that the prospect of paying even one's own legal costs will be daunting to many applicants and will deter a substantial number of appeals.

Further documents

Mr Wilson requested an order that the Department be directed to search for further documents. Smyth J held that such an order was not necessary. This was despite the fact that a number of fresh documents clearly covered by the application came to light during the case.

Issues raised by the case

Lack of expertise

The *FoI Act* has only been in operation for a year, so there is as yet limited community or judicial knowledge about its provisions.

Mr Justice Smyth admitted early in the proceedings that he 'knew nothing' about the *FoI Act* (Transcript, p.7). Clearly, expertise will develop over a period of time. The Chief Judge of the New South Wales District Court (Staunton J) has expressed interest and has been involved in the preliminary stages of other FoI appeals.

Conclusion

Ultimately, the court found that most of the documents in dispute were not exempt, and Mr Wilson therefore succeeded in his appeal to a large extent. The case, however, did little to advance the knowledge of FoI practitioners or administrators about the interpretation of the NSW Act, and revealed a reluctance on the part of the court to become involved in FoI issues or to play a supervisory role.

When Administrative Appeals Tribunals were first introduced at the Commonwealth level and in the State of Victoria, they were intended to provide quick, non-legalistic and inexpensive review of government decision. Doubt has subsequently been expressed about whether they have in fact lived up to these aims, but they are certainly more accessible to applicants than the District Courts, have the capacity to review decision on their merits, and are staffed by experts in administrative issues.

The Premier has made a commitment to an AAT in New South Wales.

As other appeals are lodged against FoI decisions in NSW, it will be interesting to see how these are dealt with.

[A.H.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

SULLIVAN and DEPARTMENT OF SOCIAL SECURITY
No. N89/232
Decided: 23 May 1989 by Deputy President Bannon.

Request for informant's letter to Department — part of letter but excluding identity of the author disclosed — identity nevertheless ascertainable when the document held up to the light — still exempt under s.37(1)(b).

The applicant sought access to a letter sent to the respondent Department concerning his entitlement to continue to receive an Invalid Pension. In the only part disclosed, it was apparent that the author of the letter informed the Department that the applicant was a citizen of the United Kingdom. This fact did not affect the applicant's entitlement to the pension. On the review by the AAT, the applicant sought access to the information in the letter which would reveal the identity of the author.

In oral reasons, subsequently reduced to writing, the Tribunal found that 'the identity of the informer who wrote the particular letter to the Department, is properly a matter of confidence within the meaning of s.37(1)(b) of the Act'. Mr Bannon cited *Re Sinclair and Secretary, Department of Social Security* (October 1985), and *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. Section 37(1)(b) provides:

> A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to —
>
> (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law . . .

The difficulty arose because the evidence showed that 'by means of holding the released letter up to the light, the applicant has been able to decipher the name of the signatory to the letter'. The applicant argued that the letter 'no longer possesses confidentiality'. The Tribunal found however that 'when he received it he knew, or ought to have known, that the Department was claiming the letter was confidential', and that although he obtained the information as to the identity of the informant innocently, he was not therefore relieved 'of the burden which a court of equity would impose on him of treating the information as confidential'.

The Tribunal affirmed the decision not to disclose the identity of the informant to the applicant.

[P.B.]

ASSOCIATED MINERALS CONSOLIDATED LTD and SECRETARY, DEPARTMENT OF TRANSPORT AND COMMUNICATIONS
No. W89/206
Decided: 26 February 1990 by Deputy President McDonald, I.A. Wilkins, and K.J. Taylor.

Investigations of loss of vessel at sea — records of interview obtained by investigator — s.40(1)(d) — whether evidence showed substantial adverse effect — likely future reactions to disclosure considered.

Following the loss of a vessel, the MV Singa Sea, an officer of the respondent, a Mr Filor, the Director of the Ships Operations Section, was appointed to conduct a preliminary investigation into its loss. By s.377A of the *Navigation Act* 1912, Mr Filor possessed power to 'coerce' persons to give oral evidence on oath, or to produce documents. Apparently some 20 persons were interviewed and gave information without any need on Mr Filor's part to use these powers.

The applicant sought access to various documents which included all the records of these interviews. The respondent contacted all the

interviewees, and in respect of the 18 who consented to disclosure under the Act it granted access. In respect of two interviewees, the respondent received a reply from the solicitors of their employer (the employer was the firm that was chartering the vessel at the time it sank). This reply indicated that the employer was reluctant to consent to the disclosure of the records of interview of its employees.

The respondent refused to disclose these documents, and the applicant sought review by the Tribunal. The only ground of exemption claimed was s.40(1)(d). This provides that:

> Subject to sub-section (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to
>
> (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency . . .

The respondent adduced evidence primarily from Mr Filor. It was to the effect that disclosure of these statements 'in the face of objection to [their] release would lead to a dimunition in the effectiveness of the preliminary hearing process as the full hearted cooperation available to date would be withdrawn'. He also gave evidence that in all the 11 investigations he had conducted, it had been unnecessary to invoke the coercive powers.

The applicant argued that 'no attempt had been made to ascertain from maritime industry representatives how the release would lead in some way to an adverse industry consequence'. Nor was there evidence of the attitude of the two interviewees concerned. The evidence as to the consequences of disclosure was only speculative.

The Tribunal found however that s.40 was 'not limited in scope so as to restrict consideration only to the person who generated the information in the document in question but rather it looked to the general effect which the release of such document may have on the operations of the agency concerned'. It accepted that the respondent dealt with 'all of the industry groups — the agents, the charterers, the seamen', and said that if it were to lose the confidence of any one of these groups 'that would no doubt be reflected throughout the entirety of the groups which make up the whole of the industry'.

On this basis, and having regard to the evidence of the employers of the two interviewees, the Tribunal was satisfied that disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the respondent in that the ongoing and full cooperation of industry members given on a voluntary basis to ensure the highest possible standards at sea are maintained, would be adversely affected.

[P.B.]

Federal Court

DEPARTMENT OF INDUSTRIAL RELATIONS v FORREST and BURCHILL
(1990) 21 FCR 93 (Full Court, Federal Court)
Decided: 2 February 1990 (Northrop, Lockhart and Hill JJ).

In March 1988 the second respondent Mr Tony Burchill, a journalist with 'The Age', sought access to a document that was identified by the applicant Department as the Commonwealth Government's submission to an Anomalies Conference conducted by the Remuneration Tribunal prior to the finalisation of its 1987 report concerning the salaries of Commonwealth parliamentarians. This conference, which was held in November 1987, had been proposed by the then Minister for Industrial Relations, who also suggested that it be attended by representatives of the ACTU, the CAI, the Commonwealth Government, the ALP caucus and the Opposition. In the event, representatives of the ACTU, the CAI and the respondent Department attended ((1990) 21 FCR 93 at p.108).

In May 1988 the request for access was denied by an officer of the Department, who claimed that the document was exempt under ss.34, 36 and 40. Internal review yielded the same response, and in August Burchill lodged an appeal with the AAT. In October 1988, Mr M.H. Codd, the Secretary to the Department of the Prime Minister and Cabinet, signed a conclusive certificate pursuant to s.34(2) of the Act, which in part certified that the document in issue 'is a document of a kind referred to in paragraphs 34(1)(c) and 34(1)(d) of that Act'.

The hearing was held in March 1989. The Department tendered an affidavit from the Director of the Cabinet Office, which in part stated the nub of the claim for exemption under s.34(1)(d) ((1990) 21 FCR 93 at p.109). This officer said that the document in issue — the submission — was prepared only two days after a Cabinet meeting which decided that the government would make a submission, and it followed the Cabinet decision 'in terms of the detail of that decision, and amplifies the key points of the decision consistent with the deliberations of Cabinet which preceded it. To release the submission would reveal the decision and the deliberations' (ibid. at p.109). The claim for exemption under s.34(1)(c) was apparently on the basis that the submission contained extracts from a Cabinet Minute, but it appears to have been abandoned by the stage of the Full Court hearing (ibid. at p.118).

On the first day of the hearing, counsel for the Department opened its case and called evidence both orally and by affidavit from officers of government agencies. At this point, the AAT apparently overlooked (or did not grasp) the significance of s.58C of the Act. This section applied by reason of the fact that the AAT was considering a request by Burchill that it determine whether there were reasonable grounds for the claim in the conclusive certificate (see ss.48(3), 58(4) and 58B(1)). In its material parts, s.58C provides:

> (1) This section has effect notwithstanding anything contained in the *Administrative Appeals Tribunal Act* 1975.
>
> (2) At the hearing of a proceeding referred to in sub-section 58B(1), the Tribunal —
>
> (a) shall hold in private the hearing of any part of the proceeding during which evidence or information is gives, or a document is produced, to the Tribunal by [an agency, an officer, a Minister, etc] or during which a submission is made to the Tribunal by or on behalf of an agency or a Minister, being a submission in relation to the claim [that the document is exempt under s.34]; and
>
> (b) subject to sub-section (4) shall hold the hearing of any other part of the proceeding in public.

(3) Where the hearing of any part of a proceeding is held in private in accordance with sub-section (2), the Tribunal —

(a) may, by order, given directions as to the persons who may be present at that hearing; and

(b) shall give directions prohibiting the publication of —

(i) an evidence or information given to the Tribunal;

(ii) the contents of any documents lodged with, or received in evidence by, the Tribunal; and

(iii) any submissions made to the Tribunal, at that hearing.

(Section 58C(4) gives to the Tribunal a discretion to regulate the 'public' parts of the hearing in the same way as it must regulate the private sessions.)

At the point where the counsel for the Department led evidence from agency officers, the Tribunal should have been asked to make orders under s.58C(2) and (3). Such a request was not made until counsel for the Department proposed to lead evidence from the Director of the Cabinet Office. Lockhart and Hill JJ noted that '[i]t was common ground that [this] evidence . . . would have involved disclosure of the contents of the [document in issue]' (ibid. at p.109). In its material part, the order made by the Tribunal was in these terms: 'It is ordered that the applicant, his witnesses and advisers save and except his counsel and instructing solicitor be excluded from the hearing of the application until otherwise directed by the Tribunal . . .' (ibid. at p.107). The 'applicant' was of course Burchill. The Department thereupon sought an order of review under s.5 of the *Administrative Decisions (Judicial Review) Act* 1977 of the order made by the Tribunal (ibid. at p.110). (The first respondent was Mr B.M. Forrest, the Deputy President of the Tribunal.)

As posed by Lockhart and Hill JJ, the questions raised for decision by the Federal Court upon the ADJR application were:

(1) whether the conclusive certificate was valid; and

(2) assuming that it was, 'whether . . . it is competent for the Tribunal to allow evidence to be given before it which would reveal the contents of the parts of the [document in issue] which were the subject of the certificate' (ibid. at p.110).

The validity of the conclusive certificate

This issue was raised by the Court at the outset of the argument, and although no party sought to make a challenge, Lockhart and Hill JJ were of the view that 'the validity of the certificate is fundamental to the jurisdiction of the Tribunal to hear the proceeding before it under s.58 of the *FoI Act*' (ibid. at p.117). It was noted that the powers of the Tribunal did not extend to a review of the decision to make the certificate [a reference to s.58(3)], but their Honours held that if the certificate were invalid, the Tribunal had no jurisdiction to determine under s.58(4) the question whether there were reasonable grounds for the claim made in the certificate (ibid.).

This certificate was issued under s.34(2), which provides:

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively, subject to the operation of Part VI, that it is an exempt document of that kind.

Lockhart and Hill JJ held that this provision required that 'the particular part of [s.34(1)] upon which reliance is placed be specified in the certificate. It is fundamental for the validity of the certificate that its reader can discern from its face, when read in conjunction with s.34, the particular kind of document in respect of which the exemption has been claimed and the certificate issued' (ibid. at p.118).

Looking at the certificate in issue, and noting the reference to s.34(1)(c) and (d), their Honours found that the number of possible bases for the claim of exemption was such that '[t]he certificate in our view is so uncertain in its description as to render it invalid. Nor is it capable of severance into that which is valid and that which is invalid' (ibid. at p.118). The fact that the parties might agree that only s.34(1)(d) was in issue could not remedy this defect. Their Honours found then that the certificate 'was bad', and that that was sufficient to dispose of the proceeding (ibid.) but nevertheless proceeded to other issues (see below).

Northrop J did not express an opinion on this issue, noting the agreement of the parties, and that '[i]n any event, a further certificate could be given rectifying any defect' (ibid. at p.102). His Honour added a warning to agencies that 'great care should be given to the question of whether a certificate should be given, the form of a certificate and whether it specifies clearly the basis on which it claimed a document is an exempt document' (ibid. and see *Re Howard and The Treasurer of the Commonwealth of Australia* (1985) 3 AAR 169 at p.182).

The order under s.58C

The majority judgment of Lockhart and Hill JJ will be first considered, and it is important to appreciate precisely the issue to which their Honours directed their minds. This was whether the Tribunal could direct that evidence which would reveal the *contents of the document* in issue be given while the counsel and the solicitor remained in the hearing (ibid. at p.119 and p.120). (It is clear that their Honours had in mind a direction under s.58C(3)(a).) It was held that the Tribunal could not give such a direction, and that in this case the Tribunal had proceeded on a wrong basis. After a review of certain provisions of the Act, their Honours said:

The Act thus plainly evinces the purposes that the Tribunal may examine a document which is the subject of a conclusive certificate solely for the purpose of determining whether the reasonable basis for the claim has been established and that the Tribunal is not authorised to permit any persons except its own members who constitute the Tribunal for the purpose of the proceeding before it, its staff, the relevant agency or Minister or their legal representatives, to be present when the document is inspected or its contents revealed. [ibid. at p.120]

To justify this view of the Act, their Honours pointed (ibid. at pp.119-120) to ss.58C(2) and (3) (see above); 58E (which regulates the production of the documents to the Tribunal, and which speaks of the need to ensure that disclosure is limited in the manner noted by their Honours); 63 (which speaks of the need on the part of the Tribunal to avoid disclosure of exempt matter to the applicant and the power of the Tribunal to exclude the applicant and her or his legal advisers where necessary); and 64 (which concerns the production of the documents to the Tribunal in non-certificate cases). Certain aspects of s.58A were also noted.

It is to be noted that Lockhart and Hill JJ said nothing to indicate that there was any legal impediment to an applicant and her or his legal advisers being present at other stages of a private hearing held in accordance with s.58C(2). Indeed, their Honours quoted a passage from the decision of Davies J in *Re Howard and The Treasurer of the Commonwealth of Australia* (1985)

3 AAR 169 at p.182 which clearly assumed that an applicant may be present at the hearing (and see further below on the procedure adopted in *Re Howard*).

In contrast to the majority, Northrop J focused on what the Tribunal should have done at the point where counsel for the agency commenced to adduce its evidence. This evidence was directed to the s.34 exemption claims *and* to the claims under other exemptions in respect of which there was no conclusive certificate. His Honour said that:

> under s.58C(2) that evidence should have been given in a private hearing. More importantly, the Tribunal should have made orders under s.58C(3) to give effect to the requirements of s.58C(2). In its context, the word 'may' appearing at the beginning of s.58C(3)(a) is a classical example of where the word 'may' imposes a duty. It imposes a duty on the Tribunal to give effect to the mandatory provisions of s.58C(2) (ibid. at pp.100-101).

It is not entirely clear, but Northrop J appears to have taken the view that at a private hearing as required by s.58C(2), the applicant and her or his legal advisers should ordinarily be excluded. Describing it as 'a question of onus', his Honour said:

> In proceedings where the Tribunal is exercising the power conferred by s.58(4) of the *Fol Act*, the hearing is in private when the matters referred to in s.58(c)(2) are being presented, unless directions are given under s.58C(3). Prima facie, therefore, the hearing must be in private. No question of natural justice arises. Directions should be given only when the material before the Tribunal justifies a departure from the statutory requirement. Thus, it is difficult to visualize what would justify the giving of a direction with respect to an applicant. Likewise, with respect to the agent, whether a lawyer or not, acting on behalf of the applicant (ibid. at p.106).

This view of the effect of s.58C(2) appears to go much further than that of the majority, who may be taken to have held that an applicant may be present at a private hearing under that provision. It may be however that Northrop J was, as were the majority, concerned with the kind of direction that should be made at the point where the evidence of the agency would reveal the *contents of the document(s)* claimed to be exempt. It was the ruling of the Tribunal that although this was the case that the applicant's legal advisers should remain in the private hearing that his Honour described as 'based upon a misunderstanding' of s.58C(2) and (3) (ibid. at p.107). The Tribunal had said that the presence of the legal advisers was essential to their critically reviewing the agency's evidence, but Northrop J pointed out that '[o]n this basis, the legal advisers should always be permitted to be present and this cannot be correct' (ibid.).

Comment

1. To deal with the second issue first, the approach of Lockhart and Hill JJ is, with respect, correct. The scheme of the Act is clearly designed to prevent an applicant or her or his legal advisers from learning of the contents of the documents in issue during the hearing of the appeal; see s.64, considered in *Re Arnold Bloch, Liebler & Company and Commissioner of Taxation* (1984) 1 AAR 355; 6 ALD 62.

Northrop J's analysis is more problematic. The AAT has, correctly it is submitted, taken the reference in s.58C(2)(a) to a 'private' hearing to mean one during which the general public will not be admitted. This view gains support from the reference to 'the hearing . . . in public' in s.58C(2)(b). The question of who should be permitted to attend this private hearing is then to be the subject of directions under s.58C(3).

In the conclusive certificate cases in which this commentator has participated, directions under s.58C(3) have been given as soon as any of the events described in s.58C(2)(a)(i), (ii) or (iii) occur, and it is odd that this course was not followed in this case. It is also my experience however, that at that point an agency has never sought to obtain a direction that the applicant and advisers be excluded immediately. Such an order is sought only at the point where the evidence to be adduced might reveal the contents of the document(s) in issue. In a series of recent cases before Hartigan J, the procedure adopted (based on the comments of Davies J in *Re Howard*) was as follows:

(i) the agency accepted the onus to begin (this departs from the suggestion in *Re Howard* 3 AAR at p.181), but was also the course taken in *Re Burchill* by the Tribunal (see 21 FCR at p.100);

(ii) in a public hearing, counsel for the agency outlined the matters in issue and tendered the material in the s.37 statement and the conclusive certificate(s) (see too *Re Howard* (see 3 AAR at p.181);

(iii) at that point where the agency proposed to give evidence or information, or produce a document to the Tribunal, counsel requested a direction under s.58C(3)(a), but in terms which excluded members of the public *apart from* the applicant and advisers (see *Re Howard* (see 3 AAR at p.181; 'Section 58C does not require that the applicant be excluded from the hearing at the time when evidence is given or submission made by or on behalf of the respondent');

(iv) counsel for the agency then adduced such evidence, information and documents as did not reveal the contents of the document(s) claimed to be exempt; and

(v) at that point where the evidence to be adduced (usually through examination in chief of an agency's witness) would reveal the contents of the document(s) claimed to be exempt, counsel for the respondent sought and obtained a direction that the applicant and advisers be excluded.

At step (iv), the evidence was adduced largely by having the agency witness adopt the contents of the affidavit he or she had sworn prior to the commencement of the hearing. (Agencies are obliged to prepare affidavits setting out the evidence to be relied upon in support of the claims of exemption; AAT Practice Direction, 12 April 1985). After step (v), that is, once the examination in chief of the agency's witnesses was completed, the applicant's counsel was permitted to cross-examine them. This cross-examination was directed to the justification offered by the deponent for the exemption claims made in the affidavit(s). It was also directed to adducing evidence which the applicant considered might assist her or his case.

The cases in which this procedure was followed concerned conclusive certificates made to support claims for exemption under ss.33 and 34 of the Act (see the *Re Aldred* decisions noted in *Fol Review* No. 27), and the respondent experienced no obvious difficulty in presenting its case. Hartigan J acted on an assurance by counsel for the respondent that his examination in chief of the deponent to the relevant affidavit would refer to the contents of the documents in issue and on that basis the applicant and his advisers were excluded from what was already a private hearing under s.58C(2)(a).

Yet in *Forrest* the majority opinion seems to suggest that cases in which a conclusive certificate supports a claim for exemption under ss.33, 34 and 35 (and presumably s.33A?) present a particular prob-

lem. Lockhart and Hill JJ approved (21 FCR at p.121) of the observations by Davies J in *Re Howard* that where the conclusive certificate was given to support claims for exemption under ss.33, 34 or 35 'there may be very good reasons for keeping the document entirely confidential and therefore seeking a private hearing before the Tribunal in the absence of the applicant' (3 AAR at p.182).

It is difficult to ascertain just what this means. There is no difficulty in keeping the documents 'entirely confidential' from the applicant if the procedure outlined above is followed. What Davies J may have intended to convey is that where the exemptions mentioned are supported by a conclusive certificate, the AAT will be more sensitive to the need to exclude the applicant and her or his legal advisers. The justification for this might lie in the fact that in such cases (in effect all those apart from a s.36 conclusive certificate case) it will be more difficult for the respondent to present its case in a way which clearly separates the contents of the documents in issue from other matter by way of evidence or submission.

Lockhart and Hill JJ also approved (21 FCR at p.121) of the procedures outlined in two USA decisions (wrongly said to be decisions of the Supreme Court). A number of points emerge from *Arieff v US Department of the Navy* (1983) 712 F 2d 1462 at pp.1468-1471, a decision of the Court of Appeals for the District of Columbia: (1) that evidence (whether of the contents of the documents, or of evidence to support the claim for exemption) must be given ex parte and in camera where it would disclose the contents of the documents in issue; (2) that neither the applicant for the documents or her/his counsel should be permitted to ascertain any of this evidence.

Concerning (1), the court appears to have distinguished between evidence comprising the documents in issue (which the USA legislation authorises the court to receive (ibid. at p.1469) from evidence of fact or opinion adduced by the agency to support the claim for exemption which reveals at least some of the contents of the documents (ibid.). There does not appear to be any suggestion that a court should not receive evidence of the first kind. Concerning the second, the court said that it should be given ex parte and in camera only when the necessity to do so exists, that is, 'when (1) the validity of the government's assertion of exemption cannot be evaluated without information beyond that contained in the public affidavits and in the records themselves; and (2) public disclosure of that information would compromise the secrecy asserted' (ibid. at p.1471). The court further said that it was not comfortable 'in endorsing regular use of *ex parte* procedures', which was 'a practice out of accord with our common law tradition', but because of the unusual problems in FoIA cases, where one party has the documents and the other has not, it 'must become a commonplace in this unique field' (ibid.).

The second USA case, a District Court decision in *Agee v Central Intelligence Agency* (1981) 517 F Supp 1335, holds that the public affidavit given to the applicant and which contains the detailed justification for the exemptions claimed (the *Vaughan v Rosen* Index — see ibid. at p.1337) should not contain any matter which, if it were in a document, would be exempt from disclosure (ibid. at pp. 1337-1338). A similar holding under the Australian Commonwealth Act is *News Corporation Ltd* v *National Companies and Securities Commission* (1984) 5 FCR 88.

2. The uncertainty of the conclusive certificate. Lockhart and Hill JJ made plain that because of its uncertainty, the certificate was invalid. It did not matter that the basis for the claim actually made (that is, as to what kind of document it was in terms of s.34(1)) fell within the terms of the claim in the conclusive certificate. Their Honours did not closely examine the requirements of s.34(2), but it might fairly be said that their Honours held that it required a degree of clarity of expression and of precision such that a conclusive certificate which did not attain that degree would be invalid. It is reasonable to assume that Lockhart and Hill JJ focused in particular on the words 'certifying that a document is one of a kind' in s.34(2). On its face the conclusive certificate referred to more than one kind of document, and it was this that made the certificate 'uncertain' (or, lacking in the requisite degree of clarity of expression and of precision).

There may well be scope for the application of this approach to conclusive certificates made under ss.33, 33A or 36. Because these provisions are worded somewhat differently to s.34, the uncertainty argument will take a different form. (Section 35 is worded in the same fashion as s.34.)

3. Concerning the production of documents to the Tribunal in conclusive certificate cases, Lockhart and Hill JJ observed that:

> It is arguable that the tribunal may itself not inspect the document or inform itself of is contents even for the purpose of performing its functions under s.58E or even if the relevant Minister or agency voluntarily offers the exempt document or exempt matter to the Tribunal in the course of deciding whether it is satisfied as to the reasonable basis of the claim (21 FCR at p.120).

Lockhart and Hill JJ expressly refrained from deciding these matters, but it is with respect difficult to appreciate just what points are being made. Section 58E(2) permits the AAT to require the production for inspection by it of the document in dispute where it 'is not satisfied, by evidence on affidavit or otherwise, that there exist reasonable grounds for the claim to which the question relates' (that is, a claim in a conclusive certificate under ss.33, 33A, 34, 35 or 36). Of course, the AAT will not inspect the document to determine whether it should require its production, but this is all that the first part of the quotation above appears to say. So far as voluntary production (which frequently occurs) is concerned, it is difficult to see why there would be any question. Section 58E is quite explicitly directed only to the power of the AAT to *require* production and should not, it is submitted, carry the negative implication that that is the only means whereby the AAT may be informed about the contents of the document in issue.

[P.B.]