APPLICATION OF COSTS IN ADMINISTRATIVE LAW PROCEEDINGS

*Judge Tim Wood**

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Introduction

A consideration of this subject should begin by noting the function of administrative law, its growth and the institutions that administer it. Over the past half century, and in particular, the last quarter of a century, both at federal and state levels in this country and elsewhere in the world, there has been an appreciable growth in the power vested in the executive arm of government. Moreover, over this period the executive's accountability to Parliament for its decisions in accordance with the traditional Westminster model has, for a host of reasons, declined in practice. We have seen the use of prerogative writs – certiori, mandamus and prohibition – used as instruments by courts to ensure that executive/administrative decisions are made in accordance with the law. Equally over this period legislation has conferred upon citizens a host of statutory rights which hitherto they did not enjoy. In order to check the exercise of administrative discretions, a host of administrative tribunals, boards, authorities both public and domestic, were established.

The Commonwealth Administrative Review Committee (The Kerr Committee) recommended in 1971 the establishment of an Administrative Appeals Tribunal. This Tribunal was established at the Commonwealth level in 1975. Moreover, at this time, the approach of the courts in 'reviewing' decisions of the executive or of tribunals was to focus not on the merits of the decision itself, but to ask whether there was a 'jurisdictional error' or an exercise of power 'ultra vires'. In short, courts did not attempt to interfere with the merits of the decision. In *Re Toohey; ex parte Northern Land Council,*[1] the High Court upon full examination of the authorities concluded, by majority, that a prerogative writ may issue to prohibit the exercise of statutory powers for ulterior purposes. However, although courts were prepared to check the unauthorized use of power by public bodies, they did not, in doing so, substitute their own decision. The Kerr Committee recognised these defects and recommended that the Commonwealth Administrative Appeals Tribunal (AAT) should undertake merits review.

In 1978 the *Administrative Law Act 1978* came into force in Victoria. Its purpose was:

> To reform the law relating to the review of administrative decisions …. (in the light of) the greatly increased number of administrative tribunals over the years, and the fact that in many ways the activities of citizens are more likely to be regulated by decisions of administrative tribunals than by decisions of the ordinary courts. However, many of these tribunals have been established without provision for appeals from their decisions, and the only procedure for reviewing a decision is by application for a prerogative writ, usually a writ of certiori.
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> The prerogative writs are writs issued by the Supreme Court as part of the prerogative powers formerly exercised by the Crown. They enable the Court to exercise a supervisory power over inferior courts and other tribunals established by statute. The jurisdiction is not by way of appeal or review. The court is not able to, nor does it, re-hear the matter or substitute its own opinion for that of the inferior court or tribunal. Its control is limited to ensuring that the court or tribunal did not exceed its jurisdiction, and that it observed the law in reaching its decision.[2]

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* *Vice President, Victorian Civil & Administrative Tribunal*

1 (1981) 38 ALR 439.

2 Second Reading Speech, Administrative Law Bill, The Honourable Hadden Storey, Attorney-General.

The purpose of the Act was to enable citizens to seek review of the merits of decisions without recourse to prerogative writ. To have standing a person must be substantially affected by the erroneous decision.

There was obviously little point in providing a procedure for invoking administrative law if the costs of doing so were too great. In an address to an international conference on environmental law in 1989, Toohey J recognized this by stating:

> Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in mitigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a Government instrumentality or wealthy private corporation) with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event it will be a fact that looms large in any consideration to initiate litigation.

This passage expresses the obvious rationale for the various statutory provisions concerning costs and their applicability in administrative tribunals. The report of the Kerr Committee noted that few tribunals were empowered to award costs and those that were rarely did so. It recommended that no general provision should be made in this regard. However, as we know, the Commonwealth AAT does have power to award costs under various enabling enactments. This also applied to the Victorian Administrative Appeals Tribunal and applies to the Victorian Civil & Administrative Tribunal.

Costs Under the Victorian Administrative Appeals Tribunal Act

Section 50 of the *Administrative Appeals Tribunal Act 1984* (Vic) provided:

> **50.** (1) Subject to and in accordance with the regulations, the Tribunal may make such orders (if any) as to costs in respect of a proceeding relating to a decision under a taxing Act as it thinks fit.
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> (2) In relation to any other proceeding, if the Tribunal is of the opinion in a particular case that there are circumstances that justify it in doing so, the Tribunal may make such orders as to costs as the Tribunal thinks just.

In 1991 an amendment was made to subsection (2) by inserting the words 'each party is to bear its own costs but' between the word 'proceeding' and 'each'.[3] Clearly, Parliament took the view that, *prima facie*, parties before the Administrative Appeals Tribunal ought to bear their own costs, unless in particular instances, in the proper exercise of discretion, the Tribunal considered otherwise. The effect of the amendment and its significance was considered by the Court of Appeal of Victoria in November 1998.[4] In that case the Court of Appeal considered four decisions, of which *O'Reilly* was one, involving the Transport Accidents Commission. The Court held that the governing power to award costs lay in s.79(2) of the *Transport Accident Act* though it is useful to note the comment of Tadgell, JA.[5] Once this pre-requisite was met, the discretion to award costs was described by his Honour as being 'a wide discretion'.

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3 Act No. 62 1991 s16(1).

4 *Transport Accident Commission v O'Reilly* [1998] VSCA 106.

5 'The distinction between the power conferred by s.50(1) and s.79(2) on the one hand and that conferred by s.50(2) was, it seems to me, substantial. As I understand it, the power conferred by s.50(2) was exercisable only where the circumstances of a particular case justified the making of a costs order whereas s.50(1) and s.79(2) did not contemplate that the very making of a costs order should be justified by circumstances', *O'Reilly*, supra at 111.

The Awarding of Costs under the VCAT Act

The *Victorian Civil and Administrative Tribunal Act 1998* provides:

> 109. (1) Subject to this Division, each party is to bear their own costs in the proceeding.
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
> (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to ---
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
> (iii) asking for an adjournment as a result of (i) or (ii);
> (iv) causing an adjournment;
> (v) attempting to deceive another party or the Tribunal;
> (vi) vexatiously conducting the proceeding;
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
> (d) the nature and complexity of the proceeding;
> (e) any other matter the Tribunal considers relevant.
> (4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in sub-section (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.
> (5) Before making an order under sub-section (4), the Tribunal must give the representative a reasonable opportunity to be heard.
> (6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.

The effect of 109(1), (2) and (3), for practical purposes, is identical. Each of the grounds specified in paragraphs (a)-(d) is capable of constituting 'circumstances' for the purposes of s.50(2) of the AAT Act. Sub-paragraph (e) of s.109(3) equally would fall within s.50(2).

Following the enactment of the legislation establishing the Victorian Civil and Administrative Tribunal, costs provisions in some enabling acts were repealed, for example, s.58 of the *Freedom of Information Act 1982* and s.58 of the *Planning Appeals Act 1980*, whereas others such as s.79(2) of the *Transport Accident Act 1986*, were preserved. Interestingly, s.58 of the Planning Appeals Act is of similar effect to s.109 of the VCAT Act. However, s.58 of the Freedom of Information Act prevented orders for costs being made against applicants. However, s.109 of the VCAT Act does not contain such a provision.

Circumstances in Which Orders for Costs Can be Made

At common law, courts had no power to make an order for costs.[6] Legislation, be it in the form of the Victorian Supreme Court Act or the County Court Act, provided for such orders. Where courts have a power to award costs, certainly since the decision of the High Court in *Latoudis v Casey* in 1990,[7] successful parties in litigation ought to be awarded their costs and the exercise of discretion to the contrary must be for 'a reason directly connected with

6 *Oshlack v Richmond River Council* (1998) 152 ALR 83, 100, per McHugh.

7 (1990) 170 CLR 534.

the charge or the conduct of the proceedings'[8] or lie in the statute itself. This applies in either summary criminal proceedings or civil proceedings though not in indictable criminal proceedings conducted in superior courts. Factors operating in favour of an unsuccessful party in summary criminal proceedings may be the conduct of the accused in reasonably bringing about the proceeding but 'a successful defendant cannot be deprived of costs because the charge was brought in the public interest or by a public official or because the charge is serious or because the informant acted reasonably in instituting the proceedings'.[9] Thus the principle is a clear one: the exercise of discretion must be based upon factors directly relevant to the conduct of the case or to its merits.

Although in *Latoudis* McHugh J rejected the notion that matters of public interest were capable, of themselves, of constituting a factor operating in favour of an unsuccessful applicant escaping a costs order, the question arose squarely again before the High Court in *Oshlack v Richmond River Council*.[10] Mr Oshlack sought to set aside a planning permit on the ground that some of the land in question was habitat for endangered fauna, in particular the koala. The Land and Environment Court of New South Wales ruled against Mr Oshlack but declined to make an order for costs in favour of the Council. It held that because the litigation was in the nature of public interest, was arguable and resolved significant issues as to the interpretation and future administration of statutory provisions, a proper exercise of discretion was to deny the successful party its costs. The relevant statutory provision as to costs provided:

> (a) costs are in the discretion of the court;
> (b) the court may determine by whom and to what extent costs are to be paid; and
> (c) the court may order costs to be taxed or otherwise ascertained on a party and party basis or on any other basis.

The Court of Appeal in New South Wales unanimously upheld the Council's appeal and followed *Latoudis*, holding that it was not open to the Court to have regard to 'public interest purpose' as a relevant consideration in the exercise of the discretion concerning costs. It followed therefore that the motivation of the unsuccessful claimant was an irrelevant factor. On appeal to the High Court this decision was overturned. The majority of the High Court held:

There is no absolute rule … that in the absence of disentitling conduct, a successful party is to be compensated by the unsuccessful party. Nor is there any rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party.[11]

The majority expressly rejected the argument put by counsel for the Council that it was not in the public interest that they be ordered to meet their costs when successfully defending such claims because it would lessen their ability to meet other demands on the public purse. The Court rejected the broad proposition that public interest considerations of themselves justified no order as to costs but held that the discretion of the trial judge was exercised on proper grounds because His Honour:

- started from the proposition that the successful party was to be awarded costs;
- identified that the rights in question were public as distinct from private rights and in doing so acknowledged that something further was required;

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8 Ibid, 566, per McHugh J.

9 Ibid, 569-580, per McHugh J.

10 (1998) 152 PLR 83. Under environmental legislation in New South Wales the respondent council purported to grant a planning permit notwithstanding that a former impact statement was not obtained.

11 *Latoudis v Casey* (1990) 170 CLR 534, 94 per Gaudron and Gummow JJ.

- emphasised the appellant's desire to ensure obedience to environmental law and to preserve the habitat of the endangered koala; that he had nothing to gain from the litigation; that a significant number of members of the public shared his view; that the preservation of the endangered fauna was in the public interest and finally that the litigation resolved significant issues as to the interpretation and future administration of statutory provisions.[12]

This decision was later considered by the Full Court of the Federal Court in *Friends of Hinchinbrook Society Inc v Minister for the Environment and Others*[13] in which the Court observed that the High Court in *Oshlack* did not decide that the presence of a public interest element in litigation *per se* was sufficient to grant a discretion denying a successful party its costs.[14]

Before the decision in *Oshlack*, Gummow J in *Botany Municipal Council & Others v Secretary Department of the Arts, Sport, The Environment, Tourism and Territories & Others*[15] rejected the applicant's submission that costs ought not to be ordered against them, because their application for judicial review could be characterised as 'public interest litigation'. A number of councils of the municipalities surrounding the Kingsford-Smith Airport sought orders to review the decision of the respondents that the environmental impact study of a proposal for the development and operation of a third runway at that airport met the objects of the *Environment Protection (Impact of Proposals) Act 1974* (Cth). His Honour held that s.43 of the *Federal Court of Australia Act 1976* contained no special categories which controlled a general discretion as to costs. Section 43 of the Act provides that the matter of the award of costs is within the discretion of the Court. As the action had been discontinued by the applicants, Gummow J exercised that discretion to conclude that costs should fall in favour of the successful parties. His Honour referred to the decision of the Supreme Court of the Australian Capital Territory and that of the High Court in *Kent v Cavanagh*[16] and *Johnson v Kent*[17] in which the objectors to the erection of a communications tower on Black Mountain in Canberra sought interlocutory and permanent injunctions against the construction of the tower. Although the applicants did not succeed in obtaining an interlocutory injunction to prevent commencement of the work on the tower, Fox J declined to make an order for costs because:

It is undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at risk of paying costs to the Government if they fail. They find themselves opposed to parties who are not personally at risk as to costs and have available to them almost unlimited public funds. The inhibiting effect of the risk of paying costs is excessive and not in the public interest.[18]

When the action came on for trial, the objectors (who had obtained the fiat of the Attorney-General and were thereby deemed to be acting in the public interest) were largely successful but, in accordance with their previous agreement with the Attorney, did not ask for costs. The defendants appealed to the High Court but in the meantime a power under legislation was exercised to approve the erection of the tower thereby removing the strongest ground

12 Ibid, 96-97. Kirby J went further and indicated that he would have exercised the discretion, had he had it, in the same manner.

13 (1998) 99 LGERA 140.

14 Ibid, 142.

15 (1999) 76 LGRA 213.

16 (1973) 1 ACTR 43.

17 (1975) 132 CLR 164.

18 *Kent v Cavanagh* (1973) 1 ACTR 43, 55.

available to the objectors in resisting the development. The High Court dismissed both the appeal and the cross appeal with costs. It is to be appreciated that this was a case in which the objectors aligned themselves with the Government. The Government subsequently by order in council authorized the development. That being so, it was not required to argue its appeal. The cross appeal was argued and dismissed with costs.

On the other hand, in *Australian Federation of Consumer Organisations Inc. v Tobacco Institute of Australia*,[19] Morling J ordered the respondent to pay the applicant's cost on an indemnity basis because such costs were incurred in the public interest. Morling J stated: 'I do not think it would be in the public interest for a litigant in the position of the applicant to be heavily out of pocket in consequence of the public spirited action it has taken'.[20]

These authorities raise the issue as to the applicability of orders for costs against persons who bring applications of a public interest nature. Professor Campbell[21] has observed:

> The deterrent effect of an inability to recover costs of litigating, and in particular legal fees, against governmental defendants and respondents was expressly recognised by the United States Congress when in 1980 it enacted the Equal Access to Justice Act, finding
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> …that certain individuals, partnerships, corporations and labour and other organisations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
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> The Congress provided, *inter alia*, that in any civil action brought by or against the United States or any agency or any official of the United States acting in an official capacity, costs (including fees and expenses) should, as a matter of course, be awarded to a prevailing party other than the United States subject to certain exceptions.
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> The details of the United States legislation, which is predicated on prior law on award of costs which differs in some important respects from that applying in England and Australia, need not detain us here. What is more important is the policy which underpins it. The mischiefs the legislation was designed to remedy, and the benefits it was intended to confer, were explained in the report of the House of Representatives' Committee on the Judiciary on the Bill for the Act. The Committee observed:
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> > While the influence of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has decreased. Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views.…This kind of truncated justice undermines the integrity of the decision-making process.
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> The Bill, the Committee went on to say
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> > …rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and reformulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of law.…The Bill thus recognises that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.
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> The practices which English and Australian courts have developed in relation to the award of costs against members of tribunals and other public officers who are respondents to successful

19 (1991) 100 ALR 568.
20 Ibid, 571.
21 'Award of Costs on Applications for Judicial Review', (1993) 10 *SLR* 20.

applications for judicial review seem to take no account of the considerations mentioned by the United States congressional committee.'

Conclusion

The question is therefore posed – whether public interest litigation by reason of its nature is capable of constituting justifiable grounds for VCAT exercising its discretion pursuant to s109(3) in favour of a successful applicant. *Prima facie* costs are not awarded. The test in s109(3) is in stringent terms. Hence only if satisfied that it is fair to do so may the Tribunal exercise its discretion contrary to the *prima facie* position. Moreover, the discretion is somewhat curtailed certainly insofar as sub-paragraphs (a) and (b) are concerned. This probably applies also to sub-paragraph (c) because the thrust of that requirement is that the case has no tenable basis or at best is something short of hopeless. The scope exists for such an order based upon public interest insofar as paragraph (d) and (e) are concerned. However sub-paragraph (e), which refers to 'any other matter the Tribunal considers relevant' must be read in the context of the other criteria in s109(3). It has been held by the Tribunal that disputes *inter partes* (for example in the Retail Tenancies List[22]) of their very nature may justify the making of a costs order in favour of the successful party. In my respectful opinion there is much to be said in favour of this distinction. However, as His Honour Judge Davey pointed out in *Stellridge*,[23] categories cannot be created in the sense of those types of case likely to attract costs orders. To do so would be to reverse the prima facie position. It follows that a decision to award costs under s109 can only be exercised on factors relevant to the conduct and the nature of the case itself, and only to the extent that fairness requires a party be granted costs. There is considerable merit in the observations of Morling J in the Tobacco Industry case referred to above. Public interest litigation should be capable of supporting costs orders in favour of successful applicants.

22 *Re Maltall and Bevondale Pty Ltd Mcnamara DP* 10 November 1998 and *Re Stellridge Pty Ltd and Handbags International Pty Ltd* [1999] VCAT RT8.

23 Supra.