Awards of Costs Under the Victorian *Freedom of Information Act 1982*

Introduction

Section 58 of the Victorian *Freedom of Information Act 1982* (the Act) provides as follows:

> (1) Subject to sub-section (2), in any proceedings before the Tribunal arising under this Act the costs incurred by a party shall be borne by that party.
>
> (2) The Tribunal may order that the costs incurred by an applicant in the proceedings shall be borne by the person who made the decision under review.

The effect of s.58 is that costs can never be awarded to a respondent, but the Victorian Administrative Appeals Tribunal has a discretion to award costs to the applicant. This provision is unusual. While some States have costs provisions in relation to appeals against freedom of information decisions,[1] the Victorian provision is not found elsewhere in the same form. The Commonwealth *Freedom of Information Act 1982* contains a different costs provision altogether.[2] The discretion in the Commonwealth Act is only exercisable when the applicant is successful, or substantially successful, in his or her request, and it is further limited by a number of enumerated matters that must be taken into account.[3]

The principles applied in the exercise of the discretion conferred by s.58 of the Act were discussed in the recent case of *Thwaites v Metropolitan Ambulance Service.*[4]

Factual background

Mr Thwaites, the Deputy Leader of the Opposition, made a request under the Act for access to various documents relating to the current contract between the Metropolitan Ambulance Service (the MAS), the other emergency services organisations and Intergraph (the private sector organisation supplying the services).

The MAS originally decided to refuse to process the request under s.25A(5) of the Act on the basis that it was clear from the face of the request that all of the documents sought were exempt in their entirety. This decision was affirmed on internal review, and Mr Thwaites applied to the Tribunal for review. The MAS subsequently chose not to rely on s.25A(5), which meant that the MAS processed the request.

Shortly after it processed the request, the MAS released a number of the documents sought to Mr Thwaites. It released the remainder one week before the hearing which, as it turned out, was scheduled to take place only six months after Mr Thwaites' request was made.

Importantly for present purposes, Mr Thwaites sought an award of costs for expenses incurred prior to the hearing. The purpose of this article is to explore the general principles underlying the exercise of the power to award costs in s.58 of the Act, and to examine the application of those principles in *Thwaites*.

S ction 58 of the Act

The relevant cases establish two different views of the scope of the discretion conferred by s.58(2). The first is the narrow view, as developed in *Re Simons and Victorian Egg Marketing Board (No. 2)* (1986) 1 VAR 112, and extended in the case of *Re Birrell and Department of the Premier and Cabinet (No. 2)* (1986) 1 VAR 230. The second is the broad view. The principles underlying these two views will be considered in turn.

The narrow view — general principles

In *Simons*, the Tribunal narrowly confined the exercise of the discretion conferred by s.58(2). The Tribunal set down the following principles which have governed the application of the section in subsequent cases:

- The general rule in s.58(1) is that each party in proceedings before the Tribunal bears their own costs. This displaces the common law rule that the successful party is entitled to costs.
- The Tribunal has a discretion in s.58(2) to depart from this general rule and award costs to an applicant whether or not the applicant is successful in his or her request.
- The Tribunal may exercise its discretion in s.58(2) where there are 'special circumstances' relating to the conduct of the respondent during the proceedings that justify an award of costs to an applicant.

In *Simons*, the Tribunal considered that 'special circumstances' justifying an award of costs included circumstances where there was clear evidence that a respondent had:

- unreasonably withheld material from the applicant;
- acted in bad faith; or
- acted in some other manner so as to warrant censure.

On the facts of *Simons* there were no such 'special circumstances'. Notwithstanding that the respondent was ultimately unsuccessful at the hearing, the respondent was entitled to go to the hearing and argue its case on exemptions. Consequently no order as to costs was made by the Tribunal.

The narrow view extended

In *Birrell* the Tribunal considered the principles discussed in *Simons* and then held that, on the facts of the case, two additional matters may justify an award of costs. First, the Tribunal held that a discrepancy in litigating power between parties to proceedings may be taken into account by the Tribunal in the exercise of its discretion.

Secondly, the Tribunal held that where the issues raised by an application are of such a novel, complex or important nature that there is a public benefit in having them properly argued at the hearing by legal advisers, the Government should contribute to the costs of the applicant's legal advisers. In *Birrell*, the legal and policy issues 'went to the philosophy underlying our form of Government' (at 243). Moreover, it was the first case to consider the Cabinet documents exemption provided by s.28 of the Act. In these circumstances, '[i]t was of assistance to the Tribunal, the respondent, the public service and the community at large to have the matters properly argued before the Tribunal'. Accordingly, the Tribunal ordered the respondent to contribute $1000 to the applicant's costs.

In subsequent cases, the Tribunal has made it clear that the standard set in *Birrell* is a high one. For example, in *Re Easdown and Director of Public Prosecutions (No. 2)* (1987) 3 VAR 24 the Tribunal held that despite the fact that the case included matters of public importance, the

issues were not unusual for the jurisdiction and therefore no order for costs was made

The broad view — general principles

In *Victorian Administrative Law*[5] Kyrou submits that the *Simons* interpretation of s.58 is too narrow. Kyrou persuasively advances a broader interpretation of s.58 in which s.58(2) is the dominant provision. On this view, the effect of s.58 is simply that the Tribunal cannot award costs against an applicant but has a general discretion to award costs to an applicant if, in all the circumstances, it is appropriate to do so.

This interpretation is supported by the words of s.58(1), which state that s.58(1) is 'subject to sub-section (2)'. Furthermore, a general discretion to award costs would more effectively promote the objects of the Act, as reflected in other provisions of the Act. For example, s.3(2) of the Act states that it is the intention of Parliament that documents be provided promptly and at the lowest reasonable cost, and s.16(1) of the Act refers to documents being available 'promptly and reasonably'. To illustrate the scope of this view, Kyrou states at para 2543/2:

> If an agency grants access to documents at the initial decision stage or at the internal review stage, then the applicant's costs will be relatively modest. If the agency refuses to provide access to the documents and forces the applicant to appeal to the Tribunal and thereby incur legal costs, then, if the agency grants access just prior to the commencement of the Tribunal proceedings or as a result of the Tribunal's decision, it is arguable that Parliament's intention is that the agency should compensate the applicant for his or her legal costs.

It must be noted that the broad view was expressly rejected by the Tribunal in *Re Bankers Trust Australia Pty Ltd and Ministry of Transport (No. 2)* (1989) 3 VAR 33. In that case, the Tribunal considered that the *Simons* interpretation of s.58 was not inconsistent with s.3(2) of the Act. It then simply stated that (at 48):

> Section 58(2) logically and literally calls for an exercise of discretion in circumstances other than those which call for the application of s.58(1): ie. special circumstances.

It is submitted that, while the Tribunal rejected the broad view of s.58 based on ss.3 and 16 of the Act, its reasoning was not altogether convincing. The Tribunal did not adequately respond to the persuasive arguments based on ss.3 and 16 of the Act, but merely restated the principles applied in previous decisions of the Tribunal based on *Simons*. If one considers the provisions of ss.3 and 16, it is difficult to see why the exercise of the discretion in s.58(2) 'logically and literally' requires 'special circumstances'. It is not necessarily clear on the face of the Act that the exercise of the discretion should be limited to 'special circumstances' only. A more purposive approach would favour the broad view of the discretion conferred by s.58(2).

Issues in *Thwaites*

There were three primary issues in *Thwaites*:

> Was the discretion conferred by s.58(2) governed by the narrow or the broad view?
>
> Did the relevant principles extend to cover pre-hearing costs?
>
> If the principles of the narrow view applied, were there any 'special circumstances' justifying an award of costs on the facts?

Mr Thwaites' submissions

Narrow view or broad view?

Counsel for Mr Thwaites did not raise the question of whether the broad view ought to be reconsidered by the Tribunal. Instead, counsel proceeded on the assumption that the discretion conferred by s.58(2) was governed by the principles of the narrow view. That is, that the restrictive 'special circumstances' test applied.

Did the narrow view extend to cover pre-h aring costs?

The cases in which costs awards had previously been made by the Tribunal were to compensate applicants for expenses incurred at hearings due to the interruption and extension of the hearing.[6] The problem for Mr Thwaites was that the documents were released one week prior to the hearing, and thus he had only incurred pre-hearing expenses. Counsel for Mr Thwaites submitted that the Tribunal should extend the operation of s.58 of the Act to cover pre-hearing costs on the ground that the release of the documents came too late to prevent Mr Thwaites from incurring the cost and inconvenience of preparing for the scheduled hearing.

Were there 'special circumstances' justifying an award of costs?

On the basis that s.58 entitled Mr Thwaites to seek pre-hearing costs, counsel for Mr Thwaites pointed to the following factors which were submitted to have constituted 'special circumstances' that justified an award of costs:

- The history of the proceedings showed that the MAS had unreasonably withheld the documents.
- Mr Thwaites had made an earlier request to the MAS for documents relating to the (now superseded) contract between the MAS and Intergraph. The MAS had released a number of these documents to Mr Thwaites. It was submitted that these documents released pursuant to the earlier request fell into the same category of documents as the documents the subject of the second request. Accordingly, it was submitted, the documents the subject of the second request should have been released as a mere formality and, therefore, it was unreasonable for the MAS to withhold the documents.
- Other conduct of the MAS warranted censure. This conduct included: that there was a delay of six months between the initial request and the eventual release of the documents; that it took the MAS more than two months from the date of the request to concede that its defence under s.25A(5) of the Act was untenable; that the MAS had delayed the proceedings by originally submitting an insufficient statement pursuant to s.36 of the *Administrative Appeals Tribunal Act 1984*; that the MAS had delayed the notification of the third parties which were ultimately joined in the proceedings; and finally, that the MAS had not given any advance notice of the eventual release of the documents.

Further, counsel for Mr Thwaites submitted that he was entitled to an award of costs on the basis of the decision in *Birrell*. This was because, as in *Birrell*, the application related to a matter of public importance, and furthermore Mr Thwaites was motivated not by self-interest, but by the interests of a wider constituency.

Th MAS's submission

Narrow view or broad view?

As this issue was not raised by Mr Thwaites, counsel for the MAS did not have to consider the applicability of the broad view.

Did the narrow view extend to cover pre-hearing costs?

Counsel for the MAS submitted that if the Tribunal awarded costs in the circumstances it would be extending the operation of s.58 of the Act. The costs awards previously made by the Tribunal all related to costs incurred at a hearing before the Tribunal. Counsel urged the Tribunal not to extend the operation of s.58 to cover pre-hearing costs on the policy ground that the threat of costs would only discourage respondents from releasing documents prior to hearings. Counsel also pointed to the comments of the Tribunal in the case of *Re EL Yencken & Co Pty Ltd and Ministry for Planning and Environment (No. 2)* (1989) 3 VAR 25 where the Tribunal warned that 'censure may discourage the disclosure of documents' (at 32) before or during hearings.

Were there 'special circumstances' justifying an award of costs?

In any event, counsel for the MAS submitted that there were no 'special circumstances' justifying an award of costs. Counsel denied that it had unreasonably withheld the documents or had acted in a way that warranted censure. Counsel also submitted that there are often good reasons why delays occur in considering a request, and therefore that decisions about the release of documents may not be made until shortly before a hearing. In *Re Bankers Trust Australia Pty Ltd and Ministry of Transport (No 2)* (1989) 3 VAR 33 the Tribunal acknowledged that some delays in processing a request are reasonable. In the circumstances the Tribunal stated (at 49) that:

> [t]he variety, nature and complexity of the documents and the need to resort to third parties in the case of a number of them all work to extend reasonable time to the respondent to properly consider and adequately respond to the applicant's request.

Moreover, in *EL Yencken* the Tribunal acknowledged (at 32) that:

> The provision of more documents to the applicant shortly before and during the hearing reflects the closer consideration of issues that is common in litigation and does not warrant censure.

Accordingly counsel for the MAS submitted that, with regard to the volume of material and the number of parties involved, the delay in deciding what position to adopt was far from unreasonable, and simply reflected the need to give due consideration to the issues. Such conduct is a normal aspect of litigation of this type, and does not warrant censure by an award of costs.

In response to Mr Thwaites' analogy with the earlier request for documents, counsel for the MAS drew two distinctions between the earlier request and the second request. Counsel submitted that the earlier request involved only the MAS, while the second request involved other emergency services organisations. Further, the earlier request involved contracts no longer on foot, whilst the second request was in relation to a current contract. Accordingly, counsel submitted that the documents were not of the same category, and consequently that the current request required due consideration in its own right.

Finally, counsel for the MAS denied that the decision in *Birrell* provided any support to Mr Thwaites. Counsel noted that the decision in *Birrell* was based on the benefit of having difficult and important issues argued properly before the Tribunal. It was submitted that, in the absence of a hearing before the Tribunal, the Tribunal was simply not able to determine whether the issues were sufficiently difficult or important to justify an award of costs.

The Tribunal's approach

Narrow view or broad view?

The Tribunal reasserted that the discretion conferred by s.58(2) was governed by the narrow view.

Did the narrow view extend to cover pre-hearing costs?

The Tribunal did not state that Mr Thwaites was precluded from an award of costs for pre-hearing expenses. Accordingly, the Tribunal did not rule out an extension of the operation of s.58 to cover pre-hearing costs.

Were there 'special circumstances' justifying an award of costs?

The Tribunal held that none of the factors raised by Mr Thwaites constituted 'special circumstances' that justified an award of costs. The Tribunal held that they amounted to no more than the fact that Mr Thwaites had been successful in the proceedings, and were simply normal aspects of litigation of this sort. For example, with regard to the alleged delay by the MAS, the Tribunal stated that 'six months is not an extensive period for the resolution of a case such as this'.[7] Accordingly, 'having regard to the amount of work that had to be done and the number of parties involved', the conduct of the MAS was 'far from unreasonable'. Moreover the Tribunal rejected the analogy with the earlier request. The Tribunal noted the significant differences between the earlier request and the second request and concluded that the analogy put forward by counsel for Mr Thwaites was 'somewhat slippery'.

Interestingly, the Tribunal conceded that Mr Thwaites's submission based upon *Birrell* was the most persuasive factor in his submission. However, the Tribunal distinguished the current case from *Birrell* on the ground that in *Birrell* the applicant's interest in a wider constituency was 'allied with other considerations which were seen to justify the making of an order for costs'.[8] Presumably these 'other considerations' were the difficult and important legal and policy issues in *Birrell*. Accordingly, the Tribunal held that Mr Thwaites did not meet the strict requirements of the principles in *Birrell*. However, it must be noted that the Tribunal did not rule out the prospect that an applicant may be able to seek pre-hearing costs on the basis of *Birrell*.

Conclusion

In *Thwaites*, the Tribunal reasserted the narrow view of the discretion conferred by s.58(2). Furthermore, the Tribunal confirmed that the 'special circumstances' test is a very restrictive test, and that costs awards will only be made in exceptional cases.

The case is of significance because the Tribunal did not rule out the prospect of an applicant being awarded pre-hearing costs under s.58 in the future. Accordingly, an agency may be ordered to pay costs even where it releases all of the documents in dispute prior to the hearing.

However, the applicant would still need to pass the restrictive 'special circumstances' test. In this regard, it would be difficult to apply the principles developed in *Birrell* because, in the absence of a hearing before the Tribunal, it is difficult to see how the Tribunal could determine whether the relevant issues raised were sufficiently novel, complex or important. This means that the applicant is unlikely to succeed unless he or she can establish that the agency unreasonably withheld material, acted in bad faith, or acted in some other manner as to warrant censure.

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Referenc s

1. New South Wales: *Freedom of Information Act 1989*, s.56(3)(a)(ii) (the District Court may order that the agency or Minister pay the appellant's costs, but only with respect to determinations that access be given to documents after an earlier delayed determination to withhold access to documents);
   South Australia: *Freedom of Information Act 1991*, s.40(2)(b) (the District Court may make orders for costs 'as the justice of the case may require');
   Queensland: *Freedom of Information Act 1992*, s.95 (each party to a review bears their own costs);
   Western Australia: *Freedom of Information Act 1992*, s.84 (each party bears their own costs, however the Information Commissioner has a discretion to order costs against any party where that party has acted unreasonably).
2. *Freedom of Information Act 1982* (Cth), s.66 (this provision is mirrored in the *Freedom of Information Act 1989* (ACT), s.76).
3. *Freedom of Information Act 1982* (Cth), s.66(2).
4. Unreported, AAT Vic., Fagan P, 11 June 1997.
5. Kyrou, E., *Victorian Administrative Law,* The Law Book Company Ltd, 1985, para. 2543/2.
6. See *Re Birnbauer and Department of Industry Technology and Resources (No. 3)* (1986) 1 VAR 279, and *Re Guide Dog Owners and Friends Association and Commissioner for Corporate Affairs* (1988) 2 VAR 405.
7. Unreported, AAT Vic., Fagan P, 11 June 1997, at 4.
8. Unreported, AAT Vic., Fagan P, 11 June 1997, at 3.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

JUST and DEPARTMENT OF JUSTICE
(No. 95/27499)

D cided: 17 July 1996 by Deputy President Macnamara.

Section 50(4) (public interest override).

Factual background

Victoria Park, which is owned by the Collingwood Council, was the Collingwood Football Club's home ground for many years. In 1991, the Council resolved to sell the land occupied by the Football Club's social club, and agreed to lease the remainder of the property. In 1992, after the composition of the Council had changed, the Council sought a declaration from the Supreme Court that it was not obliged to sell the land or grant the lease. The Victorian Parliament then passed the *Collingwood Land (Victoria) Park Act 1992*, which purported to make the sale and the lease binding obligations on the Council. The Council brought an action in the Supreme Court contending that the Act invalidly diminished the jurisdiction of the Supreme Court. This action was successful. The Parliament then passed the *Victoria Park Land Act 1992*, which also purported to make the sale and the lease binding obligations on the Council. Again the Council brought an action in the Supreme Court contending that the Act was invalid. This time the Council's action failed, and the Council's application for special leave to the High Court was rejected.

Procedural history

Just, who was a Councillor at various times while the above events took place, sought access to a number of documents relating to the sale and lease arrangements. He ultimately narrowed his request to five documents. Those documents were prepared by the State's lawyers and contained arguments that the State either considered addressing or actually addressed to the courts.

The respondent Department claimed that the documents were exempt under s.32. Just accepted that the documents were privileged, but contended that the documents should be released pursuant to the public interest override in s.50(4).

The decision

The Tribunal affirmed the Department's decision.

The reasons for the decision

Section 50(4)

The Tribunal made the following general observations about the scope of the public interest override:

- the 'public interest' refers to the benefit of the community in general rather than the benefit or curiosity of any individual;
- where there has been widespread debate and disquiet as to a particular matter, the public interest may require the release of documents that either confirm the grounds for public disquiet or dispel them;
- the public interest will not require the release of otherwise exempt documents if the public interest sought to be achieved by release can be achieved by other means;
- the public interest will not require the release of otherwise exempt documents unless such release 'is clearly adapted to achieve' the asserted public interest or benefit; and

  only public interest considerations 'of a high order' can justify the release of privileged documents.

In the present case, the Tribunal found that the release of the privi-