THE FREEDOM OF INFORMATION ACT 1982 AND REVIEW ON THE MERITS

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The Freedom of Information Act 1982 (Cth) is the last enacted element of a package of reforms in the Commonwealth administrative law area which has come to be known as the "new administrative law". The other elements, in order of enactment are: the Administrative Appeals Tribunal Act 1975 (Cth), the Ombudsman Act 1976 (Cth) and the Adminstrative Decisions (Judicial Review) Act 1977 (Cth). These measures followed widespread criticism of the existing system for the review of administrative action which gave rise to a number of government inquiries including the Commonwealth Administrative Review Committee, The Committee on Administrative Discretions, and the Committee of Review of Prerogative Writ Procedures.[1]

The need for Freedom of Information legislation, and the form in which it should be enacted were issues hotly contested by many bureaucrats. In the end result compromises were made and the Freedom of Information Act 1982 (Cth) was the subject of criticism from both sides of the Parliament. This paper concentrates on the system for review of decisions made in relation to requests for access to documents made pursuant to the Act.

The Freedom of Information Act 1982 (Cth) (herein referred to as the "F.O.I. Act") provides for a right of access to documents of an agency and official documents of Ministers.[2] This general right is circumscribed by exceptions set out in section 12 of the Act and by reference to schedules 1 and 2 which exempt certain courts, tribunals and agencies either in whole or in part from the Act. The section 11 right is further limited to documents which are not exempt documents. Exempt

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1 See D.C. Pearce, *Australian Administrative Law Service* (1985), Vol.1, 2003-2004.
2 S.11.

documents are dealt with in Part IV of the Act. The task of deciding whether a document is exempt in these cases where "conclusive" certificates have been signed is shared by the Administrative Appeals Tribunal[3] and the Minister responsible for that Department.[4] The word "shared" is used advisedly. If the Administrative Appeals Tribunal decides the relevant question in relation to a conclusive certificate[5] in the negative, the decision whether to release the document remains with the Minister.[6]

This duality of power results in a very confused system of review. The deficiencies in the Act which cause this confusion are such as to seriously compromise the stated objects of the Act. Far from "extend[ing] as far as possible the right of the Australian community to access to [official] information",[7] the Act provides for very limited access to such information. The exemptions are abundant and broadly drafted. The retention of conclusive certificates by the present Labor government defies the rhetoric of the present Attorney-General when in opposition.[8] The Senate debates reveal that the Attorney-General was committed to more thorough-going reforms than his government would allow him.

The review system, with which this paper is principally concerned, evidences a very conservative approach to Freedom of Information in Australia. The Act is a regression from the advances made by the courts in relation to discovery of government information in the context of common law discovery cases. The system of review places the Administrative Appeals Tribunal in an invidious position, with its usual powers of review *on the merits* being significantly reduced under the F.O.I. Act in relation to cases with and without certificates.

It would appear to this writer that the only way to understand these anomalies is to see the F.O.I. Act in the light of the longstanding battle between the courts and Ministers and their bureaucracies for control over the release of government information. That history is best related to the F.O.I. Act by reference to the procedure for deciding whether the documents are exempt under section 36. That section, it is suggested, comes closest of all the exemption provisions to identifying the sorts of documents which are dealt with by many (though certainly not all) of

3 Ss 55,56 and 59.

4 Ss 33(3) and (5), 33A(3) and (6), 36(3) and (8). Note that the Secretary of the Department of Prime Minister and Cabinet may sign a certificate, s.34(2), as may the Secretary of the Executive Council, s.35(4). S.58A, which deals with the results of a review by the Administrative Appeals Tribunal in relation to the certificate, does not mention the signatories of certificates referred to in s.34(2) and s.35(4) but refers to the appropriate Minister who has power to maintain the certificate despite an adverse finding by the Administrative Appeals Tribunal.

5 Ss 58(4), (5) and (5A).

6 S.58A and see *Re Bracken and Minister of State for Education and Youth Affairs (Nos 1,2 & 3)* (1984) 7 ALD 243.

7 S.3(1).

8 Senate Hansard 7 October 1983.

the common law discovery cases involving public interest immunity. Section 36 involves, to use the language of the public interest immunity cases, a "class" question[9] and a "contents" question.[10]

The "class" question in relation to public interest immunity cases is whether the documents belong to a class which, regardless of what any document might contain, must be withheld from use in litigation, for example, to protect the proper administration of government.[11] The class question in section 36(1)(a) is whether documents are internal "working" documents.[12] The documents must be such as to disclose certain types of information recorded in the course of the "deliberative processes of the agency".[13]

The "contents" claim in relation to the common law public interest immunity cases is that the release of the document would, due to the nature of the contents of the document, tend to damage the public interest. This apprehended damage must be weighed against and overcome the interest alleged by the party seeking access. In common law cases this has usually been of two types. Firstly there is the general public interest in the "due administration of justice". Secondly, and closely related to the first, there is the interest of the litigant and his right to have his cause of action tried fairly by the court. In F.O.I. Act hearings the "contents" question in section 36(1)(b) is whether release of the documents would be contrary to the public interest. It is noted here that the balancing process under section 36(1)(b) may well be different from that followed in public interest immunity cases. The F.O.I. Act provides for a general right of access whereas the common law discovery cases are in the context of traditional adversarial litigation of which the application for discovery forms but a part. Litigation under the F.O.I. Act involves no issue other than whether the document is exempt. The Tribunal does not have before it the question whether the interests of justice will be served in relation to the applicant's principal

9 S.36(1)(a).

10 S.36(1)(b).

11 *Cf.* Lord Reid's judgment in *Conway* v. *Rimmer* [1968] 1 All ER 874.

12 Note that in *Re Waterford and Department of Treasury (No. 2)* (1984) 5 ALD 588, the Tribunal preferred the words "thinking documents" to "working documents". That view was put in the context of the issue as to the scope of s.36(1)(a). Beaumont J. in *Harris*, note 13 *infra* at 560, had drawn on the United States experience in suggesting that s.36(1)(a) was directed at documents in the policy forming process. The Tribunal in *Waterford and the Treasury (No. 2)* expressed doubts as to whether s.36(1)(a) was *"limited* to policy matters the subject of deliberative processes" (para. 57).
In *Re Murtagh and the Commissioner of Taxation* (1984) 6 ALD 112, the Tribunal, comprised by Davies J., Sir Ernest Coates and Mr. R.A. Sinclair, clearly preferred the view expressed in *Waterford and the Treasury (No. 2)*. See p.118 *ff.* where the Tribunal adopts the reasons in *Waterford* and adds arguments based on ss 36(2) and 36(6). On this question see also P. Bayne, "Exemptions Under the Freedom of Information Act 1982" (1983) 14 *FLRev* 67, 78 *ff.*

13 See *J.M. Harris* v. *Australian Broadcasting Commission* (1983) 50 ALR 551 *per* Beaumont J., and on appeal to the Full Federal Court (1983) 51 ALR 581 *per* Bowen C.J., St John and Fisher JJ., and *Waterford and the Treasury (No.2)*, note 12 *supra.*

claim if discovery is not ordered. Some of the considerations relevant to the section 36(1)(b) balancing process have now been discussed by the Tribunal in *Murtagh's* case,[14] and in *Howard's* case.[15]

The issue before the Tribunal differs according to whether there is a "conclusive certificate" in force with respect to the documents.[16] If there is no certificate in force, the Tribunal has two issues to determine: (i) the section 36(1)(a) question of the status of the documents – are they internal working documents? – and (ii) the section 36(1)(b) question of the anticipated effect of disclosure on the public interest.

If, however, there is a certificate under section 36(3) in force, there are two important differences. Firstly, section 58B requires that the second issue, that relating to the public interest, be decided by a tribunal constituted by one or three presidential members. Secondly, the question to be decided changes. Section 36(3) refers only to the question of damage to the public interest, so that a "non-presidential" tribunal may decide the section 36(1)(a) status question. If it decides in the affirmative, the applicant can request that it refer the second issue to the "presidential" tribunal.[17] That question is "*whether there exist reasonable grounds for the claim* that the disclosure of the document would be contrary to public interest".[18]

That question is different from the issue under section 36(1)(b) to be decided in the absence of a section 36(3) certificate where the question is whether disclosure "would be contrary to the public interest". The reference to "reasonable grounds for the claim" in section 58(5) may well be designed to cater for "full weight" being given to the opinion of the Minister and upholding the certificate where the "Minister's reasons are of a character which judicial experience is not competent to weigh".[19] The question before the "presidential" tribunal is not "was it the right decision?" in the sense of whether disclosure could in reality be expected adversely to affect the public interest but, rather, a test based on a criterion of reasonableness. As argued more fully below, this test of reasonableness is out of step with the Tribunal's usual mode of review.

Whether the Tribunal is considering a claim to exemption supported by a certificate, that is a "presidential" Tribunal proceeding under section 58(5), or in the absence of a certificate a Tribunal proceeding under section 36(1)(a) and (b), the Tribunal must undertake a two-stage

14 *Re Murtagh and the Commissioner of Taxation*, note 12 *supra*, 121 *ff.*

15 *John Howard and the Treasurer of Australia* (1985) 7 ALD 626.

16 S.36(3).

17 S.58(5); *Re Peters and the Public Service Board and the Department of the Prime Minister and Cabinet* (1984) 6 ALD 217.

18 And see s.58(4) relating to documents in respect of which there are certificates signed pursuant to ss 33(2), 33A(2), 34 and 35; see also s.58(5A) relating to certificates under ss 33(4) and 33A(4). In *Bracken*, note 6 *supra* 250-251, Hall Dep-P analysed the question before the Tribunal in certificate cases.

19 *Conway* v. *Rimmer* [1968] 1 All ER 874, 888, *per* Lord Reid.

review procedure. The Tribunal must first attempt to answer the question in the absence of the documents. It may not require production of the documents, unless it is "not satisfied, by evidence on affidavit or otherwise that the document is an exempt document".[20] The drafting of the production sections has produced an anomaly in that the non-presidential Tribunal has power to look at the documents when deciding the section 36(1)(a) question whereas the Tribunal constituted under section 58B to decide the section 58(5) question cannot. Section 58A(2) refers to the "question referred to in sub-section 58(5)" when authorising the Tribunal to call for production. That question is that of the "reasonable grounds for the claim". The jurisdiction of the Tribunal to determine the section 58(5) question is predicated on a finding that the certificate relates to section 36(1)(a) documents. In *Waterford and the Treasury (No.2)*,[21] the Tribunal could not decide whether several documents were of a type referred to in section 36(1)(a). As there was a conclusive certificate in relation to these documents, the Tribunal could not examine them to satisfy itself as to their status.[22]

An examination of the common law cases on public interest immunity in civil (and, less frequently, criminal) suits and the United States practice on production under the Federal Freedom of Information Act[23] suggests the likely origin of the production sections of the F.O.I. Act. The rationale behind the law on "inspection by the court" in such civil suits is clear. It is an established principle of the adversary system that the court should not see material in the absence of a party in an application for discovery where the court has also to deal with the substantive issues of the action.

Mr Justice Davies has recognised the problem which sections 64(1) and 58(2) potentially present to the Tribunal dealing with cases involving conclusive certificates. In *Howard's* case,[24] the President noted the argument that there must be two decisions, and rejected it. His Honour had this to say:

> In using the term satisfaction the section is not referring to any particular degree of satisfaction. Rather, it is looking to the circumstance where the Tribunal will gain assistance in its deliberations from inspecting the documents. If it will be so assisted then the Tribunal will not be satisfied to make a decision simply on the other evidence presented to it. If the issue is whether the document is a Cabinet document or an Executive Council document, the Tribunal may be satisfied by other evidence and without inspecting the document that the document is of that character. On the other hand, when the issue is the public interest of which

20 Ss 64(1), 58E(2).
21 Note 12 *supra*.
22 The Tribunal reserved liberty to apply in respect of these documents. Mr. Waterford subsequently appealed on the grounds that if the Tribunal could not be satisfied the question must be resolved in his favour according to the onus provision, s.61. The Treasury then indicated that it would no longer rely on s.36. See *The Canberra Times* 30 April 1984.
23 Note 42 *infra*.
24 Note 15 *supra*.

> s.36(1)(b) speaks, it will be rare for the Tribunal to be satisfied that a document is exempt until it has inspected the document.[25]

If His Honour's view be correct, the difficulty would vanish. It is suggested here, however, that sections 64(1) and 58E(2) do require a two-step procedure. The word "satisfaction" is not free of contextual constraint. It clearly refers to the Tribunal's satisfaction on the question in issue, in relation to which the respondent bears the onus of such satisfaction pursuant to section 61. Satisfaction means satisfaction as to the ultimate issue, and is not merely some gratuitous guidance as to a convenient path to that decision. Why would Parliament need to say to the Tribunal "you can decide the question without calling for the documents where that is possible"? Satisfaction goes to the question whether it is an "exempt document" (section 64(1)) or "whether there exist reasonable grounds for the claim . . ." (section 58(5)).

In this writer's opinion for reasons which follow, Parliament did intend just such a restrictive procedure. It is strongly suggested herein that the Act should be amended to conform with Mr Justice Davies' view.

In *Conway* v. *Rimmer*,[26] Lord Upjohn, in the course of asserting the right of the court to inspect the documents, explains this principle and its rationale:

> There is only one other matter to which I want to refer; it is the question whether there is any objection to the private inspection by the judge himself of a document for which privilege is claimed. My Lords, in a number of the leading cases, such as *Beatson* v. *Skene* and *Duncan* v. *Cammell Laird Co. Ltd.* itself, it has been held that there is some objection to the judge looking at the document in private, as being contrary to the broad rules of justice as we understand it, where all the documents must be open to both sides. I do not understand this objection. There is a lis between A and B; the Crown may be A or B or, as in this case, a third party, for both A and B in this case want to see the documents; but when the judge demands to see the documents for which privilege is claimed he is not considering that lis but quite a different lis, that is whether the public interest in withholding the document outweighs the public interest that all relevant documents not otherwise privileged should be disclosed in litigation. The judge's duty is to decide that lis; if he decides it in favour of disclosure, cadit quaestio; if he decides it in favour of non-disclosure he banishes its contents from his mind for the purposes of the main lis. There is nothing unusual about this; judges and juries have to do it every day. So it seems to me to be quite clear that there is no erosion on our normal ideas of justice inter partes if a judge, being not satisfied about the Crown's claim to privilege, himself privately inspects the allegedly privileged documents. But before reaching that stage he may, of course, require further and better affidavits by the Minister, and may direct the Minister to attend for cross-examination by any party to the litigation before he inspects the documents.[27]

25 *Id.*, 25.
26 Note 11 *supra.*
27 *Id.*, 916.

Until *Duncan* v. *Cammell Laird & Co. Ltd,*[28] there was no clear line of authority as to the respective roles of the executive and the courts in relation to claims to public interest privilege. Prior to *Duncan,* the Privy Council had ruled, in *Robinson* v. *State of South Australia,*[29] that in such a case the court could inspect the documents to assess the public interest question.[30] Lord Pearce in *Conway* v. *Rimmer* specifically preferred this approach.[31] The House of Lords in *Duncan's* case decided, however, that the certificate of the Minister in that case was conclusive. The Court was precluded from reviewing the question of the effect of disclosure on the public interest.

For a time *Duncan's* case was regarded as authoritatively deciding that the Minister's certificate, in cases of public interest immunity, was conclusive. For example, see *Ellis* v. *Home Office*[32] where Singleton L.J. deplored the use of "conclusive class certificates" but regarded *Duncan* as binding authority against disclosure.

The courts have gradually asserted their power to review the public interest question whether it be a "contents" or a "class" claim. *Duncan's* case has been seen as reliant on its special facts – a wartime situation where the documents related to the design of a British Navy submarine – see *re Grosvenor Hotel London (No. 2).*[33] *Conway* v. *Rimmer* brought England back into the fold of those Commonwealth Courts that would undertake the review of a claim to public interest immunity by the executive.[34] In *Duncan's* case, the court had misread the Scottish law and set England off on a different tack despite their Lordships' intention to provide uniformity.[35]

It is now clear that the court may review the claim to public interest immunity made in the certificate of the Minister whether it be a "contents" or a "class" claim. *Conway* v. *Rimmer* involved a class claim and the court asserted its right to inspect.[36] The doubt expressed by Menzies J. in *Lanyon Pty Ltd* v. *Commonwealth of Australia*[37] was resolved by the High Court in *Sankey* v. *Whitlam.*[38] Dealing there with a class claim, the High Court asserted its power to inspect the documents.[39] Gibbs A-C.J. noted, however, that where the claim is made on the basis of the status of the documents, as members of a class of

28 [1942] 1 All ER 587.
29 [1931] AC 704.
30 *Id.,* 723 *per* Lord Blanesburgh.
31 Note 11 *supra,* 908.
32 [1953] 2 QB 135, 143-144.
33 [1964] 3 All ER 354, *per* Salmon L.J.
34 Note 11 *supra,* 908 *per* Lord Pearce.
35 *Re Grosvenor Hotel,* note 32 *supra,* 361 *per* Lord Denning M.R. and *Conway,* note 11 *supra,* 892 *per* Lord Morris.
36 Note 11 *supra,* 822 *per* Lord Reid, 904 *per* Lord Hodson, 900 *per* Lord Morris, 912 *per* Lord Upjohn, and 911 *per* Lord Pearce.
37 (1974) 129 CLR 650.
38 (1978) 142 CLR 1.
39 *Id.,* 46 *per* Gibbs A-C.J., 96 *per* Mason J., 110 *per* Aickin J.

documents, there may not be the same need for the court to examine the documents. This issue is dealt with in more detail below.

The procedure adopted by the courts in assessing claims to public interest immunity is mirrored by the production sections of the Freedom of Information Act. In *Sankey's* case, Gibbs A-C.J. said:

> [F]inally, the power of the court to inspect the document privately is clear, and once a court has decided, notwithstanding the opposition of a Minister, that on balance the document should probably be produced, it will sometimes be desirable, or indeed essential, to examine the document before making an order for production: see *Conway* v. *Rimmer.* However, where the objection is to the disclosure of a document because it belongs to a class, and the Minister, being represented, does not suggest that there is anything in its contents that ought to be withheld from production, there will not always be the same need to examine the document before ordering its production if the objection is overruled.[40]

Similar remarks were made by Lord Reid whilst following the same procedure in *Conway* v. *Rimmer.*[41]

This preliminary opinion of the court in discovery cases and by the Tribunal in F.O.I. cases will be formed on the basis of the certificate or affidavit of the Minister or Permanent Head and any oral evidence and cross-examination in support of the claim to immunity. This paper deals below with those certificates and supporting evidence.

This two-stage procedure is similar in some respects to procedures under the United States Freedom of Information Act.[42] In an early case it was decided by the United States Supreme Court that the District Courts could not inspect documents alleged to be exempt under exemption b(1) of the United States Act relating to national defence and foreign policy records.[43] In 1974 the Act was amended to include a specific inspection power in respect of all the heads of exemption. Section 552(4)(B) now reads:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.

An example of the use of inspection by the Court made necessary by inadequate affidavit evidence is provided by *Koch* v. *Department of Justice.*[44] The Court said:

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40 *Id.*, 46.
41 Note 11 *supra*, 888.
42 5 U.S.C. § 552 (1966), introduced as an amendment to the Administrative Procedure Act 5 U.S.C. of 500 (1946).
43 *Environmental Protection Agency* v. *Mink* 410 US 73 (1973).
44 (1974) 376 F Supp 313.

> but there is no indication that the files (as opposed to particular documents within them) were maintained for investigatory purposes. The Court must therefore examine the individual documents themselves, a task which could have been avoided had the Bureau clearly segregated investigatory material from other documents. . .[45]

As will be shown later, the United States courts have used the inspection power with some circumspection. The United States courts are not, however, bound to consider all of the affidavit and oral evidence before proceeding to an inspection of the documents. It may combine the procedures and consider all relevant matters together and reach one decision rather than a possible two.[46]

The reasons for the caution shown by the United States courts in calling for production of the documents for in camera inspection were the shifting of the burden of proof from the defendant to the plaintiff and the court in the absence of detailed argument from the respondent and the sheer volume of documents which may have to be assessed. This problem was ameliorated if not eliminated by the decision in *Vaughn* v. *Rosen.*[47]

The draftsman of the Australian F.O.I. Act has apparently seen this two stage procedure of reaching a conclusion in the absence of the documents before being entitled to call for inspection of the documents as an appropriate way for the Administrative Appeals Tribunal to approach the question whether documents are exempt. It is the view of this writer that such a procedure is quite inappropriate for Administrative Appeals Tribunal F.O.I. hearings. The mischief which the common law procedure seeks to avoid is noticeably absent in Administrative Appeals Tribunal F.O.I. hearings. To use the language of Lord Upjohn in *Conway,* there is no need, if the Tribunal decides against disclosure, to "banish from its mind" the material inspected. There is no primary lis between the parties. The only issue between the parties is that of disclosure. The proceedings do not form part of any principal claim. The applicant may want the document for use in a civil claim, but that purpose is quite irrelevant to the F.O.I. Act proceedings as section 11 of the Act creates a public right of access to non-exempt documents.

The issue before the Administrative Appeals Tribunal then should be unaffected by any principal claim context. There is nothing for the Tribunal to banish from its mind. What then is the justification for such a marked fettering of the powers of review of a Tribunal otherwise able to avoid unnecessary technicality?

45 *Id.*, 315.
46 See *Ray* v. *Turner* 587 F 2d 1187 (D.C. Cir. 1978). This was the position advocated by Davies J. in *Howard's* case, note 15 *supra.*
47 484 F 2d 820 (D.C. Cir. 1973).

Deputy President Hall sets out in "Aspects of Federal Jurisdiction: The Administrative Appeals Tribunal (Cth)"[48] the nature of review by the Administrative Appeals Tribunal. The Administrative Appeals Tribunal is essentially one part of a wider package of reforms often referred to as the "new administrative law". The other elements are the Ombudsman Act 1976 (Cth), the Administrative Decisions (Judicial Review) Act 1977 (Cth) and the Freedom of Information Act. The Administrative Appeals Tribunal has the specific task of dealing with the merits of particular government decisions. As Hall says:

> The essential difference between judicial and administrative review was emphasised by the Federal Court in *Drake*. The Tribunal's function is not simply to review the reasonableness or correctness of the reasons given by the administrator for his decision having regard to the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.[49]

This power to review the merits of government decision-making is subject to two particular limitations in this context. First, the Tribunal cannot substitute or refuse to substitute its view of the merits where to do so would be contrary to law.[50] Secondly, the Administrative Appeals Tribunal cannot exercise any discretions which are not given to it by the subject Act.[51] Thus, even where the Tribunal has the role ascribed to it in *Drake*,[52] it is not an unfettered guardian against incorrect government decision-making.

The F.O.I. Act, however, goes very much further in limiting the role of the Tribunal. It does so to an extent that begs the question, why the Tribunal rather than a Court? In an earlier article "Administrative Review Before the Administrative Appeals Tribunal – A Fresh Approach to Dispute Resolution"[53], Deputy President Hall contrasted the role of the courts and the administration by reference to the decision of Stephen J. in *Green* v. *Daniels*.[54] There, Stephen J. said:

> Even were I minded to find the necessary facts in favour, as to which I say nothing, the course suggested is not, I think, one which is open to me. It is to the Director-General or his delegates that the legislation assigns the task of attaining satisfaction and the court should not seek to usurp that function.[55]

During debate in the Senate on the Freedom of Information Bill, Senator Durack introduced the restrictive procedures which then applied to the Document Review Tribunal without the opposition calling for a division.[56] For the opposition, Senator Evans merely referred to his earlier speech supporting amendments which would

48 (1983) 57 *ALJ* 389.
49 *Id.*, 391.
50 *Cf.* s.44 of the Administrative Appeals Tribunal Act 1975 (Cth) which provides for appeal to the Federal Court on questions of law.
51 See *J.E. Waterford and the Department of Treasury (No.1)* (1983) 5 ALD 193.
52 *Re Drake and the Minister for Immigration and Ethnic Affairs* (1978) 1 ALN No. 42.
53 (1980) 12 *F L Rev* 71.
54 (1977) 13 ALR 1.
55 *Id.*, 12.
56 Senate Hansard 29 May 1981, 2384-2388.

provide for review of certificates by the Administrative Appeals Tribunal. The amendments proposed by Senator Evans were, by his own admission, for a limited review by a judicial member of the Administrative Appeals Tribunal.[57]

Clearly then, it was intended, or at least universally accepted, that review rights in relation to conclusive certificates would be limited under the original Act. Those limitations now remain in relation to reviews by the "presidential" tribunal. In addition to those limitations, however, there are limitations which go further than restricting review rights in relation to conclusive certificates. The whole nature of Administrative Appeals Tribunal review is altered by the F.O.I. Act.

Several provisions of the F.O.I. Act run counter to the accepted procedure in a tribunal set up specifically to reach the correct decision without regard to questions of formal onus of proof, with access to all relevant material and which "stands in the shoes of the decision-maker" to substitute its own decision on the merits where questions lie within its jurisdiction. The F.O.I. Act, unlike other Acts which confer jurisdiction upon the Tribunal, has an onus provision, section 61. Sections 58E and 64(1) restrict the Tribunal's access to evidence necessary for reaching "correct" decisions on the merits. Where a certificate is involved, the Tribunal's usual powers under section 43 of the Administrative Appeals Tribunal Act to substitute its own decision for that of the decision-maker is replaced, pursuant to section 58A, by a recommendatory power. In relation to matters involving a certificate, the Tribunal's usual inquiry as to what is the right or preferable decision is replaced by a test of reasonableness more commonly found in adversary court proceedings.

A key principle of review before the Administrative Appeals Tribunal is that the Tribunal is not limited to the range of issues raised by the parties. There are no formal pleadings.[58] If a party does not raise an argument, the Tribunal is nevertheless entitled to call it into aid if it is appropriate.[59] In *Kuswardana,* Fox J. said:

> Where there is material suggesting that the applicant has at, or before, the relevant time become a member of the Australian community it is in my opinion incumbent upon the Tribunal to investigate the matter and to form and record its decision. If the presidential member constituting the Tribunal affirms the Minister's decision, he must, it seems to me, be satisfied of all the critical ingredients, and, in accordance with general principle, he should state his decision thereon, with reasons. If he remits the matter for reconsideration and there are legal grounds for not affirming the decision, the Minister should know them. Section 43(2) of the Administrative Appeals Tribunal Act should be referred to in this context. That sub-section requires a Tribunal functioning under the Act to give reasons in writing for its decision, which are to include its findings

57 *Id.*, 2376-2379.

58 *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137.

59 *Kuswardana* v. *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186. See also A.N. Hall, "A Fresh Approach to Decision-Making", note 53 *supra*, 79.

> on material questions of fact. The operation of the sub-section was considered by a Full Court of this court in *Sullivan* v. *Department of Transport* (1978) 20 ALR 323, where it was held that failure to take material facts into account and to examine them in relation to a matter the Tribunal had purported to determine amounted, in that case, to an error of law, and the appeal from the Tribunal was allowed.[60]

It is clear from the court's reasoning that the statutory function to "review on the merits" of the case is the basis for the *Kuswardana* error of law principle. In hearings under the F.O.I. Act, there is not always this same review on the merits role given the limitations listed above. For example, where a section 36(3) certificate has been signed, the question for the "presidential" tribunal is not whether it was correct or preferable in all the circumstances to claim exemption but were there reasonable grounds for the claim of exemption. In hearings in the absence of a certificate there remain those other limitations on the Tribunal's remits review power set out above. These considerations raise squarely the question of the ability of the Tribunal to examine a possible ground of exemption in the absence of a claim to it by the agency.

In *Re Witheford and the Department of Foreign Affairs*[61] the Tribunal stated that it was entitled to use an exemption provision that was not raised by the agency. Similarly in *M.J.S. Keay and the Chief of Naval Staff, Department of Defence,*[62] Deputy President R.K. Todd said that the Tribunal could not be bound by a concession by the parties. He said that in this case there were good grounds for saying that section 40(1)(c) would apply to exempt the documents from access. This, he said, was supported by the fact that the Tribunal could not simply ignore the refusal of the Department to rely on section 12 (which prohibited access to certain documents).[63] The Tribunal did not decide the point finally as it found the documents to be clearly exempt on other grounds. In *Re Murtagh* the Tribunal dealt with the possible application of section 40(1)(d) though counsel for the respondent did not specifically rely upon it. It was said, however, that "many of his submissions added together to this contention".[64]

It is submitted that these views are incorrect for the reason that they do not take into account the effect of the statutory scheme of review imposed on the Administrative Appeals Tribunal by the F.O.I. Act. The Tribunal's comments in *Keay,* based on *Waterford and Treasury (No.1)* and *Waterford and Health* are based on the assumption that the Tribunal's reasoning on the section 12(2)(b) issue in *Waterford and Health* was correct. There the Tribunal did not finally decide whether

60 *Id.*, 200.
61 (1983) 5 ALD 534, 541.
62 No. A83/29, 6 October 1983.
63 See *Re Waterford and Department of Treasury (No.1),* note 51 *supra; Re Waterford and Director General of Health* No. A83/14, 2 September 1983.
64 *Re Murtagh,* note 12 *supra,* 130.

section 12(2)(b) went to jurisdiction[65] but held that the *Kuswardana* principle bound the Tribunal to rule on the point. The application of the *Kuswardana* principle to F.O.I. hearings is not without its problems. The basis of that principle is that where a Tribunal must reach the right or preferable decision, it should be apprised of all relevant matters, whether or not the parties have shown any intention to ignore a possibly material question. This is, of course, a commendable way for an administrative tribunal to proceed. Under the F.O.I. Act, however, the statutory scheme tends towards a model of review closer to traditional judicial proceedings, where concessions by the parties, so long as they do not go to jurisdiction, are frequently accepted by the court. It is suggested that this is so whether or not a certificate is involved.

Under the F.O.I. Act the Tribunal may, *Kuswardana* notwithstanding, accept the fact that an agency does not seek to rely on a particular head of exemption despite its apparent application on the face of it. The acceptance of the sort of concession that was offered in *Keay's* case is entirely consistent with section 14 of the Act. That section seeks to confirm that the Act does not prohibit disclosure in any circumstances. The agency may release a document notwithstanding any finding or opinion that it is an exempt document.

Section 14 does not provide any power to the Tribunal to release exempt documents.[66] Should the Tribunal embark on a review of a ground that appears to be applicable despite an indication by the agency that it does not rely on it, the Tribunal's decision on the point will be advisory only. In *Re Witheford*[67] the Tribunal had noted that if the concession offered by the respondent was accepted, the decision would be advisory only as a decision-maker could later change his mind and refuse access on the ground conceded before the Tribunal.

While the Administrative Appeals Tribunal is said to stand in the shoes of the decision-maker, there is still a wide range of matters of administration which the Tribunal "should not seek to usurp", to use the language of Stephen J. in *Green* v. *Daniels.*[68] The Tribunal cannot impose its will on the administration where Parliament has not given it the power to do so. If an agency considers, for whatever reason, that it wishes to have a document ruled exempt if it is an exempt "internal working document" but not if it is only a document that would be subject to legal professional privilege then, as the agency may release

65 In this writer's opinion, s.12(2)(b) does go to jurisdiction. S.12(2) removes certain documents from the scheme of Part III providing access to documents. See now s.58(7) inserted by Act No. 81 of 1983.

66 *Re Jamieson and Department of Aviation* No. V83/130, 18 October 1983, 19 *per* Davies J., and *Re Waterford and Department of Treasury (No.1),* note 51 *supra,* 203 *per* Deputy President Hall and Mr Fleming.

67 Note 61 *supra,* 541.

68 Note 54 *supra,* 12.

exempt material, the Tribunal ought not to trespass on this area of agency responsibility.

It has been said repeatedly by the courts that if the executive does not claim public interest privilege then the court must do so in a proper case.[69] It might be thought, on first reading, that as section 36, and other sections involving a public interest element,[70] seek to protect information which it might be expected would damage the public interest if released, the Tribunal ought to initiate a claim to exemption on public interest grounds. However, Parliament's clear intention, as expressed in section 14, is that the agency can quite properly release documents which the Tribunal might find would damage the public interest. It has that right whether or not it would exercise it. This is not a matter which the Administrative Appeals Tribunal can review. If the agency wished to release such a document, only a "reverse" F.O.I. application would invoke the Tribunal's jurisdiction to prevent its release.

Reverse F.O.I., or the right of third parties to oppose disclosure, is limited to sections 43 and 33A under the Australian Act. Sections 26, 26A, 33A, 43, 58F and 59 provide a specific scheme for third parties' objections to particular documents and there is no such avenue available in respect of any other ground of exemption. The only decision on the reverse F.O.I. provisions at the time of writing is *Harris* v. *The Australian Broadcasting Corporation.*[71] In *Harris,* the Corporation had initiated an independent review of its legal department. An officer of the Corporation applied under the F.O.I. Act for access to two interim reports. The Corporation gave notice that it would provide access. The head of the Legal Department then commenced proceedings under the Administrative Decisions (Judicial Review) Act 1977 (the AD(JR) Act) to enjoin the agency from providing access. Beaumont J. held that the decision to provide access was a decision made under an enactment and was amenable to review by the Court.[72]

His Honour held that, as a specifically reverse F.O.I. provision, section 43 was not available to an officer of the agency or to the agency itself.[73] His Honour stated that in any event, he should not rule on the section 43 question because the F.O.I. Act established that the Administrative Appeals Tribunal is the appropriate forum for that question.[74]

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69 *Sankey* v. *Whitlam,* note 38 *supra,* 41 *per* Gibbs A-C.J.

70 Ss 33 and 44 mention the public interest directly and ss 39 and 40 apply a negative public interest test. *Quaere* the effect of the reference in s.3 to "essential public interests" on other exemption grounds. As to this point see *News Corporation and the National Companies and Securities Commission* (1983) 5 ALD 334, overruled by the Full Federal Court (1984) 52 ALR 277.

71 (1983) 50 ALR 551.

72 *Id.,* 557.

73 *Id.,* 565.

74 *Ibid.;* see s.10(2)(b) of the Administrative Decisions (Judicial Review) Act 1977 (Cth).

The reasoning of Beaumont J. in finding that section 43 was not available to the agency was not seen to operate in reverse. Sections other than section 43 are, according to Beaumont J., available to the third party opposing access. Beaumont J. based his final decision on section 36 of the Act.[75] On appeal to the Full Federal Court,[76] the Corporation changed its mind and opposed disclosure on the basis of section 36. Thus the present position would seem to be that whilst section 43 is not available to the agency, section 36 is available to third parties in applications under the AD(JR) Act.

Such a finding may overcome the anomaly that specific provision exists for the protection by the subject of documents relating to business affairs,[77] and by the States of documents affecting relations between the Commonwealth and a State,[78] yet no such specific provision exists in relation to personal affairs.[79] The decision is, however, in conflict with section 14 which provides that the agency has the power to release material notwithstanding that it might be exempt under the Act.

It is suggested that the intention of Parliament to be gleaned from the Act is that the agency is at liberty to release any material except in those cases where provision has been made for persons, corporations and States to oppose disclosure. It is most unlikely that Parliament intended that an agency have power to release any document except in the case of applications under sections 58F and 59 and in the case of applications under the AD(JR) Act by any person in relation to any head of exemption. Such an interpretation is certainly inconsistent with the objects of the Act as set out in section 3.

If the argument that the Tribunal cannot call into aid an exemption provision of its own motion be correct, this does not mean that the Tribunal is powerless where it appears that the administration has not given consideration to a possible head of exemption. It is suggested that the proper course for the Administrative Appeals Tribunal in such a situation is to make use of the section 34 conference procedure or a directions hearing to bring the existence of a possible exemption to the notice of the agency. If the agency persists in limiting its objection to granting access the Tribunal should be bound by that concession. It should accept that the agency has legitimate reasons, within its sphere of responsibility, for limiting its objection to access. It is preferable that such a preliminary clarification of the issues be carried out at the earliest opportunity. If it is not done until the matter comes on for hearing, an adjournment may be inevitable and such delays run counter to the Administrative Appeals Tribunal's brief to provide quick review

75 *Id.*, 559 *ff.*
76 *Harris* v. *The Australian Broadcasting Corporation*, note 13 *supra*, *per* Bowen C.J., St. John and Fisher JJ.
77 S.43.
78 S.33A.
79 S.41.

on the merits. In doing so at the conference stage the Tribunal would be able to deal with this issue simultaneously with undertakings or directions along the lines of the "*Vaughn* motion" discussed *infra.*

The First Stage of Review – Ensuring the Adequacy of Evidence Tendered before Production

The Tribunal has to date had several occasions to look at the adequacy of claims to exemption made by conclusive certificates under the F.O.I. Act. Those matters suggest that the Administrative Appeals Tribunal may have to go through the same laborious process as the courts had to when assessing the claims of Ministers to privilege in the absence of the subject documents in public interest immunity cases.

Under the F.O.I. Act, section 26 requires an agency refusing access to provide written notification with reasons to the applicant. Where a conclusive certificate is signed under section 36, that certificate must state the ground of public interest relied upon.[80] In the event of an appeal to the Administrative Appeals Tribunal, the certificate need not be produced to the Tribunal but may be proved by oral or affidavit evidence.[81] The grounds of public interest should be disclosed in the statement, lodged with the Tribunal by the respondent in accordance with section 37 of the Administrative Appeals Tribunal Act 1975 (Cth). Section 64(1) provides that section 37 does not apply to the documents alleged to be exempt so that the subject documents need not be lodged with the Tribunal.

Re Waterford and Director General of Health[82] involved a section 36(3) certificate signed by the Deputy Director-General of Health. An index of documents was provided to the Administrative Appeals Tribunal describing in broad terms the nature of the document and the section under which exemption was claimed. The Tribunal subsequently ordered the respondent to file further and better particulars of the grounds of public interest. A statement of grounds was then filed which, for the most part, merely quoted the examples of public interest grounds set out in "F.O.I. Memorandum No. 27" of the Attorney-General's Department's *Freedom of Information Working Manual.* These alleged grounds were then referred to by the schedule of documents. The nexus between the grounds and the documents was not explained. There was no analysis of how or why the release of any particular document would, for example, inhibit candour between public servants.

The courts have struck the same problem in relation to the certificates of Ministers and senior public servants making claims to public interest privilege. These difficulties under the F.O.I. Act seem to be an extension of the conflict as to who is the appropriate arbiter of the public interest.

80 S.36(3), as must the s.26 notice to the applicant, s.36(7).
81 S.65.
82 Note 63 *supra.*

Opponents of the courts' power to call for and inspect documents the subject of a claim to immunity have often said that there are occasions when the Minister is in a much better position to assess the public interest. For example, as Lord Reid said in *Conway* v. *Rimmer:*

> That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character. For example a court is perfectly well able to assess the likelihood that, if the writer of a certain class of document knew that there was a chance that his report might be produced in legal proceedings, he would make a less full and candid report than he would otherwise have done.[83]

Reservations as to the expertise of the court in balancing competing aspects of the public interest have been expressed by United States courts.[84]

If the administration has on occasions a greater knowledge and understanding of the public interest the question arises as to how the Administrative Appeals Tribunal should proceed to a conclusion on the first stage of review, absent the documents.

Lord Morris makes it clear in *Conway* that it is always the role of the court to give a final decision in the matter whatever the administration's claim to special knowledge of an aspect of the public interest.

> The court, however, will be in a position of independence and will as a result often be better placed than a department to assess the weight of competing aspects of the public interest including those with which a particular department is not immediately concerned.[85]

This assertion of the objectivity of the court was taken up by Lord Edmund-Davies in *Burmah Oil Co.* v. *Bank of England* [86] where he said that the Minister's view is "one-sided" and should not be held to be conclusive. He referred to the judgment in *Conway,* where Lord Reid said that where a class claim is made, the Minister is under no duty to consider the "degree of public interest involved in a particular case".[87] Lord Edmund-Davies noted that, though not a party to the instant proceedings, the interests of the government were inextricably linked to the outcome of the litigation.

Thus while the courts have expressed the view that the Minister's opinion will be given full weight in reaching the opinion of the court, the courts have also made scathing criticisms of the certificates tendered by Ministers.

In *Burmah Oil,* Lord Keith of Kinkel had this to say of the history of claims to public interest immunity by ministerial certificate:

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83 Note 11 *supra,* 888.
84 R.C. Coykendall, "In Camera Inspection of National Security Files Under the Freedom of Information Act" (1978) 26 *Kan L Rev* 617, 622.
85 Note 39 *supra,* 891.
86 [1980] AC 1090, 1127.
87 Note 11 *supra,* 943.

> Claims to immunity on class grounds stand in a different category because the reasons of public interest upon which they are based may appear to some minds debatable or even nebulous. In *Duncan* v. *Cammell Laird & Co. Ltd.* [1942] AC 624, Viscount Simon L.C. at p.642 referred to cases "where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." These words have been seized on as convenient for inclusion in many a ministerial certificate, including the one under consideration in the present case. But they inevitably stimulate the query 'why is the concealment necessary for that purpose?' and unless it is answered there is nothing tangible to put in the balance against the public interest in the proper administration of justice.[88]

Similarly, in *Wednesbury Corporation* v. *Ministry of Housing and Local Government,*[89] Lord Denning M.R. said that the quoting of the phrase "proper functioning of the public service" was inadequate. The certificate should specify particulars of the nature of the class, and the reasons why the document should not be disclosed. Similar criticisms were made by the Court of Appeal in *Merricks* v. *Nott-Bower*[90] and in the High Court of Australia in *Sankey* v. *Whitlam,*[91] where Stephen J. spoke of the absence of specific evidence on the possible harm to the public interest in the event of disclosure:

> Certainly the ministerial and other affidavits, involving no more than class claims and making only very general and unspecific references to the proper functioning of the executive and of the public service, provide no assistance in this regard.[92]

Aickin J. was also of the opinion that the affidavits were of little or no help:

> Generally it seems to me that the affidavits claiming Crown privilege are cast in a form appropriate to the law as it stood prior to the decision of the House of Lords in *Conway* v. *Rimmer* and not the law as it now stands.[93]

Aickin J. says that at the very least the deponent should have seen each document. Gibbs A-C.J. also suggested this course if the affidavit of the Minister was to have the respect of the court.[94] As early as 1931, Lord Blanesburgh, for the Privy Council, recommended that the affidavit should state that the deponent had read and considered each document.[95]

In *Grant* v. *Downs,*[96] a case on legal professional privilege, the High Court criticised as too infrequent the use of the court's power to inspect. In their joint judgment Stephen, Mason and Murphy JJ. said:

> It is for the party claiming privilege to show that the documents for which the claim is made are privileged. He may succeed in achieving this objective by pointing to the nature of the documents or by evidence describing the circumstances in which they were brought into existence. But it should not be

88 Note 86 *supra,* 1132.
89 [1965] 1 All ER 186.
90 [1965] 1 QB 57.
91 Note 38 *supra.*
92 *Id.,* 66.
93 *Id.,* 108.
94 *Id.,* 44.
95 Note 20 *supra,* 722.
96 (1976) 135 CLR 674.

> thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual. The court has power to examine the documents for itself, a power which has perhaps been exercised too sparingly in the past, springing possibly from a misplaced reluctance to go behind the formal claim of privilege. It should not be forgotten that in many instances the character of the documents the subject of the claim will illuminate the purpose for which they were brought into existence.[97]

Thus the position in Australia would appear to be that the power to inspect should be readily availed of, the reason for this approach being that the courts do not wish to give any encouragement to the "resort to any verbal formula or ritual". The recent English case of *Air Canada* v. *Secretary of State (No.2)*[98] has extended the English view of a sparingly exercised inspection power. In the Court of Appeal Lord Denning M.R. said that the court would not overrule the Minister's certificate except in "extreme circumstances".[99] On the issue of inspection of the documents he said:

> If it [the certificate] describes documents in sufficient detail and gives the reasons with sufficient clarity, that should be sufficient for the judge to refuse production without more ado. Inspection is only necessary where the certificate is lacking in detail or the reasons are not clearly or sufficiently expressed, or the scales are very evenly balanced.[100]

It appears that Lord Denning M.R. would restrict the role of the court to that of purely *procedural* review. If the certificate obeys the procedural checks as to form and clarity, it will be upheld. While the House of Lords upheld the decision of the Court of Appeal,[101] it did not go nearly so far as the Master of the Rolls in circumscribing the court's review power. Their Lordships decided that the court should only order inspection where the party seeking to obtain inspection had shown that the subject material was likely to help his own case or damage his adversary's case. This ruling was made on the basis of what the majority Lords regarded as a general rule of civil litigation that the parties must set the issues and the court decides between adversaries rather than undertaking a search for objective truth. Lords Scarman and Templeman delivered strong dissenting judgments on the role of discovery in civil proceedings, finding that the court should inspect the documents if it could be shown to be necessary for properly deciding the case.[102] G.J. Starke Q.C.,[103] sets out the opposing conclusions of the majority led by Lord Fraser and the minority led by Lord Scarman. He notes that it is a moot point which way the High Court of Australia will rule following this decision.

97 *Id.*, 689.
98 [1983] 1 All ER 161.
99 *Id.*, 180.
100 *Id.*, 182.
101 [1983] 1 All ER 910.
102 Note 98 *supra*, 924-925, 927.
103 (1983) 57 *ALJ* 709.

In the Freedom of Information context the United States Court of Appeals reached a conclusion similar to that of the Court of Appeal in *Air Canada*. The court held in *Weissman* v. *The Central Intelligence Agency* that in the case of a claim to exemption based on national security grounds, no in-camera inspection is necessary where:

> proper procedures have been followed ..., the claim is not pretextual or unreasonable, and that by its sufficient description, the contested document logically falls into the category of exemption indicated.[104]

This strict view of the inspection power appears to be limited to the national security cases.[105] The national security element has always been the subject of judicial caution, *Duncan* v. *Cammell Laird*[106] being a prime example.

When Will Production be Unnecessary?

Whether or not there is a certificate in force, the Tribunal must reach a conclusion in the absence of the documents.[107] The public interest immunity cases will afford some assistance in the resolution of this question. Some care will be necessary, however, in the application of these cases to F.O.I. hearings.

The common law cases are based, to varying degrees, on an assessment of the relevance and worth of the documents to the plaintiff's primary cause of action. Except insofar as there may be a public interest in an individual's right to know, that element is not a relevant consideration under the F.O.I. Act. In the process of deciding whether to inspect, the Tribunal will be assisted by the courts' discussions of any element of the public interest, if there be any, which the administration has particular knowledge of and which "are of a character which judicial experience is not competent to weigh".[108] In examining such factors the Tribunal would do well to heed the views of Lord Morris in *Conway*[109] and Lord Edmund-Davies in *Burmah Oil*[110] that it is the objectivity of the court which is the reason why the court must be the final arbiter.

In the course of interim reasons for decision in *Re Burns and the Australian National University*[111] Deputy President Todd examined the question of the Tribunal's power to inspect section 58E(2). He described the procedure to be followed thus:

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104 565 F 2d 692 (D.C. Cir. 1977) and see R.C. Coykendall, note 84 *supra*, 617.
105 Contrast the approach taken in *Weissman, ibid.*, with the attitude taken by the United States Court of Appeals in *Coastal States Gas Corporation* v. *Department of Energy* 617 F 2d 854 (1980).
106 Note 28 *supra*.
107 Ss 64(1), 58E.
108 Note 11 *supra*.
109 *Ibid.*
110 Note 86 *supra*.
111 (1984) 6 ALD 193.

> The question of course is not whether disclosure would be contrary to the public interest, requiring analysis of the public interest in the matter. Unless and until this is established it is impossible to assess "whether there exist reasonable grounds for" the claim made by certificate that disclosure would be contrary to the public interest, for the assessment demands:
> (a) formulation of the ambit of the public interest;
> (b) consideration of the grounds for the claim that disclosure would be contrary to that public interest.[112]

Whilst the Deputy President did not refer to the views of Lords Morris and Edmund-Davies, his reasoning is closely analogous. He stated that the certificate did not consider the public interest in the individual's right to know what is contained in documents that affect him. This is something that would best be considered with the benefit of an inspection and the documents would have to be produced to the Tribunal.

For the Administrative Appeals Tribunal to have to go through such a convoluted procedure at all is quite alien to the normal role of the Tribunal. The question arises then of how to make the best of a bad situation.

The "Vaughn Motion": Detailed Index with Justifications

The United States Freedom of Information Act commenced in 1967 as section 552 of the Administrative Procedure Act.[113] Except in relation to exemptions based on national security,[114] the District Court has always had power to inspect the disputed documents. Limitations on the power to inspect have resulted not from the legislation but as the result of judicial pronouncements. The limitations placed on the power by the courts were seen as necessary to overcome two major difficulties said to arise from too frequent a resort to the disputed documents.

Firstly it was thought that, where the court had to rely on its own assessment of the material, the onus would shift from the defendant to the court. The court would be unassisted by any thorough argument from the plaintiff, who could not examine the documents yet whose interests would be served by disclosure. Secondly, the courts feared that an obligation to inspect the documents would impose an unreasonable burden on court time and resources.

In 1974 the Circuit Court of Appeals for the District of Columbia set out in the landmark case of *Vaughn* v. *Rosen*[115] to deal with these problems. The documents involved in *Vaughn* ran to some 9,000 folios. The court decided that the Government has to prepare "an itemization of the records withheld, a detailed justification for its claims of

112 *Id.*, 195.
113 Note 42 *supra.*
114 *Environment Protection Agency* v. *Mink,* note 43 *supra.*
115 484 F 2d 820 (D.C. Cir. 1973), Cert. denied 415 US 977 (1974).

exemption, and an index cross-referencing the itemization and justification."[116]

According to L.P. Ellsworth the so-called "*Vaughn* motion" has gained wide acceptance amongst courts hearing F.O.I. claims. The *Vaughn* motion has not been entirely successful. According to Ellsworth,

> [t]he disadvantages are that it allows the Government to pick and choose what it will reveal about them, to speak in generalized, sometimes ambiguous terms, and to reveal little information that is not contained within the four corners of the documents sought.[117]

Notwithstanding this criticism, the United States courts are required by section 552(4)(B) to conduct a *de novo* review. This precludes any "uncritical acceptance of the affidavit."[118] In fact, *Coastal States Gas Corporation* v. *Department of Energy*[119] provides an example of the courts' willingness to find for the plaintiff where the index provided fails to provide sufficient material on which the court may make a determination. Delivering the opinion of the court, Judge Wald said:

> At every point in the course of this case we will rely on a conclusion NOT that the documents are not exempt as a matter of law, but that the agency has failed to supply us with even the minimal information necessary to make a determination. We remind the agency, once again, that the burden is on them to establish their right to withhold information from the public and they must supply the courts with sufficient information to allow us to make a reasoned determination that they were correct.[120]

In *Ray* v. *Turner,*[121] it was suggested that the applicant's counsel may be given controlled access to the documents. This cannot be done under the Australian Act.[122] It has also been suggested that in the case of voluminous material subject to a claim to exemption, the court should appoint "special masters" to assess the documents and report to the court.[123] The F.O.I. Act could be amended to allow a similar response. Cases where there is a certificate in force are restricted to Presidential Members of the Tribunal.[124] The Tribunal has, however, quite a number of part-time members selected for their experience in and knowledge of

116 See J. Todd Shields, "Trial Strategy" in A. Adler and M.H. Halperin (eds), *1984 Edition of Litigation Under the Federal Freedom of Information Act and Privacy Act* (9th ed.) Center for National Security Studies, Washington D.C.

117 L.P. Ellsworth, "Trial Strategy When Using the Freedom of Information Act" in C.M. Marwick (ed.), *Litigation Under the Amended Federal Freedom of Information Act* (4th ed. 1978) Center for National Security Studies, Washington D.C., 86.

118 *Founding Church of Scientology of Washington D.C. Inc.* v. *National Security Agency* 610 F 2d 824 (D.C. Cir. 1979).

119 Note 105 *supra.*

120 *Id.*, 861.

121 587 F 2d 1187 (1978).

122 *Arnold Bloch, Leibler & Co. and the Commissioner of Taxation* (1984) 6 ALD 62.

123 *Ray* v. *Turner,* note 121 *supra,* 1211; see also R.H. Walker, "Vaughn v. Rosen: New Meaning for the Freedom of Information Act" (1974) *Temp LQ* 390 and G.C. Bertsch, "Vaughn v. Rosen: Procedure and Proof Under the Freedom of Information Act" (1974) 35 *Federal Procedure* 850.

124 S.58B.

high level government administration. It is difficult to conceive of any valid objections to the use of this store of expertise in cases involving certificates.

The message of *Vaughn* and *Ray* v. *Turner* is that the Tribunal should be keen to ensure that the administration provides proper assistance by way of schedules, but should not be reticent about inspecting the documents. In *Ray* the court said that an agency's affidavit, whilst not amounting to a misrepresentation "may reflect an inherent tendency to resist disclosure and judges may take this natural inclination into account."[125] This view is quite consistent with the views of Lords Morris and Edmund-Davies that the courts have the necessary objectivity to make proper assessments of the validity of claims to immunity. The procedures designed by the United States courts to reduce reliance on in-camera inspection have as their rationale the view that adversarial proceedings are the proper mode of procedure for resolving F.O.I. disputes. It is essentially the perceived inroads into the adversary system that sparked the criticisms of the use of in-camera inspection made in *Vaughn* and subsequent decisions. Whilst it is argued here that the procedure to be adopted under the Australian Act involves a noticeable restriction on the Tribunal's normal investigatory powers, this falls far short of the proposition that the Administrative Appeals Tribunal must adopt an adversarial mode in relation to F.O.I. hearings. Section 33 of the Administrative Appeals Tribunal Act 1975 (Cth) still applies to ensure that the Tribunal deals with matters without unnecessary regard to formality and technicality, that it is not *bound* by the rules of evidence and that it may inform itself of any matter in such manner as it thinks fit.

Thus the basis for the limitations on inspection in the United States is largely absent in the Australian system. Surely the applicant is not disadvantaged if a detailed index and justification is used by the Tribunal as an aid to its assessment of the documents. The *Vaughn* motion (index and justification) and inspection by the Tribunal ought to be seen as complementary procedures rather than as alternatives. There is no reason why the Administrative Appeals Tribunal should be restricted in its powers to deal with the claims to exemption on the basis of *all* the available evidence including the douments themselves.

The backup remedy in the United States cases of *Vaughn* motions as referred to by Ellsworth is the use of interrogatories. In the Administrative Appeals Tribunal, if it became the practice to have the agency file such statements such deficiencies might be dealt with as part of the section 34 preliminary conference procedure, or by way of directions by the Tribunal. Thus where, in a case such as *Waterford and Director General of Health,*[126] the material supplied by the agency lacks

125 Note 121 *supra,* 1195.
126 Note 63 *supra.*

the analysis of the nexus between the disputed documents and the alleged grounds of public interest, the Tribunal might issue directions that such information be supplied at an early stage. In the course of the hearing of *Re Waterford and Department of Treasury (No.2),*[127] involving the section 42 legal professional privilege exemption, the Department for the first time, in oral evidence, gave a detailed account of the nature of the disputed documents. This led directly to the applicant withdrawing his application in relation to a number of documents clearly subject to the exemption.

In *News Corporation and the National Companies and Securities Commission*[128] Deputy President A.N. Hall gave directions which ought to be seen as generally applicable to F.O.I. cases:

> My experience in hearing F.O.I. applications involving even relatively small numbers of documents (up to 100) convinces me of the desirability of the agency concerned preparing a proper affidavit and supporting schedule of documents (consistently with not disclosing the very material said to be exempt) in advance of the hearing so as to allow adequate opportunity for consideration by the applicant of that affidavit and schedule and, if appropriate, for conferral between the parties as to ways of limiting the time required for hearing (as, for example, by identifying categories of similar documents of which one such document can be agreed as representative of a class of documents). It is, I believe, in everyone's interests that such procedures should be followed in the present case.[129]

Such an approach may result, over time, in a standard procedure being adopted by the agencies. That will be a marked improvement on the current position. Even with the proper and standard use of schedules the Tribunal is still required to follow a convoluted review procedure which does anything but allow the Tribunal to comply with the spirit of section 3(2) of the F.O.I. Act which calls for interpretation of the Act so as to "facilitate and promote promptly and at the lowest reasonable cost, the disclosure of information". The Act was subjected to a significant overhauling in 1983 by the Freedom of Information Amendment Act.[130] It failed, however, save for the abolition of the Document Review Tribunal, to address the question of the review procedure. As long as the review procedure remains as confused as it is, a slow laborious process towards a limited review, the Act will never achieve its full potential.

127 Note 12 *supra.*
128 (1984) 6 ALN No. 34.
129 *Id.*, N37.
130 No. 81 of 1983.