

CHAPTER 20

AAT AND FEDERAL COURT FILING FEES

20.1 The Administrative Appeals Tribunal Regulations (Amendment) 1987 imposed a fee of \$200 payable on lodging an application for review by the Tribunal of, inter alia, most reviewable decisions made under the FOI Act. The fee has since been raised to \$240. The fee does not apply to review of decisions relating to documents which in turn relate to decisions made under a series of named Acts, which (broadly) provide for income support. In addition, where 'the proceeding terminates in a manner favourable to the applicant', the fee is refunded.¹

20.2 The Federal Court of Australia Regulations (Amendment) 1987 introduced a fee of \$300 payable when lodging an appeal to the Court from a decision of the Tribunal. The fee has since been raised to \$360. This fee, like all other Court filing fees, is not required to be paid by appellants in receipt of legal aid or where payment would impose substantial hardship.²

20.3 It is not possible to ascertain the impact of these fees on the volume of review applications from the available statistics.³

20.4 Questions which arise are whether, in principle, fees should be introduced; whether, if so, the amounts specified are appropriate; whether the circumstances in which fees are not payable are appropriate; and whether provision for refund is appropriate. The imposition of the fees affects many types of

1. Administrative Appeals Tribunal Regulations, reg.20.

2. Federal Court of Australia Regulations, reg.2(4).

3. Cf. FOI Annual Report 1986-87, pp. 34-35. See also, third supplementary submission from the Attorney-General's Department, p. 2 (para. 5).

matters taken to, and all types of matters taken from, the Administrative Appeals Tribunal, not merely freedom of information matters.

20.5 As was noted in chapter 19 above, Senator Powell is of the view that there should be no fees imposed upon applications for review of FOI matters.

Need for a fee

20.6 According to the Attorney-General's Department, the decision to impose filing fees was one of a number of decisions taken during the 1986 Budget deliberations 'intended to reduce costs by achieving greater efficiency in the review of administrative decisions and by rationalising the availability and use of the various avenues of review and access to information.'⁴ The Committee accepts that there should be some fee upon the lodging of applications with the Tribunal for the review of FOI decisions.

Size of the fee

20.7 The amount of \$240 does not represent full cost recovery.⁵

4. Submission from Attorney-General's Department in relation to the Administrative Decisions (Judicial Review) Amendment Bill 1986, p. 1. See also House of Representatives, Hansard, 8 October 1986, p. 1619 (Mr C. Hurford).

5. IDC Report, p. A21, estimated that the cost of providing a three-member Tribunal was \$2095 per sitting day.

20.8 The fee payable for commencing a matter in other Commonwealth courts, with date of last increase in brackets, is as follows:

- . High Court of Australia - \$150 (1/11/86)⁶
- . Federal Court of Australia - \$240 (1/9/87)⁷
- . Family Law Court of Australia - \$240 (1/9/87)⁸
- . ACT Supreme Court - \$180 (1/5/87)⁹
- . ACT Magistrates Court - \$30 (24/3/87)¹⁰

20.9 It is not appropriate to impose the same filing fee upon applications for review lodged in the Administrative Appeals Tribunal and the Federal Court. To the extent that appeals from decisions of the Tribunal lie to the Federal Court, the Administrative Appeals Tribunal is inferior to the Federal Court. Further, the Administrative Appeals Tribunal is intended to provide cheap, speedy, and informal justice as compared with the Federal Court. It would seem to follow that the fees for lodging applications for review in the Tribunal should be significantly lower than the fees for initiating appeals in the Federal Court.¹¹

20.10 Sub-section 44(3) of the Administrative Appeals Tribunal Act, confers upon the Federal Court jurisdiction to hear appeals from the Tribunal and provides

that jurisdiction may be exercised by that Court constituted as a Full Court and shall be exercised by the Court so constituted if the

6. SR 305 of 1986 amending High Court Rules, Third Schedule.

7. SR 171 of 1987 amending Federal Court of Australia Regulations, Schedule, Item 1.

8. SR 175 of 1987 amending Family Law Regulations, reg.11.

9. SR 55 of 1987 amending Australian Capital Territory Supreme Court (Fees) Regulations, Schedule.

10. ACT Regulation 2 of 1987 being Magistrates Court (Civil Jurisdiction) (Fees) Regulations, reg.2.

11. In both the Federal and Family Courts, the fees payable for filing appeals from a single judge to a full court are \$360. In the High Court, the fee for filing a notice of appeal is \$200.

decision of the Tribunal was given by the Tribunal constituted by a presidential member or by members at least one of whom was a presidential member.

20.11 Where the matter is heard by a Full Court, it is appropriate that the same \$360 fee should apply to appeals from the Administrative Appeals Tribunal as applies to appeals from a single judge of the Federal Court.

Exemption from liability to pay fees

20.12 The grounds for exemption from the liability to pay the \$240 filing fee in the Administrative Appeals Tribunal are listed in sub-regulation 19(2) of the Administrative Appeals Tribunal Regulations by reference to decisions taken under a series of Commonwealth Acts.¹²

20.13 It is incongruous to confer upon the Administrative Appeals Tribunal no power to waive filing fees when such a power is possessed by the Federal Court exercising jurisdiction under the FOI Act.¹³ This may have either of two consequences. A user who is unable to afford the \$240 (or any other) filing fee may be denied access to justice. In turn, this may raise human rights/civil liberties issues, although this may be countered by the argument that the Administrative Appeals Tribunal is merely an administrative body and not a court. Alternatively, applicants will be required to pay the \$240 filing fee to the Tribunal, and

 12. According to the Budget Statements 1986-87, p. 292, this exemption is intended to be confined to applications relating to personal income maintenance matters e.g. pensions and benefits.

13. E.g. High Court Rules, Order 72, Rule 12 confers on the High Court a general power to remit fees on public interest grounds - 'in a particular case for special reason'. For examples of narrower powers to remit, see the Federal Court of Australia Regulations, reg. 3(4); Family Law Regulations, reg.11(4); Australian Capital Territory Supreme Court (Fees) Regulations, reg.2(4); and Magistrates Court (Civil Jurisdiction) Ordinance 1982 (ACT), s.292(4).

then, on a further appeal from the Tribunal to the Federal Court, on the grounds of substantial hardship have the Court waive the \$360 filing fee which is payable upon appeals from the Tribunal.

20.14 The Committee recommends that the fee for lodging applications for review of FOI decisions with the Administrative Appeals Tribunal be less than that for filing documents to commence proceedings with the Federal Court.

20.15 The Committee recommends that a fee of \$120 be payable for lodging with the Administrative Appeals Tribunal applications for review of FOI decisions.

20.16 Senator Stone dissents from the recommendation contained in paragraph 20.15.

20.17 The Committee further recommends that the Registrar or a Deputy Registrar of the Administrative Appeals Tribunal be empowered to waive the payment of filing fees on the same general criteria as is the Registrar of the Federal Court, inter alia, where payment of the fee 'would impose substantial hardship' upon the applicant.

Reverse-FOI

20.18 The sections of the FOI Act which govern reverse-FOI use the expression 'decision' (s.58F(1), s.59(1)). Since the fee regulations operate by reference to 'a decision other than a prescribed decision', they apply to reverse-FOI applicants,¹⁴ unless specific exemption is made. Consequently, reverse-FOI applicants initiating reverse-FOI proceedings in the Administrative Appeals Tribunal will be required to pay filing fees.

14. Administrative Appeals Tribunal Regulations, reg.19(1).

20.19 As was discussed earlier, the cost to information-providers of seeking to prevent access to 'their' documents should be minimal. The appropriateness of imposing filing fee upon reverse-FOI applicants depends upon the existence of provisions enabling them to recover their costs.

20.20 The Committee considers that its recommendations for the award of costs, combined with the possibility of the refund of the filing fee under Administrative Appeals Tribunal Regulations, regulation 20, will ensure that reverse-FOI applicants are not exposed to unreasonable expense in protecting 'their' documents. Accordingly, the Committee does not recommend that reverse-FOI applicants be exempted from filing fees.

'Proceeding terminates in a manner favourable to the applicant'

20.21 Regulation 20 of the Administrative Appeals Tribunal Regulations provides for the refund of the filing fee where 'the proceedings terminate in a manner favourable to the applicant'. Typical FOI applications to the Administrative Appeals Tribunal involve a number of documents and/or parts of documents to which access has been denied. It is common for access to be granted to one or more of these documents, or parts of documents, between the time at which Administrative Appeals Tribunal proceedings are initiated and the Tribunal's handing down of its decision.

20.22 In deciding whether to refund the \$240 filing fee, either of two approaches could be adopted. The formal approach would be to refund the filing fee whenever any further access were to granted after the payment of the filing fee.¹⁵ The

 15. The Committee notes that the following comment was contained in the Explanatory Memorandum accompanying the Taxation Laws Amendment Bill (No. 4) 1986 which imposed a \$200 filing fee refundable, inter alia, when the proceedings 'terminate in a manner favourable to the applicant': 'the variation of a decision or the termination of proceedings in a manner favourable to a person will be taken to have occurred in circumstances where the objection decision is adjusted to any extent in favour of the person' (p. 100, emphasis added).

substantive approach would be to attempt to determine to which documents or parts of documents the applicant 'really' wanted to have access. Where, as commonly happens, additional access has been granted to purely formal parts of letters or, say, to the name of agency staff who made a particular report but not the part of the report to which the applicant 'really' sought access, no refund would be made. As is the case with awards of costs by courts, some attempt would be made to decide who had 'won' in substance.

20.23 It is not clear whether the section 66 test of the FOI Act will be relevant in this context. Nor is it clear why the regulation 20 provision for the refund of filing fees departs from the section 66 criteria.

20.24 Sub-section 66(1) of the FOI Act provides that the Administrative Appeals Tribunal may recommend the payment of costs where 'the person is successful, or substantially successful, in his application for review'. This provision has been considered in a number of Administrative Appeals Tribunal decisions.¹⁶ The Tribunal has considered the quality (as well as the quantity) of the documents released and the applicant's 'stated purpose' as being relevant.¹⁷

20.25 The Committee regards this approach to the award of costs as appropriate, and considers that it should also apply with respect to the refund of filing fees.

16. E.g. Re Lianos and Secretary, Department of Social Security (No. 2) (1985) 9 ALD 43, p. 46, Deputy President Hall: 'Substantially successful' depends upon how much information that was previously denied has been obtained as a result of the proceedings before the Tribunal. 'Success in this regard is not necessarily measured by the number of documents or the number of pages or words released. Information varies in quality ... In my view, therefore, there is both a quantitative and a qualitative element in evaluating the extent to which the applicant has "succeeded"....'

17. E.g. Re Hillock and Aboriginal Development Commission (16 March 1987); Re Lordsvale Finance and Department of the Treasury (No. 4) (22 August 1986).

20.26 The Committee recommends that regulation 20 of the Administrative Appeals Tribunal Regulations be amended to replace the phrase 'proceeding terminates in a manner favourable to the applicant' with the same test as is applied in respect of the award of costs: where the applicant is 'successful or substantially successful' in the application for review.

Application withdrawn before being heard by Tribunal

20.27 The regulation of refunds of the filing fees in respect of freedom of information matters is complicated by the fact that agencies (but not the Tribunal) may release requested material ex gratia (FOI Act, s.14). It is not clear whether the ex gratia release of documents after the lodgement of an application for review by the Administrative Appeals Tribunal will result in a refund of the \$240 filing fee.¹⁸

20.28 Where documents are released ex gratia, applicants are likely to withdraw their applications. In the Committee's view, such applicants should be entitled to the refund of their filing fees.

20.29 It is possibly only to conjecture about the effect which the possibility of fee refunds might have upon agency decisions to release material after proceedings have been commenced in the Administrative Appeals Tribunal. Agencies may be reluctant to concede on 'minor' points if they consider that they can sustain their exemption claim in respect of the documents or parts of the documents which they think are central to applicants' requests.

20.30 However, in the Committee's view, any agency reluctance to concede on 'minor' points, and thus to entitle applicants to

18. The Committee notes that under s.66 of the FOI Act the Administrative Appeals Tribunal may recommend that costs be paid even though agencies have released material previously claimed to be exempt on an ex gratia basis rather than as the result of a decision of the AAT: Re Lianos and Secretary, Department of Social Security (No. 2) (1985) 9 ALD 43, pp. 45-46.

the refund of filing fees, will be off-set by the risk that the Tribunal may award costs against the agency in the event that the application is unsuccessful.

20.31 In the Committee's view, applicants should be entitled to the refund of the filing fee where they withdraw their applications before the preliminary conference, or as a result of conciliation efforts which form part of the preliminary conference, or at some later stage.

20.32 The Committee recommends the Administrative Appeals Tribunal (Amendment) Regulations 1987 be amended to also empower the Registrar or a Deputy Registrar of the Administrative Appeals Tribunal to refund to the applicant the prescribed filing fee paid for the lodgment with the Tribunal of an application for review of an FOI decision where her/his application is withdrawn before the dispute is heard by the Tribunal.

