI Act
- the issue for determination in this review is whether CNI is a public authority within the meaning of section 16(1)(a)(ii) of the RTI Act.

38. CNI also accepts that it was established by government.²³ However, while CNI accepts that it was established by government, CNI submits that it was not 'established under an Act' as required by section 16(1)(a)(ii) of the RTI Act because:

- the word 'Act' in section 16(1)(a)(ii) of the RTI Act has the meaning given to the term in section 6 of the AI Act, ie. an Act of Queensland Parliament²⁴
- CNI was not established under 'an Act or statutory instrument' of Queensland Parliament
- CNI was established under the Corporations Act which is a Commonwealth statute.²⁵

39. CNI further submits²⁶ that it was not established *in accordance with* the process provided for in the FAAA on the basis that:

- in applying section 16(1)(a)(ii) of the RTI Act, it is unnecessary to apply any element of the extended meaning of 'under' set out in section 36 of the AI Act²⁷
- even if the AI Act definition of 'under' is used, the FAAA does not in fact or in law provide for any process 'in accordance with' which government can *establish* a corporation.²⁸

Establishment of CNI

40. The First CNI Submission assisted OIC by providing information as to the establishment of CNI²⁹, as follows:

- CNI is a proprietary company limited by shares incorporated under the Corporations Act and registered under that Act on 22 December 2006
- CNI has a constitution under which it is stated that CNI is established to manage the procurement of the Airport Link and Northern Busway Projects and any associated works

²² Paragraph 10 of the First CNI Submission.

²³ Paragraph 12 of the First CNI Submission.

²⁴ Paragraph 13(a) of the First CNI Submission and confirmed in paragraph 11 of the Second CNI Submission.

²⁵ Paragraph 12 of the First CNI Submission and confirmed in paragraph 11 of the Second CNI Submission.

²⁶ Paragraph 12 of the Second CNI Submission.

²⁷ Paragraph 12 of the Second CNI Submission.

²⁸ Paragraph 13 and 15 of the Second CNI Submission.

²⁹ As set out in paragraphs 5-7 of the First CNI Submission.

- on or about 30 July 2008, CNI was given the additional responsibility for overseeing the contract management of the Airport Roundabout Project
- CNI's projects involved the development and construction of road transport infrastructure for DTMR
- CNI is wholly-owned by the State of Queensland (**State**) with individual shareholders holding their shares in trust for the State
- in establishing CNI, the State acted through the administrative agency of DIP
- DIP was obliged as a matter of financial accountability, to obtain the Treasurer's approval to form the company³⁰ and that approval was granted on 12 December 2006.

Established under an Act

41. CNI's submissions on the issue raised in this review centre on the meaning of the words 'established...under an Act' as they appear in section 16(1)(a)(ii) of the RTI Act. CNI's submissions on this point are dealt with under the following headings:

- Corporations Act
- FAAA
- rules of statutory construction
 - contrary to the intention of the Act
 - contrary to the plain and settled meaning of the words
 - presumption of construction in favour of previously attributed meaning
 - the previously attributed meaning³¹
 - extrinsic material does not support displacing the presumption
- practical consideration.

Corporations Act

42. CNI's primary submission in this review is that:

- CNI was established under the Corporations Act, a Commonwealth Act³²
- in accordance with section 36 of the AI Act, the word 'Act' which appears in the definition of 'public authority' in section 16(1)(a)(ii) of the RTI Act, means a Queensland Act³³
- it is not open to conclude that CNI was established under any legislation other than the Corporations Act.³⁴

43. CNI submits that once the above is accepted, the application of section 16(1)(a)(ii) of the RTI Act is not enlivened.³⁵ Accordingly, CNI submits that it is unnecessary to consider any further whether CNI was established under another Queensland statutory provision and similarly, whether CNI was established for a public purpose as required by section 16(1)(a)(ii) of the RTI Act.³⁶

³⁰ Section 44 of the FAAA and section 88 of the FAA.

³¹ This includes CNI's submissions on the relevance of previous decisions of the Information Commissioner under the Repealed FOI Act.

³² Paragraph 12 of the First CNI Submission and confirmed in paragraph 11 of the Second CNI Submission.

³³ Paragraph 13(a) of the First CNI Submission and confirmed in paragraph 11 of the Second CNI Submission.

³⁴ Paragraph 16(c) of the First CNI Submission.

³⁵ Paragraph 16(c) of the First CNI Submission.

³⁶ On this basis, CNI did not make any submissions as to whether CNI was established for a public purpose. Confirmed in paragraph 16(c) of the First CNI Submission and in paragraph 7 of the Second CNI Submission.

FAAA

44. As set out in paragraph 39 of these reasons, CNI submits that the FAAA does not provide for any process in accordance with which government can establish a corporation. However, CNI accepts³⁷ that section 44(1) of the FAAA:
- provides that a department may form or participate in the formation of a company only with the Treasurer's approval
 - mandates that an approval must be obtained before a department may engage in the process of forming or participating in the formation of a company
 - pre-conditions the exercise of the State's plenary power to form or participate in forming a company.
45. In CNI's view, when the Treasurer's approval is obtained under the FAAA, the process for forming a company is not complete and in fact, has not even commenced.³⁸ CNI contends that the process for forming the company occurs totally and completely under the Corporations Act through a Commonwealth statutory process.³⁹
46. CNI submits that the FAAA does not regulate or provide for the formation or establishment of companies and that rather, the formation or establishment of companies is provided for in the Corporations Act. CNI submits that at its highest, section 44 of the FAAA '*...pre-conditions the exercise of the State's inherent capacity to form a company under (in accordance with) the Corporations Act by requiring the obtaining of Executive government approval*'.⁴⁰
47. CNI also submits that:

*...it would be contrary to logic and reason to argue that a company formed or incorporated by a Department of State was a company "established under" s.88 of the Financial Accountability Act 2009 (Qld) (being the Act that authorises Departments of State (by way of approval from the Treasurer) to form or incorporate a company) just because the approval of the Treasurer was necessary before a Government agency was authorised to incorporate an entity under the Corporation Act.*⁴¹

48. To summarise its submissions on the Act under which CNI was established, CNI submits that:

*So although it is open to conclude that CNI was formed under the Corporations Act because it was established in accordance with the process provided for in the Corporations Act (although it would not be necessary to extend the meaning of 'under' to achieve that outcome), it is plainly not open to conclude the [sic] CNI was established in accordance with any process provided for in the FAAA because the FAAA does not in law or in fact provide a process under which a corporation might be established.*⁴²

Rules of statutory construction

49. To support its submission that CNI is established under the Corporations Act and not the FAAA, CNI relies on various rules of statutory construction. The submissions made

³⁷ In paragraph 14 of the Second CNI Submission.

³⁸ Paragraph 14 of the Second CNI Submission.

³⁹ Paragraph 14 of the Second CNI Submission.

⁴⁰ Paragraph 29 of the Second CNI Submission.

⁴¹ Paragraph 26 of the First CNI Submission.

⁴² Paragraph 15 of the Second CNI Submission.

by CNI in this regard are set out in paragraphs 50 to 71 of these reasons. In summary, CNI submits that:

- the meaning of the words that Parliament has chosen to use are now well settled and unambiguous⁴³
- the proper process to be applied in identifying the statute 'under' which an entity is taken to have been established is clearly established⁴⁴
- the task for the Information Commissioner is primarily and fundamentally to interpret the words used by Parliament, not to divine the intention of Parliament⁴⁵
- it is necessary to determine what Parliament meant by the words it used, not to determine what Parliament intended and then mould the words that Parliament used to best facilitate that intention⁴⁶
- the analogous phrase 'established...under an enactment' in section 9(1)(a)(ii) of the Repealed FOI Act has a well settled meaning as set out in previous decisions of the Information Commissioner⁴⁷
- the presumption of construction that favours maintenance of the attributed meaning has not been rebutted.⁴⁸

Contrary to the intention of the Act

50. CNI submits that the definition of 'under' in section 36 of the AIA cannot be applied to aid the construction of section 16(1)(a)(ii) of the RTI Act when the RTI Act demonstrates a contrary intention.⁴⁹ To support this submission, CNI relies on:

- section 4 of the AI Act which provides that the application of the AI Act may be displaced, wholly or partly, by a contrary intention appearing in any other Act
- case law which sets out that determining whether a relevant contrary intention is demonstrated in any particular case requires careful analysis of the specific language of the relevant Act in the context of the particular provisions under consideration.⁵⁰

51. CNI submits that, in analysing this point, the following steps are required:

- examining the context in which the extended definition of the word 'under'⁵¹ should be sought to be applied
- considering the effect of the extended definition
- deciding whether the extended definition is intended to apply in all the circumstances.⁵²

⁴³ Paragraph 10(a) of the Second CNI Submission.

⁴⁴ Paragraph 10(a) of the Second CNI Submission.

⁴⁵ Paragraph 10(b) of the Second CNI Submission. CNI cites paragraph 16 of the judgment of Chief Justice Spiegelman in *Harrison v Melhem* (2008) 72 NSWLR 380 in support of this submission.

⁴⁶ Paragraph 10(b) of the Second CNI Submission. CNI cites paragraph 16 of the judgment of Chief Justice Spiegelman in *Harrison v Melhem* (2008) 72 NSWLR 380 in support of this submission.

⁴⁷ Paragraph 10(c) of the Second CNI Submission.

⁴⁸ Paragraph 10(c) of the Second CNI Submission.

⁴⁹ Paragraph 16(a) of the First CNI Submission.

⁵⁰ CNI relies on the following cases to support this principle: *Duperouzel v Cameron* (1973) WAR 181; *Simpson v Nominal Defendant* (1976) 13 ALR 218 and *Deputy Commissioner of Taxation (New South Wales) v Mutton* (1988) 79 ALR 509, *Gidaro v Secretary, Department of Social Security* (1988) 83 FCR 139, *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548.

⁵¹ In section 36 of the AI Act.

⁵² Paragraph 19 of the First CNI Submission.

52. CNI submits that, on the face of the language of section 16(1)(a)(ii) of the RTI Act, there are at least two factors that clearly establish a contrary intention that will displace the application of the extended statutory definition of 'under' in section 36 of the AI Act, as follows:

- (a) *Firstly, it is noted that the word "under" as defined by s.36 of the Acts Interpretation Act also includes "by". If the word "under" was intended to have, in s.16(1)(a) of the RTI Act, the fully expanded meaning provided for by s.36 of the Acts Interpretation Act, it would then have been unnecessary to separately enact s.16(1)(a)(i) of the RTI Act as the language used in paragraph (ii) would have been legally adequate to cover the situation of a body established "by an enactment". In this regard, the application of any expanded meaning of the word "under" will result in duplication within the distinct paragraphs of s16(1)(a) of the RTI Act. This outcome can be presumed to not have been the intention of Parliament; and*
- (b) *Secondly, there is the obvious fact that Parliament has clearly used language directed towards identifying the purpose of establishment of the entity in the phrase "for a public purpose, whether or not the public purpose is stated in the Act". The choice of language demonstrates that Parliament intended to differentiate between the identification of the statute that facilitated and enabled the establishment of a body and the purpose of the establishment of the body. In this context, the very language of the RTI Act clearly demonstrates an intention to displace any possible construction that is of a contrary effect. CNI submits that it is clear, on the face of s.16(1)(a)(ii) of the RTI Act, that the only relevant enquiry in relation to "purpose" is that directed towards the requirement that the body be established for a public purpose. To examine the issue of purpose in the context of identifying the enactment "under" which the body was established is, it is submitted, contrary to the intention displayed in s.16(1)(a)(ii) of the RTI Act.⁵³*

53. To further support the above argument, CNI emphasises that section 16(1) of the RTI Act specifically refers to the AI Act⁵⁴ and submits that:

The Note refers to s.36 of the Acts Interpretation Act with the Note considered as forming part of the RTI Act [citation omitted]. The practice of expressly referring to relevant provisions of the Acts Interpretation Act is adopted throughout the RTI Act, including for example, in ss30(4) and 191 of the RTI Act. In these circumstances, CNI submits that if it was intended that the extended definition of "under" as set out in the Acts Interpretation Act was to apply to s.16(1)(a)(ii) of the RTI Act, that the Note in s.16 would also have expressly referred to the definition of "under" in addition to the definition of "entity" contained in the Acts Interpretation Act.

54. CNI also relies on the fact that the definition of 'public authority' in the Repealed FOI Act was the subject of a specific recommendation in the Solomon Report⁵⁵ and supported in the Government's Response⁵⁶ and contends that:

...it is reasonable to infer that the Parliament would have been even more minded to emphasise the reference to "under" in the Acts Interpretation Act in the Note appearing in s.16 of the RTI Act if the intention was to adopt that mechanism for applying the RTI Act to Corporations Act companies in the circumstances where they are established for a purpose stated in a State statute.

⁵³ Paragraphs 20(a)-(b) of the First CNI Submission.

⁵⁴ In the "Note" which appears immediately below section 16(1) of the RTI Act and sets out the definition of 'entity' in section 36 of the AI Act. Section 14(4) of the AI Act confirms that a Note of this kind forms part of the Act.

⁵⁵ Recommendation 24 at page 90 of the Solomon Report recommended that the definition of 'public authority' in section 9 of the Repealed FOI Act be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory.

⁵⁶ Page 20 of the Government Response. It appears at page 18 in my hard copy of the Govt Resp.

Contrary to the plain and settled meaning of the words

55. In CNI's submission, the plain and settled meaning of the words 'established...under an Act' as they appear in the definition of 'public authority' in section 16(1)(a)(ii) of the RTI Act and as originally set out in section 9(1)(a)(ii) of the repealed FOI Act, should be applied.⁵⁷ Section 9(1)(a)(ii) of the repealed FOI Act provides⁵⁸:

9 Meaning of public authority

(1) In this Act—

public authority means—

(a) a body (whether or not incorporated) that—

...

(ii) is established by government under an enactment for a public purpose, whether or not the public purpose is stated in the enactment ...

56. The basis for CNI's submission set out in paragraph 55 above is that:

- the language used in section 16(1)(a)(ii) of the RTI Act is substantially the same as that used in the definition of 'public authority' used in section 9(1)(a)(ii) of the Repealed FOI Act
- the only substantive difference between the RTI Act and repealed FOI Act provisions is in the use of the terms 'entity' and 'Act' in the RTI Act to replace the terms 'body' and 'enactment' in the FOI Act
- the minor differences in language have no relevant impact in that the terms 'under an enactment' and 'under an Act' have the same meaning.⁵⁹

57. Based on the above, CNI submits that:

- the authorities concerning the interpretation of section 9(1)(a)(ii) of the Repealed FOI Act are of assistance in interpreting section 16(1)(a)(ii) of the RTI Act⁶⁰
- the principles set out in previous decisions of the Information Commissioner in relation to the interpretation of section 9(1)(a)(ii) of the Repealed FOI Act should equally apply when interpreting section 16(1)(a)(ii) of the RTI Act.⁶¹

58. CNI contends that in the authorities, there is no support for the proposition that, in interpreting the phrase 'established...under an enactment' in section 9(1)(a)(ii) of the Repealed FOI Act, the word 'under' is to have any element of the extended meaning set out in section 36 of the AI Act. Rather, CNI submits⁶² that the Information Commissioner previously accepted in *McPhillimy* that:

⁵⁷ Paragraph 16(b) of the First CNI Submission.

⁵⁸ I accept that the terms of this provision are substantially similar to those in section 16(1)(a)(ii) of the RTI Act.

⁵⁹ Paragraph 23 of the First CNI Submission.

⁶⁰ The authorities referred to by CNI in the First CNI Submission include *Tedesco and Mt Gravatt Community Support Group Inc* (2005) 7 QAR 33 (**Tedesco**) and *McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376 (**McPhillimy**).

⁶¹ Paragraph 24 of the First CNI Submission.

⁶² Paragraph 25 of the First CNI Submission.

- in order for an Act to be considered as an Act which established an entity, the Act must be said to regulate the establishment of the entity⁶³
- an Act that provides for the appointment of a body to a statutory role is not to be taken, by that fact, to be concerned with the establishment or continued existence of that body.⁶⁴

59. CNI also submits that:

*The use of the word “established” with the word “under” clearly demonstrates that Parliament was referring to the Act that in effect, gave birth to the relevant body and regulated the manner in which it was established. Applying this principle to the current circumstances, the Act which established CNI was the Corporations Act.*⁶⁵

60. In CNI's view, the Information Commissioner has consistently held in the previously decided cases that legislation providing an enabling power to engage in the promotion, incorporation or formation of a company will not constitute the enactment 'under' which the company was established.⁶⁶

Presumption of construction in favour of previously attributed meaning

61. CNI submits that under the Repealed FOI Act, the then Information Commissioner explained in a number of cases that when considering an incorporated entity established by government, the entity is taken to be established under the enactment by which it is constituted or continued in existence.⁶⁷

62. CNI submits that in the absence of any 'appreciable difference' in the wording of section 16(1)(a)(ii) of the RTI Act and section 9(1)(a)(ii) of the Repealed FOI Act, a presumption of construction arises whereby the meaning attributed to the phrase 'established by government under an enactment' in section 9(1)(a)(ii) of the FOI Act continues to apply to the phrase 'established by government under an Act' in section 16(1)(a)(ii) of the RTI Act.⁶⁸

63. In support of this submission, CNI referred to the presumption of statutory interpretation that when Parliament repeats, in new legislation on a given subject, words that already bear a well settled meaning, the words continue to bear the meaning that has already been attributed to them.⁶⁹ CNI provided the following two citations in relation to this presumption:

- *...when Parliament is considering de novo what the law shall be on any given subject, and it finds in a previous Act words which have received by judicial interpretation a well settled meaning or effect, and introduces those words verbatim or without any appreciable difference, merely accommodating them to their new surroundings, they are generally presumed by a Court to have been adopted in the accepted sense. But even then, there is no rigid rule of law on the subject.*⁷⁰
- *There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the*

⁶³ Paragraph 25 of the First CNI Submission.

⁶⁴ CNI cites paragraphs 19 and 25 of *McPhillimy* for this principle.

⁶⁵ Paragraph 25 of the First CNI Submission.

⁶⁶ Paragraph 26 of the First CNI Submission.

⁶⁷ Paragraph 16 of the Second CNI Submission.

⁶⁸ Paragraph 18 of the Second CNI Submission.

⁶⁹ Paragraph 19 of the Second CNI Submission.

⁷⁰ See *Melbourne Corporation v Barry* (1922) 31 CLR 174 in Justice Isaacs reasons for judgment.

*meaning already "judicially attributed to (them)"... [citations omitted] although the validity of that proposition has been questioned [citations omitted].*⁷¹

64. CNI contends that on the basis of the well settled meaning of the terms and the re-enactment of the section in the RTI Act with no appreciable difference, there is a strong presumption that the words 'established ... under an Act' will continue to bear the meaning previously attributed to them. CNI submits that therefore, there is no reasonable basis to displace the presumption.⁷²

The previously attributed meaning

65. CNI submits that in ascertaining the true meaning of the phrase 'established...under an Act' in section 16(1)(a)(ii) of the RTI Act, it is relevant to consider the meaning previously attributed by the Information Commissioner to the analogous phrase 'established...under an enactment' in section 9(1)(a)(ii) of the repealed FOI Act.
66. This submission centred upon four decisions of the Information Commissioner under the Repealed FOI Act.⁷³ These decisions are identified below and accompanied by the relevant extracts of CNI's submissions:

- **McPhillimy and Gold Coast Motor Events Co**⁷⁴

...the Information Commissioner had to consider whether the Gold Coast Motor Events Co, a partnership, was established by or under an enactment. At paragraph 18 of the reported decision, the Information Commissioner observed that the Partnership Act did not regulate the formation or establishment of partnerships so it could not be said that a partnership is established by or even under that legislation.

In similar vein, the FAAA does not regulate or provide for the formation or establishment of companies. Rather, the formation or establishment of companies is provided for in the Corporations Act. At its highest, s.44 of the FAAA pre-conditions the exercise of the State's inherent capacity to form a company under (in accordance with) the Corporations Act by requiring the obtaining of Executive government approval. Therefore, it cannot be said that a corporation is formed under the FAAA, anymore than it could be said that a partnership is formed under the Partnership Act.

- **Barker v World Firefighters Games Brisbane 2002**⁷⁵

...one issue for determination was whether a company established by a government department under the Corporations Law after approval was sought in accordance with s.44 of the FAAA, was established "under an enactment". The Information Commissioner determined in that case that the company was established under the Corporations Law⁷⁶. He reasoned that the enactments under (as distinct from by) which a body might most commonly be expected to be established by government are Corporations Law and the Associations Incorporations Act 1981, which are statutes of general application⁷⁷ providing the facilities by which an entity may be incorporated.

In discussing the mechanisms for establishing corporate entities other than by specific enabling legislation, the Information Commissioner discussed how the FOI Act could

⁷¹ See *Re Alcan Australia Limited Ex Parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96; [1994] HCA 34 at paragraph 20 (**Re Alcan Australia**).

⁷² Paragraph 21 of the Second CNI Submission.

⁷³ Paragraphs 28-34 of the Second CNI Submission.

⁷⁴ (1996) 3 QAR 376.

⁷⁵ (2001) 6 QAR 149 (**Barker and WFFG**).

⁷⁶ A State Act that was replaced by the Corporations Act in 2001.

⁷⁷ At paragraph 15 of *Barker and WFFG*.

*apply to entities incorporated by government as companies or incorporated associations. The analysis clearly demonstrates a full and complete acceptance of the incontestable proposition that such bodies are established “under” the Act by which they are constituted, such as the Corporations Law (then a State Act) or the Associations Incorporation Act as the case may be ...*⁷⁸

*There was certainly no suggestion at all in Barker that the company may have also been established under or in accordance with the process provided for in the FAAA because of the requirement that the department must seek the Treasurer’s prior approval to incorporate. This was even though the Information Commissioner had turned his attention to all relevant material including the letter seeking the approval of the Treasurer, in accordance with s.44 of the FAAA for the department to form or participate in the formation of a company*⁷⁹.

- **Tedesco v Mt Gravatt District Community Support Inc**⁸⁰

...the Information Commissioner held that the body in that case was established under an enactment because it had been incorporated under the provisions of the Associations Incorporation Act 1981.

- **Barker and The Executive Resources Group Pty Ltd**⁸¹

*...it was readily accepted by the Information Commissioner that a proprietary company was not “established under any enactment other than the Federal corporations law”.*⁸²

67. CNI submits that the past decisions of the Information Commissioner set out above clearly establish that when making enquiry as to whether an entity or body was 'established under an enactment', the proper approach is to seek to identify the Act of general application that enabled the body to be constituted or continued in existence. Further, it is CNI's view that, in the case of proprietary companies set up since 1 July 2001, including those in government ownership, that task leads to only one possible conclusion, being that such companies are established under the Corporations Act.⁸³

Extrinsic material does not support displacing the presumption

68. In its submission, CNI emphasises that while the Solomon Report and Government Response discussed the prospect of amending the definition of 'public authority' to ensure that government bodies incorporated under the Corporations Act would be subject to the legislation, there was, in the end, no change to the definition of 'public authority' to achieve the proposed reform.⁸⁴ On this point, CNI submits that:

Whether intentionally or otherwise, Parliament did not adopt language that would operate to expressly include a Corporations Act company within the ambit of the meaning of the defined term “public authority”. No declaratory regulation has been promulgated. Rather company GOCs were made subject to the operation of the RTI Act by being expressly included as a class of “agency” within the meaning of the Act. The definition of “public authority” was not appreciably altered. Why Parliament chose to proceed in this way is a matter of speculation. There is no guidance to be obtained by an examination of the

⁷⁸ At paragraph 31 of the Second CNI Submission, CNI quoted paragraphs 23 and 28 of *Barker and WFFG* which I have not reproduced here.

⁷⁹ At paragraph 28 of *Barker and WFFG*.

⁸⁰ (2005) 7 QAR 33 (**Tedesco**)

⁸¹ Unreported, Information Commissioner of Queensland, 31 July 2006 (**Barker and ER Group**)

⁸² *Barker and ER Group* at paragraph 3.10.

⁸³ Paragraph 35 of the Second CNI Submission.

⁸⁴ Paragraph 22-23 of the Second CNI Submission.

*Parliamentary debates. Consequently there is no basis upon which to conclude that there has been a change in the law to the effect that a government corporation incorporated under the Corporations Act 2001 is now included as a “public authority” within the meaning of the RTI Act. The plain language of the definition of “public authority” in the RTI Act (being relevantly similar to the language of the definition of “public authority” in the FOI Act) does not support such an outcome.*⁸⁵

69. With respect to the use of extrinsic material, such as the Solomon Report and Government Response, as an aid to statutory interpretation, CNI contends that:

*...when engaging in an exercise of statutory construction, primacy must be given to the language of the Act being the words Parliament has chosen to use, rather than attempting to identify or attribute a Parliamentary intention that is inconsistent with the words that are used, by reference to extrinsic material or notions of objective purpose.*⁸⁶

70. In summary, CNI made the following submission with respect to interpreting the words 'established...under an Act' in section 16(1)(a)(ii) of the RTI Act:

*...the application of facilitative reasoning to the task of interpretation, for the sake of achieving a more beneficial outcome “in favour of an interpretation that would further rather than hinder access to information”, is not a valid application of the rules of statutory construction in seeking to identify the true meaning of the words Parliament used when it enacted the phrase “established...under an Act” in s.16(1)(a)(ii) of the RTI Act. The clear language of the RTI Act and the decided cases in relation to this well ventilated point, require that the Information Commissioner reconsider and reformulate her preliminary view.*⁸⁷

Practical consideration

71. CNI also contends that there is a practical consideration which supports its argument that Corporations Act companies, such as CNI, are not subject to the RTI Act as follows:

...if the Parliament had intended to apply the RTI Act to a new or additional category of government entities that are State owned corporations incorporated under the Corporations Act, it is reasonable to expect that there would have been a public announcement of some kind outlining such a significant change in Government policy. In this regard, we note that in the second reading speech for the RTI Bill, the Honourable the Premier Anna Bligh specifically referred to the limited exemptions now provided to the GOCs under the RTI Act compared to the previously broad exemptions for the GOCs that was made in the context of an example of a move to greater openness and accountability [citation omitted]. CNI submits that it would be reasonable to assume that a similar statement would have been made to Parliament by the Premier if it was the Government's intention to apply the RTI Act to Government entities incorporated under the Corporations Act.

Applicant's submissions

72. The OIC did not require the applicant to provide submissions in relation to the jurisdictional issue raised in this review. However, as set out in paragraph 31 of these

⁸⁵ Paragraph 23 of the Second CNI Submission.

⁸⁶ Paragraph 24 of the Second CNI Submission. CNI relied on a number of authorities to support this position: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at paragraph 47 of the judgment of Justices Hayne, Heydon, Crennan and Kiefel and *Harrison v Melham* (2008) 72 NSWLR 380 at paragraphs 15-16 in the judgment of Chief Justice Spiegelman and paragraph 168 in the judgment of Mason P.

⁸⁷ Paragraph 36 of the Second CNI Submission.

reasons, the Applicant provided the OIC with a submission on 17 March 2010 in which he contended as follows:

- from an accountability and integrity perspective, CNI should be subject to the RTI Act because it is a wholly owned State government company comprising six shares that are all held by Queensland government bodies or representatives
- the Treasury Company Guidelines confirm that a company structure is not appropriate if the objective is to reduce the transparency and accountability of the use of public funds and assets⁸⁸
- Since its inception in December 2006, CNI has reduced the transparency and accountability of the use of public funds and assets by declaring themselves not subject to RTI
- CNI has been imputed State government powers whilst abrogating State government transparency in terms of RTI.

Findings

73. As set out in paragraph 21, during the course of this external review, the Applicant obtained access to the Document in Issue through Brisbane City Council. Despite this, the Applicant confirmed that he wanted the review to proceed and for me to make a finding on whether or not CNI is an entity that is subject to the RTI Act. As the applicant was able to obtain access to the Document in Issue, it was, unnecessary for me to make any findings on whether the Applicant could be given access to the Document in Issue under the RTI Act. Therefore, the only issue upon which I have made a finding in this review is whether CNI is a public authority under the RTI Act.

Is CNI a public authority under the RTI Act?

74. CNI is a public authority for the purposes of the RTI Act. Reasons follow.

75. There is no evidence before me in this review to establish that CNI falls within any of subsections (a)(i), (b), (c), (d) or (e) in the definition of 'public authority' in section 16(1) of the RTI Act. I accept CNI's submission that the only limb of the definition which may apply to CNI is section 16(1)(a)(ii) of the RTI Act.⁸⁹

76. For CNI to fall within the meaning of 'public authority' in section 16(1)(a)(ii) of the RTI Act, it must be shown that CNI was established:

- (i) by government
- (ii) under an Act
- (iii) for a public purpose (whether or not the public purpose is stated in the Act).

(i) Established by government

77. CNI was formed through the agency of the Coordinator General, now a part of DIP.⁹⁰ Individual shareholders in CNI were at the time of creation (and remain) officers of the Queensland public service representing and acting as trustees for their departments (DIP and DTMR).⁹¹ Queensland Treasury Holdings Pty Ltd was and remains a shareholder in CNI, acting as trustee for Treasury.⁹²

⁸⁸ Section 1.2.1 of the Treasury Company Guidelines.

⁸⁹ CNI accepts this as set out in paragraph 37 of these reasons for decision.

⁹⁰ Paragraph 4(b) in the First CNI Submission.

⁹¹ CNI Annual Report 2007-2008, page 19.

⁹² CNI Annual Report 2007-2008, page 19.

78. Under section 44 of the FAAA, a department or person can only form or participate in formation of a company, such as CNI, with the Treasurer's approval.⁹³ CNI has confirmed that DIP was obliged, as a matter of financial accountability to obtain the Treasurer's approval to form CNI and was granted such approval on 12 December 2006.
79. In my view, the fact that CNI could not have been formed without obtaining the approval of the Treasurer under the FAAA, confirms that CNI was established by government.
80. In Media Release 1, the then Deputy Premier, Treasurer and Minister for Infrastructure, the Honourable Anna Bligh, stated that *'the State Government had established CNI to manage on its behalf the procurement process for the Airport Link'*.
81. As set out in paragraph 38 of these reasons, this point has not been in dispute in this review as CNI accepts that it was established by government.
82. Based on the above, I find that CNI was established by government.

(ii) Established under an Act

83. The next requirement of section 16(1)(a)(ii) of the RTI Act is that an entity is established 'under an Act'.
84. Different language used in the same legislation tends to show that the Parliament intended different outcomes.⁹⁴ For this reason the use of the word 'under' in section 16(1)(a)(ii) of the RTI Act should be contrasted with the use of the word 'by' in section 16(1)(a)(i) of the RTI Act.
85. I consider that an entity established 'by an Act' is one that is established by Parliament and provided for in unequivocal terms in legislation. In contrast, an entity 'established by government under an Act' is one established by the executive in accordance with a power given to it by or a process authorised by an Act.
86. The definition of 'under' in section 36 of the AI Act, as set out in the Appendix to these reasons, is inclusive and therefore, enlarges the ordinary meaning of the word.⁹⁵ The function of a definition in an Act is to aid the proper construction of a provision. A narrow, literal interpretation of a word or phrase that negates the evident policy or object of an Act should be rejected.⁹⁶
87. CNI submits that the AI Act definition of 'under' should not be used as an aid to interpret section 16(1)(a)(ii) of the RTI Act because the RTI Act demonstrates a contrary intention.⁹⁷

⁹³ Further information about the process and requirements for company formation under the FAAA is set out in paragraphs 97 to 99 of these reasons for decision.

⁹⁴ *Scott v Commercial Hotel Merbein Pty Ltd* (1930) VLR 25 at 30; *Gardner v R* (2003) 39 MVR 308; [2003] NSWCA 199 at [43].

⁹⁵ *Sherritt Gordon Mines Ltd v FCT* [1977] VR 342 at 353; 10 ALR 441 at 455.

⁹⁶ *Kelly v R* (2004) 218 CLR 216 at 253.

⁹⁷ CNI's submission on this point is set out in paragraphs 50 to 54 of these reasons for decision.

Purposive approach

88. In accordance with the High Court decision in *Project Blue Sky Inc v Australian Broadcasting Authority*⁹⁸, the now settled approach to statutory interpretation is that a provision of an Act should be construed consistently with the language and purpose of its provisions. In *Project Blue Sky*, the majority judges reasoned as follows:

*The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"... Thus, the process of construction must always begin by examining the context of the provision that is being construed [citations omitted].*⁹⁹

89. A purposive approach to interpretation is also required by section 14A of the AI Act which sets out that in interpreting an Act, the interpretation that best achieves the Act's purpose is to be preferred to any other interpretation. Section 14A(1) of the AI Act applies whether or not the Act's purpose is expressly stated in the Act.¹⁰⁰ The High Court has held that use of such a provision does not require ambiguity or inconsistency but:

*...it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done.*¹⁰¹

90. As set out in the Appendix to these reasons, the object of the RTI Act is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.¹⁰²
91. Section 3(2) of the RTI Act requires the RTI Act to be applied and interpreted to further the Act's primary object. This adds weight to the argument that a purposive approach to interpretation should be adopted when considering provisions of the RTI Act.
92. The RTI Act is beneficial legislation. It is well accepted that in interpreting such legislation, the words should be read in favour of an interpretation which would further, rather than hinder, access to information.¹⁰³
93. In the Preamble to the RTI Act, Parliament set out its reasons for enacting the RTI Act. Relevantly, the Preamble provides:

1 *Parliament recognises that in a free and democratic society—*

...

(b) *information in the government's possession or under the government's control is a public resource; and*

...

⁹⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (**Project Blue Sky**).

⁹⁹ Justices McHugh, Gummow, Kirby and Hayne at paragraph 69.

¹⁰⁰ See section 14A(2) of the AI Act.

¹⁰¹ See the judgment of Justice Dawson in *Mills and Meeking* (1990) 169 CLR 214 at 235 in the context of the equivalent provision (section 35) in the *Interpretation of Legislation Act 1984* (Vict.).

¹⁰² Section 3(1) of the RTI Act.

¹⁰³ *Victorian Public Service Board v Wright* (1986) 160 CLR 145 at 153 and *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111 at 15. See also *Queensland Law Society Inc v Albietz and Anor* (1996) 2 Qd R 580 at 585 and *Local Government Association of Queensland Inc v Information Commissioner & Anor* [2001] QSC 052, 1 March 2001.

(d) *openness in government enhances the accountability of government; and*

...

- 2 *The Government is proposing a new approach to access to information. Government information will be released administratively as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort.*
- 3 *It is Parliament's intention to emphasise and promote the right to government information. It is also Parliament's intention to provide a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to provide the information. This Act reflects Parliament's opinion about making information available and the public interest.*

94. In my view, an objective reading the RTI Act as a whole and in a way that furthers the RTI Act's primary object, does not establish that the RTI Act demonstrates the contrary intention, as submitted by CNI. The language of the Act emphasises a principle of maximum disclosure of public sector information (unless there is a contrary public interest) and a principle that public sector information is a community resource to be pushed out into the public space. The structure of the Act provides for a specific list of entities the Parliament has decided are not within the ambit of the legislation. In my view, a section that determines whether entities are subject to the obligations set out in the RTI Act, such as section 16(1)(a)(ii) of the RTI Act, must be interpreted in a way that furthers the objects of the Act.
95. Using the AI Act definition of 'under' as an aid to interpret section 16(1)(a)(ii) of the RTI Act furthers the object of the RTI Act. It follows therefore, that for an entity to be 'established by government under an Act', the executive government:
- must be the cause of the entity being established, and
 - may do so in accordance with a process authorised by an Act or further to a power given under an Act.

Was CNI 'established by government under an Act'?

96. In accordance with my findings in paragraph 94 to 95 above, if the executive government can be shown to have established CNI in accordance with a process authorised by an Act, CNI will be 'established by government under an Act' as required by section 16(1)(a)(ii) of the RTI Act. From this, it will follow that CNI is an 'agency' under section 14 of the RTI Act to which access applications can be made.
97. The State has all the powers, and the legal capacity of an individual¹⁰⁴. However, most executive government actions are taken in accordance with a process authorised by legislation. The process for company formation is authorised by the *Financial Accountability Act 2009* (Qld) (**FAA**), and previously by the FAAA.
98. At the time CNI was established¹⁰⁵, the provisions of the FAAA applied¹⁰⁶. Significantly, under the FAAA:
- all public moneys are State property¹⁰⁷

¹⁰⁴ Section 51 of the *Constitution of Queensland 2001* as noted in paragraphs 4(a) and 7 of the First CNI Submission.

¹⁰⁵ December 2006.

¹⁰⁶ CNI has not contested this point.

¹⁰⁷ Section 6 FAAA

- a Department can only form or participate in the formation of a company or become a member of a company if the Department has the Treasurer's approval¹⁰⁸
 - unless authorised by an express power under an Act, a Department requires the Treasurer's approval to make an investment¹⁰⁹.
99. The Treasury Company Guidelines provide further guidance on the company formation and approval process under the FAAA. Relevantly, the Treasury Company Guidelines set out that:
- in some instances, a company structure is the most effective structure to deliver a specific outcome¹¹⁰
 - approval under section 44 of the FAAA is required to form or participate in the formation of a company irrespective of the level of control¹¹¹
 - a company structure is not appropriate if the objective is to reduce the transparency and accountability of the use of public funds and assets¹¹²
 - where the company is a Queensland public sector entity as defined in the FAAA, the constitution must provide that the Treasurer's approval is required for any amendment of the 'objects' of the company¹¹³
 - following the Treasurer's approval, the FAAA requires the appropriate Minister to provide written notice to the Auditor-General and the Treasurer that a public sector entity is established¹¹⁴.
100. CNI has confirmed that the Department was given approval under the FAAA by the Treasurer to form the company on 12 December 2006.¹¹⁵
101. On the basis of the above, I find that:
- division 9, part 2 of the FAAA sets out a process for Queensland government agencies to obtain approval to form companies¹¹⁶
 - CNI was established in accordance with that process
 - CNI is an entity that was established by an action of the executive government under the FAAA.
102. Therefore, I find that CNI is an entity established under an Act for the purpose of section 16(1)(a)(ii) of the RTI Act.

Relevance of the Corporations Act

103. As set out in paragraph 42 of these reasons, CNI submits that it was established by its incorporation under the Corporations Act and that therefore, CNI cannot have been established under any other Act.

¹⁰⁸ Section 44 FAAA

¹⁰⁹ Section 40C FAAA

¹¹⁰ Page ii of the Treasury Guidelines.

¹¹¹ Section I, page 1 of the Treasury Guidelines.

¹¹² Section 1.2.1, page 3 of the Treasury Guidelines.

¹¹³ Section 2.3.2, page 8 of the Treasury Guidelines. Clause 12 of CNI's Constitution provides that the Constitution may only be amended in accordance with the written direction and approval of the Treasurer. Based on the definition of 'public sector entity' in schedule 3 of the FAAA, it appears that CNI is a 'public sector entity' (see item (d) of the definition). However, I have not made a finding on this issue as it is not directly relevant to the question of under which Act, CNI was established.

¹¹⁴ Section 2.12, page 15 of the Treasury Guidelines and section 75 of the FAAA.

¹¹⁵ Paragraph 7 of the First CNI Submission.

¹¹⁶ This is now set out in part 5, division 7 of the FAA.

104. Significantly, it was not until 2001 that the Commonwealth Parliament held the power to enact legislation providing for the incorporation of companies.¹¹⁷ It follows, therefore, that when the Repealed FOI Act was enacted in 1992, there was no Commonwealth legislation, comparative to the Corporations Act, which provided for the formation or establishment of State government companies. On that basis, until the Corporations Act commenced in 2001, a proprietary limited company, such as CNI, could only have been incorporated under a State Act.
105. Since 2001, the Corporations Act has provided for new companies to be registered by ASIC.¹¹⁸ Upon registration under the Corporations Act, a new company comes into existence as a 'body corporate' for the purposes of the Corporations Act.¹¹⁹
106. Although a newly created State government company takes on its corporate character through registration under the Corporations Act, I consider that the formation and establishment of the company involves more than registration (and incorporation). Formation of a company is a process undertaken by the entity's shareholders and requires the approval of the Treasurer under the FAA (and previously the FAAA).
107. In applying the inclusive definition of 'under', it is foreseeable that an entity could be established 'by' one Act, 'for the purposes of' another Act and 'in accordance with' a third Act. In such circumstances, that entity would, in my view, be established 'under' three separate pieces of legislation, within the meaning of section 36 of the AI Act. Applying the inclusive definition in this way demonstrates that an entity can be established under more than one Act.
108. In considering the meaning of 'under' in section 36 of the AI Act, I accept that CNI was not established 'by', 'for the purposes of' or 'within the meaning of' the FAAA¹²⁰. However, I am satisfied that:
- the participation of State government departments in the process of company formation and obtaining the Treasurer's approval under the FAAA, served to establish CNI in accordance with the FAAA
 - the fact that CNI was registered and obtained its corporate character under the Corporations Act does not prevent CNI from also having been established under the FAAA.

Settled meaning

109. As set out in paragraph 55, the definition of 'public authority' in section 16(1)(a)(ii) of the RTI Act is substantially the same as that in section 9(1)(a)(ii) of the repealed FOI Act.
110. CNI relies on the similarities between these provisions to support its submission that the settled meaning of the expression 'established by government...under an enactment' found in section 9(1)(a)(ii) of the repealed FOI Act, as set out in previous decisions of the Information Commissioner, should be applied in interpreting section 16(1)(a)(ii) of the RTI Act. CNI cites the reasons of the then Information

¹¹⁷ State powers were referred to the Commonwealth by the *Corporations (Commonwealth Powers) Act 2001* (Qld). See also, *NSW v Commonwealth of Australia* (1990) 90 LAR 355.

¹¹⁸ Section 118(1)(b) of the *Corporations Act*. Requirements for registration are set out in section 117 of the *Corporations Act*.

¹¹⁹ Section 119 of the *Corporations Act*.

¹²⁰ These are the requirements in (a), (b) and (d) of the definition of 'under'.

Commissioner(s) in *Barker and ER Group*, *Barker and WFFG*, *McPhillimy* and *Tedesco* to support this submission.

111. I am satisfied that each of the previous decisions of the Information Commissioner can be distinguished, on its facts, from the present case. My reasons for this are set out below:

- In *Barker and ER Group*, the phrase 'under an enactment' was not considered as the Information Commissioner was satisfied that there was no evidence that the entity in question, the ER Group, was established by government.¹²¹
- In *Barker and WFFG* the Information Commissioner found WFFG to be established by government, for a public purpose under an enactment, the Corporations Law. The Information Commissioner found that at the time WFFG was established¹²² the Corporations Law¹²³ was an 'enactment' under which WFFG was established for the purpose of section 9(1) of the repealed FOI Act. Therefore, it was not necessary for the Information Commissioner to consider whether WFFG was also established under the FAAA¹²⁴.
- *McPhillimy* involved an entity which was a partnership of six companies, established by the individual partners entering into a partnership agreement. The Information Commissioner decided that while the entity was originally established by government, the partnership was not established or continued in existence, under any identifiable enactment¹²⁵. In *McPhillimy*, the Information Commissioner noted that the *Partnership Act 1891* (Qld) does not regulate the formation or establishment of partnerships so that it cannot be said the entity was established by, or even under, that legislation.¹²⁶
- In *Tedesco*, the entity concerned was a community sporting club that received some funding from the then Department of Housing. The Information Commissioner found that the respondent had been established under an enactment for the purpose of section 9(1) of the repealed FOI Act on the basis that it was incorporated under the *Associations Incorporation Act 1981* (Qld). However, the Information Commissioner did not find that the entity was a public authority under section 9(1)(a)(ii) of the RTI Act because although it was established for a public purpose, it was not established by government.¹²⁷

112. Each of the above decisions turned on a different set of facts. Notably, the only decision which concerned a company formed by government was *Barker and ER Group*. As set out above, the Corporations Law (a Queensland Act) applied to the ER Group's establishment and therefore, it was unnecessary for the Information Commissioner to look beyond that legislation in order for the ER Group to fall within the definition of 'public authority'.

¹²¹ See paragraph 3.10 of *Barker and ER Group*

¹²² The exact date of WFFG's creation is not expressly stated in the decision. However, the Information Commissioner identified in paragraph 28 of *Barker and WFFG* that the Treasurer's approval to form the company was sought in a letter dated 11 November 1998.

¹²³ At the time when the Corporations Law was still a Queensland Act. The Corporations Act 2001 commenced on 15 July 2001.

¹²⁴ The Information Commissioner did however, in paragraph 28 of *Barker and WFFG*, refer to the Treasurer's approval that was sought under the FAAA for formation of the company.

¹²⁵ See paragraphs 18-19 and 25 of *McPhillimy*.

¹²⁶ Paragraph 18 of *McPhillimy*.

¹²⁷ See paragraphs 17-19 of *Tedesco*.

113. Also of relevance is that none of the previous decisions identified above was subject to judicial review in the Supreme Court. Therefore, with respect to the Queensland Information Commissioner, it cannot be said that in re-enacting the definition of 'public authority' in the RTI Act in substantially the same terms as the repealed FOI Act, that Parliament was repeating '*words which have been judicially considered*¹²⁸ or that the words were intended to have the meaning already '*judicially attributed to them*¹²⁹'.
114. In the absence of judicial interpretation of the phrase 'established by government under an enactment' in section 9(1)(a)(ii) of the repealed FOI Act, no presumption about the 'settled meaning' of the phrase arises.
115. I am not satisfied that the cases identified above establish a 'settled meaning' for the phrase 'established by government under an enactment' which should be applied to the interpretation of section 16(1)(a)(ii) of the RTI Act, as submitted by CNI. On that basis, I am satisfied that section 16(1)(a)(ii) of the RTI Act should be interpreted in accordance with the purposive approach as set out in paragraphs 88 to 95 of these reasons.

Extrinsic material

116. CNI also submits (see paragraphs 68 to 70) that the use of certain extrinsic material, namely the Solomon Report and Government Response, does not support displacing the presumption that the settled meaning of the phrase 'established by government under an Act' should be applied in this case. CNI also questions the use of extrinsic material as an aid to interpretation and favours an interpretation which applies the language of the Act.¹³⁰
117. The AI Act confirms that extrinsic material may be considered to confirm the interpretation conveyed by the ordinary meaning of a provision.¹³¹ In this review, I have considered extrinsic materials in the form of the Solomon Report and the Government's Response. In my view that material confirms the interpretation given in this decision.
118. The sections of those materials concerning the definition of 'public authority' in the Repealed FOI Act provide as follows:

Recommendation 24

The definition of 'public authority' in s.9 of the Act should be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory.

Queensland Government Response

Supported

The government supports this recommendation which is intended to ensure that Government bodies incorporated under the Corporations Act 2001 (Cth) (such as company GOCs) are included in the operation of the proposed Right to Information Bill.

¹²⁸ *Re Alcan Australia* at paragraph 20.

¹²⁹ *Re Alcan Australia* at paragraph 20 citing *Barras v Aberdeen Steam Trawling and Fishing Co* (1933) AC 402 at 446, *D'emden v Pedder* (1904) 1 CLR 91 at 110, *Pillar v Arthur* (1912) 15 CLR 18 at 22, 23, 29-30 and *Platz v Osborne* (1943) 68 CLR 133 at 141, 146-147.

¹³⁰ Paragraph 24 of the Second CNI Submission and quoted in paragraph 68 of these reasons.

¹³¹ Section 14B(1)(c) of the AI Act.

The impact of changes to the definition of a “public authority” on other legislation, such as the Public Records Act 2002, will be considered.

The advice of the Queensland Parliamentary Counsel will be sought as to the appropriate form of drafting for the proposed provision.

119. The extrinsic materials set out above demonstrate that the Queensland government supported the Solomon Report recommendation that entities such as CNI be included in the operation of the RTI Act.
120. This position is supported by the specific listing of entities to which the RTI Act does not apply in schedule 2 of the RTI Act. I consider that if Parliament had intended for CNI to be excluded from the operation of the RTI Act, CNI would be listed in schedule 2 of the RTI Act.

(iii) Established for a public purpose

121. As set out in paragraph 43 of these reasons, CNI did not make submissions as to whether CNI is established for a public purpose on the basis that it considered it unnecessary due to CNI not being an entity that was 'established under an Act'. However, as I have found that CNI was established by government under an Act for the purpose of section 16(1)(a)(ii) of the RTI Act, the issue of whether CNI was 'established for a public purpose' must be determined.
122. CNI was established to manage the procurement of the Airport Link and Northern Busway (Windsor to Kedron) projects.¹³² This is confirmed by clause 1.4 of CNI's Constitution, which details the objects of CNI to include managing the procurement of the 'Projects'. CNI's Constitution defines 'Projects' as:
- (a) *The financing, design, construction, commissioning, operation, maintenance, repair, levying and collection of tolls, maintaining public safety, network interfaces, traffic management, and handover of Airport Link;*
 - (b) *The design, construction, commissioning, maintenance and handover of Northern Busway; and*
 - (c) *Any associated works.*¹³³
123. Shortly after CNI was established, the then Deputy Premier described CNI as a '*Public-Private Partnership with the private sector responsible for financing, designing, constructing, commissioning, operating and maintaining the project*'.¹³⁴
124. The Treasury website explains that one of the objectives of Public Private Partnerships (PPPs) is to '*deliver improved services and better value for money*'.¹³⁵

¹³² CNI Annual Report 2007-2008, page 19.

¹³³ Schedule 1, clause 1

¹³⁴ Media Statement 1.

¹³⁵ See <http://www.treasury.qld.gov.au/clients/government/public-private.shtml>. Further information about PPPs is available on the DIP website <http://www.dip.qld.gov.au/processes-frameworks/public-private-partnerships-and-value-for-money-framework.html>

Meaning of 'public purpose'

125. Under the repealed FOI Act, the Information Commissioner expressed the view that a body established for a purpose of expending public funds to stimulate or subsidise desirable private sector economic activity is a body established for a 'public purpose'.¹³⁶ In *McPhillimy*, the Information Commissioner reasoned that the term 'public purpose' is apt to include a purpose that is for the benefit of members of the community generally or a substantial segment of them.¹³⁷

126. In *English and Queensland Law Society Incorporated*¹³⁸, the Information Commissioner reasoned that the meaning of 'public purpose' in section 9(1)(a) of the repealed FOI Act was '*relatively straightforward*'¹³⁹. In that decision, the Information Commissioner explained that:

*The word "purpose" directs attention to the objects or aims for which a body has been established as evidenced by the relevant powers, functions or duties conferred on it The word "public" imposes a requirement that a purpose be one for the benefit of members of the community generally (or a substantial segment of them ...).*¹⁴⁰

127. CNI's Constitution demonstrates that the purpose for which it was established was to manage the procurement of significant public infrastructure projects, namely, Airport Link and the Northern Busway. In my view, the planning, approval and procurement of significant public infrastructure projects is ordinarily a government responsibility which, by virtue of the Public Private Partnership, has been assigned to CNI. I expect that the procurement of public infrastructure projects would ordinarily involve significant use of public monies.

128. By establishing CNI as a PPP an objective of the State government was to deliver improved services and achieve value for money.¹⁴¹ I consider that these objectives necessarily have a public context. The fact that the projects for which CNI is responsible are intended to be for public use and to benefit members of the community, further supports this view.

129. On the basis of the above, I find that CNI was established for a public purpose.

Summary of findings

130. I find that CNI:

- was established by government under an Act, namely the FAAA, for the public purpose of managing the procurement of significant public infrastructure projects in Queensland
- falls within the definition of 'public authority' in section 16(1)(a)(ii) of the RTI Act
- is an agency under section 14 of the RTI Act to which access applications can be made under section 24 of the RTI Act.

¹³⁶ *McPhillimy* at paragraphs 22-23 and cited with approval in *Barker and WFFG* at paragraph 30.

¹³⁷ *McPhillimy* at paragraph 22.

¹³⁸ (1995) 2 QAR 714 (**English**)

¹³⁹ Paragraph 74 of *English*.

¹⁴⁰ See paragraph 74 of *English*.

¹⁴¹ In accordance with the stated objectives of PPPs as set out on Treasury and DIP websites [see footnote 135 above].

DECISION

131. CNI's decision that it is not an entity to which the RTI Act applies is set aside and substituted with the decision that CNI is an 'agency' to which access applications can be made under the RTI Act on the basis that CNI falls within the definition of 'public authority' in section 16(1)(a)(ii) of the RTI Act.

Julie Kinross
Information Commissioner

Date: 31 March 2010

APPENDIX

Relevant sections of RTI Act

3 Object of Act

- (1) *The primary object of this Act is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.*
- (2) *The Act must be applied and interpreted to further the primary object.*

14 Meaning of agency

- (1) *In this Act, an **agency** means—*
 - (a) *a department; or*
 - (b) *a local government; or*
 - (c) *a public authority; or*
 - (d) *a government owned corporation; or*
 - (e) *a subsidiary of a government owned corporation.*
- (2) *However, in this Act, **agency** does not include an entity to which this Act does not apply.*

Note—

See section 17 for entities to which this Act does not apply. Also, under section 26, an application may not be made to the information commissioner, RTI commissioner or privacy commissioner.

16 Meaning of public authority

- (1) *In this Act, **public authority** means any of the following entities—*

Note—

Under the Acts Interpretation Act 1954, section 36—
entity includes a person and an unincorporated body.

- (a) *an entity—*
 - (i) *established for a public purpose by an Act; or*
 - (ii) *established by government under an Act for a public purpose, whether or not the public purpose is stated in the Act;*
 - (b) *an entity created by the Governor in Council or a Minister;*
 - (c) *another entity declared by regulation to be a public authority for this Act, being an entity—*
 - (i) *supported directly or indirectly by government funds or other assistance or over which government is in a position to exercise control; or*
 - (ii) *established under an Act; or*
 - (iii) *given public functions under an Act;*
 - (d) *subject to subsection (3), a person holding an office established under an Act;*
 - (e) *a person holding an appointment—*
 - (i) *made by the Governor in Council or Minister otherwise than under an Act; and*
 - (ii) *declared by regulation to be an appointment the holder of which is a public authority for this Act.*
- (2) *A prescribed entity is not a public authority in relation to documents received, or created, by it in performing a function other than a public function given under an Act.*
 - (3) *A person is not a public authority merely because the person holds—*
 - (a) *an office the duties of which are performed as duties of employment as an agency's officer; or*
 - (b) *an office of member of a body; or*

- (c) *an office established under an Act for the purposes of an agency.*
- (4) *In this section—*
prescribed entity *means an entity that is a public authority only because it is given public functions under an Act and is declared by regulation to be a public authority for this Act.*

Relevant sections of the AI Act

6 References to Act

- (1) *In an Act—*
Act *means an Act of the Queensland Parliament, and includes—*
(a) *a British or New South Wales Act that is in force in Queensland; and*
(b) *an enactment of an earlier authority empowered to pass laws in Queensland that has received assent.*
- (2) *In an Act, a reference to ‘an Act’ includes the Act in which the reference is.*

14A Interpretation best achieving Act’s purpose

- (1) *In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.*
- (2) *Subsection (1) does not create or extend criminal liability, but applies whether or not the Act’s purpose is expressly stated in the Act.*
- (3) *To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.*

14B Use of extrinsic material in interpretation

- (1) *Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation—*
(a) *if the provision is ambiguous or obscure—to provide an interpretation of it; or*
(b) *if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result; or*
(c) *in any other case—to confirm the interpretation conveyed by the ordinary meaning of the provision.*
- (2) *In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to—*
(a) *the desirability of a provision being interpreted as having its ordinary meaning; and*
(b) *the undesirability of prolonging proceedings without compensating advantage; and*
(c) *other relevant matters.*
- (3) *In this section—*
extrinsic material *means relevant material not forming part of the Act concerned, including, for example—*
...
(b) *a report of a royal commission, law reform commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly before the provision concerned was enacted; and*

36 Meaning of commonly used words and expressions

In an Act—

...

establish includes constitute and continue in existence.¹⁴²

...

under, for an Act or a provision of an Act, includes—

- (a) *by; and*
- (b) *for the purposes of; and*
- (c) *in accordance with; and*
- (d) *within the meaning of.*¹⁴³

Relevant sections of the FAAA

6 Property in public moneys and public property

All public moneys and public property are the property of the Crown in right of the State.

40C No-one other than Treasurer may invest or otherwise lend an amount

- (1) *A body, including a department, may not—*
 - (a) *make an investment based on, at the time of the investment, all or part of any balance in the departmental accounts of a department; or*
 - (b) *otherwise lend an amount even if lending the amount may be for the department's purposes; or*
 - (c) *pay moneys out of a departmental financial-institution account for making an investment or otherwise lending an amount under paragraphs (a) or (b).*

44 Formation of companies by department etc. requires Treasurer's approval

- (1) *A department may—*
 - (a) *form, or participate in the formation of, a company; or*
 - (b) *otherwise become a parent entity in relation to a company;*
only under a Treasurer's approval.
- (2) *A person may use public moneys to form, or participate in the formation of, a company only under a Treasurer's approval.*
- (3) *If the use of public moneys for a purpose would result in an entity becoming a parent entity in relation to a company, the moneys may only be used for that purpose under a Treasurer's approval.*

¹⁴² This definition of 'establish' has been in operation since 1991 pursuant to *Acts Interpretation Amendment Act 1991*, No. 30, section 32.

¹⁴³ This definition of 'under' has been in operation since 1994 pursuant to *Statute Law (Miscellaneous Provisions) Act (No.2) 1994*, No. 87, section 3, schedule 1.