

The Duty to Inquire in Tribunal Proceedings

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Abstract

The constitutional position of tribunals in our legal system is quite different to that of the courts. It is well settled that tribunals are administrative rather than judicial in character but the consequences of this distinction have not been fully explored. A key question is when and why tribunals ought to adopt procedures that differ greatly from those used by the courts. This article examines a possible duty to inquire as an example of a different approach or obligation for tribunals. As a general rule courts have no duty to inquire into the issues placed before them. It is the parties who define issues and call relevant evidence. Should the same rule apply in tribunals? The High Court has left open the question of whether the Refugee Review Tribunals may sometimes be subject to a duty to inquire. This article examines tribunal powers, the possible basis for a duty to inquire in administrative proceedings and concludes that the High Court should endorse tentative steps towards a limited duty to inquire in administrative proceedings.

Introduction

The High Court frequently acknowledges the different character of tribunal and judicial proceedings but has provided little guidance on the precise nature or consequences of those differences.¹ Questions of tribunal procedure therefore remain difficult to determine. A duty to inquire is an example. Courts have no such duty because the common law adversarial tradition assigns the tasks of defining issues and gathering evidence to the parties concerned. Administrative tribunals are different. In *Minister for Immigration and Citizenship v SZIAI* ('SZIAI')² the High Court accepted that the Refugee Review Tribunal ('RRT') might sometimes be subject to a duty to inquire but pointedly left the issue open. The Court suggested that common law requirements of procedural fairness would

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¹ See, eg, *Abebe v Commonwealth* (1999) 197 CLR 510, 576 (Gummow and Hayne JJ); *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 [29] (Gleeson CJ, Gaudron and Gummow JJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 201 ALR 437 [56] (Gummow and Heydon JJ, Gleeson CJ agreeing); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 164 [40] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, 17 [40] (Gummow ACJ, Callinan, Heydon and Crennan JJ); *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

² (2009) 259 ALR 429.

not normally support a duty to inquire and might never do so.³ The High Court also left open the question of whether the ground of unreasonableness might support a limited duty to inquire,⁴ but did appear to accept that a failure to inquire might give rise to a jurisdictional error when the RRT had failed to make ‘an obvious inquiry about a critical fact, the existence of which is easily ascertained’.⁵

This article examines possible foundations of a duty to inquire in administrative proceedings and the extent to which the reasoning adopted in *SZIAI* might be useful beyond the RRT. The first parts of the article consider the nature of tribunal proceedings and the powers granted to tribunals relevant to any duty to inquire. The article then examines the grounds of judicial review offered in support of a duty to inquire. It will be argued that the different elements of a possible duty to inquire expounded in *SZIAI* replicate those provided in earlier cases, but that the connection drawn by the High Court to jurisdictional error imposes an undesirable limitation.

II The Nature of Tribunal Proceedings

For much of the 20th century, the English conception of tribunals emphasised and tacitly encouraged the similarities between tribunals and courts.⁶ Although the reforms to Australian administrative law that commenced in the 1970s and saw the establishment of the Administrative Appeals Tribunal (‘AAT’) and other tribunals of wide jurisdiction intended to provide a radical new system, many influential early cases viewed the AAT through a judicial prism. These cases accepted that the AAT exercised administrative rather than judicial power but also reasoned it was ‘constituted upon the judicial model’⁷ and ‘in the ordinary case ... under a duty to act judicially’.⁸ Such cases arguably fostered an adversarial and adjudicative culture.⁹ Professor Mullan has described this as ‘the

³ Ibid [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell J). Ibid [52]-[53], Heydon J delivered a separate decision, finding the tribunal did not need to make more inquiries than it had, which made it unnecessary for his Honour to consider wider issues of any duty to inquire.

⁴ Ibid [20]-[23].

⁵ Ibid [25]. The High Court recently acknowledged that any possible duty of inquiry of the RRT and the basis of such a duty remained unsettled but pointedly left those issues open: *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 603 [23] (French CJ and Kiefel J), 620 [78] (Gummow J). Heydon and Crennan JJ agreed with both judgments: 623 [91]-[92].

⁶ This approach is generally traced to: [United Kingdom] Franks Committee, Parliament of the United Kingdom, *Report of the Committee on Tribunals and Inquiries*, Cmnd 218 (1957) (‘Franks Report’). Carol Harlow and Richard Rawlings argue the Franks Report ‘opened the way for the judicialisation of tribunal procedure’ by favouring a ‘trial-type model’ for tribunals: *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 490; see also Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals’ (2005) 25 *Legal Studies* 462, 470-1. Some elements of the Franks Report were clearly rejected when the AAT was established, notably its recommendation against creating a merits review tribunal of general jurisdiction: Commonwealth, *Report of the Commonwealth Administrative Review Committee* (Parl Paper No 114/1971) (‘Kerr Report’) [142]-[143].

⁷ *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161 (Brennan J).

⁸ *Sullivan v Department of Transport* (1978) 1 ALD 383, 402-3 (Deane J, Fisher J agreeing).

⁹ Joan Dwyer, ‘Overcoming the Adversarial Bias in Tribunal Procedures’ (1991) 20 *Federal Law Review* 252. The influence of the judicial model and adversarial tradition in Australian tribunals may have been amplified by the appointment of Federal Court judges to head the AAT: *Administrative Appeals Tribunal Act 1975* (Cth) s 7(1). Judges are now appointed to head tribunals

pull of traditional adjudicative models ... which the judges in general are more familiar and comfortable'.¹⁰

The sway of the judicial model may lessen the courts' ability to accept the need to expound or sanction procedural innovations in tribunals. It may also mean that the judicial model and associated features of adjudicative decision-making provide the initial point of reference and guiding star to decide questions about tribunals. Gleeson CJ appeared sympathetic to this approach when he acknowledged that 'fairness in administrative decision-making is not measured by reference to a judicial paradigm' but, he continued, 'judicial procedure ought to be an example of fairness in action, and it is not surprising to find some aspects of that procedure taken up for some administrative purposes'.¹¹

Some judges caution that the subliminal effect of the judicial model may distract attention from particular features of the tribunal at hand.¹² Spigelman CJ explained that lawyers and judges tended to view questions about tribunal procedures through the lens of their curial experience:

by treating judicial decision-making as some kind of paradigm, departures from which have to be explained or even justified by reason of the particular statutory power or decision-making body. In my view this is an incorrect approach. The case law on judicial decision-making is not a starting point ... The statute must be part of the assessment from the outset and not treated as some kind of qualification of a prima facie approach.¹³

An example is *Re Farnaby and Military Rehabilitation Commission*,¹⁴ where the AAT held the question of whether legal privilege applied to its proceedings should not be determined by reference to the adversarial/inquisitorial distinction. The better course was to:

look at the nature of the proceedings ... to see whether they have characteristics sufficiently analogous to court proceedings to compel a conclusion that the proceedings attract legal professional privilege. In this process the nature of the exercise being undertaken will be more important than the procedure by which it is achieved.¹⁵

in four states: *Administrative Decisions Tribunal Act 1997* (NSW) ss 12–14; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 10–11A; *State Administrative Tribunal Act 2004* (WA) ss 108–115; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 175–176.

¹⁰ David Mullan, 'Tribunals Imitating Courts — Foolish Flattery or Sound Policy?' (2005) 28 *Dalhousie Law Journal* 1, 19. See also Paul Craig, *Administrative Law* (Sweet & Maxwell, 6th ed, 2008) 277 where that author states that the adversarial model favoured by the courts 'is the norm for the tribunal system'. Craig argues that new rules for English tribunals should draw from other influences.

¹¹ *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 300 [8].

¹² This caution has a long history: *Local Government Board v Arlidge* [1915] AC 120, 138 (Lord Shaw); *Federal Communications Commission v Pottsville Broadcasting Co* 309 US 134, 143 (1940) (Frankfurter J).

¹³ *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 507 [6]; see also *Port Stephens Council v Sansom* (2007) 156 LGERA 125, 141 [47] (Spigelman CJ, Mason P, Beazley, Giles and Ipp JJA agreeing).

¹⁴ (2008) 47 AAR 11.

¹⁵ *Ibid* 15 [19].

Such cases presume the judicial model is a useful testing ground for principles which might then be transposed to tribunals. This approach is valuable in deciding if substantive principles or specific procedures applicable to courts should extend to tribunals.¹⁶ The judicial model may become a limitation upon tribunals if seen as the only legitimate source of innovation by precluding consideration of procedures which have no counterpart in the curial model, such as the adoption of investigative behaviour by tribunals. That possibility requires consideration of the distinction between the adversarial and inquisitorial paradigms and whether it is useful to understanding the nature of tribunal proceedings.

III The Adversarial/ Inquisitorial Divide

Judicial and tribunal proceedings are often distinguished by reference to the adversarial and inquisitorial paradigms. The Australian Law Reform Commission ('ALRC') noted neither has an exact or simple meaning and that advocates of each frequently argue over 'stereotypical legal models ... often failing to acknowledge the number of variables in play' in both.¹⁷ The ALRC accepted that an adversarial system, in 'very broad terms', encompassed 'the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the case'.¹⁸ The inquisitorial model, by contrast, referred to proceedings in which 'a neutral judicial officer carries out an investigation to discover the facts, the discovery of which will serve some identifiable public purpose'.¹⁹ Gummow and Hayne JJ adopted similar reasoning in *Minister for Immigration and Multicultural Affairs v Wang*,²⁰ when they explained that in adversarial litigation:

The issues of fact and law joined between the parties will be defined by interlocutory processes or by the course of the hearing. They are, therefore, issues which the parties have identified. A review by the Tribunal is a very different kind of process. It is not adversarial; there are no opposing parties; there are no issues joined.²¹

The adversarial/inquisitorial distinction is often criticised as being a crude use of convenient labels²² without clear understanding of their meanings or

¹⁶ See, eg, *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 98–100 [24]–[29] ('VEAL'), where the High Court drew upon the doctrine of public interest immunity devised in the courts to fashion the requirements of procedural fairness in the disclosure to a party of material received in confidence by the RRT.

¹⁷ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 1999) 1.116.

¹⁸ *Ibid* 102 [1.117].

¹⁹ *Ibid* 103 [1.120].

²⁰ (2003) 215 CLR 518.

²¹ *Ibid* 540–1 [71], approved in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 201 [30] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ); see also *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 [29] (Gleeson CJ, Gaudron and Gummow JJ); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 164 [40] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

²² Margaret Allars, 'Fairness, the Judicial Paradigm and Tribunal Procedure' (1991) 13 *Sydney Law Review* 377, 391; see also *Swift v SAS Trustee Corporation* [2010] NSWCA 182 (3 August 2010) [40] where Basten JA said that adversarial 'should not be understood to involve some homogenous

differences.²³ An important issue is whether the two models should be viewed as competing alternatives. Can and should one operate to the exclusion of the other? It is now widely accepted that an extreme version of either model is undesirable and that no country adopts a pure or full version of either.²⁴ Many observers might still believe that courts and tribunals operate according to different criterion for which the adversarial/inquisitorial distinction provides a useful demarcation—but that is not the case. Some judicial proceedings are clearly not adversarial in the commonly understood sense.²⁵ Bedford and Creyke similarly questioned whether the inquisitorial label should be attached to Australian tribunals when they are not normally invested with a hallmark of the inquisitorial system, namely the role of actively collecting and testing evidence to identify the truth of a matter.²⁶ Those authors acknowledged that the inquisitorial label was so widely used it could not easily be cast aside, but they suggested it should have a modified vernacular use in Australia.²⁷

Australian courts have accepted that tribunals are largely, rather than entirely, inquisitorial. In *SZIAI*,²⁸ the High Court concluded that proceedings before the RRT bore many inquisitorial features, but concluded the RRT was not an inquisitor bound to ‘inquire, examine or investigate’ in the full sense. The Court reasoned that ‘applied to the Tribunal “inquisitorial” does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal’s ordinary functions.’²⁹ If tribunals may be constituted generally, but not totally, according to the inquisitorial model, the creation of tribunals with many inquisitorial features does not necessarily import the full panoply of inquisitorial features such as a power or duty to inquire. The existence of such powers or duties may instead depend upon the functions granted to tribunals. Accordingly, the characterisation of tribunals as adversarial or inquisitorial, or their adoption of one approach more than the other, may not itself be helpful in determining whether and why tribunals have a duty to undertake inquiries or other powers or duties normally associated with inquisitorial justice.

The level of adversarial or inquisitorial procedures may also vary within a single forum according to several factors, including the character of the

characterisation of functions, just as the commonly opposed epithets of “adversarial” and “inquisitorial” do not usefully provide a comprehensive description of the field of decision-making’.

²³ See, eg, *South Western Sydney Area Health Service v Edmonds* (2007) 4 DDCR 421 [92]–[96] (McColl JA, Gyles and Tobias JJA agreeing) where the New South Wales Court Appeal examined material of that State’s Workers Compensation Commission, detailing the ‘inquisitorial role’ played by its members and the ‘inherently inquisitorial’ nature of its proceedings. The Court suggested these terms were used without a clear understanding or explanation of their meaning.

²⁴ Australian Law Reform Commission, above n 17.

²⁵ An example is Family Court proceedings involving children, which are not regarded as adversarial disputes inter parties: see *M v M* (1988) 166 CLR 69, 76; *Separate Representative v JHE* (1993) 16 Fam LR 485, 498 (Nicholson CJ and Fogarty J); *Re Lynette* (1999) 25 Fam LR 352, 366 (Nicholson CJ, Kay and Holden JJ); In *Re L (A Minor)* [1997] AC 16, 31 (Lord Nicholls).

²⁶ Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006) 4–9.

²⁷ *Ibid* 11.

²⁸ (2009) 259 ALR 429.

²⁹ *Ibid* [18]. See also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 164 [40] where Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ stated that the proceedings in the RRT were inquisitorial ‘in their *general character*’ (emphasis added).

proceedings,³⁰ or the conduct of the parties.³¹ In *Bienstein and Attorney-General (Cth)*,³² Forgie DP accepted that the many types of proceedings conducted in the Administrative Appeals Tribunal ('AAT') gave it a 'chameleon-like quality and made its role somewhat elusive at times'.³³ Forgie DP suggested that the Federal Court adopted an equally elusive view of the AAT. In some cases it favoured the AAT questioning the evidence instead of simply accepting what was presented by the parties, which implied support for an inquisitorial approach, while other cases favoured a more adversarial approach.³⁴ The differing approaches available to the AAT indicate a single tribunal, particularly one of wide or general jurisdiction, may have a protean character enabling procedural variation depending on the jurisdiction it exercises and the nature of the parties and issues before it. It also means such tribunals are likely to adopt a blend of adversarial and inquisitorial practices, but never the entire version of one model to the exclusion of the other. Forgie DP explained this possibility as follows:

Even when it is suggested that the Tribunal is either an inquisitorial or an adversarial body, neither term can be used in its pure sense. In the case of what are said to be its inquisitorial quality, it must be remembered that the Tribunal's powers are limited to its powers to give directions to the parties, issue summonses and to question witnesses and test the submissions made to it. It may conduct its own researches or draw on the expertise of its members provided it ensures that it gives the parties a reasonable opportunity to address the material that is raised in this way. Unlike truly inquisitorial bodies, though, it does not have investigative powers such as the power to conduct its own searches. In practical terms, it is necessarily limited by budgetary considerations and, if it is of the view that a particular avenue should be explored, is limited to asking the parties to do so and to submit the results of their exploration.³⁵

Such variations in tribunals of general jurisdiction reflect a wider procedural divergence between Australian tribunals. The difference in statutory framework between tribunals and the procedural variation within jurisdictions in larger tribunals confirms there is no single template or model for Australian tribunals.³⁶ If

³⁰ Examples can be taken from the Victorian Civil and Administrative Tribunal (VCAT). Some aspects of VCAT's jurisdiction, such as guardianship, are clearly inquisitorial: *XYZ v State Trustees Ltd* (2006) 25 VAR 402 [43] (Cavanough J). Others, such as liquor licensing, are a hybrid of adversarial and inquisitorial: *Hauer v Lord* (2006) 24 VAR 41 [18]–[19] (Morris J).

³¹ See, eg, the widely cited statement of Brennan J in *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424–5 which noted that proceedings in the AAT to review military compensation decisions 'may sometimes appear to be adversarial when the [respondent] Commission chooses to defend its decision or to test a claimant's case but in substance the review is inquisitorial'. This statement presumes that the conduct of a respondent in appearing and actively defending a decision may change the character of the proceedings. This occurs often in tribunals: see also *Winky Pop Pty Ltd v Hobsons Bay CC* [2008] VCAT 206 (7 February 2008) [25]–[27] (Dwyer DP).

³² [2008] AATA 330 (23 April 2008), affd *Bienstein v Attorney-General* (2009) 51 AAR 223 (Gray J).

³³ *Bienstein v Attorney-General* [2008] AATA 330 (23 April 2008) [30].

³⁴ *Ibid* [31].

³⁵ *Ibid* [32].

³⁶ Robin Creyke, 'Where Do Tribunals Fit into the Australian System of Adjudication?' in Grant Huscroft and Michael Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, 2006) 81–3. This does not mean the courts are different. Some courts such as the Family Court train their judges and other staff and mould their procedures to take account of the high levels of unrepresented applicants who appear before them. Other courts are quite different.

tribunals vary greatly and none adopt a pure version of the inquisitorial model, whatever that may entail, their suitability to adopt traditionally inquisitorial techniques such as a duty to inquire cannot be determined by the degree to which tribunals follow the inquisitorial mode. That yardstick is inevitably a limited one. The adversarial/inquisitorial distinction may, however, be useful to highlight a basic difference between courts and tribunals. Courts are typically more adversarial than tribunals and have more experience of the adversarial paradigm, however imperfectly that concept is used, yet they are granted enormous influence to determine the nature and scope of tribunal powers by exercise of their supervisory jurisdiction over tribunals.³⁷ The greater adversarial focus of the courts does not diminish their authority to determine the law as it applies to tribunals, but it should provide them with a reason to understand an inherent limitation in the value of their own experiences.

IV Active and Passive

Another typology used to define tribunal proceedings and distinguish them from judicial proceedings is that of active and passive decision-making. Courts are normally characterised as passive, while tribunals are more active.³⁸ Professor Cane has used this distinction to contrast two possible models for decision-makers performing a review function, particularly in gathering evidence. He explained the passive model as one in which:

the reviewer plays no part in the collection of evidence. In the presentation of evidence the passive reviewer plays a management role (keeping order, for instance, and regulating the admission of evidence), but does not participate as a presenter.³⁹

By contrast, a reviewer in the active model might:

manage collection of evidence by the parties particularly in order to prevent wastage of time and resources. The active reviewer may go further and participate in collection by requiring parties to gather specified evidence or evidence on specified matters, or even by gathering evidence personally. In the presentation of evidence, the active reviewer may go beyond managing the presentation of evidence to assisting (or 'enabling') the parties (especially the applicant) to present evidence, or—especially where the evidence is presented in writing rather than orally—to marshalling evidence provided by the parties.⁴⁰

The extent to which tribunals adopt these different approaches remains unclear. Similarly, the extent to which the active/passive distinction or other taxonomies might apply to different divisions within a single large tribunal is also unsettled. Cane acknowledges an active approach is generally not adopted by

³⁷ This rarely noticed point is made in Bedford and Creyke, above n 26, 6.

³⁸ See, eg, *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29, 38 [30] (Maxwell P, Neave and Weinberg JJA agreeibg); *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422, 443 [71] (Warren CJ, Maxwell P and Osborn AJA).

³⁹ Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 239.

⁴⁰ *Ibid.*

tribunals in the common law world.⁴¹ Subsequent parts of this article confirm that powers enabling tribunals to gather material, or to encourage or require the parties to do so, generally enable, but do not require, the adoption of an active approach.

Some procedural provisions governing tribunals blur this active/passive distinction. An example is the duty imposed upon some tribunals to explain issues or procedures to the parties before them, including the nature of assertions made in proceedings and the legal implications of those assertions.⁴² Such obligations require tribunals to take reasonable steps to ensure parties understand the proceedings they are involved in. They do not oblige tribunals to assume control of, or responsibility for, the conduct of a party's application, which might require tribunals to adopt a distinctly different role and undertake more active functions such as conducting inquiries, but they may coax tribunals beyond an entirely passive approach.⁴³ The active reviewer may therefore be an ideal type, though the distinction provides a useful contrast between differing possible approaches.

V Statutory Provisions Creating or Affecting a Duty to Inquire

The courts have made clear that any examination of administrative proceedings, and the powers and obligations of tribunals or other bodies responsible for those proceedings, must pay close attention to any applicable legislation.⁴⁴ Variations in the duties and discretions conferred upon administrative bodies make it difficult to distil wider principles, but some can be drawn from the provisions that expressly impose upon or invest tribunals with particular procedural powers.

A Express Statutory Duties to Inquire

Australian Parliaments have generally not enacted legislation imposing a positive duty to inquire upon tribunal or other bodies conducting administrative review

⁴¹ Ibid 242. An English scholar has similarly concluded tribunals in that country 'have applied an inquisitorial gloss to a basically adversarial process' and therefore have rejected the type of active approach envisaged by Cane: see Tom Mullen, 'A Holistic Approach to Administrative Justice' in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010) 391.

⁴² *Administrative Decisions Tribunal Act 1997* (NSW) s 73(4); *State Administrative Tribunal Act 2004* (WA) s 32; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29. The obligation of these tribunals to ensure parties understand the proceedings at hand arises if the tribunal is requested to do so. A review of VCAT recommended the enactment of a provision similar to that of Queensland: see Kevin Bell, *One VCAT: President's Review of VCAT* (VCAT, 2009) 75–6 <<http://www.vcatreview.com.au/presidents-report>>.

⁴³ See, eg, *Jones v Ekermawi* [2009] NSWCA 388 (7 December 2009) [36]–[47] (Sackville AJA, McColl JA and Hadley AJA agreeing) where the applicant misunderstood directions given by a tribunal and wrongly thought he was given leave to proceed with his complaint of racial vilification. The Court of Appeal held the tribunal was required to correct this misunderstanding by explaining its directions and providing the applicant with an opportunity to put his views.

⁴⁴ A point affirmed in *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 [5] (Gleeson CJ, Gaudron and Gummow JJ); see also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161 [26] where Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ similarly stressed the importance of the statutory framework to determining the requirements of procedural fairness.

proceedings.⁴⁵ An exception was considered in *R v The Australian Broadcasting Tribunal ('Hardiman')*,⁴⁶ where the Broadcasting Tribunal had been conferred with powers under the *Broadcasting and Television Act 1942* (Cth) to regulate media ownership. Section 92F empowered the Tribunal to refuse permission of any purchase of an interest in a media company, but only if it had held an inquiry into the purchase. Section 25(1) provided that the Tribunal should 'make a thorough investigation into all matter relevant to an inquiry' of issues under s 92F and other provisions of the Act. The Tribunal received material for the purposes of s 92F, but decided it was insufficient to warrant an investigation because much of it did not conform to the rules of evidence. It also doubted that the company which had provided the material would take a sufficiently active role in any inquiry.

The High Court held that these reasons did not lessen the Tribunal's duty to conduct an inquiry because s 25(1) was sufficiently clear that:

the Tribunal must in an appropriate case investigate for itself the possibility of contravention, even in circumstances where there is no party before the Tribunal willing, anxious or able to pursue the issue.⁴⁷

The Court continued:

the appearance of a party in an inquiry before the Tribunal alleging that there are, or may be, contraventions of the Act cannot qualify or modify the Tribunal's statutory duty to inquire into relevant matters.⁴⁸

This reasoning confirms that statutory duties to inquire imposed in sufficiently clear terms may overcome many traditional features of adversarial adjudication, such as allowing the parties to define the issues in dispute or to even commence a dispute. It also makes clear that appropriately drafted legislation may compel a tribunal to examine issues against the wishes of one or more parties in a proceeding before it, or even if there is no party before it. Provisions of this nature are, however, very unusual.⁴⁹

⁴⁵ Such duties are sometimes imposed upon courts: see, eg, *Magistrates Court Act 1991* (SA) s 38(1)(a), which provides that trials of minor civil actions in the Magistrates Court 'will take the form of an inquiry by the Court into the matters in dispute ...'. The Act also provides that 'the Court itself will elicit by inquiry from the parties and the witnesses, and by examination of evidentiary material produced to the Court, the issues in dispute': s 38(1)(b). The court may call and examine witnesses to achieve this: s 38(1)(c). This procedure has been held to import the inquisitorial system of inquiry: *Petracca v Fitzgerald* [2002] SASC 97 (19 March 2002).

⁴⁶ (1981) 144 CLR 13.

⁴⁷ *Ibid* 33 (Gibbs, Stephen, Mason Aickin and Wilson JJ).

⁴⁸ *Ibid*.

⁴⁹ The provision examined in *Hardiman* was not replicated in legislation enacted after that case: see *Broadcasting Services Act 1992* (Cth).

B Statutory Requirements of Informality and Freedom from the Rules of Evidence

The legislation governing tribunals often allows, or even requires, them to adopt an informal approach.⁵⁰ The legislative objectives of many tribunals confirm they should provide an informal means of review,⁵¹ which is often amplified by the imposition of express duties upon tribunal heads to foster this objective.⁵² Most tribunals are also subject to specific statutory directions to conduct hearings with as little formality as possible.⁵³ To achieve these ends, legislation governing tribunals commonly provides that they are not bound by the rules of evidence and other legal forms and technicalities.⁵⁴

In *Minister for Immigration and Multicultural Affairs v Eshetu*,⁵⁵ Gleeson CJ and McHugh J confirmed that such provisions were ‘facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals.’⁵⁶ Such statements imply that the judicial model provides a starting point from which tribunals may depart if this is warranted. That possibility illustrates the enduring influence of the judicial model by confirming the need for clear justification for any

⁵⁰ Informal procedure is an imprecise concept but in tribunals it invariably means something less formal than the courts, whose more complex procedures tribunals usually strain to avoid: see, eg, Bell, above n 42, 21, 26 where the review of VCAT expressed concern about ‘creeping legalism’ in VCAT.

⁵¹ See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 2A; *Administrative Decisions Tribunal Act 1997* (NSW) s 3(c); *State Administrative Tribunal Act 2004* (WA) s 9(a); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b).

⁵² *Migration Act 1958* (Cth) s 397(2)(a) (responsibilities of Principal Member of MRT include ensuring tribunal operations are fair, just, informal, etc); s 460(2)(a) (similar responsibility imposed upon Principal Member of RRT); *Administrative Appeals Tribunal Act 1975* (Cth) s 23(12) (President must take account of various issues when reconstituting AAT including the need for it to be informal); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 31 (functions of President include advising Minister how the tribunal may be more efficient, effective and avoid delays in hearings); *State Administrative Tribunal Act 2004* (WA) s 147(a); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 172(3) (same as Victoria).

⁵³ See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(b); *Administrative Decisions Tribunal Act 1997* (NSW) s 73(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d); *State Administrative Tribunal Act 2004* (WA) s 32(2)(b); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 4(c), 28(3)(d).

⁵⁴ *Migration Act 1958* (Cth) s 353(2)(a) (Migration Review Tribunal (‘MRT’)); s 420(1) (Refugee Review Tribunal (‘RRT’)); *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c); *Administrative Decisions Tribunal Act 1997* (NSW) s 73(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b); *State Administrative Tribunal Act 2004* (WA) s 32(2)(b); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(b). On what may constitute the rules of evidence for the purposes of these provisions, see Neil Rees, ‘Procedure and Evidence in “Court Substitute” Tribunals’ (2006) 28 *Australian Bar Review* 41, 69–83. Such provisions have a long lineage, including use in some specialist courts: see, eg, the provisions discussed in *Federated Engine Drivers and Firemen’s Association of Australia v BHP* (1912) 12 CLR 398. (1999) 197 CLR 611.

⁵⁵ *Ibid* 628 [49]; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 201 ALR 437 [56] (Gummow and Heydon JJ, Gleeson CJ agreeing). These statements were made in the context of other provisions requiring the tribunals to act in a manner that is fair and just. In respect of this requirement, the Full Court of the Federal Court has stated that to be ‘fair and just does not refer to substantive notions of justice or fairness but is more usefully to be compared with the content of the words “justice” and “fairness” in the expressions “natural justice” and “procedural fairness”’: *Minister for Immigration and Citizenship v SZMOK* (2009) 110 ALD 15 [18].

departure from that model, either in the form of clear legislative permission or the requirements of procedural fairness.⁵⁷ In their study of several Tasmanian tribunals, Blackwood and Henning cautioned that tribunals that did not guard against the adoption of rigid procedures, whether by rules or common practice, might be ‘freed by statute from one set of fixed formal rules only to subject themselves to another’.⁵⁸ It follows that provisions that require informality or loosen the grip of the rules of evidence in tribunal proceedings should not be interpreted in a counterintuitive manner and should instead be seen to enable, but not require, the adoption of specific procedures such as the conduct of inquiries.

C The Power of an Administrative Tribunal to ‘Inform Itself on a Matter as it Thinks Fit’

Another procedural provision relevant to any possible duty to inquire is one enabling a tribunal to ‘inform itself on any matter as it thinks fit’.⁵⁹ Such powers are clearly subject to the requirements of procedural fairness.⁶⁰ Those requirements will normally be satisfied if the tribunal informs the parties of the inquiries made, discloses any credible and relevant material discovered and provides an opportunity to respond to this information.⁶¹ Where parties wish an issue to be further examined, it is normally better to invoke the tribunal’s power to summon witnesses or order production of documents on their behalf.⁶² This course enables the tribunal to assist in obtaining documentary and witness evidence to be placed before it.

Such powers are invariably conferred in discretionary terms which make clear that the body in which they are invested has the freedom to decide whether and when they should be exercised. There is no clear authority suggesting that powers of this nature must be exercised at the behest of parties to proceedings before a tribunal. Accordingly, the discretionary nature of these powers means that parties to tribunal proceedings can normally request, but not compel, their

⁵⁷ Accordingly, provisions which free tribunals from the rules of evidence and legal technicalities grant procedural rather than substantive freedom. They do not authorise departure from fundamental legal principles such as legal privilege: Keith Mason, ‘The Bounds of Flexibility in Tribunals’ (2003) 39 *ALJ Forum* 18, 21.

⁵⁸ John Blackwood and Therese Henning, ‘Tribunals’ Power to Control their Own Procedures and the Requirements of Procedural Fairness’ (2003) 11 *Australian Journal of Administrative Law* 5, 8. This conclusion accords with earlier work concluding that informality in tribunals was normally valuable but might create other problems if used without caution: Hazel Genn, ‘Tribunals and Informal Justice’ (1993) 56 *Modern Law Review* 393.

⁵⁹ Such provisions are common in tribunal statutes: see, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c); *Administrative Decisions Tribunal Act 1997* (NSW) s 73(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(c); *State Administrative Tribunal Act 2004* (WA) s 32(4); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(c).

⁶⁰ See, eg, *Adamou v Director-General of Social Security* (1985) 3 AAR 321, 326 (Wilcox J).

⁶¹ See, eg, *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29, 38 [29] (Maxwell P, Neave and Weinberg JJA agreeing), citing *Wajnberg v Raynor* [1971] VR 665, 678–9.

⁶² See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 40(1A)–(1E); *Administrative Decisions Tribunal Act 1997* (NSW) s 84; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 104; *State Administrative Tribunal Act 2004* (WA) s 6; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 97. Similar powers to compel the appearance of witnesses and production of documents are granted to the MRT and RRT: *Migration Act 1958* (Cth) ss 363(2), 427(3).

exercise.⁶³ This possibility is expressly confirmed by the legislation governing migration tribunals.⁶⁴ In my view, other administrative tribunals possess a similar procedural discretion by virtue of the general procedural powers they are granted and the discretionary nature of those powers.⁶⁵

The discretionary nature of such powers was confirmed by the High Court in *SZGUR*,⁶⁶ when it considered the effect of a provision stating that the RRT ‘may ... require’ migration officials to ‘arrange for the making of any investigation or any medical examination ... and to give to the Tribunal a report’.⁶⁷ Two views of the provision emerged in the Federal Court. Allsop J reasoned that the absence of an express duty to exercise the power did not preclude individual cases of ‘a confluence of circumstance and claim whereby there came to be an obligation to exercise the power’.⁶⁸ By contrast, the Full Court held that the power did not oblige the RRT to either consider its exercise or make inquiries.⁶⁹ This issue was settled in *SZGUR* when a majority of the High Court agreed with the Full Court.⁷⁰ Importantly, French CJ and Bell J explained that the absence of any duty to consider the exercise of the power was ‘not to say that circumstances may not arise in which the Tribunal has a duty to make particular inquiries. That duty does not, when it arises, necessarily require the application of’ the RRT’s specific power to obtain medical and other information.⁷¹ This reasoning does not foreclose a duty to inquire and does not illuminate the likely source of any such duty except, perhaps, to confirm that discretionary procedural powers are not fertile ground.

D Powers to Ensure Material is Available to a Tribunal

In most tribunal proceedings, decision-makers must lodge material central to a decision when an application for review is filed, including a statement of reasons

⁶³ *Wecker v Secretary, Department of Education, Science and Training* (2008) 168 FCR 272, 298 [109] (Greenwood J, Weinberg J agreeing); *Kowalski v Military Rehabilitation and Compensation Commission* [2011] FCAFC 44 (28 March 2011) [81] (Cowdroy J).

⁶⁴ The *Migration Act 1958* (Cth) expressly provides that each is ‘not required’ to obtain evidence when requested by an applicant do to so in exercise of its statutory powers: s 362(2) (MRT); s 426(3) (RRT).

⁶⁵ Tribunals of general jurisdiction are not normally expressly empowered to refuse requests by parties to compel production of the documents or attendance of witnesses, but the principles governing the exercise of such powers by courts are broadly applicable: see, eg, *Cosco Holdings Pty Ltd v Commissioner of Taxation* (1997) 37 ATR 432; *Comcare v Maganga* (2008) 47 AAR 487; *AF v HealthQuest* (GD) [2009] NSWADTAP 41 (30 June 2009) [47]–[52]. Accordingly, requests found to be a fishing expedition or seeking material not relevant to the proceedings may be refused.

⁶⁶ (2011) 241 CLR 594.

⁶⁷ *Migration Act 1958* (Cth) s 427(1)(d). The MRT is granted a similar power: s 363(1)(d).

⁶⁸ *Gomez v Minister for Immigration and Multicultural Affairs* [2001] FCA 935 (13 July 2001) [30]; see also *Azzi v Minister for Immigration and Multicultural Affairs* (2002) 195 ALR 166 [113] (Allsop J).

⁶⁹ *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426, 445 [86] (Heerey, Goldberg and Weinberg JJ); *WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 277 (4 July 2002) [22]–[27] (Heerey, R D Nicholson and Mansfield JJ).

⁷⁰ (2011) 241 CLR 594, 603 [22] (French CJ and Bell J, Heydon and Crennan JJ agreeing).

⁷¹ *Ibid.*

for the decision and any relevant material they hold.⁷² Tribunals are commonly granted additional powers to require the production of any further material held by the decision-maker which the tribunal considers relevant.⁷³ Senior Member Dwyer argued that the AAT was reluctant to exercise this and other inquisitorial powers it was granted by reason of the Federal Court cases which emphasised the need for the AAT to act judicially. She suggested that this problem could be overcome by an amendment to the powers of the AAT which ‘stated unequivocally that it had a duty to manage applications for review so as to ensure that all relevant material was before it’.⁷⁴

The New South Wales Administrative Decisions Tribunal (‘NSWADT’) is granted such a power, requiring it ‘to ensure that all relevant material is disclosed to ... [it] ... so as to enable it to determine all of the relevant facts in issue in any proceedings’.⁷⁵ This duty extends the obligation to ensure production of relevant material beyond the decision-maker. Bedford and Creyke doubted the provision had any significant effect on proceedings in the NSWADT but suggested such provisions might usefully confirm the power of tribunals to require production of relevant material.⁷⁶ Such provisions could be useful where other requirements to produce relevant material were not observed, or the parties took a narrow view of what was relevant and the tribunal disagreed with this. There is, however, no reason to believe such provisions would encourage tribunals to undertake inquiries to determine the sufficiency of the material lodged by the parties and the need to compel the production of further material.

E Obligations of Decision-makers and their Advocates to Assist a Tribunal

The tribunal statutes of the Commonwealth, Western Australia and Queensland require decision-makers whose actions are subject to review to use their ‘best endeavours’ to assist the tribunal to make its decision in relation to the proceeding’.⁷⁷ The full implications of such provisions are yet to be determined.⁷⁸

⁷² *Administrative Appeals Tribunal Act 1975* (Cth) s 37(1); *Administrative Decisions Tribunal Act 1997* (NSW) s 58(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 49(1); *State Administrative Tribunal Act 2004* (WA) s 24; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(2).

⁷³ *Administrative Appeals Tribunal Act 1975* (Cth) s 37(2); *Administrative Decisions Tribunal Act 1997* (NSW) s 58(4); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 49(3); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(2).

⁷⁴ Dwyer, above n 9, 268.

⁷⁵ *Administrative Decisions Tribunal Act 1997* (NSW) s 73(5)(b).

⁷⁶ Bedford and Creyke, above n 26, 17.

⁷⁷ *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1AA); *State Administrative Tribunal Act 2004* (WA) s 30; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(1). English law recognises an obligation of decision-makers and their advocates to assist tribunals in refugee cases: see Matthew Groves, ‘The Surrogacy Rule and Motherhood Statements in Administrative Law’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 79–83.

⁷⁸ See, eg, *Harris v Secretary, Department of Workplace and Employment Relations* (2007) 45 AAR 247 [19]. Gyles J noted s 33(1AA) in the course of a discussion of the inquisitorial features of the AAT, which suggests the provision forms part of the wider framework of inquisitorial powers conferred upon the AAT, but his Honour did not rule conclusively on the provision. The provision

They may, as a minimum, require decision-makers to draw all relevant material to the attention of tribunals.⁷⁹ In *Kumar v Minister for Immigration and Citizenship*⁸⁰ Forgie DP queried whether this obligation ‘can be interpreted as a duty to respond to a direction by the Tribunal to conduct further investigations’. According to this view, the obligation enables a tribunal to initiate inquiries and compel a decision-maker to essentially act as an agent in the performance of those inquiries. Forgie DP concluded that this possibility was a ‘moot point’ because ‘[a]s any Tribunal member who has encouraged a decision-maker to spend money on a further report or time or money on further investigations that it does not think are relevant will attest, only the most persuasive member will succeed.’⁸¹ On this view, the real obstacle to a tribunal seeking to invoke the active assistance of decision-makers is not the relatively narrow question of whether it has a specific power to require decision-makers to provide legal assistance, but the more practical questions of whether and how the tribunal may convince decision-makers to assist it.

F Reflections on the Statutory Provisions Relevant to a Duty to Inquire

The analysis so far indicates that there is no inherent quality in tribunal proceedings that might provide a firm basis for any duty to conduct inquiries. Tribunals may possess many inquisitorial features and be generally less adversarial in their procedure than the courts, but they are not inquisitorial in any pure sense, if there is such a thing. Accordingly, any nomenclature used to describe tribunal proceedings or distinguish them from the courts will not itself provide a clear reason for the adoption by tribunals of a duty to inquire. The procedural powers granted to tribunals are an equally inconclusive basis to construct a duty to inquire. Legislation imposing a clear duty upon administrative tribunals to undertake inquiries is extremely rare in Australia. Any duty to inquire that is anchored to a legislative basis must, therefore, draw support from the more general powers granted to tribunals. This possibility seems unlikely. Most procedural powers granted to tribunals are clearly discretionary. Many powers such as those enabling tribunals to define issues, or requiring proceedings to be conducted in an informal manner, largely restate or amplify the procedural flexibility granted to tribunals. None provide a secure basis upon which to found a clear duty to inquire in tribunal proceedings.

There are many reasons why legislatures might be reluctant to impose a duty to inquire upon tribunals. Any such duty would almost certainly have to be accompanied by appropriate education for the members of any tribunal to whom it applied. Training could help overcome the longstanding norms of our legal culture

was also discussed inconclusively in *Kasupene v Minister for Immigration and Citizenship* (2008) 49 AAR 77 [19]–[20].

⁷⁹ A view taken in *Neumann and City of Swan* [2007] WASAT 30 (6 February 2007) [78].

⁸⁰ (2009) 50 AAR 96 [101].

⁸¹ *Ibid*; see also *Leane v Barcode (King Street) Pty Ltd* [2008] VCAT 2076 (8 October 2008) [8], where Davis SM noted that VCAT had power to call witnesses but no resources to do so. He concluded that ‘inquisitorial power without resources to find such witnesses ... is thus very limited. The Tribunal relies on parties to locate and call witnesses.’

which discourage such proactive behaviour by decision-makers.⁸² It would equip tribunal members upon whom any duty to inquire was imposed with the skills needed to start, shape and end a proceeding that included a duty to inquire.⁸³ The resource implications of duties to inquire may also discourage their introduction. Members of the AAT have, for example, noted that the tribunal has no specific budgetary allocation for the costs of any inquiry it might initiate, such as payment for specialist medical witnesses or the staff required to assist such activities.⁸⁴ The ALRC was mindful of similar issues when it considered a proposal to amalgamate most federal administrative tribunals.⁸⁵ It conceded resources were an 'important constraint' on tribunals and that a 'more active investigative review model has implications for the allocation of resources'.⁸⁶ The emphasis that this and more recent reviews of tribunals have placed upon cost savings makes the prospect of additional funding for investigation and inquiries by tribunals unlikely.⁸⁷

The conduct of inquiries by tribunals might save time and money by simplifying and shortening administrative proceedings.⁸⁸ These benefits might be difficult to quantify, particularly in the short term, but their costs would not present the same difficulty.⁸⁹ The failure of governments to enact legislation and provide adequate funding to support a duty to inquire on the part of tribunals may be understood against this background. This article next considers whether a duty to inquire can instead be founded in the common law grounds of judicial review of procedural fairness, the requirement to take account of relevant considerations, unreasonableness or as a species of jurisdictional error.

⁸² This could be aided by specialist research units within tribunals, which were recommended as part of the AAT: Kerr Report, above n 6, [292].

⁸³ On the training tribunal members might require, see Joan Dwyer, 'Smoothing the Sharp Corners of the Adversarial System: The Experience of the Administrative Appeals Tribunal' in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (Federation Press, 1999) 27.

⁸⁴ See, eg, *General Merchandise and Apparel Group Pty Ltd and CEO of Customs and Australian Weaving Mills* (2009) 51 AAR 1 [163]; Dwyer, above n 9, 269.

⁸⁵ On this discarded proposal, see Peter Bayne, 'The Proposed Administrative Review Tribunal: Is There a Silver Lining in the Dark Cloud?' (2000) 7 *Australian Journal of Administrative Law* 86.

⁸⁶ Australian Law Reform Commission ('ALRC'), above n 17, 9. 64. The ALRC considered a more active tribunal model but also stressed the need to 'measure costs and time savings': at 9.65.

⁸⁷ See, eg, Administrative Review Council ('ARC'), *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995) 128–31 [7.22]–[7.32], [8.101]–[8.107]. The ARC emphasised potential costs savings in its recommendations to establish a single federal 'super tribunal'. See also Bell, above n 42, 27–8 which noted areas of potential cost savings in proposed reforms to VCAT. Budgetary issues have influenced reform of English tribunals: Robert Kirkham, 'Reforming the Tribunal Sector' (2005) 27 *Journal of Social Welfare and Family Law* 185, 196.

⁸⁸ The possibility is speculative until informed by empirical research. In *Kowalski v Military Rehabilitation and Compensation Commission* [2011] FCAFC 44 (28 March 2011) [21] Dowsett J queried whether the burden of any duty to inquire imposed upon the AAT might ultimately be transferred to the parties. If so, the financial benefits of a duty to inquire might prove illusory.

⁸⁹ A point conceded by Joan Dwyer, 'Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal's Use of Inquisitorial Procedures' (1997) 5 *Australian Journal of Administrative Law* 5, 32.

VI Procedural Fairness as a Foundation for a Duty to Inquire

At first glance the requirements of procedural fairness might appear to form a suitable foundation for a duty to inquire because they support a myriad of principles in tribunal and other administrative decision-making.⁹⁰ A duty to inquire is arguably also consistent with the approach of the High Court to the principles of procedural fairness in recent decades which has essentially supported a procedural rather than substantive conception of fairness.⁹¹ This approach clearly excludes grounds of review, such as substantive unfairness which may draw the courts towards the merits or factual quality of decisions.⁹² This procedural conception of fairness does not, however, preclude the adoption of a duty to inquire as a requirement of fairness because any such duty would concern whether and how a tribunal might be obliged to seek further information rather than how it might be required to use that information in the substantive decision it must reach.

A majority of the Full Court of the Federal Court took a tentative step in this direction in *Teoh v Minister for Immigration and Ethnic Affairs* ('*Teoh*')⁹³ when it accepted that a duty to inquire could arise as an aspect of natural justice. Lee J relied on several decisions of the Federal Court in support of the proposition that the decision-maker in that case was required to 'initiate appropriate inquiries and obtain appropriate reports' on how deportation of a father might affect his children.⁹⁴ Carr J accepted that the same cases recognised a limited duty to inquire as a species of unreasonableness and was prepared to assume that fairness could also require a decision-maker to initiate inquiries 'in an appropriate case'.⁹⁵ Neither judge explained the nature or content of this duty in significant detail.

The High Court emphatically rejected this reasoning. Mason CJ and Deane J, with whom Gaudron J agreed on this issue, held that the authority invoked by Lee and Carr JJ simply did not support a duty of inquiry as an aspect of procedural fairness.⁹⁶ Toohey J did not entirely reject the recognition of such a duty but held

⁹⁰ On the particular procedures that fairness might require in a hearing, see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) ch 8.

⁹¹ The High Court has affirmed this procedural focus in *Re Minister for Immigration and Multicultural and Indigenous Affairs v Lam* (2003) 213 CLR 1, 21–7 [65]–[80] (McHugh and Gummow JJ), 48 [148] (Callinan J); *VEAL* (2005) 225 CLR 88, 95 [14] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160 [25] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). An argument supporting this approach is made in Michael Barnett, 'Dobbing-in and the High Court — *VEAL* Refines Procedural Fairness' (2007) 30 *University of New South Wales Law Journal* 127, 144–6.

⁹² A central point of *Re Minister for Immigration and Multicultural and Indigenous Affairs v Lam* (2003) 213 CLR 1, 10 [28], 12 [32] (Gleeson CJ), 23 [72] (McHugh and Gummow JJ, Callinan J agreeing on this issue); see also Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) *Melbourne University Law Review* 470, 504–21.

⁹³ (1994) 49 FCR 409.

⁹⁴ *Ibid* 423, citing *Videto v Minister of Immigration and Ethnic Affairs* (1985) 8 FCR 167, 178 ('*Videto*'); *Luu v Renevier* (1989) 91 ALR 39, 45; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 169 ('*Prasad*'); *Lek v Minister for Immigration, Local Government and Ethnic Affairs [No 2]* (1993) 45 FCR 418, 436–7.

⁹⁵ (1993) 45 FCR 418, 434.

⁹⁶ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 290 (Mason CJ and Deane J), 305 (Gaudron J).

fairness did not ‘generally speaking’ require a decision-maker to make inquiries.⁹⁷ Toohey J acknowledged that the decision-maker was not obliged to seek further information but reasoned that, if she had done so, she would have been better able to discharge the legitimate expectation his Honour identified to exist in that case.⁹⁸ This reasoning provides an unsteady foundation for any duty to inquire in procedural fairness because its general assumption against a duty might only be reversed where a legitimate expectation exists. The subsequent narrowing of the legitimate expectation doctrine by the High Court means the circumstances in which this might arise are uncertain at best.⁹⁹

Despite this apparently strong sentiment, some later cases suggested tribunals could sometimes be obliged to make inquiries.¹⁰⁰ The High Court appeared to accept the possibility in *Applicant VEAL of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs* (‘VEAL’),¹⁰¹ when it noted that the requirements of procedural fairness depend on the context of each case and added that the RRT ‘was bound to make its own inquiries and form its own view upon the claim’ of an applicant.¹⁰² Some commentators argued that this implication that fairness could sometimes necessitate inquiries by the RRT might extend to other tribunals.¹⁰³ That approach was pointedly disclaimed in *SZIAI*¹⁰⁴ where a unanimous High Court cautioned that it was ‘difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law’.¹⁰⁵ Why might that be?

A duty to inquire could certainly encounter difficulties if developed as an instance of the principles concerning information relevant to the deliberative process. Cases of this nature have focused on whether information held by a decision-maker should be disclosed to those who stand to be affected by that information,¹⁰⁶ or how information should be disclosed.¹⁰⁷ A common thread in such cases is that the requirements of fairness attach to information upon its receipt

⁹⁷ Ibid 302.

⁹⁸ Ibid 302–3.

⁹⁹ The High Court strongly doubted the legitimate expectation in *Re Minister for Immigration and Multicultural and Indigenous Affairs v Lam* (2003) 214 CLR 1. The issue is examined in Bruce Dyer, ‘Legitimate Expectations in Procedural Fairness after *Lam*’, in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 184.

¹⁰⁰ See, eg, *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28, 63 (Merkel J); *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 413 [76] (McHugh J). Neither judge discussed or cited the High Court’s disapproval of a duty to inquire in *Teoh*.

¹⁰¹ (2005) 225 CLR 88.

¹⁰² Ibid 98–9, [25]–[26] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

¹⁰³ A view taken by Bedford and Creyke, above n 26, 44.

¹⁰⁴ (2009) 259 ALR 429.

¹⁰⁵ Ibid [24] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (emphasis added).

¹⁰⁶ The classic example was *Kioa v West* (1985) 159 CLR 550. A breach of natural justice was also founded on a failure to disclose information in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; and *Muin v Refugee Review Tribunal* (2002) 190 ALR 601.

¹⁰⁷ See, eg, *VEAL* (2005) 225 CLR 88; and *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448.

by a decision-maker, which presumes that someone else will, and perhaps should, gather that information.¹⁰⁸

Another common thread in these cases is their focus on managing information adverse to people who may be affected by the decision. One might question whether this body of law which essentially governs how decision-makers should consider and disclose adverse information fairly, could guide principles to gather information. Could those same principles govern the collection of adverse information, which any duty to inquire might reveal? The rule against bias would surely require any search for information to be an even-handed exercise, seeking information regardless of whether it favoured a party. It is not clear whether or how the requirements of fairness could regulate inquiries that might lead to unfavourable information. Would fairness require a party be warned of this possibility? If that information might be relevant, would a decision-maker be bound to seek it despite the objections of the party who might be adversely affected by it? Would fairness entitle a respondent to know of, and object to, any decision not to inquire for fear of uncovering information adverse to an applicant? These are serious problems that highlight the counterintuitive question at the heart of any duty to inquire founded on procedural fairness.¹⁰⁹ Can and should fairness oblige an action that could damage a party's interests?

Similar problems could arise in any duty of inquiry developed as a specific instance of the obligation to ensure parties have a fair opportunity to be heard. This obligation can require tribunals to take positive steps to assist unrepresented parties and take 'a more active role ... [by] identifying the real issues between the parties and directing them as to the evidence which legally and logically bears on those issues'.¹¹⁰ Tribunals appear to be subject to a 'higher burden of explanation and assistance' than the courts.¹¹¹ There is, however, a clear distinction between 'persuading' unrepresented parties on 'the appropriateness of a suggested course and ... overriding' their right to decide.¹¹² The former is permissible, the latter is not.¹¹³ The principles governing the obligation of tribunals to assist unrepresented parties may, depending on how they develop, come into tension with a duty to inquire. The need to preserve the autonomy of unrepresented people, which is a central tenet of fairness upon which the obligations of a tribunal to fashion its procedures for unrepresented people are ultimately anchored, and the possibility that a duty to inquire might oblige a tribunal to act unilaterally or without the

¹⁰⁸ A point made in *Djalil v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 314 [83] (Tamberlin, Sackville and Stone JJ) and applied in *Le v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 521, 540 [103] (Jacobson and Bennett JJ).

¹⁰⁹ This problem may also highlight a wider tension between the competing demands of fairness and efficiency upon tribunals: Mark Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230, 245–7.

¹¹⁰ *Winn v Blueprint Instant Printing Pty Ltd* [2002] VSC 295 (2 August 2002) [9] (Byrne J).

¹¹¹ *Collection House Ltd v Taylor* (2004) 21 VAR 333 [27] (Nettle J).

¹¹² *Wade v Comcare* (2002) 69 ALD 602, 607 (Drummond and Dowsett JJ).

¹¹³ A tribunal need only offer advice or assistance, rather than ensure it is taken, because 'an opportunity foregone, but reasonably available, does not demonstrate breach of procedural fairness': *Italiano v Carbone* [2005] NSWCA 177 (2 June 2005) [88] (Basten JA); see also Mason, above n 57.

consent of the parties, may conflict.¹¹⁴ A separate but closely related principle is the need to preserve a decision-maker's neutrality. While fairness may require a decision-maker to assist unrepresented parties, it also requires a neutral decision-maker.¹¹⁵ Accordingly, procedures taken to assist unrepresented parties cannot favour one party over another.¹¹⁶

The complex procedural regime of the RRT is an unlikely source of a narrow exception that might ultimately found a more general duty to inquire. Guidance can be drawn from the voluminous law concerning the obligation imposed upon the RRT to 'invite' applicants to appear before it 'to give evidence and present arguments relating' to their claim.¹¹⁷ In *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* ('SCAR'),¹¹⁸ the Full Court of the Federal Court held that this obligation did not require the RRT to 'actively assist' applicants in putting their case or 'require the Tribunal to carry out an inquiry in order to identify what that case might be' but that the RRT was required to provide a 'real and meaningful' hearing.¹¹⁹ The precise content of this obligation remains unsettled but the fairly confined manner in which the High Court has interpreted other duties of the RRT suggests it is unlikely to provide a secure foundation upon which to base significant positive duties such as one of inquiry.¹²⁰ The High Court has, for example, accepted that the requirements of procedural fairness may oblige the RRT to undertake particular actions or procedures before it may reach particular conclusions,¹²¹ or act upon certain information,¹²² but appears unwilling to require the RRT to take a distinctly more active approach.

¹¹⁴ The Victorian Court of Appeal recently stated that 'within our adversarial system of justice it cannot be said that the judge could (and indeed should), on his own motion have taken steps against the wishes' of a party to obtain evidence: *McWhinney v Melbourne Health* [2011] VSCA 22 (11 February 2011) [26] (Neave, Redlich and Mandie JJA). If this restraint is due to fairness rather than adversarialism, it would have wide application.

¹¹⁵ *Tomasevic v Travaglini* (2007) 17 VR 100, 130 [141]–[142] (Bell J).

¹¹⁶ *Hoe v Manningham City Council* [2011] VSC 37 (22 February 2011) [5] (Pagone J), citing *Rajski v Scitec Corporation Pty Ltd* (Unreported, NSW Court of Appeal, Kirby P, Samuels and Mahoney JJA, 16 June 1986); *Tomasevic v Travaglini* (2007) 17 VR 100, 130 [141]–[142] (Bell J).

¹¹⁷ *Migration Act 1958* (Cth) s 425(1).

¹¹⁸ (2003) 128 FCR 553.

¹¹⁹ *Ibid* 561 [37] (Gray, Cooper and Selway JJ). This principle is consistent with the rule requiring that a hearing or similar chance to put a claim be real or genuine: see, eg, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 [40] (Gaudron and Gummow JJ).

¹²⁰ The High Court has not ruled directly on the principle of *SCAR*. The principle attracts mixed views in the Federal Court itself. It has been applied without difficulty in *PI19/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 130 (22 May 2003) [16] (Mansfield and Selway JJ); and *NALQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 121 (10 May 2004); *SZHKA v Minister for Immigration and Citizenship* (2008) 249 ALR 58 [5] (Gray J). It was described as plainly wrong by Graham J in *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365, 417 [212]. French J disagreed: 389 [93]–[94]. The Full Court of the Federal Court recently acknowledged this uncertainty but did not resolve it: *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575 [31]–[33] (Keane CJ), [47]–[48] (Emmett J), [73]–[78] (Perram J).

¹²¹ See, eg, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 163–4 [37] (Gleeson, Kirby, Hayne, Callinan and Heydon JJ): fairness may require the RRT to indicate clearly and openly test doubts it holds about an applicant's claims before making adverse findings on those issues.

¹²² See *VEAL* (2005) 225 CLR 88, 100 [29] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ): fairness may require the tribunal to consider confidential information but maintain the anonymity of

That reluctance was well illustrated in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* ('SGLB')¹²³ where an applicant had his case remitted to the RRT but claimed he was unfit to attend a hearing. The RRT sought a medical report, which confirmed the applicant suffered various conditions, but concluded he could generally recall and speak about past events. The applicant's adviser suggested his client had post-traumatic stress disorder ('PTSD') and requested the RRT seek further medical reports to clarify this possibility. The RRT did not. It instead accepted the applicant had PTSD and that this explained many of the inconsistencies in his evidence. Several elements of the High Court's reasoning indicate a clear preference for the adoption by the RRT of an active rather than passive approach in the sense suggested by Cane. One was an acceptance that the provisions empowering the RRT to obtain medical and other evidence were clearly discretionary and therefore did not require the tribunal to either seek further information generally or to inquire into the medical condition or competency of the applicant.¹²⁴ A majority of the High Court also accepted that procedural fairness might require the RRT to take specific measures to determine if an applicant could adequately participate in proceedings, but only in exceptional cases.¹²⁵ Gleeson CJ explained that the decision of the RRT to seek one report did not oblige it 'to embark on an open-ended investigation' of the applicant's condition 'to see whether, in any way, it might have affected his ability to put his case to best advantage'.¹²⁶

In the similar recent Federal Court case of *Minister for Immigration and Citizenship v SZNVW* ('SZNVW'),¹²⁷ Keane CJ also rejected any suggestion that the provisions governing the RRT required it to 'press' an applicant with medical problems to call evidence on those problems or amplify his arguments about their impact upon the case he had presented. He reasoned that the RRT was not to 'take upon itself the role of ensuring that all possibly arguable lines of argument which might be available to an applicant in any given case are pursued to the applicant's best advantage'.¹²⁸ This possibility explains the High Court's reluctance in *SGLB* to impose a positive duty of inquiry even on the key issue of an applicant's competence. Any such duty could easily move from examining the condition of applicants and whether they could participate in the proceeding to the closely related questions of how best to overcome these problems and present the claim. If

its source by providing the applicant with details of the substance of the information and an opportunity to respond to those allegations.

¹²³ (2004) 207 ALR 12.

¹²⁴ Ibid [43] (Gummow and Hayne JJ), [124] (Callinan J). Gleeson CJ held that the RRT had obtained the report 'for a limited and reasonably specific purpose' which did not oblige it to 'embark on an open ended investigation of the respondent's psychological's condition': at [19]. This reasoning presumes a similar discretionary characterisation of the RRT's power accepted by other members of the majority.

¹²⁵ Ibid [19] (Gleeson CJ), stating that fairness did not 'ordinarily' require courts or tribunals to undertake medical assessments of parties ([45] (Gummow and Hayne JJ)), stating that fairness could require special steps 'in particular circumstances arising in individual cases'. Callinan J accepted a court or tribunal was generally obliged to establish whether a party could understand and participate in proceedings (at [123]), but adopted a relatively low threshold for this: at [127].

¹²⁶ Ibid [19].

¹²⁷ (2010) 183 FCR 575.

¹²⁸ Ibid [19] (Keane CJ, Emmett J agreeing). See also *SZJBD v Minister for Immigration and Citizenship* (2009) 179 FCR 109, 125 [73] where the Federal Court held that its power to appoint an expert translator was 'a special power ... not available to applicants just to fill a gap in their own cases' (Buchanan J, Perram J agreeing).

inquiries about the condition of an applicant may become tangled with questions about the condition of the case itself, one can understand the courts' reluctance to venture down such a path. Any such inquiry could be onerous, difficult to confine and tempt a tribunal to take control or 'hijack' an applicant's claim.¹²⁹ These concerns illustrate how considerations of fairness can pull as much against such a duty as towards it.

VII Inquiries and Relevant Considerations

The obligation of decision-makers to take account of relevant considerations has also been suggested as a basis for a duty to inquire. Such cases appear to assume decision-makers cannot always 'do no more than react to the material sent to them'.¹³⁰ They must sometimes instead actively seek out relevant material. In *Teoh's Case*,¹³¹ McHugh J allocated the handful of decisions to this effect into three categories. The first involved specific issues raised by applicants or within the knowledge of decision-makers, which could not be properly considered without additional inquiry. Subsequent attempts to rely on this possibility have foundered. Applicants who have supplied incomplete or imperfect information have often failed to convince courts that decision-makers are bound to overcome these problems by searching for more information. The courts have held that the error in such cases lies with applicants, who could have provided more information but did not.¹³² These cases confirm applicants are normally responsible for gathering and providing information relevant to their claim and that this responsibility will not shift to tribunals without strong reason.¹³³ In other cases it has been accepted that some effort well short of an exhausting search or success by decision-makers is sufficient.¹³⁴

¹²⁹ A description used in *SZNWA v Minister for Immigration and Citizenship* [2010] FCA 470 (14 May 2010) [41] (Foster J).

¹³⁰ Aronson, Dyer and Groves, above n 90, 296–7. This proposition was endorsed in *VISA International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, 431 [629] (Tamberlin J).

¹³¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 321. McHugh J dissented in *Teoh* but this aspect of his Honour's decision is not at odds with the majority: *Djalil v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 314 [82] (Tamberlin, Sackville and Stone JJ).

¹³² See, eg, *Djalil v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 314 [83] (Tamberlin, Sackville and Stone JJ); *Taylor v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 208 (30 September 2005) [19] (Marshall, Mansfield and Soipis JJ); *Yalniz v Minister for Immigration and Citizenship* [2007] FCA 426 (28 March 2007) [24] (Kenny J).

¹³³ See, eg, *Boyes v Minister for Immigration and Citizenship* [2007] FCA 505 (10 April 2007) [54] where a tribunal adjourned to obtain evidence from the applicant's mother. No such statement was made and the tribunal did not seek one. Kenny J held the tribunal was not obliged to do more, which implies that any responsibility to obtain information from the mother lay with the applicant rather than the respondent or the tribunal. An example of facts sufficiently exceptional to fall within this category is *Videto* (1985) 8 FCR 167, discussed below.

¹³⁴ See, eg, *VISA International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, 431 [628]; *Hopkins v Minister for Immigration and Citizenship* [2007] FCA 1108 (2 August 2007) [38] (Moore J). In each case the court was satisfied by steps taken by a decision-maker to obtain information and did not suggest they must be exhaustive.

The related instance in McHugh J's first category, where information was within the knowledge of the decision-maker, appears equally unpromising in the wake of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte S134/2002* ('S134').¹³⁵ In that case an applicant for refugee status had not made her claim as part of a family unit because she did not know where her husband was. He had in fact been granted refugee status in Australia. A file note in the materials before the RRT raised this very issue, by querying if the two claims were connected, but this was not addressed by the RRT.¹³⁶ A majority of the High Court held that the absence of any reference to the file note did not constitute a failure to take account of a relevant consideration.¹³⁷ If the RRT was not even obliged to read the whole of the file placed before it, surely there was no duty to pursue issues that might arise from those contents.¹³⁸ If information which clearly begs a question is placed before a decision-maker, but this question begs no answer in the guise of a relevant consideration, one might ask when it possibly could. Perhaps never.

The second category noted by McHugh J, of cases where information before the decision-maker was outdated, was slightly different. The only such decision cited by his Honour was *Tickner v Bropho*,¹³⁹ where events around a site being considered for heritage listing were extremely fluid and might change suddenly. Black CJ concluded that current information was of 'crucial importance' due to the 'serious prospect of a fundamental change' in events, details of which were 'readily available'.¹⁴⁰ His Honour held that the failure of the federal Minister to obtain current information from a state Minister was unreasonable rather than a breach of the relevancy ground, which undermines the value of this case to McHugh's second category.

The third of McHugh J's categories was information before a decision-maker which was incomplete by reason of officials misleading the applicant. This occurred in *Videto v Minister for Immigration and Ethnic Affairs* ('*Videto*'),¹⁴¹ where migration officials had information favourable to Mr Videto, but did not pass it to the decision-maker. They also dissuaded Mr Videto from providing similar material by incorrectly stating it was irrelevant. Toohey J accepted 'as a broad proposition' that the relevant legislation did not impose a duty to initiate inquiries, but held an exception might arise where information placed before a decision-maker 'contains some obvious omission or obscurity that needs to be resolved before a decision is made'.¹⁴² Toohey J pointedly confined his remarks to decisions to deport prohibited non-citizens and stressed that the applicant received no

¹³⁵ (2003) 211 CLR 441.

¹³⁶ The High Court did not decide whether the RRT failed to read the note or, that it did, but failed to understand its significance: (2003) 211 CLR 441, 452 [10] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

¹³⁷ *Ibid* 459 [39]–[40] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

¹³⁸ This is the conclusion reached in Aronson, Dyer and Groves, above n 90, 298.

¹³⁹ (1993) 40 FCR 183.

¹⁴⁰ *Ibid* 197–9.

¹⁴¹ (1985) 8 FCR 167.

¹⁴² *Ibid* 178–9.

independent advice.¹⁴³ Later cases have doubted whether a more wide-ranging duty to inquire might arise from these unusual facts.¹⁴⁴

In my view, cases where decision-makers or other officials have clearly misled an applicant, whether deliberately or negligently, fall within existing requirements of fairness as a failure to provide adequate notice.¹⁴⁵ There seems little purpose in trying to also shoehorn such conduct within the scope of the relevancy ground. A separate but related problem is that attempts to place such conduct within the relevancy grounds essentially appeals to an expansive and proactive conception of this ground that does not sit easily with the formulaic approach typical of this ground.¹⁴⁶ A similar criticism can be made of the reliance of McHugh J for his second category upon *Tickner v Bropho*¹⁴⁷ which upon close inspection, it is submitted, does not support the potential fruits of an inquiry as a relevant consideration. Black CJ instead held that the failure of the Minister to seek current information was unreasonable. Such a finding is not difficult once information is accepted as obviously important and easy to obtain. Why stretch the relevancy ground to a conclusion that the ground of unreasonableness can reach much more easily?

VIII *Prasad* and the Elements of a Duty to Inquire

In *Prasad v Minister for Immigration and Ethnic Affairs* ('*Prasad*'),¹⁴⁸ Wilcox J accepted a duty to inquire might arise in some circumstances, or rather that a decision could be invalid due to an unreasonable failure of a decision-maker to make inquiries. His Honour explained that this could occur when a decision was 'so devoid of plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew to be readily available'.¹⁴⁹ Wilcox J continued:

The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to a decision ... to proceed to a decision without making any attempt to obtain that information may

¹⁴³ Ibid 179.

¹⁴⁴ *Djalil v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 313 [81] (Tamberlin, Sackville and Stone JJ).

¹⁴⁵ Fairness could require notice of an important point in issue. This possibility is not at odds with *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 207 [53], where the High Court accepted parties cannot normally complain about the effect of mistaken or negligent advice in administrative proceedings. Those remarks concerned advice from a party's agent rather than administrative officials.

¹⁴⁶ David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalism as Constitutionalism' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 10. Those authors regard the ground as a 'tick a box' exercise in which superficial efforts by decision-makers can satisfy the courts.

¹⁴⁷ (1993) 40 FCR 183.

¹⁴⁸ (1985) 6 FCR 155.

¹⁴⁹ Ibid 169.

properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have to exercised it.¹⁵⁰

This connection between unreasonableness and inquiries is limited by the requirements that material must be obvious, centrally relevant and easily obtained. In *SZLAI*,¹⁵¹ the High Court acknowledged these three elements had gained support in the Federal Court as a means to identify unreasonableness but concluded they should be marshalled to identify jurisdictional error. The Court explained that:

[R]eferences to a ‘duty to inquire’ [are] apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.¹⁵²

At the same time, however, the High Court held that the decision under challenge could not be impugned because either a ‘failure to inquire constituted a failure to undertake the statutory duty to review or that it was otherwise so unreasonable as to support a finding’ of jurisdictional error.¹⁵³ The combined effect of this reasoning is to locate a duty to inquire within the realm of jurisdictional error, in the form of a constructive failure to review or unreasonableness,¹⁵⁴ as gauged by the three requirements devised in *Prasad*.¹⁵⁵ The final part of this article considers whether a duty to inquire should be located within jurisdictional error rather than unreasonableness, though it is first useful to examine the three elements which lie at the heart of this requirement, however it is expressed.

A An ‘Obvious Inquiry’

In *SZLGP v Minister for Immigration and Citizenship* (‘*SZLGP*’),¹⁵⁶ Logan J stated that ‘reasonable minds might reasonably differ as to whether a particular inquiry was “obvious”’.¹⁵⁷ Although this suggests that a requirement of obviousness may be inherently uncertain, some principles are reasonably settled. An inquiry will not be obvious simply because it is requested by a party,¹⁵⁸ or would have been a sound or reasonable course for a tribunal to take.¹⁵⁹ Several cases that have considered when a tribunal might be obliged to look beyond the material filed by the parties suggest an inquiry is obvious when the reason for it

¹⁵⁰ Ibid 169–70.

¹⁵¹ (2009) 259 ALR 429.

¹⁵² Ibid [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁵³ Ibid [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁵⁴ *Khant v Minister for Immigration and Citizenship* (2009) 112 ALD 241 [67] (Cowdroy J) (‘*Khant*’).

¹⁵⁵ Ibid [63]–[67] (Cowdroy J).

¹⁵⁶ (2009) 181 FCR 113.

¹⁵⁷ Ibid [50].

¹⁵⁸ Ibid 128 [49] (Logan J).

¹⁵⁹ *Prasad* (1985) 6 FCR 155, 169–70 (Wilcox J); *SZMJM v Minister for Immigration and Citizenship* [2010] FCA 309 (1 April 2010) [30] (Bennett J).

is self-evident. A tribunal is normally entitled to rely upon the material lodged by the parties, but not when it contains ‘some obvious omission or obscurity that needs to be resolved before a decision is made’.¹⁶⁰ If this is the case, the tribunal must inquire to address the omission or obscurity. That is not the case, however, if the material is equivocal rather than plainly flawed,¹⁶¹ or it is unclear how the tribunal could seek further information or what source it could pursue.¹⁶² The same may also apply when information found by an inquiry does not clarify the issues.¹⁶³

In *SZOER v Minister for Immigration and Citizenship* (‘*SZOER*’),¹⁶⁴ Cowdroy J rejected an argument that a failure by the RRT to obtain reports from foreign police officials was an obvious inquiry after it was established the applicant had easily obtained other information from the same source and not requested the RRT to obtain the further information he required. This conclusion suggests that, where an applicant has previously obtained information without great difficulty and gives no indication of difficulties obtaining further information from the same source, any possible inquiry that could be made of the same source would not be an obvious one. It might also suggest that an applicant who has commenced inquiries bears a clear onus of explaining why further inquiries should be made by the tribunal. By implication, applicants who commence their own inquiries may be expected to complete them or, where this is not possible, to clearly signal such problems.¹⁶⁵

B Readily Available or Easily Ascertained

The requirement that information be easily ascertained has been interpreted to demand relatively little effort of decision-makers.¹⁶⁶ The classic example is a simple phone call or email, which might clarify an uncertain point.¹⁶⁷ To require such relatively limited effort may reconcile any duty to inquire with the apparently conflicting principle that a tribunal or other decision-maker is not

¹⁶⁰ *Videto* (1985) 8 FCR 167, 178 (Toohey J); see also *Luu v Renevier* (1989) 91 ALR 39, 50 (Davies, Wilcox and Pincus JJ); *Khant* (2009) 112 ALD 241 [74] (Cowdroy J).

¹⁶¹ See, eg, *Brown v Minister for Immigration and Citizenship* (2009) 112 ALD 67 [99] where Edmonds J concluded that evidence about an applicant’s criminal history did not point clearly to further relevant material that might be obtained.

¹⁶² See, eg, *Lai v Minister for Immigration and Citizenship* (2010) 188 FCR 451 [36]–[37] where Gray J held it was unclear where and how the tribunal might seek further information about a training course relevant to an applicant’s visa.

¹⁶³ See *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571, 579 where Ryan and Finkelstein JJ held that if information uncovered by an inquiry was ‘unhelpful, a decision-maker is clearly not obliged to go further’.

¹⁶⁴ [2010] FCA 1100 (12 October 2010) [42].

¹⁶⁵ The suggestion that applicants clearly signal such problems is consistent with other cases suggesting the RRT must deal with the case articulated by an applicant, which includes claims raised ‘squarely’: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, 18–9 (Black CJ, French and Selway JJ). If applicants must raise claims ‘squarely’, arguably they may have to do likewise with problems about their claim.

¹⁶⁶ *Brown v Minister for Immigration and Citizenship* (2009) 112 ALD 67 [96] (Edmonds J).

¹⁶⁷ See, eg, *Khant* (2009) 112 ALD 241.

obliged to make an applicant's case. In *Khant*,¹⁶⁸ Cowdroy J explained an inquiry in these circumstances 'would not make the appellant's case for him. Rather, it would seek clarification of the grounds already provided to the delegate, in the circumstance where the delegate's record was wholly unsatisfactory.'¹⁶⁹

In *SZJBA v Minister for Immigration and Citizenship* ('*SZJBA*'),¹⁷⁰ the RRT received a fax cover sheet which stated it was followed by five further pages, but these were not received. Tribunal staff destroyed the cover sheet without calling the telephone number noted on it to ask about the further pages. Allsop J distinguished between an 'evidence gathering task' of some sort and 'a simple administrative step of an office or housekeeping nature, the failure to take which could be seen on its fact at the time to subvert the observance of the Tribunal of its obligation to give procedural fairness'.¹⁷¹ This distinction implies some tasks are so simple they might not qualify as inquiries in any real sense but are instead matters of common sense requiring some action.

That would not be the case where any information that might be uncovered is likely to be equivocal or open to doubt. This possibility often arises where the RRT has found that the statements or documents supplied by applicants are of doubtful credibility. An inquiry is often called for in such cases on the basis that a simple phone call or letter to follow up information contained in the material might resolve the doubts held by the RRT. The courts have held that solution to be illusory because an inquiry to a source of questionable authenticity would almost certainly not yield information of decisive value.¹⁷² In other words, it is not possible to 'easily ascertain' information by an inquiry based on material found to be of doubtful credibility because the fruits of any inquiry may continue rather than clarify doubts held by a decision-maker.¹⁷³

C Critical or Centrally Relevant Information

The extent to which information might influence the decision-making process sufficiently to be critical is less clear. No case has gone so far as to suggest that information must be decisive to the ultimate issue, but it is clear the information must make a difference. Accordingly, material is not central or critically relevant if it would have made no difference to the ultimate outcome.¹⁷⁴ The same appears true of information that enables a tribunal to draw inferences about facts in issue rather than determine those issues.¹⁷⁵

¹⁶⁸ Ibid.

¹⁶⁹ Ibid [69].

¹⁷⁰ (2007) 164 FCR 14.

¹⁷¹ Ibid 29 [59].

¹⁷² *Minister for Immigration and Citizenship v SZLAI* (2009) 259 ALR 429 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell J); see also *SZNYI v Minister for Immigration and Citizenship* (2010) 114 ALD 220 (Yates J).

¹⁷³ *SZMJM v Minister for Immigration and Citizenship* [2010] FCA 309 (1 April 2010) [43] (Bennett J).

¹⁷⁴ *Luu v Renevier* (1989) 91 ALR 39, 50–1 (Davies, Wilcox and Pincus JJ) ('*Luu*'); *Minister for Immigration and Citizenship v Dhanoa* (2009) 180 FCR 510, 521–2 [50] (Jagot and Foster JJ).

¹⁷⁵ *SZOEG v Minister for Immigration and Citizenship* [2011] FCA 61 (8 February 2011) [23] (Collier J).

Within these broad margins there may be considerable discretion. Wilcox J gave no clear guidance in *Prasad*,¹⁷⁶ though it is instructive to note that his Honour held the many minor inconsistencies in statements taken from a couple about their living arrangements should have been investigated and clarified. The validity of the couple's marriage was the central issue, which suggests information that might point one way or the other on key issues may be sufficiently important to warrant inquiry. In *Luu v Renevier*¹⁷⁷ the Full Court of the Federal Court similarly held that information on the potential recidivism of a person facing deportation after conviction for serious criminal offences was of 'critical importance'. It followed that medical reports on this key issue should have been obtained from doctors who had treated the person.¹⁷⁸

IX Unreasonableness or Jurisdictional Error as a Foundation for a Duty to Inquire?

The possibility that material which is obvious, centrally relevant and easily obtained may trigger a duty to inquire by the principles of unreasonableness or jurisdictional error invites the consideration of whether one ground is a more suitable vehicle for a duty to inquire. The discussion of unreasonableness by Wilcox J in *Prasad* was clearly obiter,¹⁷⁹ but it has been applied in many cases. A rarely noticed and arguably more important point is that *Prasad* was an application under s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'), which enables review for unreasonableness for 'the exercise of a power'. The *ADJR Act*'s expression of the unreasonableness ground provides textual support for the reasoning of Wilcox J because it enables review of the *manner* in which a power is exercised, and not simply the result that is reached.¹⁸⁰

Prasad was decided before the rise of the constitutional writs, in the halcyon days of the *ADJR Act* when it was the preeminent vehicle for judicial review at the federal level.¹⁸¹ This period is often looked back upon as an expansionary one in judicial review, made all the more remarkable for the apparent lack of any guiding or overarching theory to propel that expansion.¹⁸² The duty to inquire recognised in

¹⁷⁶ (1985) 6 FCR 155, 170–6.

¹⁷⁷ (1989) 91 ALR 39, 50 (Davies, Wilcox and Pincus JJ).

¹⁷⁸ But see *Sales v Minister for Immigration and Citizenship* (2007) 99 ALD 523 [28]–[30], reversed on other grounds (2008) 102 ALD 521. Flick J held that a decision-maker need not seek evidence concerning recidivism. The difference may be because *Luu* concerned evidence specific to the applicant, while *Sales* concerned more general evidence. The former is clearly more useful than the latter.

¹⁷⁹ A point Wilcox J acknowledged while upholding the claim on other grounds: *Prasad* (1985) 6 FCR 155, 167.

¹⁸⁰ Although s 5(2)(g) of the *ADJR Act* enables review of a 'decision', as defined elsewhere in the Act, the text of the section appears to clearly enable review of the way in which a power was exercised.

¹⁸¹ The *ADJR Act* spawned many leading cases, including: *Kioa v West* (1985) 159 CLR 550; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Johns v Australian Securities Commission* (1990) 178 CLR 408; *Minister for State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

¹⁸² Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 95.

Prasad might provide an interesting and ultimately modest example of this expansion. Its modesty arose from the anticipation by Wilcox J that the three requirements he identified would enable the duty to apply in ‘strictly limited’ circumstances, which in turn meant the duty did not overturn the general principle that a decision-maker is not obliged to make an applicant’s case.¹⁸³ The reasoning in *Prasad* might also illustrate how the codified grounds of review in the *ADJR Act* may foster innovation, despite recent charges to the contrary.¹⁸⁴

If *Prasad* was not fashioned by reference to particular and complex requirements of migration legislation, it could provide a duty of inquiry of general application to tribunals. The High Court suggested otherwise in *SZIAI*¹⁸⁵ when it noted that the ‘proposition which may emerge from *Prasad* has not been the subject of full consideration whether in litigation under the *ADJR Act*, or any other statutory regime or under s 75(v) of the *Constitution*’ in the High Court.¹⁸⁶ It is unlikely these remarks were intended as a cryptic suggestion that the content of the unreasonableness ground might differ significantly between these various avenues of review. That possibility would fragment and complicate the grounds of review for no good reason. It would also be contrary to the evolutionary capacity of the common law grounds of review.¹⁸⁷

Aronson, Dyer and Groves argue that unreasonableness has essentially been split from irrationality and illogicality by *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (‘*S20*’)¹⁸⁸ which, in turn, means *Prasad* would now likely be decided by reference to irrationality or illogicality. Those authors also accept that their interpretation of *S20* is largely one of nomenclature which would see the reasoning employed in *Prasad* marshalled under a different ground without effecting any substantial change to either the reasoning or the result.¹⁸⁹ This approach does not appear to have been widely adopted. The courts have instead recognised that a failure to inquire might give rise to jurisdictional error.

An influential statement to this effect was made in *Minister for Immigration and Citizenship v Le*.¹⁹⁰ Kenny J held that a failure to inquire ‘may ground a finding of jurisdictional error because the failure may render the ensuing decision manifestly unreasonable’ in the *Wednesbury* sense.¹⁹¹ Kenny J undertook a lengthy

¹⁸³ *Prasad* (1985) 6 FCR 155, 170. The limitation of the duty to exceptional cases means it is consistent with similar doctrinal limitations on the ground of unreasonableness.

¹⁸⁴ The possible effect of the codification of the grounds of review in the *ADJR Act* upon Australian judicial review is examined in Mark Aronson, ‘Is the *ADJR Act* Hampering the Development of Australian Administrative Law?’ (2005) 12 *Australian Journal of Administrative Law* 79. (2009) 259 ALR 429.

¹⁸⁵ *Ibid* [23] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁸⁶ A capacity frequently affirmed by judges: see, eg, J J Spigelman, ‘The Foundations of Administrative Law: Towards General Principles of Institutional Law’ (1999) 58 *Australian Journal of Public Administration* 3, 7.

¹⁸⁷ (2003) 198 ALR 59.

¹⁸⁸ Aronson, Dyer and Groves, above n 90, 294–5. Those authors also conclude that *Q* conception of unreasonableness does not enable challenges to findings of fact: at 372–3. That conclusion is not at odds with a duty to inquire under the auspices of unreasonableness because that duty goes to the search for information rather than fact-finding per se.

¹⁸⁹ (2007) 164 FCR 151.

¹⁹⁰ *Ibid* 172–3 [60], citing *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

analysis of the cases in which the ‘concept of vitiating unreasonableness has been extended to the manner in which a decision was made’.¹⁹² Her Honour appeared to accept that the principles devised in *Prasad* as applied in subsequent cases did not differ significantly between the *ADJR Act* and other avenues of judicial review.¹⁹³ This reasoning conflated unreasonableness and jurisdictional error in the decision-making process with an error in the ultimate decision in the same way that Wilcox J accepted was possible under the *ADJR Act*. In other words, the limited duty of inquiry Wilcox J fashioned in *Prasad* is not restricted to, or dependent upon, the wording of the *ADJR Act*. It can also be accommodated within jurisdictional error.

SZIAI appears to suggest that a failure to inquire might only be considered under the rubric of jurisdictional error, though the High Court was guarded even on this. The Court held there was no indication further inquiries in the case could yield a ‘useful result’ and that further inquiries would be futile.¹⁹⁴ Accordingly, it was not strictly necessary to explore whether a failure to inquire might give rise to jurisdictional error in the form of a constructive failure to review or unreasonableness more generally. Subsequent cases have reasoned that this aspect of *SZIAI* does not disturb the finding of Kenny J in *Le’s* case.¹⁹⁵ It therefore appears a failure to inquire might give rise to a jurisdictional error of several forms and also that the ground of unreasonableness might also be available, or rather that it has not been clearly disavowed by the High Court.

One curious aspect of *SZIAI* was its suggestion that a failure to make an obvious inquiry about a critical fact which could be easily ascertained might ‘supply a sufficient link to the outcome to constitute a failure to review’.¹⁹⁶ One can question whether this adds anything of value to the factors devised in *Prasad*. More particularly, what does the need for a ‘sufficient link to the outcome’ add to the requirement from *Prasad* that information be central or critical? Each directs attention to information that will be vital to the matter at hand but neither goes so far as to suggest the information must be decisive. This ‘sufficient link’ requirement appears to set a less onerous standard than the one allowing the refusal of relief for denial of natural justice when it is proved the denial made no difference to the outcome.¹⁹⁷ Whatever the difference between ‘sufficient link’ and ‘no difference’, judicial review or the tribunals to which it extends are unlikely to be enhanced by yet another discretionary and differently expressed reason to refuse relief.

There are several reasons why a duty to inquire should be located in the ground of unreasonableness as an instance of jurisdictional error rather than a constructive failure to exercise jurisdiction. If a duty to inquire is accepted as an

¹⁹² Ibid 173 [63].

¹⁹³ Ibid 173–9 [63]–[79].

¹⁹⁴ *SZIAI* (2009) 259 ALR 429 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁹⁵ See, eg, *SZNMJ v Minister for Immigration and Citizenship* (2009) 112 ALD 284 [36] (Cowdroy J); *Khant v Minister for Immigration and Citizenship* (2009) 112 ALD 241 [67] (Cowdroy J); *SZMJM v Minister for Immigration and Citizenship* [2010] FCA 309 (1 April 2010) [20] (Bennett J).

¹⁹⁶ *SZIAI* (2009) 259 ALR 429 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁹⁷ At present relief for denial of natural justice may be refused if the court is satisfied the denial made no difference to the outcome: *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145–6; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 109 [58] (Gaudron and Gummow JJ), 120 [104], 128 [122] (McHugh J).

incident of unreasonableness, it can provide a limited duty to inquire of general application to tribunals. Such a duty could mark a minimal point at which tribunals must stop, consider the material before them and decide whether some key issues call out for further investigation. This is a small and natural extension of the simpler and less adversarial approach tribunals ought to take. The potential application of *Prasad's* limited duty to inquire to administrative officials should also not be forgotten. *Prasad* has generally been raised in cases seeking judicial review of tribunal decisions, which has distracted attention from the precise origins of the case. The decision-maker was a bureaucrat. *Prasad* can set a limited but useful benchmark for tribunal and bureaucratic behaviour by indicating when both forms of decision-makers cannot remain passive but must instead do a little more. It is not simply that a failure to do so could be labelled unreasonable. It is because it is reasonable to do what *Prasad* requires.

If the factors devised by Wilcox J in *Prasad* are marshalled under jurisdictional error in the form of a constructive failure to review, any duty to inquire, whether labelled as such or a failure to review, would be limited to RRT and its unique legislative context. There are many reasons why this should be avoided. The most obvious one is that jurisdictional error is a notoriously difficult issue to define or identify. While it is clear jurisdictional error may encompass conduct that falls within many of the traditional grounds of judicial review, such as a denial of natural justice or acting in bad faith, other forms of conduct that may or may not give rise to a jurisdictional error are much less clear.¹⁹⁸ Examples include a decision-maker failing to discharge an imperative duty or to observe an inviolable limitation or restraint upon a statutory power,¹⁹⁹ misapprehending or disregarding the nature or limits of their functions or powers,²⁰⁰ or a constructive failure to review, as noted in *SZIAL*.

The common theme in these expressions of the conduct that may give rise to jurisdictional error is their obscurity. They are statements of the conclusion reached, namely that an error has been found, which provide no real guidance on when and why a statutory provision may be interpreted as one that will give rise to jurisdictional error if breached.²⁰¹ Many limitations or imperative duties which may give rise to jurisdictional error are implied by judicial interpretation rather than expressly stated by legislative prescription. Jurisdictional error becomes far more obscure and contestable when reached by a process of implication rather than

¹⁹⁸ Mark Aronson has catalogued eight different forms of error so far recognised as jurisdictional: Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 335–6. This assessment was cited with approval in *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531, 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁹⁹ See examples mentioned in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 506 [76]–[77] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

²⁰⁰ An instance given in *Craig v South Australia* (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

²⁰¹ The Full Court of the Federal Court conceded that jurisdictional error was a term of conclusion in *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 43 [27] (Hill, Branson, and Stone JJ). In *WAJZ v Minister for Immigration and Multicultural and Indigenous Affairs [No 2]* (2004) 84 ALD 655 [70], French J similarly acknowledged the 'somewhat circular' terminology of jurisdictional error.

express statements.²⁰² Such findings of jurisdictional error also have little precedent value because the vague and context-dependent process by which limitations and duties are implied rarely provide significant guidance from one legislative context to another.²⁰³ That possibility is implicit in the High Court's admission that the instances of jurisdictional error identified to date are exactly that — particular examples of a general principle.²⁰⁴

X Concluding Observations

At first glance, the hesitant attitude of the High Court in *SZIAI* toward a duty to inquire is puzzling. While such a duty might be at odds with the more passive or neutral approach adopted by courts, in which the parties are more responsible for defining and investigating issues in dispute, that is not necessarily true of tribunal proceedings. The courts are not reluctant to emphasise the constitutional distinctions between courts and tribunals, but appear less willing to recognise or expound the functional consequences of that distinction. There is an obvious paradox in that the courts appear anxious to keep tribunals at arm's length at the constitutional level but often in a close embrace at the procedural level.

The recognition of a limited duty to inquire in tribunal proceedings would represent a divergence between the procedural obligations of courts and tribunals, but there are several reasons why that may be desirable. Perhaps most importantly, a limited duty to inquire would provide a useful and flexible procedural rule. That flexibility would arise because any such duty would not have to be exercised in every proceeding, but the potential for its exercise would have to be considered frequently. That would require tribunal members to pause and ask whether they believed that all obvious material was before them and, if not, whether they could fairly obtain any relevant material that was not at hand. Such a question would normally be a simple and logical one that would not complicate tribunal proceedings. If such a question was posed by tribunal members as a matter of course, experience would almost certainly sharpen their ability to quickly identify those instances in which relevant and easily available material that was not before the tribunal should be sought. It is also possible that tribunal members could, over time, become equally adept at managing those cases identified to require an exercise of a duty to inquire.

Such a duty to inquire would also signal a small but notable procedural divergence between courts and tribunals. There is no conceptual reason why the procedure applicable to tribunals cannot be different, and sometimes more onerous, than for the courts. A limited duty of inquiry of the type recognised in *Prasad*

²⁰² Gageler, above n 182, 104–5; see also J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 85 where it is acknowledged that 'different judges may reach different conclusions with respect to [jurisdictional] matters' because of 'the significant range of elements that must be taken into account'.

²⁰³ In *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 the High Court held that identical phrases used in different parts of an Act would not necessarily have the same effect. Accordingly, cases deciding if and when the breach of provisions cause jurisdictional error may provide limited guidance to similar provisions.

²⁰⁴ *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531, 573–4 [71]–[73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

which requires tribunals to pursue issues that cry out for further action is one example. This principle requires more than is normally expected of courts but is neither demanding nor at odds with what can reasonably be expected of tribunals. The recognition of such incremental principles for tribunals might also encourage the High Court to articulate a more coherent vision of what precisely is expected of tribunals. The time for that is surely due.