

CHAPTER 18

PROCEDURES IN THE ADMINISTRATIVE APPEALS TRIBUNAL

18.1 The Committee is aware that, in December 1986, the Attorney-General established a Task Force to review the procedure of the Administrative Appeals Tribunal. The Task Force, whose members comprise the President of the Administrative Appeals Tribunal, the Chairman of the Administrative Review Council, and a Deputy-Secretary from each of the Attorney-General's Department and the Department of Finance, has not yet reported.

18.2 In this chapter, the Committee has considered only those aspects of the procedure of the Administrative Appeals Tribunal which are regulated by the FOI Act.

Conclusive certificate cases: section 58C

18.3 The President of the Administrative Appeals Tribunal, the Law Institute of Victoria, and the Administrative Review Council all suggested that section 58C, which establishes an elaborate procedure by which the Tribunal hears appeals against exemptions claimed by conclusive certificates, should be repealed.¹ This would leave the Tribunal free to exercise its general discretionary powers under the Administrative Appeals Tribunal Act 1975, (ss.35(2)) to make confidentiality orders if and when necessary.

18.4 The Administrative Review Council explained the background to the proposal as follows:

1. Submissions from Justice J.D. Davies, p. 1 (Evidence, p. 1364); the Law Institute of Victoria, p. 6 (Evidence, p. 379); the Administrative Review Council, p. 42. See also Re Waterford and Treasurer of Commonwealth of Australia (No. 2) (Deputy President Todd) (1985) 8 ALN 37, p. 48.

In some cases, the agency or Minister does not desire that the hearing should be in private and would be satisfied with the making by the AAT of a confidentiality order under section 35 of the Administrative Appeals Tribunal Act 1975. In other cases, there is only a part of the evidence or submissions that the agency or Minister desires to be given in private. Moreover, it is only in the minority of cases that the agency or Minister desires that the applicant be excluded while evidence is given and submissions are made on behalf of the agency or Minister. Indeed, rarely does an agency or Minister seek to have the applicant excluded from the hearing for more than a short time. In the Council's view, it is desirable that the hearing of the AAT and the reasons for decision of the AAT should be public unless there are good reasons to the contrary in a particular case.

These problems arise in every case involving a conclusive certificate. At present the result is that, ordinarily, the reasons for decision of the AAT in conclusive certificate cases are distributed in full to the respondent and either in full or in part to the applicant but only in part or not at all to the public. In particular, the private reasons for decision are not distributed to members of the AAT who do not constitute the AAT for the particular case. If no change to the law is made, a useful body of precedent will be built up of which probably only the Attorney-General's Department will be aware.²

18.5 The Committee recognises that section 58C is unnecessarily restrictive. The Committee considered whether section 58C should be repealed, or merely amended to require a private hearing and/or restrictions upon the publication of evidence and reasons only where the agency so requests. The latter is consistent with the overall rationale for retaining conclusive certificates, in that it leaves control over the documents in the hands of the executive rather than the Tribunal.

2. Submission from the Administrative Review Council, p. 42.

18.6 The Committee has not received any submissions or evidence from agencies on this point. The Committee does not know whether agencies would agree to the Administrative Appeals Tribunal controlling confidentiality when reviewing conclusive certificates. Consequently, the Committee prefers to adopt the more cautious approach of leaving control with agencies.

18.7 Accordingly, the Committee recommends that section 58C be amended to require a private hearing and/or restrictions imposed upon the publication of documents lodged with or received in evidence by the Administrative Appeals Tribunal or submissions made to it, only to the extent that the agency concerned so requests.

Conclusive certificate cases: paragraph 58C(3)(b)

18.8 Where agencies claim exemption upon a variety of certificate and non-certificate grounds, the restrictions upon publicity attached to the hearing of the application for review of the conclusive certificate may spill over into the hearing of the non-certificate grounds. This may mean that paragraph 58C(3)(b) requires the Administrative Appeals Tribunal to make a confidentiality order in terms wider than it would have done otherwise.³

18.9 The difficulties which may be created thereby appear to be an inescapable consequence of having a system of conclusive certificates. The Committee considered whether the procedural complexity could be reduced if questions involving a conclusive certificate were to be resolved in a separate hearing conducted before the consideration of other exemption provisions. The

3. E.g. see Re Lordsvale Finance and Department of Treasury (No. 4) (22 August 1986), paras. 7-8.

latter hearing would be necessary only if the conclusive certificate was withdrawn, in which case the restrictions imposed by section 58C would no longer operate.⁴

18.10 However, the Committee considers that section 33 of the Administrative Appeals Tribunal Act 1975 gives the Administrative Appeals Tribunal ample discretionary power to hold separate hearings on different categories of exemption claims. Further, the Tribunal is best placed to decide case-by-case, at a directions hearings or preliminary conference, whether the advantage of assigning different issues to different hearings outweigh the disadvantages of so doing.⁵

Production of documents to the AAT in conclusive certificate cases: section 58E

18.11 Section 58E governs the production to the Administrative Appeals Tribunal of documents in relation to which a certificate has been issued. Section 64 governs the production of documents otherwise claimed to be exempt. Under sub-section 58E(2), the Tribunal may require production of the documents only if the Tribunal is not satisfied by the evidence already adduced that there are reasonable grounds for the issue of the conclusive certificate.⁶

18.12 The Administrative Review Council noted that 'particularly difficult procedural questions have arisen' in the Tribunal as a result of section 58E.⁷ One witness argued that the

4. Cf. Re Bracken and Minister of State for Education and Youth Affairs (No. 3) (1985) 7 ALD 243, p. 269.

5. See Re Dillon and Department of Treasury (No. 1) (1986) 10 ALD 366, pp. 372-73, for a survey of some of the cases in which this has happened.

6. By contrast, sub-section 56(1) of the Victorian FOI Act gives the Victorian Administrative Appeals Tribunal an unqualified power to inspect documents claimed to be exempt.

7. Submission from the Administrative Review Council, p. 44, and pp. 45-46.

Tribunal should be able to inspect the documents prior to the preliminary conference stage in all cases.⁸

18.13 To some extent, the procedural difficulties are independent of section 58E. They arise out of the existence of both ordinary and conclusive certificate exemption claims in respect of the same documents.⁹ As was noted above, the Administrative Appeals Tribunal has the power to order that conclusive certificate exemption claims should be dealt with in a separate hearing. This may alleviate some of the potential difficulties arising out of section 58E.

18.14 The Committee notes the criticism that the relationship between section 61 and section 36 conclusive certificate claims makes it difficult to decide whether the contents of the documents are 'purely factual' without being able to require production of the documents. However, the Committee does not consider that this provides sufficient reason to alter section 58E. Agencies may voluntarily produce documents to the Administrative Appeals Tribunal.¹⁰

Production of documents to the AAT in non-conclusive certificate cases: section 64

18.15 Section 64 governs the production of documents in appeals against non-conclusive certificate exemption claims. Under sub-section 64(1), the Tribunal may require documents to be produced only if the Tribunal is not satisfied, by evidence upon affidavit or otherwise, that the document is an exempt document. As was noted above,¹¹ the Victorian Administrative Appeals

8. Evidence, p. 547 (Mr H. Selby).

9. Cf. Re Dillon and Department of Treasury (No. 1) (1986) 10 ALD 366, pp. 373-75.

10. Re Lordsvale Finance Ltd and Department of Treasury (No. 2) (7 February 1986) para. 3.

11. See footnote 6 on p. 258 above.

Tribunal has an unqualified power to examine documents claimed to be exempt.

18.16 The Committee received information suggesting that agencies occasionally delay the production of documents unnecessarily.¹² To the extent that, in the early days of FOI, agencies simply misunderstood their obligations regarding the production of documents, the developing case-law can be relied upon to clarify the position.¹³

18.17 Fairly applied, section 64 need not lead agencies to withholding from the Administrative Appeals Tribunal documents which the Tribunal otherwise might require to be produced. This is so particularly where the Tribunal has indicated its view upon the production of documents, perhaps informally, during the preliminary conference or directions hearing. However, in the Committee's view, it is desirable to amend section 64 so as to preclude the agencies from withholding documents unnecessarily.

18.18 The Committee recommends section 64 be amended to give the Tribunal the power to oblige agencies to produce documents at any stage of proceedings.

Production of documents to applicant's legal representative in non-conclusive certificate cases

18.19 The Committee accepts that applicants' ability to argue for disclosure of documents in the Administrative Appeals Tribunal may be impaired by the lack of an opportunity to inspect the documents in dispute. It has been suggested this disadvantage might be reduced if the FOI Act were to be amended to give the Tribunal power to permit applicants' counsel to inspect the

12. Submission from Justice J.D. Davies, p. 2 (Evidence, p. 1365), and submission from the Administrative Review Council, p. 44. See also Evidence, pp. 547 and 551 (Mr H. Selby); p. 1376 (Justice J.D. Davies).

13. Cf. Re Howard and Treasurer of Commonwealth of Australia (1985) 7 ALD 626, p. 639 (Davies J).

documents at the hearing: the counsel would be required to give an undertaking not to reveal the documents or their contents to the applicant or anyone else.¹⁴

18.20 An agency may voluntarily grant access to documents outside of the FOI Act (s.14). However, where the documents are voluntarily disclosed to the Administrative Appeals Tribunal by agencies, the Tribunal has taken the view that, first, it has no power to direct the respondent to grant access to the applicant's counsel¹⁵ and, secondly, the Tribunal ought not itself to make the documents available to the applicants' counsel.¹⁶

18.21 The Administrative Review Council concluded that it was undesirable to give the Tribunal a discretion to permit applicants' legal representatives to gain access to documents to which applicants are not permitted access but which the Tribunal has required to be produced to it or which have voluntarily been produced to the Tribunal. According to the Council, once the Administrative Appeals Tribunal has itself inspected the documents, the Tribunal

will usually be able to elicit from the applicant's representative appropriate argument concerning the matters which should guide the AAT in making its decision.¹⁷

14. E.g. see Evidence, pp. 385-95 (Law Institute of Victoria); submissions from the New South Wales Law Society, p. 5; and the Law Institute of Victoria, p. 6 (Evidence, p. 379). The Victorian Administrative Appeals Tribunal already possess this power: FOI Act (Vic), s.56(3).

15. Re Kim Yee Chan and Department of Immigration and Ethnic Affairs (1985) 8 ALN 48, p. 50.

16. Re Chandra and Minister for Immigration and Ethnic Affairs (1984) 6 ALN 257, pp. 260-61; Re Dunn and Australian Federal Police (1986) 11 ALN 185, p. 186.

17. Submission from the Administrative Review Council, p. 48. Cf. Re Edelsten and Australian Federal Police (1985) 9 ALN 65, p. 70, where the AAT commended the counsel for the applicant for having sought to elaborate a number of general propositions of a positive kind which the Tribunal was invited to invoke in the course of the inspection of the documents.

18.22 The Administrative Review Council also advised the Committee that

an applicant's legal representative who had had access to the subject documents would be placed in an invidious position vis-a-vis the applicant, even when the latter had given specific instructions for the representative to inspect the documents without disclosing them to the client. Difficulties could also arise in later proceedings in relation to the representative's knowledge of the documents. Again, to permit only legal representatives in the strict sense to have access to documents would discriminate against applicants represented by some other person or without representation at all.¹⁸

18.23 The Committee supports both the Administrative Review Council's reasoning and its conclusion.

18.24 Senator Alston dissents from paragraph 18.23 in the light of the successful operation of such arrangements under the Victorian Freedom of Information Act.

Powers of the AAT to ensure non-disclosure of certain matters

18.25 Section 63 of the FOI gives the Administrative Appeals Tribunal specific powers to regulate its procedures and the content of its reasons for decisions in order to ensure that confidentiality of exempt matter is preserved. The section provides that:

63. (1) In proceedings under this Part, the Tribunal shall make such order or orders under sub-section 35 (2) of the Administrative Appeals Tribunal Act 1975 as it thinks necessary having regard to the nature of the

18. Submission from the Administrative Review Council, p. 48. See also Evidence, pp. 1376-77 (Justice J.D. Davies); News Corporation Ltd v National Companies and Securities Commission (1984) 57 ALR 550, p. 556 (Fox J), pp. 563-64 (Woodward J); and Re Robinson and Australian Federal Police (29 August 1986) para. 4.

proceedings and, in particular, to the necessity of avoiding the disclosure to the applicant of -

- (a) exempt matter contained in a document to which the proceedings relate; or
 - (b) information of the kind referred to in sub-section 25 (1).
- (2) Notwithstanding anything contained in the Administrative Appeals Tribunal Act 1975 -
- (a) the Tribunal shall not, in its decision, or reasons for a decision, in a matter arising under this Act, include any matter or information of a kind referred to in sub-section (1); and
 - (b) the Tribunal may receive evidence, or hear argument, in the absence of the applicant or his representative where it is necessary to do so in order to prevent the disclosure to the applicant of matter or information of a kind referred to in sub-section (1).

18.26 The Committee's attention has been directed to the relationship between these powers in the FOI Act and more general powers contained in the Administrative Appeals Tribunal Act. In his submission, Justice Davies, the then President of the Tribunal, recommended that

[t]he provisions of sub-s. 63(2) should be widened. Paragraph 63(2)(a) should include all confidential information communicated to the Tribunal in documentary or oral evidence which has been subject to a confidentiality order and which has not been communicated to the applicant.¹⁹

18.27 A further problem arises in respect of paragraph 63(2)(b). According to the Administrative Review Council, it may be necessary to exclude applicants from parts of

 19. Submission from Justice J.D. Davies, p. 1 (Evidence, p. 1364).

a hearing in circumstances which do not fall within those specified in paragraph 63(2)(b).²⁰ Justice Davies submitted that:

Paragraph 63(2)(b) should comprehend all cases in which evidence is given in confidence to the Tribunal. Frequently, confidential evidence is given to the Tribunal as to the circumstances which may make a particular document exempt. It is frequently necessary to exclude the applicant and his representative while that evidence is given. No purpose is served by requiring the Tribunal to refer to that evidence in its decision, as s.43(2) of the Administrative Appeals Tribunal Act 1975 (Cth) may require, and then to place a confidentiality order upon that part of the reasons for decision, with the result that the reasons expressed are not available to the applicant or the public.²¹

18.28 The Administrative Review Council submission reached a similar conclusion. The Council's submission expressed

the Council's view that paragraph 63(2)(b) may be seen as unduly limiting and that an amendment is required to make it clear that the paragraph does not derogate from the ordinary powers of the AAT under section 35 of the Administrative Appeals Tribunal Act 1975 to make orders concerning the hearing of proceedings.²²

18.29 The Committee notes that, in a decision made since these submissions were received, the Administrative Appeals Tribunal observed

that paragraph 63(2)(b) elaborates, rather than delimits, the circumstances in which a s.35 order may be appropriate in proceedings under the FOI Act.²³

20. Submission from the Administrative Review Council, p. 43.

21. Submission from Justice J.D Davies, p. 1 (Evidence, p. 1364).

22. Submission from the Administrative Review Council, p. 44.

23. Re Dunn and Australian Federal Police (1986) 11 ALN 185, p. 186.

18.30 However, to the extent that this decision fails to clarify the position, the Committee supports the amendment of section 63 along the lines recommended by the Administrative Review Council and the then President of the Administrative Appeals Tribunal.

Powers to deal with application not made in good faith

18.31 The Commonwealth Administrative Appeals Tribunal, unlike superior courts, the Commonwealth Ombudsman and the Victorian Administrative Appeals Tribunal, has no power summarily to dismiss applications for review made in bad faith. Justice Davies noted that such applicants have been few and, apart from one example given, have not posed a major problem for the Administrative Appeals Tribunal.²⁴

18.32 There has not been any suggestion in other evidence or in submissions that the Tribunal should be empowered to deal with applicants seeking review in bad faith. Agencies argued that applicants should be dealt with at the agency level. The implication was that if the problem is tackled at that level successfully, there is little need for any mechanism at the Tribunal level.

18.33 The Committee agrees with this approach. The Committee would not oppose the grant of power to the Administrative Appeals Tribunal to enable it to deal with mala fide applicants. If a case is made out for such a power generally, it should apply to the Tribunal's freedom of information jurisdiction.

 24. '[A] case in Melbourne, where the applicant had something like 50 applications before the Tribunal, basically dealing with one matter. We had no means of stopping him from putting in the applications. Once the application was in, the Registrar was under a statutory duty to give notice to the respondent and the respondent was under a statutory duty to produce the section 37 statements, and all that gave rise to a good deal of work on the part of the agencies': Evidence, p. 1370.

Sanctions against recalcitrant bureaucrats

18.34 A few submissions called for the establishment of mechanisms by which to discipline agency staff found to be flouting their obligations under the FOI Act.²⁵ The Law Institute of Victoria recommended that the

ability of the Tribunal to make disciplinary orders of some kind when officers have flouted the purpose and provisions of the Act should be strengthened.²⁶

18.35 The Administrative Appeals Tribunal lacks any power to make orders of this type, except where the conduct constitutes contempt of, or otherwise relates to, the Tribunal.²⁷ The Ombudsman's role in reporting upon officers who fail to carry out their duties was noted above in chapter 17.

18.36 The Victorian FOI Act makes specific provision for disciplinary action by the Administrative Appeals Tribunal. Section 61 provides:

where the Tribunal, at the completion of a proceedings under this Act, is of [the] opinion that there is evidence that a person, being an officer of an agency, has been guilty of a breach of duty or of misconduct in the administration of this Act and that the evidence is, in all the circumstances, of sufficient force to justify it in doing so, the Tribunal shall bring the evidence to the notice of -

(a) if the person is the principal officer of an agency - the responsible Minister of that agency; or

(b) if the person is an officer of an

25. Submissions from Mr B.F. Grice, p. 2; Mr Jim Moore, p. 1; 'The Age', p. 41 (Evidence, p. 226).

26. Submission from the Law Institute of Victoria, p. 7 (Evidence, p. 380).

27. Administrative Appeals Tribunal Act 1975, ss.61-63.

agency but not the principal officer of that agency - the principal officer of that agency.

18.37 Without wishing to suggest that such misconduct is common, the Committee agrees that instances of misconduct by agency staff which are exposed in the course of Administrative Appeals Tribunal hearings should be brought to the attention of their superiors. However, the Committee does not consider that it is necessary to confer upon the Tribunal any formal power or obligation to do this. As was noted above, a broadly equivalent power possessed by the Ombudsman is not used; instead recourse is had to less formal methods of achieving the desired end.

18.38 As presently informed, the Committee takes the view that it is sufficient that the Administrative Appeals Tribunal may refer evidence of individual misconduct to Ministers or agency heads informally. On the same basis, the Committee would not regard it as appropriate to give the Administrative Appeals Tribunal a general power to fine, dismiss or otherwise discipline agency staff found to be in breach of their duties under the FOI Act. Should such action be necessary, it should be undertaken as part of the general public service disciplinary procedures.

18.39 In evidence to the Committee, Justice Davies, noted that one situation in which it would be useful if the Tribunal could refer a matter to the Ombudsman formally would be where, as a result of disclosure of documents under FOI, the Tribunal has encountered a question of maladministration.²⁸ Justice Davies did not refer specifically to the question of disciplining agency staff.

18.40 The Committee recognises that a power to refer questions of this sort would enable prompt investigation of the scope of, and responsibility for, an apparent maladministration which had

28. Evidence, p. 1375.

come to light in the course of an Administrative Appeals Tribunal hearing.

18.41 In the Committee's view, permitting the Tribunal to inquire into, or refer to other bodies (such as the Ombudsman), the merits of agency conduct or actions which are revealed during FOI disputes would unduly expand FOI jurisdiction. Where questions of maladministration or illegality are revealed, whether by disclosure under FOI or otherwise, these should be the subject of specific inquiry and investigation by an appropriate authority (e.g. the Ombudsman, or police) uninfluenced by the means by which they were discovered.

Powers to award costs

18.42 Section 66 of the FOI Act empowers the Administrative Appeals Tribunal to deal with questions of costs arising from proceedings in the exercise of its jurisdiction in FOI matters. Sub-section (1) provides that :

Where -

- (a) a person makes application to the Tribunal under section 55 for review of a decision constituting the action to which the complaint relates; and
- (b) the person is successful, or substantially successful, in his application for review,

the Tribunal may, in its discretion, recommend to the Attorney-General that the costs of the applicant in relation to the proceedings be paid by the Commonwealth.

18.43 Sub-section 66(2) sets out a non-exhaustive list of the criteria to which the Administrative Appeals Tribunal shall have regard in deciding whether to make a recommendation under sub-section 66(1).

18.44 The awards of costs in reverse-FOI applications was considered above. The issues considered here are whether the Administrative Appeals Tribunal should be empowered to award, as opposed to recommend the award of, costs; whether parties other than the Commonwealth should be liable to pay costs; and, if so, under what circumstances.

Awards, not recommendations

18.45 The Administrative Appeals Tribunal does not have any general power to order that the costs incurred by a successful party should be paid by the losing party. The reason for this appears to be one of policy rather than a result of any limitations arising out of the nature of the Administrative Appeals Tribunal itself.

18.46 Although the point is not beyond doubt, it appears that empowering the Administrative Appeals Tribunal to order a party to pay costs would not be a constitutionally impermissible vesting of judicial power upon a body not being a court.²⁹ In its submission, the Attorney-General's Department said that

[a] mechanism could be provided for recovery by applicants and agencies of costs of AAT proceedings ...

The AAT's determination could not itself be binding or conclusive between any of the parties, nor could it be given power to enforce costs, but the costs order could be enforced by a Court (Cf. s.174 Copyright Act 1968; ss.81, 82 Sex Discrimination Act 1984). The usual types of recovery problems could arise and the AAT might need to be given power to require security for costs in appropriate cases.³⁰

29. Australian Law Reform Commission, Lands Acquisition and Compensation [ALRC14. AGPS. Canberra. 1980] para. 125.

30. Submission from the Attorney-General's Department, pp. 83-84 (Evidence, pp. 88-89).

18.47 One policy reason for not empowering the Administrative Appeals Tribunal to award costs is to discourage the parties from seeking legal representation.³¹ The Administrative Review Council has recommended that the Administrative Appeals Tribunal should not have a general power to make awards of costs, but that provision could be made for the award of costs in particular Tribunal jurisdictions.³²

18.48 The Committee has not received any information which suggests that the distinction between the award of costs and a recommendation that the Attorney-General pay costs has any practical significance. As at December 1986, the Attorney-General had refused payment in only one of the three cases in which the Tribunal recommended an award of costs.³³

18.49 However, if costs are to be payable by parties other than the Commonwealth, they would, for practical purposes, have to be payable at the order, as opposed to the recommendation, of the Administrative Appeals Tribunal. In turn, if the Tribunal is to have the power to order other parties to pay costs, it seems reasonable that it should also have the power to order costs against the Commonwealth.

Awards of costs against parties other than the Commonwealth

18.50 A number of agency submissions recommended that the Tribunal should be able to award costs against unsuccessful FOI

31. See submission from the Attorney-General's Department, p. 83 (Evidence, p. 88), referring to the policy that 'the AAT should be an inexpensive forum open to all parties, whatever their means, undeterred by the fear of having to pay another party's costs.' See also Administrative Review Council, Annual Report 1986-87, pp. 80-87.

32. Administrative Review Council, Annual Report 1978-79, para. 97, Annual Report 1979-80, para. 88.

33. First supplementary submission from the Attorney-General's Department, p. 2.

applicants.³⁴ The objective would be to deter applicants who might otherwise frivolously or vexatiously put agencies to considerable expense in preparing their cases and appearing in the Tribunal.

18.51 It appears that many of the small number of FOI applicants who abuse the system act without legal representation and lack the means to pay any significant award of costs made against them. It is probable that very few of these will be able to afford the fees for lodging applications in the Tribunal for review. (These fees are discussed below in chapter 20).

18.52 It is possible to target frivolous and vexatious applications by the award of costs. This may be done, in part, by developing criteria to ensure that applicants have to do something more than simply lose the case before being liable to pay costs. In its submission, the Department of Immigration and Ethnic Affairs proposed

guidelines to be taken into account, e.g. the reasonableness of the applicant's actions; whether any or adequate notice was given to the agency; whether the applicant's actions involved either abuse of the AAT's procedures or were frivolous or vexatious; costs borne by the agency, etc.³⁵

18.53 The Committee considers the Administrative Appeals Tribunal should have the ability to order that applicants pay costs. The conditions for making such an order should be defined as precisely as possible so as to preclude applicants acting responsibly and in good faith from being subject to an order for costs, even where they fail before the Tribunal. To ensure that

34. E.g. submissions from the Department of Resources & Energy, p. 4; the Department of Health, p. 34 (Evidence, p. 1254); the Department of Housing & Construction, p. 6; the Department of Immigration and Ethnic Affairs, p. 23 (Evidence, p. 713); the Australian Customs Service, p. 40; and the Department of the Special Minister of State, p. 3.

35. Submission from the Department of Immigration and Ethnic Affairs, p. 23 (Evidence, p. 713).

applicants are aware of their liability for costs, and to avoid agencies having to defend frivolous, vexatious, etc matters with no realistic prospect of recovering costs, the Committee proposes the following mechanism.

18.54 The Committee recommends that the Administrative Appeals Tribunal be able to award costs against both the Commonwealth and applicants; but that the Tribunal not be able to award costs against an applicant unless: (a) the agency had sought an order at the earliest phase of the proceedings, that is, at the directions hearing/preliminary conference stage; and (b) at such a directions hearing/preliminary conference, the agency satisfies the Tribunal that there is no merit to the applicant's case; and (c) the Tribunal at that directions hearing/preliminary conference decides that the applicant should be exposed to the risk that costs may be awarded against her/him at the conclusion of the Tribunal proceedings. The Committee notes that the decision of the Tribunal at this stage should be whether to expose the applicant to the risk of an award of costs being made against her/him. The decision should not pre-empt the Tribunal's eventual decision whether to award costs.

18.55 Senator Stone dissents from clause (b) of the recommendation contained in paragraph 18.54.

18.56 The Committee also recommends that the Tribunal be empowered to order that applicants lodge security for costs at the earliest (directions hearing/preliminary conference) phase of proceedings. In many cases, this may ensure the early resolution of any question whether the application is frivolous, vexatious, etc.

18.57 The Committee further recommends that if, at this directions hearing/preliminary conference stage, the Administrative Appeals Tribunal finds that the applicant's case is not without merit (ie. that the application is neither

vexatious nor frivolous), there be no possibility of any award of costs being made against the applicant should the application proceed.

18.58 Senator Stone dissents from the recommendation contained in paragraph 18.57.

18.59 The Committee notes the suggestion by the Department of Housing and Construction that the FOI Act should be amended to permit the award of costs against applicants who 'withdraw from AAT proceedings at the "eleventh" hour'.³⁶

18.60 However, in the Committee's view, it will be counter-productive to expose applicants to liability for costs in these circumstances. In the Committee's view, it is preferable to encourage applicants to settle.

18.61 There is no scale of costs applicable to Administrative Appeals Tribunal applications. In awards of costs under its Compensation (Commonwealth Government Employees) Act 1971 jurisdiction, the Tribunal makes reference to the scales of costs applicable in other equivalent courts and tribunals if the parties are unable to agree upon the amounts.³⁷ This practice could apply equally in FOI matters.

36. Submission from the Department of Housing and Construction, p. 6.

37. E.g. for matters heard in Victoria reference is made to the Victorian County Court scale of costs, and for matters in NSW the scale of costs set out in the NSW Workers Compensation Rules have been used.

