

Proceedings before the Administrative Appeals Tribunal

30.1 We have discussed in a number of previous chapters, and endeavoured to summarise in Chapter 27, the various grounds upon which appeals may be—and in our view should be—able to be brought. The present chapter does not traverse this ground again. Rather it focuses on a number of matters of general procedure which arise with respect to Administrative Appeals Tribunal proceedings: the initiation of proceedings; powers with respect to costs and fees; discovery procedures; the expedition of priority matters; and the language of Tribunal decisions.

Initiation of proceedings

30.2 Section 29 of the *Administrative Appeals Tribunal Act 1975* requires that all applications for review must be lodged within twenty-eight days of the day on which notice in writing of the decision in question was furnished to the applicant. This basic time limit is not altered by anything in the Freedom of Information Bill, except insofar as the Bill makes an application for internal review a condition precedent of an appeal to the Tribunal. Clause 38 of the Bill requires that an application for internal review be made within twenty-eight days of the giving of the original decision, and in effect prohibits an appeal to the Tribunal until either the review decision is made or fourteen days have elapsed, whichever occurs earlier. It would appear that once the notice of the internal review decision has been given, section 29 of the Administrative Appeals Tribunal Act applies and the applicant has twenty-eight days from that date to lodge his appeal. Where no internal review decision has been forthcoming within fourteen days, or more, of the request for it, clause 38 (4) of the Freedom of Information Bill applies to deem an appeal to the Tribunal 'as having been made within the time allowed under the *Administrative Appeals Tribunal Act 1975*' provided the Tribunal is satisfied there was 'no unreasonable delay' in lodging it.

30.3 There is an imprecision about the expression 'unreasonable delay' which is regrettable but probably unavoidable in the no-answer context in which it applies. What is perhaps avoidable is the strict requirement of twenty-eight days which otherwise routinely applies. We regard this period as, in all the circumstances, somewhat too brief. The applicant would wish to be adequately prepared for what may be a complex and legalistic hearing. The time constraint should be more realistic regardless of the applicant's right under section 29 (7) of the Administrative Appeals Tribunal Act to seek an extension of time. While one rationale for the relatively short twenty-eight-day time limit in general administrative matters may well be to ensure that no department is kept in an unduly prolonged state of uncertainty about the status of decisions involving general operating procedures or the expenditure of significant funds, we do not see this kind of practical administrative consideration as having any real application in the freedom of information area: a greater lapse of time before the result of an appeal application is known is unlikely to prejudice departmental operations in any way.

30.4 We are aware that the Administrative Review Council is presently conducting a review of time limits provided by the Administrative Appeals Tribunal Act

and is seeking the views of departments, applicants and lawyers. Rather than refer this matter for further consideration by the Council, we are sufficiently persuaded of the need for an extension of time in the specific context of freedom of information to recommend accordingly. We therefore propose that, for the purposes of freedom of information, a period of sixty days be substituted for the twenty-eight days presently provided.

30.5 Recommendation: For the purposes of freedom of information, the time within which an application for review must be made to the Administrative Appeals Tribunal should be extended from twenty-eight days to sixty days commencing on the day on which notice in writing of the decision is furnished to the applicant.

Awarding costs

30.6 Both the Commonwealth Administrative Review Committee (Kerr Report 1971) and the Committee on Administrative Discretions (Bland Report 1973) recommended that the then proposed Administrative Appeals Tribunal be empowered to award costs in favour of an aggrieved person where the Tribunal considered that the application for review was reasonably justified.¹ Despite this, the Administrative Appeals Tribunal Act makes no provision for the award of costs, providing only that if a person is indigent, legal aid can be given at the discretion of the Attorney-General.

30.7 One of the most frequently recurring criticisms of the scheme of review provided by the present Freedom of Information Bill was that the Administrative Appeals Tribunal's inability to award costs in favour of an applicant would render the right of review by the Tribunal an impracticable one for the vast majority of potential applicants. Specific submissions on this matter were made by organisations such as the FOIL Campaign Committee, WEL (Victoria), the Victorian Committee for Freedom of Information, the Australian and South Australian Councils for Social Services, the Queensland and South Australian Councils for Civil Liberties, and the Australian Consumers' Association.²

30.8 The exclusion from the Administrative Appeals Tribunal Act of a power to award costs appears to reflect, in part, a policy that those seeking review of administrative decisions before the Tribunal should be discouraged from seeking legal representation. Nevertheless there will be cases where, because difficult questions are involved, or because the facts are complex, or because of personal factors, the individual would need to have legal representation.

30.9 Some see the power to award costs by tribunals in general as a mechanism for equalising the power of individuals and government or, by reflecting adversely on the performance of particular officers, as ensuring a greater measure of accountability on the part of public servants. In any case the government would only have to pay costs if the agency loses the action. There are in fact precedents for costs being awarded against the Commonwealth in certain Tribunal proceedings. Under section 85 of the *Compensation (Commonwealth Employees) Act*

¹ Australia, Parliament, *Commonwealth Administrative Review Committee Report* (Hon. Mr Justice Kerr, Chairman), Parl. Paper 144/1971, Canberra, 1971; Australia, Attorney-General's Department, Committee on Administrative Discretions (Sir Henry Bland, Chairman), *Final Report*, AGPS, Canberra, 1973.

² See *Transcript of Evidence*, p. 217; Submission no. 7, incorporated in *Transcript of Evidence* pp. 366-7 and 385-6; Submission no. 44, incorporated in *Transcript of Evidence*, p. 397; Submission no. 48, incorporated in *Transcript of Evidence*, p. 439 and *Transcript of Evidence* pp. 1766-7; Submission no. 19, incorporated in *Transcript of Evidence*, p. 1342, and *Transcript of Evidence*, p. 1973; Submission no. 61, incorporated in *Transcript of Evidence*, p. 577.

1971 the Commonwealth has to pay the costs of the applicant if the Tribunal under that Act sets aside the decision of the Commissioner and remits it for re-determination, and the costs of a party not initiating the proceedings if the Tribunal affirms the decision. In income tax challenges it has been an administrative practice of the Commonwealth to bear the costs of an appeal by the Commissioner against a decision of a Board of Review favouring a taxpayer in certain specified circumstances.

30.10 There are, in addition, compelling reasons why costs should be awarded in favour of the aggrieved individual in the specific case of freedom of information actions before the Administrative Appeals Tribunal. For instance, a person is less likely to bring an action in which he might incur costs if the object at stake is information, and not—as will usually be the case in other actions before the Tribunal—an item of property or a pecuniary benefit. Further, an individual who brings an action and successfully asserts his right to information will be helping to change bureaucratic attitudes of secrecy in favour of more open government and should not have to bear the financial burden for what is of benefit to the community in general. Even from the point of view of a personal benefit an action under the Freedom of Information legislation may be an essential precursor for an individual who wishes to challenge a government decision concerning his personal monetary or property rights.

30.11 United States experience indicates that a power to award costs may be crucial if denials of information are to be subject to external review. Before 1974 when United States courts were given power to award costs under the United States Freedom of Information Act, the government won only 25% of court cases, yet less than 4.5% of people denied information were prepared to appeal to a court.³ It is true that the Australian procedure of appeal to the Administrative Appeals Tribunal (simpler than court appeals under the United States Freedom of Information Act), together with the power of the Ombudsman to investigate complaints, might help to counter the same anti-litigation pressures arising here, but it is arguable that Australians have been traditionally reluctant to assert their rights and to this extent a costs incentive is justified.

30.12 While we agree with the rationale for relieving the financial burden of an appeal to the Administrative Appeals Tribunal for freedom of information purposes, we have contrived to resolve the problem by means other than conferring a power on the Tribunal to award costs for all freedom of information cases. Our proposal, set out in Chapter 29, that the Ombudsman be empowered to act as counsel on behalf of an applicant before the Tribunal will, we believe, go a long way to resolving the question for the great majority of deserving cases.

30.13 Where the applicant seeks the assistance of the Ombudsman in the first instance, it is only if conciliation fails and the Ombudsman declines to represent the applicant before the Administrative Appeals Tribunal that the applicant will be faced with the prospect of paying his own costs. We propose that in these circumstances, if the applicant substantially prevails in his case before the Tribunal, the Tribunal should be empowered to recommend to the Attorney-General that costs be awarded in the applicant's favour. Since it is highly improbable that the government will change a clear policy decision not to confer a power to award

³ United States, Congress, House of Representatives, *U.S. Government Policies and Practices—Administration and Operation of Freedom of Information Act: Hearings before Sub-Committee of House Committee on Government Operations*, 92nd Congress, 2nd Session, Washington, 1972.

costs directly on the Tribunal itself, whether in relation to freedom of information or other cases, our proposal leaves the ultimate decision with the government in any particular case when the Tribunal decides that an award of costs is justified.

30.14 Where, on the other hand, an applicant does not seek the assistance of the Ombudsman in the first instance but decides to invoke his right to proceed directly to the Administrative Appeals Tribunal as he would be entitled to do under most clauses of the Freedom of Information Bill in our scheme of review, the Tribunal would have no power to recommend to the Attorney-General that costs be awarded in the applicant's favour. The purpose of this proposal is to encourage procedure by way of the Ombudsman, thus relieving pressure on the Tribunal without closing off the opportunity of direct appeal to the Tribunal. The same proposals would apply both to applicants seeking release of information and third parties pursuing Reverse-Freedom of Information actions. In line with our objective of removing the financial burden of appealing to the Tribunal it is, of course, a necessary corollary of our proposals, that the Tribunal have no corresponding power to recommend an award of costs in favour of the government.

30.15 Recommendation: Where an applicant, having pursued his right of review through the Ombudsman, proceeds for review before the Administrative Appeals Tribunal without representation by the Ombudsman, and he substantially prevails in his case, the Tribunal should be empowered, in its discretion, to recommend to the Attorney-General that costs be awarded in the applicant's favour.

30.16 The criteria by which the Tribunal might exercise its discretion to recommend an award of costs could include consideration of the public benefit, the possible commercial benefit to the applicant, and the reasonableness of the agency's action in withholding the document, or, in the case of a Reverse-Freedom of Information action, the reasonableness of the agency's decision to release the document. For example, where disclosure is less in the interest of the public than in the interest of the individual applicant, an award of costs may not be appropriate. There would be no need or justification for public financial support to be given when an application is made to advance private commercial interests. In the case of mixed motives it would be possible to recommend a partial award.

30.17 Recommendation: In deciding whether to exercise its discretion to recommend an award of costs, the matters to which the Administrative Appeals Tribunal is to have regard should include:

- (a) the public benefit;
- (b) the possible commercial benefit to the applicant; and
- (c) the reasonableness of the agency's action in withholding the document or (in the case of a Reverse-Freedom of Information action) deciding to release it.

30.18 We consider that one additional benefit that would flow from a power being vested in the Administrative Appeals Tribunal to award, or at least recommend, the payment of costs to a successful applicant is that this would act as a financial disincentive to agencies unreasonably withholding information. Such awards would certainly represent a budgetary burden on individual departments and authorities which it may be assumed they would be anxious to avoid. It is true that, as a matter of law and legal procedure, court and tribunal actions are taken against the Commonwealth and not against individual departments, except in

the case of statutory authorities and departments headed by statutory office holders, and that costs awarded against the Commonwealth are paid out of Consolidated Revenue. But as a matter of accounting rather than law, such costs would be reflected in the accounts of the relevant department, and if such a department did not have sufficient funds to satisfy an award of costs, it would need an advance from the Minister for Finance.

30.19 There is another aspect of the financial disincentive involved in agencies contesting appeals to the Administrative Appeals Tribunal which may be conveniently mentioned at this point. This is the matter of the cost of the agencies' own representation, which must be borne by the government, whatever the outcome of the case. We note that in the United States the escalating cost of defending freedom of information suits has prompted the Attorney-General to limit the availability of representation assistance for government agencies to a quite narrow range of cases. In a letter to the heads of all federal departments and agencies dated 5 May 1977, the then Attorney-General, Griffin B. Bell, stated the guiding principle in this way:

The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act.⁴

We regard it as wholly desirable that principles of this kind should be applied in Australia. If cost considerations do act as a disincentive to departments and agencies resisting disclosure in all but the most obviously defensible cases, then so much the better.

30.20 Defending freedom of information cases before the Administrative Appeals Tribunal will have budgetary implications not only for the government as a whole, but also for individual departments and authorities. There is, it is true, a less immediate nexus between the financial burden and the individual agency in the case of the government's own costs than there is with respect to amounts of applicant's costs which the government might be obliged to pay if our recommendation above is accepted. This is because, for the most part, departments use (without being obliged to pay for) the services of the Deputy Crown Solicitor's Office rather than their own house counsel in tribunal matters. However a few departments, notably Capital Territory and the Department of Business and Consumer Affairs, already provide their own representation. Other departments are usually billed by the Deputy Crown Solicitor when, as often happens, disbursements are incurred in the briefing of private counsel; moreover all statutory authorities (as distinct from departments) using Deputy Crown Solicitor services are billed for the costs so incurred. We have been advised by the Attorney-General's Department that this general pattern is likely to continue in the future for freedom of information matters and it seems clear to us that the trend will be more and more towards departments as well as authorities either directly providing their own legal services or having to pay for them out of departmental budgets. These considerations should help to ensure that resistance to disclosure is not unnecessarily pursued to the Tribunal stage, and accordingly to reinforce the effect of the several other recommendations we have made with this end in mind.

⁴ Committee Document no. 58.

Power to waive fees

30.21 We have given close consideration to whether the Administrative Appeals Tribunal should have the power to order the waiver or reduction of fees and charges (other than litigation costs) in appropriate cases. For reasons fully discussed in Chapter 11, paragraphs 11.40–11.45, and which need not be repeated here, we have recommended that the Tribunal have no jurisdiction in this respect, and that the sanctions for misuse of ministerial or agency discretion in this area should remain political only.

Discovery

30.22 The particular circumstances of a freedom of information action, where the applicant must conduct his case without access to the documents claimed to be exempt, raises the question of whether some extra provision should be made in this context to augment the present provisions of the Administrative Appeals Tribunal Act requiring the production of documents by a decision-maker. Under section 37 of the Administrative Appeals Tribunal Act (which continues to apply to non-exempt documents under the Freedom of Information Bill) a decision-maker is required, within fourteen days of having been advised that an application for review of a decision has been lodged with the Tribunal, to lodge copies of all documents in his possession relating to the decision being reviewed. Unless, following application by the decision-maker, the Tribunal orders that certain of these documents should not be furnished to the applicant, all these documents will, by virtue of section 35 (2) of the Administrative Appeals Tribunal Act, be made available to the applicant. It was suggested to the Committee that in the particular circumstances of freedom of information, an applicant should have extra power of discovery, or power to make interrogatories, or, at the very least, an agency should be required to produce as a public record a detailed index of the withheld documents accompanied by specific justifications for its action.

30.23 In the United States the trend has been for courts to require the creation of as complete a record as possible so that the applicant will not be unduly disadvantaged in freedom of information proceedings. *Vaughn v. Rosen*⁵ established that an agency must produce a detailed index of the withheld documents accompanied by specific justifications for its action. This general principle was modified in *Phillippi v. CIA*⁶ where the United States Central Intelligence Agency claimed that the fact of the existence or non-existence of the requested documents was itself exempt information and the agency submitted sealed affidavits to the court explaining its position. While the court held that an agency must create as complete a public record as possible, it stated that no *Vaughn* index would be required unless the court determined that the refusal to admit or deny the existence of the records was unjustified.

30.24 There are sound reasons for not importing all or any of these specific aids for the applicant. The provision of greater powers of discovery, or a power to make interrogatories or the requirement for an index would import a formidable apparatus for the applicant, one normally associated with the courts. It would raise once again the spectre of a constitutional issue, adding weight to the view that to a certain extent the functions of the Administrative Appeals Tribunal in relation to freedom of information can be characterised as judicial and not

⁵ 484 F. 2d 820 (D.C. Cir. 1975).

⁶ 546 F. 2d 1009 (D.C. Cir. 1976).

administrative review. Furthermore since the proceedings of the Tribunal should be inquisitorial there should be no need to rely on the applicant to supply either the necessary information or argumentation. We note that section 38 of the Administrative Appeals Tribunal Act, which enables the Tribunal to obtain additional statements, would permit the Tribunal to order that a *Vaughn* index be produced. However, we see no merit in importing a United States court practice in this regard as standard procedure in the Australian Tribunal. We prefer to leave a decision as to the need or desirability of such an index to the discretion of the Tribunal in each particular case. We also accept clause 44 of the Freedom of Information Bill, which precludes the Tribunal from examining the exempt documents *in camera* unless it is not satisfied of their exempt status by affidavit evidence or otherwise.

Expedition of priority matters

30.25 Several witnesses expressed the view that the Freedom of Information Bill should provide that freedom of information matters be accorded some degree of priority before the Administrative Appeals Tribunal. The rationale for according priority to freedom of information cases is that the value of information may tend to diminish rapidly with time. On the other hand, it must be acknowledged that a great many other matters which come before the Tribunal, for example deportation appeals, may have an equal or greater degree of urgency.

30.26 We are aware that although there is a priority provision in the United States Freedom of Information Act, a large number of other United States statutes contain equivalent provisions on particular matters, with the net result that a system of priority no longer appears to operate in practice.

30.27 We do not consider it appropriate to expressly provide in the Freedom of Information Bill that freedom of information matters should be accorded priority before the Tribunal. We do however express the hope that freedom of information proceedings will be expedited, if the particular circumstances of the case demand it, and that the Tribunal will, in scheduling its cases, give consideration to the particular need for an early resolution of freedom of information cases.

The language of Tribunal decisions: disclosing the existence of a document

30.28 We have already discussed, in paragraphs 9.27–34 and 20.14–16 the problem which arises in respect to certain specially sensitive documents as to whether the initial decision-maker should be entitled to answer a request in a form of words which neither confirms nor denies the existence of the document in question. We recommended, albeit with some hesitation, that a minister or agency should have such a power in respect of documents relating to security, defence or international relations (clause 23), Cabinet and Executive Council documents (clauses 24 and 25), and law enforcement documents (clause 27). We emphasised our concern that this power be not abused, and pointed to the role the Ombudsman might be expected to play—by means of his informal, conciliatory access to agency decision-makers—to ensure that it was not.

30.29 A similar problem obviously arises with respect to decisions that are made, in the areas in question, by the Administrative Appeals Tribunal itself. Such matters will come before the Tribunal in the normal way, the giving of a 'no confirmation or denial' response being treated for appeal purposes as amounting to a

straightforward refusal to grant access. The Tribunal will, no more or less than is the case with claims of exemption generally, be in the position of having to reach a conclusion about the justification for the exemption without the benefit of argument from a fully informed applicant. In the case of appeals under clauses 23, 24 and 25 we have recommended already that any such consideration take place in closed inquisitorial proceedings, with the applicant limited to the submission of affidavit evidence, so no additional problems of maintaining secrecy will arise. In the case of matters of this kind arising in respect to law enforcement documents, claimed to be exempt under clause 27, it may be that some variation in existing procedures will be required in order to preserve, at least up to the point of the decision, secrecy as to whether the document in question does exist or not.

30.30 The Administrative Appeals Tribunal's decision on appeal will either be that the document (if in fact it does exist) is exempt from disclosure or it is not. In the latter event the document whose existence has neither been confirmed nor denied will have to be disclosed. In the former event, where the document does exist but access is to continue to be denied, then we see no reason why the Tribunal, any less than the original decision-maker, should not be empowered to announce its finding, if it regards it as appropriate to do so, in exactly the same 'no confirmation or denial' terms as the original decision-maker.

30.31 Recommendation: In relation to appeals under clauses 23 (relating to security, defence, or international relations) 24 and 25 (relating to Cabinet and Executive Council documents) and 27 (relating to law enforcement documents) the Administrative Appeals Tribunal should be empowered, if it regards it as appropriate to do so, to announce its findings in terms which neither confirm nor deny the existence of the document in question.