AWARD OF COSTS ON APPLICATIONS FOR JUDICIAL REVIEW

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Introduction

In civil litigation the judicial discretion to award costs as between party and party[1] is normally exercised in favour of the successful party. The discretion should not, it has been said, be exercised against the victor "except for some reason connected with the case".[2] Circumstances which have been held to justify departure from the general rule include the fact that the successful defendant brought the litigation upon himself or led the plaintiff to believe that he had a good cause of action.[3]

The main reason why a defendant will normally be ordered to pay the successful plaintiff's costs is that it was the defendant's wrongdoing which made it necessary for the plaintiff to litigate to vindicate his rights and obtain redress. Similarly an unsuccessful plaintiff will normally be ordered to pay the defendant's costs for the reason that it was the plaintiff's action which made it necessary for him to incur expense in defending the suit.

An award of costs is intended only to indemnify a party for reasonable expenses incurred by him in litigating. A liability to pay costs cannot be "imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them".[4] The gravity of the wrong done by the defendant, the worthiness of the plaintiff's claim, and the predictability of the outcome have little or no relevance to the imposition of a liability to pay costs or the extent of that liability.[5]

Costs may be awarded in applications for supervisory judicial review whether they be applications for prerogative writs or like orders, or for injunctions or declarations. Respondents to such applications usually are or include public officers or agencies. For example, in an application for certiorari or like order to quash the determination of a tribunal to cancel

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[1] The discretion is conferred by Judiciary Act 1903 (Cth.), ss 26 and 27 (High Court); Federal Court of Australia Act 1976 (Cth.), s. 43; Supreme Court Act, 1970 (N.S.W.), s. 76; Supreme Court Act, 1867 (Qld.), s. 58; Supreme Court Act, 1935-1975 (S.A.), s. 40; Supreme Court Civil Procedure Act, 1932 (Tas.), ss. 12 and 13; Supreme Court Act, 1958 (Vic.), s 32 (1); Supreme Court Act, 1975-1979 (W.A.), s. 37.

[2] *Donald Campbell & Co. Ltd.* v. *Pollak* [1927] A.C. 732 at 812.

[3] See P. G. Nash, *Civil Procedure* (1976) at 364-71, and *Schaftenaar* v. *Samuels* (1975) 11 S.A.S.R. 266.

[4] *Harold* v. *Smith* (1860) 5 H. & N. 381 at 385. See also *Clark & Chapman* v. *Hart* (1858) 6 H.L.C. 633 at 667; *R.* v. *Highgate Justices; Ex parte Petrou* [1954] 1 W.L.R. 485.

[5] *Cooper* v. *Whittingham* (1880) 15 Ch. D. 501.

the applicant's licence, the tribunal or its members will necessarily be the principal respondents.[6] The person, if any, who initiated the proceedings before the tribunal and who has an interest in defending the tribunal's decision will appear as a co-respondent. He may be a public officer, for example a police officer or inspector who prosecuted in a court of summary jurisdiction.[7] Similarly if the applicant for review seeks mandamus or a like order to compel a licensing authority to hear and determine his application for a licence according to law, a public officer who appeared before the authority to object to the grant of a licence to the applicant may be joined as a co-respondent.[8]

There is no rule of law which forbids the award of costs against public officers and agencies appearing as respondents to successful applications for judicial review.[9] Nor is there any rule which precludes the award of costs in favour of such officers and agencies, even when their costs have been borne by another agency.[10] Nevertheless the courts have, in exercising their discretion to award costs in proceedings for judicial review, applied special principles. These work to the advantage of public respondents and to the disadvantage of applicants for review. It is with these special principles that this article is concerned.

Award of Costs Against Tribunals

There is a convention that when an application is made for review of decisions or other action of courts and of tribunals invested with adjudicatory functions, the respondent court or tribunal (or its members if they are the appropriate respondents[11]) should not actively oppose the application but should merely admit service of process and submit to whatever order the reviewing court thinks it proper to make.[12] Some courts of law have suggested that it is not improper for a tribunal to mount an active defence to proceedings when its jurisdiction is challenged.[13] But it is

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[6] On how respondent tribunals should be named see *Horne* v. *Locke* [1978] 2 N.S.W.L.R. 88 at 90-1; *R.* v. *Small Claims Tribunal; Ex parte Escor (No. 2)* [1979] V.R. 635 at 636-7.

[7] *Ex parte Davis* (1860) 2 Legge 1305; *Ex parte Blacke* (1901) 18 W.N. (N.S.W.) 166 at 230; *R.* v. *Drake-Brockman; Ex parte National Oil Pty. Ltd.* (1943) 68 C.L.R. 51 at 57-58, 61, 64.

[8] See *Cook* v. *Head* [1976] 1 N.S.W.L.R. 176.

[9] But see Magistrates' Courts Act, 1971 (Vic.), s. 101 which prohibits awards of costs against magistrates on orders for review.

[10] *Ex parte Slack* (1884) 6 A.L.T. 23. A party who has been represented by Crown counsel or a lawyer in government service is entitled to be indemnified for the reasonable costs of that representation even though he is not under any liability to pay for those services: *The "Bengairn"* (1916) 12 Tas. L.R. 26; *Lenthall* v. *Hillson* [1933] S.A.S.R. 31; *Nolan* v. *George; Ex parte George* [1959] Qd. R. 315; *Whitbred* v. *Velliaris* [1969] S.A.S.R. 291; *Ex parte W.A. Grubb Pty. Ltd.; Re Johnson* (1949) 66 W.N. (N.S.W.) 224; *Blackall* v. *Trotter (No. 1)* [1969] V.R. 939; *McCallum* v. *Ifield* [1969] 2 N.S.W.R. 329; *Cook* v. *Head* [1976] 1 N.S.W.L.R. 176 at 182, 190; *Inglis* v. *Moore (No. 2)* (1979) 25 A.L.R. 453.

[11] *Supra* n. 6.

[12] *Re Canada Labour Relations Board and Transair Ltd.* (1976) 67 D.L.R. (3d) 421; *Re The Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 C.L.R. at 35; *Re City of Dartmouth* (1976) 17 N.S.R. (2d) 425 at 440. The convention is discussed and criticised in Enid Campbell, "Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review" (1982) 56 *A.L.J.* 293.

[13] *International Association of Machinists* v. *Genaire Ltd.* (1958) 18 D.L.R. (2d) 588 at 589; *Labour Relations Board (N.T.)* v. *Eastern Bakeries* (1960) 26 D.L.R. (2d) 332 at 336; *Central Broadcasting Co. Ltd.* v. *Canada L.R.B.* (1976) 67 D.L.R. (3d) 538.

generally considered improper for a tribunal to offer resistance to the application when it is made on the ground that the tribunal has violated its duty to accord natural justice.[14]

The convention described above is enforced through exercise of the judicial discretion to award costs. If the application for judicial review succeeds, costs will not, as a rule, be awarded against the respondent tribunal or its members, if it has done no more than accept service of process and has submitted to the court's order.[15] (I say, as a rule, because there are circumstances in which, despite the fact that the tribunal has not actively opposed the application for review, the successful applicant will be considered entitled to an order for costs. These circumstances will be explained presently.) If, on the other hand, the tribunal has opposed the application, and the application succeeds, the reviewing court may penalise the tribunal for its opposition by ordering it to indemnify the applicant for his costs.[16] Furthermore, even if the application for review fails, the tribunal may be penalised for its opposition to the proceedings by the rejection of its application for an order for costs against the applicant for review.[17]

Notwithstanding that the respondent tribunal has not opposed the successful application for review it may be ordered to pay the applicant's costs if the reviewing court finds it guilty of serious misconduct, corruption, gross ignorance or perversity.[18] Costs have been awarded against tribunals which have assumed a jurisdiction they clearly do not possess[19] or which have knowingly and wilfully disregarded relevant legislation or binding precedents which have been brought to their attention.[20] In a Canadian case costs were awarded against a tribunal because of its excessive delay in making a return to an order nisi for certiorari.[21] In a New South Wales case

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[14] *Supra* n. 12:

[15] *R.* v. *Cumberland JJ.*; *R.* v. *Lancashire JJ.* (1848) 5 Dow. & L. 430; *R.* v. *Surrey JJ.* (1850) 14 Q.B. 684; 117 E.R. 264; *R.* v. *Birmingham Union Guardians* (1874) 44 L.J. M.C. 48; *R.* v. *Liverpool Justices; Ex parte Roberts* [1960] 1 W.L.R. 585; *R.* v. *Hastings Licensing JJ.; Ex parte John Lovibond & Sons* [1968] 1 W.L.R. 735 at 738; *Re Bastian* (1922) 24 W.A.L.R. 119; *Charlton* v. *Members of Teachers Tribunal* [1981] V.R. 831 at 855.

[16] *R.* v. *Kingston Upon Hull Rent Tribunal; Ex parte Black* [1949] 1 All E.R. 260; *R.* v. *Llanidloes Licensing JJ.; Ex parte Davies* [1957] 1 W.L.R. 809n; *R.* v. *Wilson; Ex parte Ferret* (1860) 1 Q.S.C.R. 12; *R.* v. *Electoral Justices of Toombul* (1894) 6 Q.L.J. 88; *Ex parte Biggins* (1906) 6 S.R. (N.S.W.) 493; *National Clothing Manufacturing Co. Ltd.* v. *Court of Arbitration & Perth (W.A.) Amalgamated Tailors Union* (1911) 13 W.A.L.R. 114; *Ex parte Coorey* (1944) 45 S.R. (N.S.W.) 287; *R.* v. *Railway Appeal Board; Ex parte Dunning* [1960] Qd. R. 172; *R.* v. *Will; Ex parte Visona* [1960] Qd. R. 123; *Re Giannone's Appeal* (1961) 35 W.W.R. 320; *R.* v. *Ontario L.R.B.; Ex parte Hannigan* [1967] 2 O.R. 469 at 479; *R.* v. *Small Claims Tribunal; Ex parte Escor (No. 1)* [1979] V.R. 503; *R.* v. *Levine; Ex parte de Jong* [1981] V.R. 131.

[17] *R.* v. *Marlow (Bucks.) JJ.; Ex parte Schiller* [1957] 2 All E.R. 783 at 785.

[18] *Ex parte Blume; Re Osborn* (1958) 58 S.R. (N.S.W.) 334; see also *R.* v. *Willesden JJ.; Ex parte Utley* [1948] 1 K.B. 397; *R.* v. *Paddington South Rent Tribunal; Ex parte Millard* [1955] 1 All E.R. 691; *R.* v. *Goodall* (1874) L.R. 9 Q.B. 557; *Ex parte Alexander* (1886) 8 A.L.T. 43; *R.* v. *Bailes; Ex parte Pickup* (1884) 6 A.L.T. 29; *R.* v. *Tranter* (1868) 7 S.C.R. (L) (N.S.W.) 213; *Ex parte Cox* (1896) 12 W.N. (N.S.W.) 172.

[19] *Ex parte Britt* (1897) 14 W.N. (N.S.W.) 7; *Ex parte Liddiard* (1900) 16 W.N. (N.S.W.) 151; *Houlahan* v. *Tully; Ex parte Tully* [1915] Q.S.R. 74; *Uppman* v. *Uppman; Ex parte Uppman* [1961] Q.W.N. 27.

[20] *R.* v. *Smith* (1894) 10 W.N. (N.S.W.) 171; *Ex parte Smith, Sydney Morning Herald* 28 July, 1896; *R.* v. *Coventry Rent Tribunal; Ex parte Whitcombe*, 1 December 1948 — noted in 11 *Halsbury's Laws of England* (4th ed.) at 824.

[21] *Creamette Co. of Canada Ltd.* v. *Retail Store Employees Union* (1956) 4 D.L.R. (2d) 78 at 84.

costs were awarded against a council which did not so much as appear to explain why it had failed to perform its statutory duty.[22]

There have been occasions on which costs have been awarded against tribunals guilty of flagrant denials of natural justice.[23] But it is clear that breach of a duty to accord natural justice is not by itself a ground for awarding costs against the delinquent respondent.[24] Similarly tribunals which have not actively opposed the review proceedings will not be ordered to pay costs if they have made honest errors of law, unless the error is so serious as to amount to gross ignorance.[25]

If mandamus or like order is sought against a tribunal to compel it to perform its statutory duty, for example to compel exercise of a jurisdiction improperly declined, and the tribunal then proceeds to perform its duty, then notwithstanding that the writ is eventually refused because of the respondent's compliance, the respondent tribunal may be ordered to pay the applicant's costs.[26]

It is possible that although costs are not awarded against the respondent tribunal or its members, they will be awarded against a co-respondent — a person or body who has opposed the applicant in the proceedings before the tribunal — or if an Attorney-General has intervened to defend the tribunal's actions and has been joined as a co-respondent, against him. But there could be cases in which the only respondent is the tribunal. If, despite his success on the merits, no order for costs is made in the applicant's favour, he may well consider himself to have been unfairly treated. Why, he may ask, should I be left to bear the costs of litigation which it was necessary for me to bring to secure my entitlements, to correct errors not of my making, or to enforce the public right? And why should the judicial discretion to award costs be used to enforce a convention about the proper role of tribunals in the defence of applications for judicial review?

Some judges have begun to question the propriety of not allowing a successful applicant for review his costs merely because the respondent happens to be a tribunal which has not actively opposed the application and has not been guilty of serious misconduct. In *Carr* v. *Werry*[27] in 1979, Lee, J. suggested that the reviewing court should have power to award costs against the Crown, to be paid out of a public fund similar to an appeal costs

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[22] *Attorney-General* v. *Peak Hill Municipal Council* (1912) 1 L.G.R. 76.

[23] *Re Starr* (1896) 12 W.N. (N.S.W.) 172; *West* v. *O'Shea* (1875) 4 Q.S.R. 101; *R.* v. *Meyer* (1875) 1 Q.B.D. 173; *R.* v. *Smith* (1894) 10 W.N. (N.S.W.) 171; *R.* v. *Licensing JJ. of Mackay; Ex parte Ferris* [1904] Q.S.R. 223; *McKeering* v. *McIlroy; Ex parte McIlroy* [1915] Q.S.R. 85; *Ex parte Taylor; Re Butler* (1924) 41 W.N. (N.S.W.) 81; *R.* v. *Will; Ex parte Visona* [1960] Qd. R. 123.

[24] *Ex parte Warren* (1906) 23 W.N. (N.S.W.) 149; *Ex parte McQuellin* (1929) 29 S.R. (N.S.W.) 346; *Peppin* v. *R. Grayson & Co. Ltd.* [1910] Q.S.R. 383; *Ex parte Blume; Re Osborn* (1958) 58 S.R. (N.S.W.) 334; *Carr* v. *Werry* [1979] 1 N.S.W.L.R. 144; *Cummins* v. *Mackenzie* [1979] 2 N.S.W.L.R. 803.

[25] *R.* v. *Bailes; Ex parte Pickup* (1884) 6 A.L.T. 29; *Ex parte Alexander* (1886) 8 A.L.T. 43; *Ex parte Vincent* (1900) 16 W.N. (N.S.W.) 215; *R.* v. *Licences Reduction Board; Ex parte Miller* [1909] V.L.R. 327; *Ex parte Herman; Re Mathieson* (1961) 78 W.N. (N.S.W.) 6; *Willesee* v. *Willesee* [1974] 2 N.S.W.L.R. 275; *Sankey* v. *Whitlam* [1977] 1 N.S.W.L.R. 333; 29 F.L.R. 346.

[26] *Ex parte Howard Smith & Sons* (1902) 2 S.R. (N.S.W.) 376; *R.* v. *Gold Coast City Council; Ex parte Raysun Pty. Ltd.* [1971] Q.W.N. 13; 26 L.G.R.A. 237.

[27] [1979] 1 N.S.W.L.R. 144.

fund. (As will be explained later existing Australian legislation enabling an unsuccessful respondent to an appeal or an application for judicial review to obtain indemnification for his own costs and those he has been ordered to pay to his opponent, is ill designed to deal with the kind of cases being considered here.) Lee, J.'s suggestion was endorsed by Sheppard, J. in *Cummins* v. *MacKenzie*.[28] In that case an application had been made to the Supreme Court of New South Wales for an order to quash an order of a Court of Petty Sessions made on appeal against a decision of the Commissioner of Transport. The Commissioner had cancelled the applicant's provisional driving licence and his decision was affirmed on appeal. Appearances to the application for review were entered by both the magistrate and the Commissioner. The magistrate's order was quashed on the ground that he had misconceived his functions and denied the applicant natural justice. Sheppard, J. declined to award costs against either of the respondents since neither of them had been guilty of serious misconduct. He had misgivings about this and recommended that the Crown make an *ex gratia* payment to the applicant to cover not merely the costs of the Supreme Court proceedings but also the costs of the appeal to the Court of Petty Sessions.

There can be little doubt that if costs were to be awarded against a statutory tribunal or its members, the liability thus imposed would normally be discharged out of public funds, just as awards of damages against public officers acting in an independent capacity, for example police officers guilty of unlawful arrest, rather than as servants of the Crown are normally met from the public purse. It is worthy of note that, in a recent case before the High Court of Australia in which a writ of prohibition or certiorari was sought against a judge of the Family Court for an alleged excess of jurisdiction,[29] the Attorney-General of the Commonwealth, who appeared as *amicus curiae* to assist the Court in interpretation of a section in the Family Law Act 1975 (Cth.) gave an undertaking that if the application succeeded, the Commonwealth would pay the prosecutor's costs. He submitted that as the respondent judge had not, if he had indeed exceeded his jurisdiction, been seriously at fault, costs should not be awarded against him. But he conceded that if the application for review were to succeed, which it did, it was not fair that the prosecutor should be left to pay his own costs.

The present state of affairs regarding award of costs in successful applications for review of tribunal decisions can hardly be regarded as satisfactory. Whilst it is not reasonable to expect members of tribunals who have acted in good faith to be fixed with personable liability to pay any costs awarded against them, it is just as unreasonable for the successful applicant to be left to bear his own costs or to be dependent on the readiness of governments to authorise *ex gratia* payments to indemnify him for his reasonable costs of litigating.

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[28] [1979] 2 N.S.W.L.R. 803.
[29] *R.* v. *Cook; Ex parte Twigg* (1980) 54 A.L.J.R. 515.

It is also incongruous that whereas legislation exists whereby an unsuccessful respondent to an appeal, or proceedings in the nature of appeal, against a judicial decision may, if the appeal succeeds on a question of law, be indemnified for his costs from a public fund[30] — an appeal costs fund — there is no corresponding comprehensive legislative provision whereby recourse can be had to a public fund to obtain indemnification for costs incurred in litigating to secure the correction or undoing of the legal errors committed by tribunals. For reasons which will be explained later the appeal costs schemes have limited application to proceedings for review in courts of supervisory jurisdiction, and being in the nature of compulsory insurance schemes funded by litigants through payment of court fees, they are not altogether well suited to deal with cases where the principal respondent to the successful "appeal" is a public officer or agency.

Award of Costs Against Other Public Officers

A public officer or agency appearing as a respondent or co-respondent to an application for review may, unless he or it is being proceeded against in a matter involving the exercise of adjudicatory functions, defend the proceedings with as much vigour as any other defendant. Unless he or it is appearing as co-respondent to an application for review of a tribunal's decision or action, costs will usually be awarded according to the principles applied in civil actions.

A public officer who appears as a co-respondent to an application for review of a tribunal's decision or action will so appear either because he initiated the proceedings before the tribunal or because he appeared there as an opponent of the present applicant, for example as an objector to an application for grant or renewal of a licence.[31]

There have been cases in which it has been held that on a successful application for judicial review, costs should not be awarded against a public officer who appears as a co-respondent in either of the capacities described above if he has done all he could do in a right and proper manner in the discharge of his duties;[32] or if the matter before the reviewing court raises a question of statutory interpretation which has never before arisen for judicial determination;[33] or if the need for judicial review was occasioned by the applicant's own actions;[34] or if the error in respect of which judicial review was sought was made by another respondent, uninfluenced by or without prompting by the co-respondent officer;[35] or if

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[30] For examples of legislation which allows orders to be made for payment of costs out of public funds see Costs in Criminal Cases Act, 1967 (N.S.W.); Costs in Criminal Cases Act 1967 (N.Z.); Costs in Criminal Cases Act 1973 (U.K.); Costs in Criminal Cases Act, 1976 (Tas.); Administration of Justice Act 1964 (U.K.), s. 27.

[31] *Supra* n. 7.

[32] *R.* v. *Cox* (1884) 48 J.P. 440; *R.* v. *Harding* (1890) 6 T.L.R. 175.

[33] *R.* v. *Harden* (1854) 23 L.J.Q.B. 127; *R.* v. *Hull & Selby Railway Co.* (1844) 6 Q.B. 70; 115 E.R. 27; *M.L.C. Assurance Co. Ltd.* v. *Minister for Labour and Industry* (1921) 22 S.R. (N.S.W.) 16.

[34] *R.* v. *Burleigh Board of Health* (1859) 1 L.T. 92; *R.* v. *Hendon Justices; Ex parte D.* (1974) 118 *Sol. Jo.* 756.

[35] *R.* v. *Cheshire JJ.* (1848) 5 Dow. & L. 426; *R.* v. *Sheriff of Middlesex* (1843) 5 Q.B. 365; 114 E.R. 1287; *R.* v. *Daly; Ex parte Hansford* (1880) 6 V.L.R. (L) 28; *Ex parte Vincent* (1900) 16 W.N. (N.S.W.) 215; *Ex parte Jones* (1907) 24 W.N. (N.S.W.) 155.

the officer has not actively opposed the relief sought and has not himself been guilty of improper conduct.[36] But there have also been cases in which a respondent who was the informant in the proceedings below has been ordered to pay the costs of the successful applicant for judicial review when the court or tribunal below lacked jurisdiction in the cause.[37]

There are signs that judicial attitudes are beginning to change and that courts these days are much less ready to depart from the general principle that costs should follow the event merely because the respondent or co-respondent to a successful applicant for judicial review is a public officer who is not himself at fault. This change of attitude parallels developments which have taken place in the principles governing the exercise of the discretion reposed by statute in magistrates' courts to award costs against informants, particularly informant police officers.[38]

In *Ex parte Hivis; Re Michaelis,*[39] a case in which a writ of prohibition was issued in respect of a decision of a court of summary jurisdiction, Rogers, J. found, after consulting with other judges of the New South Wales Supreme Court, that there was no rule or practice that, in the exercise of the discretion conferred by s. 117 of the Justices Act, 1902 (N.S.W.), the award of costs against police officers was exceptional. Accordingly he ordered that the officer who appeared as a co-respondent to the application for review, by reason of his status as informant in the proceedings below, pay the costs of the successful applicant for review. It was assumed that the liability thus imposed would be discharged by the State. In *Ex parte Justelius; Re Lucas*[40] costs were awarded against another police officer who was a co-respondent to an application for a writ of prohibition against justices. The New South Wales Court of Appeal noted that in the past the practice had been not to award costs against an officer of the Crown if he had acted reasonably and in good faith. But, having regard to the fact that statutory provision had been made for award of costs against informants in summary proceedings, it queried whether this practice should be maintained.[41] The Queensland Full Court took much the same view in *R.* v. *Stipendiary Magistrate at Townsville; Ex parte Tinsley.*[42] In that case the Court departed from its former practice and on a successful application for a writ of prohibition, awarded costs against the Official Receiver who had instituted the prosecution in the lower court. It did so notwithstanding that the Official Receiver had not actively contributed to the magistrate's error in failing to satisfy himself that the defendant had a prima facie case to answer.

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[36] *R.* v. *Esplin; Ex parte Stewart* (1908) Q.W.N. 1; *Re Bastian* (1922) 24 W.A.L.R. 119.
[37] *Re Carey* (1892) 8 W.N. (N.S.W.) 82; *Ex parte Davoren* (1906) 6 S.R. (N.S.W.) 270.
[38] See *Hamdorf* v. *Riddle* [1971] S.A.S.R. 398 at 402; *Leighton* v. *Samuels* [1972] 2 S.A.S.R. 422; *McEwan* v. *Siely* (1972) 21 F.L.R. 131 at 134-6; *Puddy* v. *Borg* [1973] V.R. 626 at 629; *Walters* v. *Owens* (1973) 21 F.L.R. 138; *Smith* v. *Robinson; Ex parte Robinson* [1980] Qd. R. 372; *Harris* v. *S.* (1976) 18 S.A.S.R. 329; *Schaftenaar* v. *Samuels* (1975) 11 S.A.S.R. 266 at 274-5; *Barton* v. *Berman* [1980] 1 N.S.W.L.R. 63.
[39] (1933) 50 W.N. (N.S.W.) 90 at 92.
[40] [1970] 2 N.S.W.R. 610.
[41] *Id.* 611.
[42] [1970] Q.W.N. 23.

The reasoning in these cases cannot be faulted. If in the tribunal proceedings which are the subject of a successful application for judicial review, costs could have been awarded against a party who appears as a co-respondent to the application for review, irrespective of whether he was personally at fault, there can be no reason why on the application for judicial review, that party should receive any treatment more favourable than that he might receive in the tribunal proceedings. But, by the same token, if there is some statutory provision which protects the co-respondent against liability for costs in the proceedings below, that must have some bearing on the exercise of the discretion to award costs on the application for judicial review. In *Hitchins* v. *Martin*[43] the Western Australian Full Court, overruling *Barbarich* v. *Lee,*[44] held that a statutory provision which immunised officers against liability for matters or things done by them in good faith for the purpose of carrying out the Act had the effect of exempting them from liability to pay costs in respect of unsuccessful prosecutions brought under the Act. Were a conviction secured on the prosecution of such an officer, and the conviction were then to be the subject of a successful application for judicial review, the officer would not, presumably, be ordered to pay the applicant's costs.

There will be many cases in which the tribunal whose actions are the subject of an application for judicial review will have no power whatsoever to make orders for costs as between party and party.[45] On an application for judicial review, the liability of a party to those tribunal proceedings to be ordered by the tribunal to pay his opponent's costs will therefore not arise for consideration. The absence of power in the tribunal to make orders for payment of costs should not, I believe, count against the successful applicant for judicial review.

If, as seems likely, any costs awarded against a public officer who is a respondent to successful application for judicial review will not be paid by him personally but will be met out of public funds, there can be little justification for disallowing a successful applicant for review his claim to costs as between party and party simply because the respondent happens to be a public officer who has acted in good faith in the performance of what he thought to be his duty. One hopes that, in future, courts of supervisory jurisdiction will, in the exercise of their discretion to award costs be more sensitive to the interests of the successful applicant for review.

Award of Costs on Unsuccessful Applications for Judicial Review

Like any civil litigant, a person who invokes a supervisory judicial jurisdiction takes the risk that if he fails in his suit, he may be ordered to

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[43] [1964] W.A.R. 144.

[44] (1957) 59 W.A.L.R. 11. See also *In Re Wedlock* (1899) 20 L.R. (N.S.W.) 353.

[45] No court or tribunal has authority to make orders for costs unless that authority is given to it by statute: *Re Birkman; Ex parte Pickering* (1860) 1 Q.S.C.R. 14; *Garnett* v. *Bradley* (1878) 3 App. Cas. 944 at 962; *The Victorian Phillip-Stephan Photo-Litho Co.* v. *Davies* (1890) 11 L.R. (N.S.W.) (L) 257; *Booker* v. *Gill* (1899) 15 W.N. (N.S.W.) 158; *Service* v. *Flatau* (1900) 16 W.N. (N.S.W.) 248; *R.* v. *Justices of South Brisbane; Ex parte Zagami* (1901) 11 Q.L.J. 81 at 83; *Spicer* v. *Carmody* (1948) 48 S.R. (N.S.W.) 348 at 350; *Barrett* v. *Raynor* [1968] V.R. 386 at 387; *Queensland Fish Board* v. *Bunney; Ex parte Queensland Fish Board* [1979] Qd. R. 301; *R.* v. *Mining Warden; Ex parte Midcoast Lands* [1979] Qd. R. 427.

indemnify his opponent or opponents for their reasonable costs in defending the suit. Costs will not, of course, be awarded against him unless the reviewing court is asked to make an order for costs, and it is always open to respondents to forego their right to seek a favourable exercise of the court's discretion by not requesting that an order for costs be made.

In practice, orders for costs are not sought by respondents who have not actively opposed the application for review. There have been instances in which a respondent who has actively and successfully opposed an application has sought an order for costs against the applicant but has been refused his costs because the reviewing court considered that the case was one in which it was improper for him or it to have resisted the application.[46] But a respondent who has successfully opposed the application, and has properly opposed it, has a reasonable expectation of obtaining an order for costs in his favour, in accordance with the principles ordinarily applied in civil litigation. He is not disentitled to his costs simply because he happens to be a public officer who has not personally borne the expenses of litigating.[47]

In exercising their discretion to award costs to successful respondents to applications for judicial review, the courts have had regard to the fact that applications may be refused on grounds other than ones going to the merits of the applicant's case. The cause may be a good one but the applicant may fail because he lacks the requisite standing to sue.[48] An application for mandamus may be refused because the very making of the application has prompted the respondent to perform the duty sought to be enforced.[49] The remedy sought by the applicant may be refused because an appeal on the merits is pending elsewhere, or because, having regard to changes, or impending changes, in legislation, remedy would be futile. In such cases, the reviewing court may, in its discretion, decline to order that the applicant pay the respondent's costs.[50]

Hitherto courts seem to have taken little notice of the fact that some applications for judicial review are made by private parties, not so much to vindicate their personal interests as to vindicate what they conceive to be the public interest. Relator actions fall squarely into this category. The relator sues, as it were, as the surrogate of the Attorney-General whose fiat he has sought and obtained. Invariably the person or persons seeking the Attorney-General's fiat will have been required to give an undertaking that he or they will assume responsibility for payment of any costs awarded in the suit. The relator's suit may be against a private party, for example a suit for an injunction to restrain a land developer from proceeding with a development of land authorised by a planning permit which is alleged to be

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[46] *R.* v. *Marlow (Bucks.) JJ.; Ex parte Schiller* [1957] 2 All E.R. 783.

[47] *Supra* n. 10.

[48] As in *I.R.C.* v. *National Federation of Self Employed & Small Businesses Ltd.* [1981] 2 All E.R. 93.

[49] *Ex parte Howard Smith & Sons* (1902) 2 S.R. (N.S.W.) 376; *R.* v. *Gold Coast City Council; Ex parte Raysun Pty. Ltd.* [1971] Q.W.N. 13; 26 L.G.R.A. 237.

[50] See *Re Davidson* (1879) 2 S.C.R. (N.S.) (N.S.W.) 303; *R* v. *Hendon JJ.; Ex parte D* (1974) 118 *Sol. Jo.* 756; *Ex parte Corbishley; Re Locke* (1967) 67 S.R. (N.S.W.) 396; *O'Brien* v. *Fagg; Ex parte O'Brien* [1972] Qd. R. 559.

invalid. But it may also be a suit against a government or public authority. But whether against a private or public party, the suit may be one which, whatever the outcome, is serving the interests of the public at large. The issue to be determined may be one affecting the public at large or a section of the public and one which is in urgent need of resolution.[51]

Leaving aside the possibility that the relator may have been assisted in the prosecution of his cause by the grant of publicly funded legal aid, the question needs to be asked whether it is right that the "private Attorney-General" should, if his suit fails, be fixed with what may be a crippling bill of costs for the indemnification of a victor who, possibly, has commanded vastly superior financial resources in defence of the suit, and who, being himself or itself an agency of government, has appeared in order to represent a public interest at variance with that propounded by the relator.

I have in mind litigation typified by that mounted in what has come to be known as the *Black Mountain Tower Case.*

Black Mountain is situated in the A.C.T. It is now surmounted by an imposing tower built primarily for purposes of telecommunications. In 1973 a group of residents of the Territory who were opposed to erection of the tower on environmental grounds decided to contest the legality of the proposed public works. Since it was fairly clear that none of the protestors had the requisite standing to sue in his own right in respect of what was alleged to be a public nuisance and a course of action lacking the requisite statutory authority, application was made by some of them to the Attorney-General for the Commonwealth for his fiat to allow them to sue as relators. The Attorney-General granted the fiat sought, subject to a number of conditions, among them the customary undertaking as to costs.[52]

Subsequently the relators sued in the A.C.T. Supreme Court for injunctions and declarations. They applied, unsuccessfully, for an interlocutory injunction to prevent commencement of work on the tower. On that occasion Fox, J. declined to make an order for costs against them. It was, he thought

> . . . 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. Once, not so long ago, litigation was more a luxury than it now is and for the most part only wealthy people could engage in it.[53]

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[51] See e.g. *Attorney-General (Victoria); Ex rel. Black* v. *The Commonwealth* (1981) 55 A.L.J.R. 155.

[52] The actions did not proceed in the name of the Attorney-General because of the prior gazettal of the Enforcement of Public Interests Ordinance 1973.

[53] *Kent* v. *Cavenagh* (1973) 1 A.C.T.R. 43 at 55.

In his account of the case, Sir Keith Hancock relates that up to this stage the relators had spent nearly $6,000 of a total of some $11,000 raised by public subscription. The $5,000 left was not likely to be sufficient to meet the costs of the trial.

> The total bill would almost certainly exceed $50,000, a sum which we saw no prospect of raising. We therefore asked the Attorney-General to give us his assurance that we should not have to pay the defendants' costs in the event of our losing. He replied that he would be prepared to consider our request after the legal proceedings were completed. That reply did not meet our immediate and urgent need. We therefore decided to break off the action and publish our reasons, unless the Attorney-General showed himself more forthcoming. Although his name had been removed from the documents before the court, he still remained in law not only the originator of the case but in some degree its controller. We felt confident that public opinion would be on our side if we were forced out of court by our contingent liability for unreasonable costs.
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> On 1 August [1973 — almost a month after Fox, J. delivered his judgment] the Attorney-General proposed an arrangement whereby we should not be liable for the costs of the defendants if we lost the case and they should not be liable for costs if we won it. We accepted that arrangement to our own financial disadvantage, as we realised when we became the winners.[54]

At the subsequent trial before Smithers, J. the relators were partially though substantially, successful in their suit for it was found that in erecting the tower against the will of the National Capital Development Commission, the defendants were taking unto themselves functions which, by statute, had been reposed in the Commission. Smithers, J. noted that, under s. 12 of the National Capital Development Commission Acts 1957 (Cth.) the Governor-General had power, in the event of the Minister and the Commission being unable to reach agreement as to the policy which the Commission should follow in relation to a matter, to make an order as to the policy to be adopted by the Commission. But no such order had been made and it was not clear whether one would be made. Smithers, J. also found that the development would constitute a public nuisance. Although the case for issue of an injunction had been established, Smithers, J. made declarations only, with liberty to apply for an injunction at a later stage. In accordance with their previous agreement with the Attorney-General the relators did not ask for costs.[55]

This was not the end of the battle for Black Mountain. In November 1973 the defendants appealed to the High Court of Australia and work on the tower commenced. The relators cross appealed. But between the handing down of judgment in the A.C.T. Supreme Court and the hearing of the appeal and cross appeal, the power conferred by s. 12 of the National

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[54] W. K. Hancock, *The Battle of Black Mountain* (1974) at 26-7.
[55] *Johnson* v. *Kent* (1973) 21 F.L.R. 177.

Capital Development Commission Act 1957 was exercised to approve the erection of the tower, thereby removing the strongest ground available to the relators for resisting the development. In the event — and over nine months after the High Court hearing — both the appeal and the cross-appeal were dismissed with costs.[56] The battle for Black Mountain was lost!

It was undoubtedly a costly battle, especially for the relators and their supporters. Professor Hancock records that by early 1974 the $17,000 which by then had been contributed by the public had been spent and the relators were in debt for about $2,000. "With the concrete-mixers already at work on the summit, we decided we could not launch a new appeal 'to save Black Mountain'. We ourselves, the fourteen litigants, accepted the additional financial risk."[57] According to Professor Hancock, the Attorney-General, shortly before the High Court hearing, offered (without prejudice) the relators "a way out". It was that if they withdrew their cross-appeal, the Commonwealth would withdraw its appeal and pay all the costs so far incurred by the relators. This offer was rejected.[58]

Although the *Black Mountain Case* was in some ways unusual, it does, I think, highlight the difficulties which relators face when they align themselves against the forces of government. Even if they succeed in their action, any costs that are awarded in their favour will certainly not provide them with a complete indemnification for the expenses they have incurred in litigating. If they fail, they are at risk of being ordered to pay the other side's costs, which costs may be very substantial. The court may in the exercise of its discretion, decline to make any order for costs, thus leaving the parties to bear their own costs. Exceptionally it may order that the successful defendants or respondents pay the relators' costs. One circumstance in which a court might be disposed to adopt this last course is where at the time the relator proceedings were instituted, the defendants were clearly guilty of illegality or *ultra vires* action, but where between that time and the hearing or judgment, the illegality or other defect was cured either by the voluntary action of the defendants or by the enactment of corrective legislation.[59]

Judicial discretions to award costs are expressed in sufficiently open ended terms to enable courts to develop special principles regarding the award of costs against unsuccessful relators, having regard to the fact that relators are acting, as it were, as surrogates for the relevant Attorney-General, and not for the vindication of personal rights or public rights in which they have a special interest over and above that of other members of the public. Account must surely be taken of the fact that if the Attorney-General had himself initiated and actively conducted the suit, any costs awarded against him would have been borne by the public purse. Why, it may be asked, should the position be any different when the Attorney-General has authorised others to sue in his name or in his place? The

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[56] *Johnson* v. *Kent* (1975) 132 C.L.R. 164.
[57] W. K. Hancock, *Professing History* (1976) at 125.
[58] *Id.* 125-6.
[59] *Supra* n. 50.

difficulty is that, no matter how sympathetic the judge may be to the claims of the unsuccessful relators to relief from the burden of costs, he cannot provide any relief save by leaving the costs to lie where they fall or, exceptionally, by ordering the other side to pay the relator's costs.

Relators who are unsuccessful respondents to appeals on questions of law may sometimes receive indemnification from appeal costs funds.[60] In New South Wales they may also be granted legal aid such that any costs awarded against them will be met from a public fund. Generally speaking, applicants for legal aid in that State must satisfy a means test, but the Legal Services Commission and its delegates have been authorised to waive the means test when they are "of the opinion that there are special circumstances relating to the property or means of the applicant or otherwise" which justify dispensation from the test.[61] Special circumstances have been defined to include the fact that the applicant for aid is a party to: (i) proceedings relating to environmental matters; (ii) a relator suit; or (iii) a test case.[62]

Indemnification from Appeal Costs Funds

All Australian States, except South Australia, now have legislation establishing appeal costs funds from which respondents to appeals to certain courts of law may, if the appeal succeeds on questions of law, be indemnified, in whole or in part for costs awarded against them and also their own costs. The appeal costs funds are maintained by contributions of litigants who pay court fees. New South Wales led with its Suitors' Fund Act, 1951. Similar Acts were enacted in Victoria and Western Australia in 1964, in Tasmania in 1968 and in Queensland in 1973.[63] Corresponding federal legislation was introduced by the Federal Proceedings (Costs) Act 1981 (Cth.). The legislation

> . . . proceeds on the assumption that the law is known so that if error of law occurs in a court at first instance, or an inferior appellate court, such error may ordinarily be attributed to a fault in the administration of justice rather than of the parties so that the cost of having the error rectified ought not ordinarily to lie on the unsuccessful respondent to the appeal, but to be paid from a fund contributed to by all litigants.[64]

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[60] *Infra.*

[61] Legal Services Commission Act, 1979 (N.S.W.), s. 35(1).

[62] S. 35(3).

[63] Appeal Costs Fund, Act 1964 (Vic.); Suitors' Fund Act, 1964 (W.A.): Appeal Costs Fund Act, 1968 (Tas.); Appeal Costs Fund Act, 1973 (Qld.). In every case the grant of a certificate of indemnity by a court authorised to grant such a certificate is discretionary. On the exercise of the discretion see *Steele* v. *Mirror Newspapers* [1975] 2 N.S.W.L.R. 48 at 51. *Di Battista* v. *Motton* [1971] V.R. 565; *Acquilina* v. *Dairy Farmers Co-operative Milk Co. Ltd. (No. 2)* [1965] N.S.W.R. 772; *Lauchlin* v. *Hartley* [1980] Qd. R. 149; *McLennan* v. *Broome* [1969] V.R. 566 at 573; *Zappulla* v. *Perkins (No. 2)* [1978] Qd. R. 401; *Brisbane C.C.* v. *Ferro Enterprises Pty. Ltd.* [1976] Qd. R. 332 at 335-6; *Richards* v. *Faulls Pty. Ltd.* [1971] W.A.R. 129 at 138.

[64] *Acquilina* v. *Dairy Farmers Co-operative Milk Co. Ltd. (No. 2)* [1965] N.S.W.R. 772 at 773; see also *Gurnett* v. *The Macquarie Stevedoring Co. Pty. Ltd. (No. 2)* (1956) 95 C.L.R. 106 at 113; *Pataky* v. *Utah Construction & Engineering Pty. Ltd.* [1966] 1 N.S.W.R. 689 at 695; *Jansen* v. *Dewhurst* [1969] V.R. 421 at 429-30; *Re Pennington, deceased* [1972] V.R. 869 at 875; *Brisbane City Council* v. *Ferro Enterprises Pty. Ltd.* [1976] Qd. R. 332.

Applications for judicial review in a supervisory jurisdiction are not, strictly speaking, appeals, though they are analogous to appeals on questions of law. The appeal costs schemes are not primarily designed to deal with cases in which a supervisory jurisdiction has been successfully invoked, though some of them have been framed in such a way as to make it possible for unsuccessful respondents to some successful applications for judicial review to obtain certificates entitling them to indemnification for their own costs and the costs they have been ordered to pay on the application for review. Curiously this possibility appears not to have been taken into account by reviewing courts in the exercise of their discretion to award costs.

The principal beneficiaries of the appeal costs schemes are respondents who have opposed appeals in a private capacity. The Crown, in all its capacities, is expressly excluded from participation in the scheme, and under the federal Act, persons sueing or being sued on behalf of the Commonwealth, a State, or the Northern Territory, and authorities of the Commonwealth, a State or Territory. Respondents to successful applications for supervisory judicial review may be public officers or bodies but not Crown agents or servants. They may also include private parties, for example in an application for a writ of prohibition against a small claims tribunal, the party who has moved the tribunal to exercise its jurisdiction.

The State legislation allows for indemnification of unsuccessful respondents in appeals and "proceedings in the nature of an appeal" to designated courts.[65] Proceedings in the nature of an appeal would certainly include appeals by way of case stated, and reservation of special cases on questions of law.[66] Applications for certiorari and prohibition and orders for review have also been regarded as proceedings in the nature of appeal.[67] I see no reason why applications for mandamus, injunctions and declarations should not also be regarded as proceedings in the nature of an appeal if they are, in substance, applications for review of decisions on grounds of legality.

The most substantial limitation on the availability of the appeal costs funds to provide indemnification to unsuccessful respondents to applications for judicial review arises from the fact that a certificate of indemnity may be granted only if the appeal, or the proceeding in the nature of an appeal, is against a decision of one of the bodies specified in the legislation. Under the Federal Proceedings (Costs) Act 1981 the appeal must have been from one of specified courts or an appeal from the Administrative Appeals Tribunal to the Federal Court on a question of law.[68]

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[65] N.S.W.: s. 2; Qld.: s. 4; Tas.: s. 2; Vic.: s. 2; W.A.: s. 3.

[66] *Richards* v. *Faulls Pty. Ltd.* [1971] W.A.R. 129; *Builders Licensing Board* v. *Pride Constructions Pty. Ltd.* [1979] 1 N.S.W.L.R. 607.

[67] *Ex parte Parsons, re Suitors' Fund Act* (1952) 69 W.N. (N.S.W.) 380 (prohibition); *Stacey* v. *Meagher* [1978] Tas. S.R. 56 (motion to set aside an arbitrator's award); *McLennan* v. *McBroom* [1969] V.R. 566 (order for review); *Glynn* v. *Denman and Monk* [1978] V.R. 349 (order for review); *R.* v. *Melbourne Magistrates' Court; Ex parte Hiscock* [1977] V.R. 569 (certiorari).

[68] S. 3(1).

The Queensland,[69] Tasmanian[70] and Victorian[71] legislation requires that the appeal should have been from a court, but the term court has been defined in such a way as to include a number of tribunals which are not part of the ordinary judicial system. Courts include bodies (and in Queensland and Tasmania, persons): (a) from whose decisions there is an appeal or proceeding in the nature of an appeal to a superior court on a question of law, (b) which may state a case for the opinion or determination of a superior court on a question of law, or (c) which they may reserve any question of law in the form of a special case for opinion of a superior court.

That the Victorian legislation was apt to cover successful proceedings in the nature of appeal from decisions of some administrative tribunals was implicitly recognised in *Slapjums* v. *City of Knox (No. 3).*[72] In that case Menhennit, J. held that the legislation did not permit grant of a certificate of indemnity to an unsuccessful respondent to an appeal from a decision of an arbitrator appointed under s. 569AA of the Local Government Act, 1958 (Vic.). His only reason for so holding was that the arbitrator was not a board or other body within the meaning of s. 2 of the Appeal Costs Fund Act, 1964 (Vic.). A board or other body referred to a collective mass or group of persons and not a single individual, as here.[73]

It is conceivable that despite the width of the definitions of courts in the Queensland, Tasmanian and Victorian legislation, an application for judicial review in respect of a decision of a tribunal will not be characterised as a proceeding in the nature of an appeal on a question of law from a court unless the tribunal exhibits some court-like characteristics. For example it may be that at the very least the decision-maker whose decision is successfully challenged on legal grounds must have been a body which is charged with an adjudicatory function and is obliged to act in accordance with the principles of natural justice.

The New South Wales Suitors' Fund Act, 1951 and the Western Australian Suitors' Fund Act 1964 also apply only to appeals from courts to prescribed higher courts. The Workers' Compensation Commission is declared to be court for the purposes of the latter Act.[74] Otherwise the legislation of these two States offers no guidance on what is to be classified as a court. In *Gosford Shire Council* v. *Anthony George Pty. Ltd.*[75] it was held that an appeal to the Land and Valuation Court of New South Wales from a decision of a Board of Subdivision Appeals was not an appeal from a court within the meaning of s. 6 of the New South Wales Act. In so deciding, Hardie, J. applied the same tests which the High Court of Australia has applied in determining what is an exercise of judicial power for the purposes of Chapter III of the Commonwealth of Australia Constitution. He noted that a body is not deemed to be exercising a judicial

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[69] S. 4.
[70] S. 8.
[71] S. 2.
[72] [1978] V.R. 552.
[73] See *Stacey* v. *Meagher* [1978] Tas. S.R. 56.
[74] N.S.W.: s. 6; W.A.: s. 10, but see also s. 12A(2).
[75] (1969) 17 L.G.R.A. 129. See also *Harker* v. *Boon* (1956) A.R. (N.S.W.) 178.

power merely because it is obliged to act judicially, that is in accordance with the principles of natural justice. As the Board in this instance functioned as an arbitral body in the resolution of disputes between local government councils and landowners who sought approval of proposed subdivisions, it was not exercising a truly judicial power.

If courts, for the purposes of the New South Wales and Western Australian Acts, are confined to those persons and bodies exercising judicial power in the strict sense, it would seem to follow that the availability of indemnification under those Acts in respect of costs incurred and payable by unsuccessful respondents in subsequent curial proceedings will not be concluded by the fact that the body whose decision was set aside on appeal, or proceedings in the nature thereof, has been styled by the legislature a court. If, for example, licensing functions have been reposed in a magistrate's court, and there is a large measure of discretion involved in determination of applications for licences, a magistrate might not, in the exercise of the licensing function, be considered to be a court for the purposes of the appeal costs legislation.[76]

One factor which may well dispose superior court towards a restrictive interpretation of the ambit of the appeals costs schemes is that they are in the nature of compulsory insurance schemes funded by those who resort to litigation and pay fees for the "privilege". If indemnification from the funds were to be available to unsuccessful respondents to applications for judicial review of decisions of a wide range of administrative tribunals, the result would be that some of the beneficiaries of the scheme would be persons who had not contributed to the fund by payment of fees in the proceedings in respect of which judicial review was sought. This was one of the considerations which weighed with the Western Australian Law Reform Commission when, in its first report on the State's Suitors Fund Act, presented in 1976, it recommended against an extension of the State scheme along the lines of the schemes operating in Queensland, Tasmania and Victoria.[77] The Commission considered that the schemes operating in those States suffered from an undesirable degree of uncertainty because they applied only to judicial bodies and the criteria for distinguishing between judicial and non-judicial bodies were imprecise. To extend the State scheme to proceedings in the nature of appeal from administrative tribunals would also necessitate the imposition of fees on parties to tribunal proceedings.[78]

It is doubtful whether extension of the appeal costs schemes to encompass successful applications for review of decisions of administrative tribunals would, of itself, provide significant relief to successful applicants for review against the burden of costs they frequently have to bear. At present certificates of indemnity may be granted only upon application by unsuccessful respondents to appeals or proceedings in the nature of appeal;

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[76] See *Cummins* v. *Mackenzie* [1979] 2 N.S.W.L.R. 803. The distinction between courts and tribunals was considered in *Attorney-General* v. *British Broadcasting Tribunal* [1981] A.C. 303.

[77] Para. 19.

[78] Paras. 21-22.

successful appellants have no direct recourse to the appeal costs funds. It is true that the grant of a certificate of indemnity is not dependant on an order for costs having been made against an unsuccessful respondent to an appeal, but if no such order has been made, he cannot be indemnified for more than his own reasonable costs. The only circumstance in which the costs of a successful applicant for judicial review may eventually be borne by an appeal costs fund is where a respondent to the application has been ordered to pay his costs and that respondent has subsequently sought and been granted a certificate of indemnity.

Conclusions

There can be little doubt that considerations which loom large in the minds of prospective litigants when deciding whether or not to litigate are the likely cost to them of litigating relative to the benefits likely to accrue to them if they succeed, and the likelihood that if they do succeed, an order for costs as between party and party, will be made in their favour. If, therefore, a prospective applicant for judicial review of the action of a tribunal cannot be assured that, even if he does succeed, he will be indemnified for his reasonable costs of litigating, he may, despite the justice of his cause, decide not to litigate at all. Having regard to the principles which courts have applied in the past in the exercise of their discretion to award costs on applications for review of the decisions and other actions of tribunals, no such assurance can be given.

The deterrant 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

> . . . that certain individuals, partnerships, corporations, and labor and other organizations 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.

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.

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.[79] The Committee observed:

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[79] Equal Access to Justice Act — Report No. 96-1418 (1980).

> 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.[80]

The Bill, the Committee went on to say

> . . . 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 the law . . . . The bill thus recognizes 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.[81]

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 applications for judicial review seem to take no account of the considerations mentioned by the United States congressional committee. They deviate from the general principle that, in civil litigation, the award of costs should normally follow the event. They rest on an assumption, of questionable validity, that if costs were to be awarded against members of tribunals, those members would be expected to pay those costs out of their own pockets. They make the potential liability of those respondents to indemnify an applicant for judicial review for his reasonable costs of litigating dependant on an assessment of the gravity of their errors and the presence or absence of fault on their part — factors that are not normally considered relevant to the exercise of the discretion to award costs as between party and party. Additionally they are directed towards enforcement of certain judicial notions about the role members of tribunals should play when cited as respondents to applications for review of their actions.

Whether or not one agrees with the idea that members of tribunals whose actions are contested on an application for judicial review should not actively oppose the application,[82] the use of the judicial discretion to award costs as a means of inducing compliance with a policy of this kind is of dubious propriety. It is true that, by discouraging respondent tribunals

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[80] *Id.* 10.
[81] *Ibid.*
[82] This question is considered in Campbell, *op. cit. supra* n. 12.

from active resistance to applications for judicial review, courts are aiding the causes of applicants and perhaps even reducing the costs incurred by them in prosecuting. But this small measure of relief is unlikely to be of much comfort to the applicant who, having succeeded in his application, is then left to bear his entire costs of litigating.

It may be that judicial practices against the award of costs against members of tribunals and other public officers who are respondents to judicial review proceedings are too deeply entrenched to be changed by judicial decision. If that is the case, the remedy for the injustice that these practices must work on many successful applicants for review lies with parliaments. The occasional *ex gratia* payment of a successful applicant's reasonable costs from public funds is clearly not an adequate response. What may be required are statutory schemes akin to the appeal costs fund schemes to which successful applicants for judicial review may have direct recourse. If provision along these lines were to be made, there might even be circumstances in which the grant of some financial assistance to unsuccessful applicants, including unsuccessful relators, would be justified, for example where it was certified that the matter presented for judicial review raised a question of law of public importance and where, in the circumstances of the case, the applications for review was not unreasonable.