INQUISITORIAL PROCESSES IN AUSTRALIAN TRIBUNALS

Narelle Bedford
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Preface

As the result of a presentation by Ms Robin Creyke, then Reader in Law at the Centre of International and Public Law, Faculty of Law, the Australian National University, at the AIJA Annual Conference held in Hobart in September 2001 entitled “Courts, Tribunals and Government”, the AIJA Project and Research Committee resolved to explore with Ms Creyke the possibility of a project further focusing upon the work of tribunals.

Consequent upon discussion between Ms Creyke, Mr Stephen Skehill, a Life Member of the Institute and then an AIJA Councillor and Professor Greg Reinhardt, AIJA Executive Director, Ms Creyke put forward a proposal for a research project on Inquisitorial Processes in Australian Tribunals.

A detailed proposal was submitted to the AIJA Project and Research Committee which formally recommended to Council a project focusing upon an analysis of what it means for a tribunal to operate in an inquisitorial rather than an adversarial fashion and an empirical study of relevant legislation in practices and procedures of tribunals described as inquisitorial.

The way in which tribunals operate and the practices and procedures they adopt are relevant not only to their work but can also inform the way in which courts manage litigation.

The AIJA is pleased to have worked cooperatively with tribunals and tribunal members over a number of years and to have conducted an annual conference for tribunal members. It has been particularly pleased to be associated financially and otherwise with the development of the COAT Practice Manual which is shortly to be launched.

The Institute’s thanks are extended to Professor Creyke and Ms Narelle Bedford for a work which will greatly enhance knowledge of the way in which tribunals work. The Institute is also grateful to the Advisory Committee for the project which consisted of: Mrs Anne Coghlan, the Hon Justice Michael Barker, the Hon Justice Garry Downes AM, Dr Robin Handley, the Hon Justice Murray Kellam AO, Professor Greg Reinhardt, Mr Stephen Skehill, and Her Honour Judge Christine Trenorden.

Mrs Kathy Jarrett was responsible for formatting and desktop publishing and I am grateful to her for her work in this regard.

The Hon Justice John Byrne
President, AIJA
March 2006
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INQUISITORIAL PROCESSES IN AUSTRALIAN TRIBUNALS

NARELLE BEDFORD AND ROBIN CREYKE*

The terms ‘adversarial’ and ‘inquisitorial’ have no precise or simple meaning and to a significant extent reflect particular historical developments rather than the practices of modern legal systems. No country now operates strictly within the prototype models of an adversarial or inquisitorial system. The originators of those systems, England, France and Germany, have modified and exported different versions of their respective systems.¹

I  INQUISITORIAL CONCEPTS – AN ANTIPODEAN RESPONSE

We are accustomed to describing hearing processes as either adversarial or inquisitorial. Despite frequent references to this dichotomy, the meaning of ‘inquisitorial’ is less well understood than ‘adversarial’. A consequence is that the description ‘inquisitorial’ may have been allocated inappropriately to the procedures of Australian tribunals, at least if the term is taken to imply that non-adversary bodies in Australia operate in accordance with the traditional concept of civil law process.

This paper explores the meaning of ‘inquisitorial’ in civil law jurisdictions, and assesses whether the European model has been faithfully adopted in the context of Australian tribunals. In light of the negative answer to that question, the paper next considers what descriptor should be used for Australian tribunals not operating in an adversary mode and what flows from the allocation of the label ‘inquisitorial’. The views of Australian federal courts and key tribunals are examined to give practical content to what is meant in Australia in describing a tribunal’s procedures as ‘inquisitorial’.

There are several reasons these questions should be addressed in this country. The perceptions of parliamentarians about the mode of operation of tribunals colour their views of the procedures that tribunals should be given. If that perception is inappropriately influenced by legislators’ understanding of ‘inquisitorial’, tribunal legislation may be ill-fitted for the inquisitorial role. An appreciation of the meaning of ‘inquisitorial’ also contributes to the standards and processes courts expect of tribunals. If judges have not understood the impact of their non-adversarial role, tribunals may be found unfairly to breach standards set by the courts. For example, to judges trained in adversarial methods the level of questioning required in an inquisitorial process may indicate bias. The public's perception, too, of tribunal

processes and whether their claims are justly treated influence their willingness to rely on tribunals rather than the courts to vindicate their grievances. The inquisitorial processes of a tribunal have a bearing on each of these matters.

These issues led to this study of inquisitorial processes, a study funded by the Australian Institute of Judicial Administration.2

(a) Definitional issues

Traditionally, the word ‘inquisitorial,’ with its echoes of the Star Chamber, conjured up a negative connotation for a common lawyer. This attitude is reflected in the definition of ‘inquisitorial’ as ‘pertaining to an inquisitor or inquisitor, or to inquisition,’ and the specific legal meaning as ‘pertaining to a trial with one person or group acting as prosecutor and judge, or to secret criminal prosecutions’ (italics supplied).3 Even in Europe, there are indications of this negativity. As one French expert pointed out, the Latin root of inquire, inquisivi, inquisitum, to ask, comes from quaestio, ‘questioning’, and ‘question’ in old French ‘ominously means torture’.4

More recently, however, common lawyers have come to regard an inquisitorial system in a different light. Faced with increasing criticism of the costs, complexity and delays in the common law adversarial system, and some notable cases in which it is widely believed the adversarial system produced an injustice,5 a more favourable view of its civil law counterpart has emerged. As the Australian Law Reform Commission (ALRC) described it:

The term ‘adversarial’ …connotes a competitive battle between foes or contestants and is often associated in popular culture with partisan and unfair litigation tactics. Battle and sporting imagery are commonly used in reference to our legal system. Lawyers’ anecdotes about the courtroom are ‘war stories.’ The term ‘adversarial’ has become pejorative. The comparison is the perceived harshness of our own system with an idealised, cooperative dispute resolution model (not a conflict model) associated with ADR, or the ‘games’ and tactics of adversarial systems set against ‘truth finding’ inquisitorial processes of civil code systems.6

This change of view is evident in the terms of reference for the Australian Law Reform Commissions Review of the adversarial system of litigation, the civil justice reference which led to the Managing Justice reports.7 These reports covered, among other things, the operation of the Commonwealth tribunal system. The first specific

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2 This funding is gratefully acknowledged by the authors.
5 For example, the OJ Simpson trial, and the David Milat trial for rape.
6 Above n 1, [1.118].
term of reference’ was the requirement that ‘The Commission …consider civil litigation and administrative law procedures in civil code jurisdictions.’ Although in the terms of reference issued in 1997, this specific mandate had slipped to second place, its continuing prominence was a notable example of the more favourable perception of inquisitorial methodology in Australia in the late 1990s.

This heightened interest in the civil law system of justice was not confined to government and law reform bodies. Academic recognition during this period resulted in two texts of conference papers on the contrasting processes within civil law and common law systems. These were supplemented by several articles confirming the developing interest in inquisitorial processes in tribunals within the academy. What was the attraction? What was it about an inquisitorial system which had resulted in this untoward interest on the part of Australians? The question invites an examination of the civil law inquisitorial process to identify what are its appealing features.

8 By the Labor Attorney-General, Michael Lavarch.
9 ALRC, above n 7, 3 – Terms of Reference.
10 Issued by the Attorney-General, Daryl Williams AM QC in the subsequent Coalition Government.
European model of inquisitorial process compared with its adversarial counterpart

The following description by Certoma, an Australian academic trained in the civil law, captures key features of the European model of ‘inquisitorial’ process:

The inquisitorial process, which has its origins in Canon Law, is characterised by the following factors. First, the fact-finder enjoys an active role in the proceedings in terms both of controlling the proceedings and of participating in the investigation and the collection of the evidence so that the judge is not restricted to the evidence presented by the parties. This does not compromise the neutral role of the judge who is only concerned with the collection of all of the relevant and significant evidence irrespective of whether it is in favour of or against either party. Moreover, the judicial investigation of the facts does not replace but merely supplements and integrates the evidence produced by the parties who remain free to tender any relevant and significant evidence. Secondly, the process strives towards a decision based on a full and complete judicial inquiry with its related power-duty to ascertain the truth. Finally, and contrary to the beliefs of common lawyers, the inquisitorial process contains all the usual procedural guarantees such as the right of a party not to give evidence or remain silent.¹⁵

This description identifies two distinctive elements of the civil law system as it is generally perceived in Australia. A third is assumed. The first is the methodology of collecting evidence. The task of the judge or adjudicator is to act as a protagonist in the proceedings, and it is the judge and prosecuting officials, not the parties, who have the responsibility for seeking out and testing the evidence, often in advance of the formal hearing.¹⁶ The second is the philosophy underlying the system, to elicit the truth.¹⁷ The third, assumed, element is that in the European model tribunals are

¹⁶ Bullier, n 4, 49. See, however, G Downes ‘The Movement Away from Oral Evidence: How Will this Affect Advocates?’ in C Sampford, S Blencowe, S Condlin (eds) Educating Lawyers for a Less Adversarial System (1999), The Federation Press, Sydney, 75-88, where he points out that civil proceedings today are much closer to an adversarial model, in that parties do institute the proceedings and define the issues and are principally responsible for the presentation of evidence, albeit there is generally no hearing, no cross-examination, and the matter is generally decided on documentary evidence alone. Further, he notes that the administrative justice system is principally focused on what a common lawyer would classify as judicial review, not merit review (correspondence between Justice Downes and the authors, 7 July 2004). Nonetheless, these findings do not detract from the hypothesis that it was the perception of Australian legislators and law reformers of what is meant by ‘inquisitorial’ process which underpinned their adoption of what is meant by the ‘inquisitorial’ label as attached to Australian tribunals. ¹⁷ Bullier, n 4, 49-50. However, this conclusion has been described as ‘controversial’, see M Nolan ‘The Adversarial mentality versus the Inquisitorial mentality’ in ‘Investigating the Adversarial and Inquisitorial systems of law’ (2004) 16 LegalDate 7. cf Joan Dwyer who gives primary emphasis to inquisitorial procedures in truth elicitation in her article cited in n 14 at 252.
part of a hierarchy of investigative and adjudicative bodies all of which operate
according to the same inquisitorial rules.

By contrast, an adversarial system focuses more heavily on the hearing as the
locus for the identification of issues and the bringing out and testing of the evidence.
The judge is impartial and has not been involved in the collection or the sifting of
evidence or the interviewing of witnesses. The rules, including the rules of evidence,
play a key role, and centre on protection of the accused, at times at the expense of
the truth.\textsuperscript{18} The adversarial methodology, then, is party and rules of evidence-
centred, and the rationale for this style of hearing is the protection of the rights or
interests of the accused person or the applicant.\textsuperscript{19}

While it must be conceded that the ‘pure’ model of an ‘adversarial’ or
‘inquisitorial’ system no longer exists, even in Europe,\textsuperscript{20} and there are variations
between the criminal, the civil and the administrative justice processes even within
the European system,\textsuperscript{21} sharp differences remain between the perception of the two
systems. It is that perception, rather than the civil law system as practised, which
underpins this study. These differences raise the question: to what extent
‘inquisitorial’ in the Australian context has the same procedural and ideological
focus as the classic European model? Has Australia borrowed a concept and
modified it so that the label ‘inquisitorial’ is not suitable for indigenous Australian
use? Or is the Australian version a relatively faithful reflection of the elements of the
European model which have been identified?

(c) Does the Australian model for inquisitorial bodies match key elements
of the European model?

The answer to this question will be considered in relation to two case studies: the
Commonwealth AAT; and the Immigration Review Tribunal (IRT), the precursor of
the Migration Review Tribunal (MRT).\textsuperscript{22} The IRT has been chosen because it was
overtly designed as ‘inquisitorial’; it was assumed that the AAT would operate in an
inquisitorial manner. ‘Inquisitorial’ processes have been adopted for Australian
tribunals since at least the mid-1970s.

It is notable that Australian tribunals differ in one key respect from their
European counterparts. Although tribunals are part of an executive branch of

\textsuperscript{18} Bullier, n 4, 51. For a quite detailed analysis of the non-adversary system for administrative
adjudication see the Commonwealth Administrative Review Committee Report (Kerr Committee report)
Parliamentary Paper No 144, 1971, 63 (Chapter 9 Overseas Systems of Administrative Law – France). For
a discussion of the concepts of ‘adversarial’ and ‘inquisitorial’ in the contexts of criminal and family law
see the articles collected in ‘Investigating the Adversarial and Inquisitorial systems of law’ (2004) 16
LegalDate 1.

\textsuperscript{19} Bullier, n 4, 51.

Bronitt, H Mares ‘The history and theory of the Adversarial and Inquisitorial systems of law’ (2004) 16
LegalDate 2.

\textsuperscript{21} G Downes ‘The Movement Away from Oral Evidence: How Will this Affect Advocates?’ in C
Sampford, S Blencke, S Conlin (eds) Educating Lawyers for a Less Adversarial System (1999), The
Federation Press, Sydney, 75-88.

\textsuperscript{22} The MRT commenced operations on 1 June 1999.
government and, when making decisions, exercise much the same powers as the primary decision-maker, review of a tribunal’s decisions is ultimately by a court, not a further tribunal. Since courts in Australia generally operate in an adversarial, not an inquisitorial, mode, there is a dissonance between the processes of the review body and the tribunal being reviewed. That difference inevitably creates tension in common law systems, a dissonance that is absent from the civil law administrative justice system with its court and tribunal structure separated from the parallel civil and criminal law systems. The effects of this distinction will be discussed later in this paper.

Commonwealth Administrative Appeals Tribunal

Although it was not at first identified as ‘inquisitorial’, it is clear that from its inception, the AAT was seen as possessing many features of an inquisitorial body. The key characteristic is the role of the adjudicator. The absence of a contradictor, the denial that any party bears the onus of proof, and the concomitant obligation on the members of the tribunal to undertake the role of eliciting and testing evidence, mean that the tribunal itself is in charge of the process to a considerably greater extent than applies under an adversarial system.

In a report in 1981, the Administrative Review Council (ARC) described the powers of the AAT, the final tier merit review body for income support matters, in these terms:

[T]he [AAT] tends to be more active than courts in asking questions of witnesses. Because many claimants will be unrepresented and unskilled in presentation of their cases, a departure from the traditional court role and a development of the AAT’s pattern is likely to be necessary. It is envisaged that the tribunal would not expect the claimant in every case to present without guidance all relevant evidence and arguments. On that basis, it is expected that the Tribunal will take an active role in the conduct of hearings, including asking questions of witnesses, though this active questioning is not expected to extend to the exclusion of parties asking questions should they so wish. It is recognised that there can be a danger in an adjudicator entering too much into the development of a party’s case.²⁴

Further, the report noted that ‘procedures before tribunals should be flexible, [and] allow substantial informality in cases where formality is not essential’.²⁵

²³ That label was not used until 3 years later when, in a subsequent report into social security appeals, the ARC recommended the introduction of an intermediate external tribunal, the SSAT, to hear appeals in this jurisdiction. In doing so, the ARC noted that ‘SSAT hearings are at present essentially of an inquisitorial nature’ (Administrative Review Council The Structure and Form of Social Security Appeals Report No 21 (1984) [141] 38). Since that time, use of the term has become commonplace.
²⁵ See n 24 at [8.003] 38.
Although the ARC may not initially have described the AAT as ‘inquisitorial’ others soon did.²⁶ Nonetheless, to anticipate a finding of this study, it may be more accurate to suggest that although AAT hearings are shorn of the rules of evidence, and there is a capacity for the Tribunal to operate in an inquisitorial manner,²⁷ the prospects for AAT hearings to be inquisitorial depend to a large extent on the nature of the matter before the AAT and the parties and members involved. The preliminary conference and the directions hearing, rather than the hearing itself, are the principal stages at which inquisitorial processes are most commonly encountered. This is illustrated by the findings in Part VI of this paper.

The tribunals included in this study operate within a spectrum of inquisitorial practice, ranging from very to less inquisitorial. In this spectrum the AAT would be placed at the end nearest to the courts, a style of operation that is arguably appropriate, given that the AAT is the final tier of merits review.

**Immigration Review Tribunal**

The Committee for the Review of the System for Review of Migration Decisions (CROSROMD) said of the inquisitorial style of the IRT:

> The most obvious characteristic of the IRT as a non-adversarial tribunal, when compared with a more traditional tribunal such as the AAT, is that there is no direct confrontation at a hearing between parties and between their lawyers. In an adversarial system, there are commonly two parties, each represented by lawyers, who argue the issues of law and fact to be resolved, and challenge the contentions of the opposing party. In the IRT, however, it is usually only the applicant who attends any ‘hearings’, and he or she is often not represented by anyone else, whether a lawyer or otherwise. Tribunal members themselves are responsible for actively assisting the applicant to present his or her case, identifying all the relevant issues, thoroughly testing the evidence and protecting the interests of both applicant and the Department or Minister.²⁸

The inquisitorial nature of the IRT’s process was evident in the absence of an opposing party with the consequence that the evidence-gathering and testing role fell on the tribunal. Other features of the non-adversarial process were that the tribunal


²⁷ An example of an innovation which has the potential to repair one of the omissions in the AAT’s inquisitorial tools is the use of Writeway Research Service, a research body, to undertake empirical and historical research. That research at present is only conducted at the instigation of the Repatriation Commission in veterans’ matters, and is designed to produce evidence for use in AAT hearings. There would be advantages for the AAT if it had general access to a service of this kind.

²⁸ CROSROMD Committee report, Non-adversarial review of migration decisions: the way forward (1992), [7.1.2].
was not bound to follow formal rules of evidence, and the tribunal was to adopt procedures designed to minimise legalistic approaches, achieved principally by the refusal of legal representation. 29 Although lawyers could accompany applicants to tribunal hearings, they were permitted to address the tribunal only in exceptional circumstances and could contribute only if information was sought from them by the tribunal. These features have been retained by the successor of the IRT, the MRT, although there is no equivalent provision concerning legal and other assistants before the Refugee Review Tribunal (RRT). 30

These procedures mimic those adopted in the European model. Certainly, the burden of information gathering is placed on the tribunal rather than the parties. To that extent the IRT’s procedures have adopted one facet, the methodology, of the continental inquisitorial system. This might explain the enthusiastic declaration of one member of the federal Parliament during the parliamentary debates preceding the passage of the Bill for the IRT 31 that the new review tribunal ‘is modelled on the original French process of administrative law’. 32 However, that assessment fails to take account of another key feature of the civil law system, the underlying rationale of the European inquisitorial model, the satisfaction of the public interest in uncovering the truth. This objective has not been given the same prominence in Australia.

This conclusion is supported by another key objective of the IRT. 33 The tribunal was set up to achieve ‘speedy review of decisions with minimum cost and formality’. 34 In this regard, the IRT is not alone. A common objective in establishing Australian tribunals has been to manage large numbers of disputes more cheaply and efficiently than could be achieved by the courts. This is illustrated by the debates on the Bill introducing the IRT. The features of its processes were granted ‘largely [to] overcome the problems of delay, cost, formality and technicalities’ of the preceding system. 35 The problems included ‘massive waiting periods; all sorts of different legislation; and adversarial situations which produced immense difficulty and heartache for people’. 36 The emphasis on speed, informality, and economy suggests that the principal motivation for giving the tribunal inquisitorial powers was not because of a belief in the truth-elicitation advantage of the civil law model, but

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29 Ibid, [7.1.3]-[7.1.4].
30 Migration Act 1958 (Cth) Parts 5, 7.
31 The Migration Legislation Bill 1989 (Cth).
32 Commonwealth, Parliamentary Debates, House of Representatives, 1 June 1989, 3493 (Cadman).
33 Similar sentiments were expressed in relation to the other high volume Commonwealth specialist tribunals, the SSAT, the two migration tribunals, and the VRB: for example, see the Administrative Review Council The Structure and Form of Social Security Appeals Report No 21 (1984) [136], [138]. The indicator that speediness is a major objective is usually found in the statutory formula that the tribunal should operate in a manner which is described as ‘fair, just, economical, informal and quick’. This statutory formula applies to the SSAT and both migration tribunals: Social Security (Administration) Act 1999 (Cth) s 141; Migration Act 1958 (Cth) s 353 (MRT), s 420 (RRT).
34 Above n 28, [7.1.9].
35 Certoma, above n 15, 5. Several speakers during the parliamentary debates pointed out that the aim of the ‘new review system [the proposed IRT] … [was] to ensure the cases are resolved fairly and speedily’: Commonwealth Parliamentary Debates, House of Representatives, 1 June 1989, 3450 (Holding).
36 Ibid, 3498 (Charlesworth, Member for Perth).
rather to ensure an efficient and relatively speedy resolution of complaints. The choice was pragmatic rather than principled.

(d) Should Australian tribunals be labelled 'inquisitorial'?

This failure of the Australian model to replicate one of the key features of its European counterpart, the truth identification role, suggests that purloining the label ‘inquisitorial’ to describe Australian inquisitorial tribunals may be misconceived. In addition, ‘inquisitorial’, as the earlier reference to the Star Chamber indicates, is most commonly associated at common law with the criminal, not the civil, side of the justice system. Use of ‘inquisitorial’ for administrative functions is, therefore, misleading.37

What other label might be adopted? Would ‘investigative’ be more appropriate? The problem with this option is that ‘investigative’ is commonly associated with institutions such as the ombudsman, royal commissions, anti-corruption commissions,38 coroners,39 and the Australian Securities and Investments Commission.40 These bodies conduct inquiries, rather than adjudicate, and have extensive coercive powers to compel the production of documents, and to command the presence of witnesses. To categorise investigative bodies alongside determinative tribunals is equally inapposite.41

This was recognised in the United Kingdom in the Tribunals and Inquiries Act 1958 with its distinction between tribunals and inquiries.42 As the Report of the United Kingdom Committee of the Justice-All Souls described it: ‘Though often referred to in the same breath as tribunals, inquiries have quite a different origin, purpose, and status and their development has been quite different’.43

This difference has been recognised in Australia,44 for example, by the Australian Law Reform Commission, which preferred ‘investigative’,45 having conceded that the term ‘inquisitorial’ internationally has ‘no precise or simple meaning’.46 Commonly, however, the terms ‘investigative’ and ‘inquisitorial’ are used as

37 For example, Hammond v Commonwealth (1982) 152 CLR 188.
38 For example, Ainsworth v Criminal Justice Commission (1992) 175 CLR 564.
39 For example, Annetts v McCann (1990) 170 CLR 596.
41 This difference was recognised in the United Kingdom in the Tribunals and Inquiries Act 1958.
42 The Tribunals and Inquiries Act 1958 (UK) was a product of the Franks Committee Report, Parliament of the United Kingdom, Administrative Tribunals and Inquiries (1957), 218.
44 For example, see Community Advocate v Gallop [2002] ACTSC 45; L Hallett Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects (1982), 12-13.
46 ALRC, Review of the Federal Civil Justice System Discussion Paper No 62 (1999) [2.24]. The choice of ‘investigative’ has already been criticised on the basis that ‘investigative’ more properly applies to inquiries, rather than adjudicative processes.
synonymous, and Certoma prefers ‘inquisitorial’. The labelling problem has been decried by Kirby J, who noted of the Refugee Review Tribunal: ‘I do not consider it necessary or helpful … to decide whether the Tribunal can be classified as ‘inquisitorial’ … or ‘adjudicative’ or ‘investigative’. Such labels may have a tendency to mislead.’

Similarly, the then Commonwealth Attorney-General, Daryl Williams, advocated moving on from the ‘ongoing and potentially unproductive “adversarial” versus “inquisitorial” debate’.

What other descriptions have been suggested? Four members of the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) in *Minister for Immigration and Multicultural Affairs v Wang* have described such processes as ‘not adversarial’.

Others, like Justice Balmford, opted for ‘interventionist’. The Leggatt inquiry into tribunals in the United Kingdom preferred to describe the mode of procedure of tribunals as ‘enabling’ rather than ‘inquisitorial’. Other suggestions have been ‘cooperative’, ‘facilitated’, or ‘dialogue-based’.

As a minimum, since Australian tribunals do not possess all the features of a classic civil law inquisitorial body, perhaps it is time to coin a new adjective to refer to these bodies. At the least, the term ‘inquisitorial’ should be understood in its vernacular, Australian, sense. The authors of this paper, in deference to established nomenclature, have continued to use ‘inquisitorial’. Nonetheless they hope that the light shed by this study will present a different picture from the European portrait of ‘inquisitorial’ when that descriptor is applied to an Australian tribunal.

II  RESEARCH METHODOLOGY

47 For example, the ALRC in its civil justice investigation predominantly used the term ‘investigative’, but also referred to tribunals as ‘inquisitorial’: see ALRC, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999), Chapters 6 and 12.
48 L Certoma, n 15.
49 Re *Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 149 [63].
56 There is a tendency to use ‘inquisitorial’ and ‘investigative’ as synonyms: Kirby J in *Re Minister for Immigration and Ethnic Affairs; Ex parte Epeabaka* (2001) 206 CLR 128; *Re Talma and Repatriation Commission* (2005) AATA 866, [5] per Senior Member Dwyer.
The empirical component of the study involved two distinct elements: an analysis of the legislation and other documentation of tribunals, and observations of the processes adopted in their hearings. These elements of the research were designed to identify what ‘inquisitorial’ means in the context of Australian tribunals. It was necessary to limit the number of tribunals in the study in light of the recent proliferation in tribunals across Commonwealth and State jurisdictions.\(^ {57}\) For this reason the study was restricted to eight key Commonwealth and State tribunals. These were the Commonwealth’s Administrative Appeals Tribunal (AAT), the Migration Review Tribunal (MRT), the Refugee Review Tribunal (RRT), the Social Security Appeals Tribunal (SSAT), and the Veterans’ Review Board (VRB), and at the State and Territory level, the New South Wales Administrative Decisions Tribunal (ADT), the NSW Guardianship Tribunal (NSW GT), and the Victorian Civil and Administrative Tribunal (VCAT).

(a) Tribunal selection and research design

At the Commonwealth level, the tribunals were selected on the basis of those recommended in the Better Decisions report\(^ {58}\) for amalgamation into the proposed Administrative Review Tribunal.\(^ {59}\) These were also the tribunals included in the Managing Justice report and its predecessor discussion and issues papers.\(^ {60}\) A common feature of these tribunals is that they review primary decisions made by an executive department or agency,\(^ {61}\) although the AAT also has a role of reviewing decisions made by other tribunals.

At a state level, the NSW Administrative Decisions Tribunal (ADT)\(^ {62}\) and the Victorian Civil and Administrative Tribunal (VCAT) were selected as a reflection of the new ‘super’ tribunals with combined civil and administrative jurisdictions which are emerging at the State and Territory level. Resource and time constraints prevented an examination of other similar State-based tribunals. The ADT and the VCAT are located in the two most populous states, and have also been in existence for the longest period of time. This study was confined to the administrative jurisdiction only of their combined caseload.


\(^ {59}\) These were the AAT (Cth), MRT, RRT, SSAT and the VRB.


\(^ {61}\) In NSW, a Parliamentary Committee reported in November 2002 on the jurisdiction and operation of the ADT. Its principal recommendation was that there be further legislation to merge separate tribunals into the ADT with consideration being given to merging all professional disciplinary tribunals with the ADT. Other recommendations were for a systematic policy approach to conferring jurisdiction in respect of the review of governmental administrative decisions on the ADT, ADT Annual Report, 2002-03, 4, 37.

State tribunals making decisions about guardianship\(^63\) were chosen because of the nature of their jurisdiction. The person the subject of a guardianship inquiry is frequently unable to present their case and as a consequence, an inquisitorial approach is often relied on to obtain the information required for a decision about the need for a guardian.\(^{64}\) A distinction between guardianship tribunals and administrative review tribunals is that guardianship tribunals make original, as well as review, decisions. In New South Wales, the Guardianship Tribunal has remained a discrete tribunal whereas in Victoria the previous Guardianship Board was amalgamated into the VCAT, although its jurisdiction is exercised in a separate list.

The following method was adopted to the collection of empirical data from the eight tribunals. First, reference tables were prepared. The legislation governing each tribunal is set out in Attachment 1 and a Quick Reference Table of Inquisitorial Legislative Powers is contained in Attachment 2. Attachment 3 provides full textual detail of the legislative powers of a non-adversarial character conferred upon the tribunals. Second, annual reports published by the eight tribunals were examined for references to the nature of their proceedings. Third, a hearing observation program was conducted. This involved observing over thirty hearings across the different registries of the eight tribunals. Finally, a questionnaire was administered in interviews with thirty-seven members and staff of the tribunals. The questionnaire involves seventeen questions covering a broad range of conceptual, procedural and practical issues related to inquisitorial powers and proceedings: see Attachment 4.

(b) The Tribunals: A Snapshot

To provide a snapshot of the eight tribunals included in this study, a comparative table was prepared based upon information contained in the 2003-04 annual reports.\(^65\) While the data in this table may not be directly comparable, it is nonetheless useful as a guide to the membership structure of each tribunal, the annual caseload and the staff resources which support that membership structure and caseload.

<table>
<thead>
<tr>
<th>Tribunals: Comparative Table – 2003-2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAT</td>
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<tr>
<td>-----</td>
</tr>
<tr>
<td><strong>Full time Members</strong></td>
</tr>
<tr>
<td>26</td>
</tr>
<tr>
<td><strong>Part time Members</strong></td>
</tr>
<tr>
<td>45</td>
</tr>
<tr>
<td><strong>Staff</strong></td>
</tr>
<tr>
<td>113</td>
</tr>
<tr>
<td><strong>No. of applications</strong></td>
</tr>
<tr>
<td>7 267</td>
</tr>
<tr>
<td><strong>No. of finalisations</strong></td>
</tr>
<tr>
<td>9 909</td>
</tr>
</tbody>
</table>

*Numbers include staff of both RRT and MRT. Separate figures for each tribunal are not provided in the annual reports.

\(^{63}\) A generic description used here to include guardianship of the person (including, when applicable, decisions about medical treatment) as well as management of the person’s property.

\(^{64}\) Similar considerations would also apply to the various state-based mental health review bodies, but as these have not been included in any of the amalgamated ‘super’ tribunals, it was felt that the guardianship jurisdiction would provide the broadest scope for study.

\(^{65}\) Annual reports from 2003-2004 were used for each tribunal.
A number of general trends can be ascertained from this comparative table. The first is the increasing reliance on part-time members rather than full-time members at each tribunal. The implication in terms of the inquisitorial workload and skills of members is a matter that is addressed in the later section of the paper and in the actual interviews with members and staff. A point of divergence between the tribunals is the relative numbers of staff in comparison to members. In three tribunals - the AAT, the RRT and the MRT - the numbers of staff outweigh the numbers of members. This may indicate the reliance by these tribunals on staff rather than members to perform inquisitorial functions. Another notable trend is the difference between case flows for the tribunals. The caseload ranges from approximately 400 applications per year for the ADT as compared to the 86,000 applications to VCAT (although refer to note **) in the same period. Despite the disparity in the workload, these tribunals have a similar number of part-time members.

III ANALYSIS OF OPERATION OF TRIBUNALS

(a) Self-Perception of Tribunals

To understand how an institution operates, it is often illuminating to examine how the institution views itself. In their public documents, five of the eight tribunals identify themselves as non-adversarial, suggesting they have embraced the idea, label and practice of non-adversarial proceedings. Of the five tribunals so self-identifying three directly referred to their procedure as inquisitorial, while two were more reticent about calling themselves inquisitorial, they were comfortable to highlight their investigative powers. For example, the following references are found in their 2002-03 annual reports:

- The [Refugee Review] Tribunal is inquisitorial in nature and can obtain whatever information it considers necessary to conduct the review.

- As a merits review tribunal, the SSAT is inquisitorial in its approach.

66 The RRT, the SSAT, the NSW Guardianship Tribunal, the MRT and the VRB.
67 The MRT and the VRB.
69 Social Security Appeals Tribunal Annual Report 2002-03, 11.
For these reasons, the Guardianship Tribunal conducts its hearings differently to other tribunals. The Tribunal operates in an inquisitorial manner.\(^{70}\)

The [Migration Review] Tribunal can also conduct further investigations to support its decision-making process.\(^{71}\)

… the Principal Member [of the Veterans’ Review Board] (or a Registrar to whom the power has been delegated) may request the Secretary to conduct further investigations and provide further material.\(^{72}\)

\(\text{(b) Factors indicating processes are inquisitorial}\)

The ALRC’s Issues Paper 24 Federal Tribunal Proceedings noted that:

> The legislation establishing federal merits review tribunals, anticipates that, in appropriate cases, tribunals will undertake their own investigations or inquire into matters relevant to decisions under review. These investigative powers derive from the particular form and function of review tribunal proceedings.\(^{73}\)

The ALRC observed that ‘review tribunals are provided with a range of permissive, information gathering powers to enable them to perform investigative functions’.\(^{74}\) This was true for each of the tribunals involved in this study.

\(^{70}\) NSW Guardianship Tribunal Annual Report 2002-03, 11.

\(^{71}\) Migration Review Tribunal Annual Report 2002-03, 9.


\(^{74}\) Id [6.20].
The following indicators drawn from tribunal legislation, the literature and the case law signify the inquisitorial character of the tribunals:

1. A duty to inquire;
2. The ability to inform itself;
3. The power to compel the production of witnesses;
4. The power to compel the production of documents;
5. The discretion of the tribunal to determine its own procedure;
6. The informality of the hearings;
7. The absence of an obligation to abide by the rules of evidence;
8. The requirement to provide fair process;
9. The ability to make a decision on the papers;
10. The need for the proceedings to be reasonably prompt;
11. The absence of a burden of proof on the parties;
12. The requirement for the standard of proof that the tribunal be ‘satisfied’ as to its decision; and
13. The absence of legal representation for parties and their right to self-represent.

No legislation for the tribunals studied provided for each of these indicators. The variable compliance level means that some tribunals are capable of being more inquisitorial than others. As Blackwood and Henning75 noted after a detailed study of four Tasmanian tribunals: ‘… it is, nevertheless, exceedingly difficult to articulate a concise set of principles relevant to all hearings before quasi-judicial tribunals’.76 They concluded that the circumstances:

… may mean that the tribunal has to adopt a more specifically inquisitorial stance in some cases. This would require flexibility by tribunals in determining whether to deal with specific cases on an adversarial or inquisitorial basis. The consequence of that would be that their practice directions could not be set in concrete.77

76 Id at 40.
77 Ibid.
The variety of Australian models of investigative tribunals was also identified by the ALRC in its review of the federal civil justice system, namely:

- **Model 1**: Only the applicant appears at the hearing, with no prehearing process (this model is currently used in the MRT, RRT, SSAT and VRB);
- **Model 2**: Only the applicant appears at the hearing, with prehearing process (this model was in use at the IRT);
- **Model 3**: Both parties appear at the hearing, with no prehearing process (this model could describe VCAT, the ADT and the SAT);
- **Model 4**: Both parties appear at the hearing, with prehearing process (this model is currently used in the AAT and could also describe VCAT, the ADT and the SAT).

This flexibility is a feature of Australian inquisitorial bodies.

(c) **Legislative indicators for tribunals studied**

The study assessed the level of the tribunals’ inquisitorial processes by finding which of the indicators identified in (b) was present in the legislation for each tribunal. Not all the indicators are discussed, but all are listed in Attachment 3.

A key indicator was the provision of information-gathering powers. For example, their legislation states that the AAT and the SSAT may each ‘inform itself on any matter in such manner as it thinks appropriate.’

The *Migration Act 1958* (Cth) provides that the MRT and the RRT ‘may [each] get any information that it considers relevant’ while the NSW ADT legislation provides that the ADT may ‘inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.’ Likewise, the NSW GT and the VCAT legislation states that the tribunal may ‘inform itself on any matter as it sees fit.’ The VRB has a somewhat different provision ‘to any further evidence…being further evidence relevant to the review’. The breadth of these provisions suggests that the tribunals have extensive power to seek evidence to enable members to perform their adjudicative task.

Another commonly encountered indicator was the ability to call further witnesses or obtain documents. However, tribunals may lack the coercive powers to compel

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76 ALRC, n 46, [12.113].
80 Attachment 2, No 2 *Guardianship Act 1987* (NSW) s 55(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1).
81 Attachment 2, No 2, *Veterans’ Entitlement Act 1986* (Cth) s.139(2).
82 Attachment 2, No.s 3 and 4.
the production of documents or to enter premises. Furthermore, even in those tribunals where the power to compel documents exists, in practice it is rarely used. Possible explanations for this are discussed later. Attachment 2 also records that the tribunals in this study have differing statutory provisions as to the consequences for non-compliance with summons. The usual practice was to create an offence of contempt but consistent with the separation of powers, tribunals can not enforce this offence and instead any breaches would be referred to the DPP for prosecution.

As noted elsewhere in this paper, all tribunals had the statutory power to determine their own procedures. Similarly, all statutes have a provision to the effect that the tribunals are not bound by the rules of evidence. The legislation for the Commonwealth tribunals (with the exception of the VRB) all now contains the requirement that proceedings be ‘fair, just, economical, informal, and quick’. Likewise, all tribunals are required to provide a fair process or to act according to the substantial justice and the merits of the case.

The legislation of only one tribunal, the ADT, imposes a specific duty of inquiry. While such a provision may be important to provide a structural framework in which the tribunal operates and to give guidance to tribunal members and those reviewing the decisions of tribunal members, it is doubtful whether there are discernible differences in the processes of ADT hearings as compared to those in the other tribunals. This is illustrated by the cases covered in Part VI. That is not to deny the advantages of including such a duty in the legislation for tribunals. The intrinsic value of such a provision is not the practical impact it has on the conduct of hearings but rather the confirmation that the power exists and can be relied on.

A procedure available to three of the tribunals is the use of alternative dispute resolution (ADR) techniques. These tribunals are the AAT, the VCAT, and the ADT. The critical factor for use of ADR is that the hearing will involve parties contesting a position. In tribunals in which it is normal practice for only one party to be present ADR is not suitable.

The legislation for some tribunals grants staff investigatory powers, but this is not the norm. On first impression, such a power provides a critical support measure if an active investigative role is to be performed by a tribunal. It is surprising, therefore, that more tribunals have not been granted powers of this nature. At present the legislation provides that staff may undertake such an investigation only in the ADT. In the ADT, the assistance was to be provided by assessors. Interviews with Members at the ADT confirmed, however, that no assessors had yet been appointed.

85 For example, the SSAT does not have the power to compel witnesses to appear: Attachment 2, No 3. VCAT has been granted a contempt power.
86 Attachment 2, No 1, Administrative Decisions Tribunal Act 1997 (NSW) s 73(5).
87 Attachment 2, Procedural Powers.
88 Administrative Appeals Tribunal Act 1975 (Cth) s 34A.
89 Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 88.
91 Attachment 2.
(d) Inquisitorial practices of tribunals

There is clearly a spectrum ranging from the heavily investigative to the adversarial in the practices of the tribunals. That is a mark of the flexibility in the tribunals’ processes which is permitted by their legislation. The range of information-gathering tools sanctioned by the legislation allows a tribunal to adopt a variety of procedures to suit the matter.

When VCAT was established in 1998 it was pointed out, this ‘…was a new experiment, and the reforms were hailed as the most far-reaching of any jurisdiction in Australia.’\(^{92}\) Likewise in 1997 when the NSW AD was created, it was noted that ‘…emphasis has been placed on giving the Tribunal flexibility and a range of procedural options and powers.’\(^{93}\) This ability of tribunals to tailor their procedure to the facts is a valued feature of the tribunal system.

By way of illustration, at VCAT in the general list (general list matters are principally comprised of FOI, transport accidents, state superannuation and criminal injuries compensation) involving a contested matter, it would be common for the tribunal to adopt a more traditionally adversarial approach and rely more heavily on the parties to supply information, to define the issues in contention, and to argue their case. Since in this list parties are most often legally represented, this is an appropriate practice. The example illustrates the capacity for high volume, amalgamated tribunals with diverse civil and administrative caseloads to be either more or less inquisitorial depending on the list or division in which the matter arises and the particular facts.

Similarly, a tribunal can be investigative in its pre-hearing procedures, but more adversarial in the conduct of its hearings. This is exemplified, for example, by the AAT. Conference registrars in the AAT play an active role during the pre-hearing phase in identifying the issues, and directing the parties to obtain information that would be useful. This often requires the provision of further documents or other evidence.

The AAT uses conference registrars extensively. They conduct the bulk of the pre-hearing processes in all District Registries, with the exception of Tasmania.\(^{94}\) While these staff are mentioned in the AAT legislation,\(^{95}\) their precise role is not spelt out.\(^{96}\) At AAT hearings, in the veterans’ jurisdiction, there is a de facto form of investigative agency in that the Repatriation Commission uses a private sector body.

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\(^{94}\) AAT 2002-03 Annual Report, 12.

\(^{95}\) Administrative Appeals Tribunal Act 1975 (Cth) Part IIIA.

\(^{96}\) Administrative Appeals Tribunal Act 1975 (Cth) ss 24B, 24D.
Writeway Research Services, to obtain information on its behalf for use in hearings.\(^{97}\)

The MRT and RRT also make extensive use of investigative staff. The MRT:

… employs a case review model which involves Tribunal staff in the analysis and preparation of most cases. This includes the preparation of a case examination document, which is intended to be reviewed and expanded during the course of the review to become the Tribunal’s final statement of reasons.\(^{98}\)

The RRT use staff in the country research section to provide members with relevant and authoritative country information drawing on a ‘large range of information from both government and non-government sources.’\(^{99}\) Similarly, the NSW Guardianship Tribunal has a Coordination and Investigation Unit that deals with assessment, investigation and preparation of all new and review cases for hearing.\(^{100}\) In contrast to the AAT and ADT legislation, the investigative staff of the MRT, RRT and NSW GT are not specifically mentioned in the legislation.

Another example of a tribunal exploiting the flexibility in its processes is the concurrent presentation of expert evidence process being trialled at the AAT. This technique is a departure from the traditional adversarial method of dealing with expert evidence.\(^{101}\) In an adversarial hearing cross-examination of experts is designed to discredit or undermine the opposing expert rather than to reach a consensus on those aspects of the evidence on which the experts can agree. By contrast, the AAT trial involves taking evidence from experts while each is present and can respond to the evidence of the others. This allows the experts to discuss their different approaches and gives the opportunity for parties and the tribunal to ask questions.\(^{102}\) More than other procedures in the Australian tribunal system, this process is closest to the European inquisitorial process with its focus on discovering the truth.

Although tribunals do, on occasions, obtain their own evidence, in practice, tribunal members typically seek information from the primary decision making agency, or require the parties to provide further evidence, rather than seek out the information themselves. This is most marked at the VRB where the practice is bolstered by a statutory obligation on the Department to prepare a report for the

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97 The role of Writeway Research Services was explained in a letter of the President of the AAT, Justice Downes, to the authors dated 25 November 2004. The authors gratefully acknowledge Justice Downes information on this point.
100 NSW GT Annual Report 2002-03, 5.
102 See also AAT Annual Report 2002-03, 24.
VRB whenever a review is sought, and there is a commensurate obligation on the Repatriation Commission to provide any material which may assist the Board.

IV HEARINGS OBSERVATIONS

While the legislative powers of the eight tribunals might be considered broadly similar, significant differences emerged during the hearing observations. These differences included the use of single and multi-member panels. The sample of hearings covered cases conducted by video conference, and those in which some or all of the parties, interpreters and/or witnesses participated in the hearing via telephone. In the RRT, the legislation requires that all proceedings be conducted in private. This reflects the sensitive nature of the matters being discussed and protects applicants who might be in a politically or emotionally vulnerable position. For similar reasons, hearings of the SSAT are also generally conducted in private.

The proceedings in all the tribunals in this study were considerably less formal than in a typical court proceeding. The atmosphere and styling of the rooms was also relatively informal and hence not intimidating. This informality was contributed to by the number of parties at the hearing. It was routinely the practice in the MRT, RRT, SSAT and VRB for there not to be another party at the hearing. The absence of a contradictor is a common non-adversarial indicator. The only ‘voice’ in defence of the primary decision was the original file and usually a statement of reasons for the decision. In the AAT, VCAT and ADT whether a contradictor was present depends on the facts and the list in which the matter arises. In the guardianship jurisdiction, by contrast, many parties were present at the hearing, sometimes including the person the subject of the application for a guardianship order and sometimes not.

The hearings observations suggest that the types of matters in which it is more common and appropriate that inquisitorial methods be used have certain key characteristics. These are listed in the material which follows.

(a) Key factors for taking an investigative approach

In the hearings observed, it was common for inquisitorial powers to be used when a tribunal was exercising its review, rather than its primary, decision-making jurisdiction. In the hearings involving primary decisions, the tribunals commonly relied more on the applicant to present the case. In all the hearings observed the party/parties were given ample opportunity to present their case throughout the hearing and again towards the conclusion of the hearing.

Two factors which determine the style of the hearings are whether there is only one party present at the hearing, and whether that party is represented. In cases in

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103 Veterans’ Entitlement Act 1986 (Cth) s 137.
104 Veterans’ Entitlement Act 1986 (Cth) s 138(2).
105 Migration Act 1958 (Cth) s 429.
which only one party is present and that party is not represented, it is common to find that further evidence is needed to enable the tribunal to reach the correct or preferable decision. Typically in these cases tribunal members took steps to ensure that the applicant understood the process, had opportunities to provide documentary evidence, and to give such oral information as the applicant, guided by the tribunal, considered relevant. The atmosphere in such hearings was generally relaxed and informal. Members were empathetic in their manner while retaining control of the proceedings, only intervening to keep applicants focused on issues relevant to the matter being determined.

In hearings observed at the SSAT, MRT, RRT, VRB and both guardianship jurisdictions the tribunal members were broadly in control of the proceedings. That meant members guided the applicant on relevant issues and evidence by directing questions to them. In these tribunals, at the conclusion of the hearings, members commonly ask the applicant or other parties ‘is there anything more you would like to tell me/us today?’ This question appears to be designed to encourage the fullest disclosure and to ensure that fair process has been accorded.

By contrast, in the AAT it was more often the case that the parties, or indeed their legal representatives, were in control of the proceedings. At both the VCAT and the ADT the level of intervention also depended on the type of matter and whether the party was represented.

The tribunal members observed were generally skilled in questioning techniques and interview skills. Where appropriate, members used open-ended questions to encourage the provision of full information and rephrased the applicant’s answer to ensure they understood crucial replies. In matters involving translators, members appeared to be conscious of the need to keep questions short and focussed, capturing single ideas and avoided technical terms and sentence structures which might be confusing to non-English speakers, for example, the use of double negatives.

At those hearings where the agency was not present, typically the VRB, the SSAT, the MRT and the RRT, it was made clear to the applicant that the tribunal member/s had available to them a copy of all the material on the respondent’s file relevant to the original decision and the facts of the case. In the case of the SSAT this material was consistently page numbered, copied and provided to the applicant to assist in the conduct of proceedings. Members often raised inconsistencies between the facts asserted at hearing and the details contained in these files and invited the applicant to respond. In these proceedings it was made clear to the applicant at the start of the proceedings, that the tribunal was independent of the department or agency which had made the original decision.

Some tribunals, under their legislation, offer only a limited right of representation to applicants. Under the Migration Act 1958 (Cth), an applicant to the MRT is only entitled to have ‘another person’ (the assistant) present to assist him or her. The assistant is not entitled to present argument to the Tribunal, or address the Tribunal.

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107 Migration Act 1958 (Cth) s 366A.
unless the Tribunal is satisfied that, ‘because of exceptional circumstances, the assistant should be allowed to do so’. In circumstances where the respondent department does not appear and the applicant has no automatic right to representation, the requirement that the tribunal be satisfied and make the correct or preferable decision may imply, of necessity, some investigation by tribunal members or staff if the facts presented are deficient.

(b) **Principal areas in which additional material is sought**

The circumstances in which tribunals frequently sought information were when an applicant had not provided sufficient supporting evidence initially, when evidence needed to be updated, or when there was a need to test inconsistencies between evidence provided in the initial application and the subsequent evidence elicited during the review. This further evidence or more detailed information was either presented by the applicant at or sometimes after the hearing, or was elicited by means of questions from the tribunal members at the hearing itself. At the AAT, in the VCAT general list, and at the ADT, the pre-hearing process was designed to ensure that required evidence was identified and made available at or prior to the hearing. In one of the VRB hearings observed, the proceedings were adjourned to allow the applicant to obtain further evidence required by the tribunal.

(c) **Material obtained from sources other than the parties**

Examples of material being obtained from sources other than the parties arose at the MRT and RRT. In such cases the information was disclosed to the applicant for comment, a practice which is consistent with both legislatively imposed requirements\(^\text{108}\) and natural justice principles. In the RRT such information typically involved current events in the country of origin of the applicant, and was obtained by research staff whose role it is to assist members. At the MRT members sometimes had evidence from other people or institutions known to the applicants, for example, character references, so-called ‘dob-in’ letters which contain allegations of adverse material or contradict information provided by the applicant, and evidence from research staff as to conditions or practices in the applicant’s country of origin.

In response to a question in the questionnaire other tribunals explained that:

- Rarely does the tribunal go behind parties and do its own investigation, although it does happen. In [a recent] case the tribunal obtained phone records without prior reference to the parties. The tribunal often seeks further evidence from parties but rarely acts on its own.

and from another tribunal

\(^{108}\) *Migration Act 1958 (Cth) ss 359A, 424A.*
It is not unusual at a certain point that further evidence may be sought but this is generally a matter for the parties, not the member, to obtain. Adjournments are also used to allow parties more time to gather further evidence.

and another

- In the previous twelve months the Tribunal would not have summoned a single witness. Over the last five years, this power was probably only required two or three times and then usually when extra medical/psychiatric evidence was needed.

(d) Absence of rules of evidence

While tribunals are not bound by the rules of evidence, in the AAT, the RRT, the MRT, the ADT and the VCAT, all witnesses and often applicants were required to swear a formal oath or make an affirmation before giving evidence. The explanation for this practice was that it impressed upon the person the importance of the hearing and the requirement to tell the truth. It is questionable whether this formal procedure, more commonly associated with an adversarial courtroom setting, is the most appropriate method of achieving this result. Support for this argument is provided by hearings before the SSAT or the VRB where no such oaths are administered. In the hearings before these tribunals there did not appear to be a noticeable trend to deliberately mislead the tribunal.

(e) Constitution of panels

In the hearings observed, all members, whether constituted as a single or a multi-member panel, had clearly undertaken substantial preparation in advance of the hearing. The preparation involved reading the file, the submissions and the applications to identify areas where further clarification or evidence was required, identifying inconsistencies between the original and any subsequent claim, or independently collecting information relevant to the matter. In some tribunals, it was clear that much of this preparation had been covered in the pre-hearing processes. In other words, the tribunal members took seriously their inquisitorial role.

The observations suggested that multi-member panels were better equipped to perform the inquisitorial role. The body of experience of each member of a multi-member panel broadened the areas in which experience could be applied to the facts and the legal issues. All hearings observed in which there were multi-member panels conferred before the commencement of the matter and allocated fields of questioning to each member. Frequently, different members raised different, and substantive, items for consideration. The use of multi-member panels also ensured that where adverse material, or the applicant’s credibility, had to be tested, this was done in a manner that was less likely to sustain an allegation of apprehended bias. Multi-member panels also allowed members the opportunity, without interrupting the flow of the questions, to pursue a line of questioning to its conclusion, while other members were able to focus on new areas that required further investigation arising from the answers. In these ways, the members of multi-member panels were
able to perform the tasks of counter-balancing and supplementing each other’s questions during the hearing, thereby achieving a more accurate picture of the facts.

(f) Level of formality at hearings

As Joan Dwyer has noted “the desire to avoid excess formality should be demonstrated by the physical surrounds of a hearing room as well as by the procedures adopted during a hearing”. The level of formality in the design of the hearing room varied significantly between tribunals. At the AAT, the VCAT and the ADT, the hearing room and its furniture was reminiscent of a court room with separate, sometimes raised, ‘bench’ structures for the member to sit behind, a coat of arms on the wall, desks to the side for hearing attendants, and witness boxes for the giving of evidence. In contrast, the SSAT, the VRB and the NSW GT were set-up in an informal style with a simple oval conference table for use in hearings by members, applicants, advisers and interpreters. The furnishing in the MRT and the RRT hearing rooms were situated in the middle of this continuum. Tribunal members sat on one side of an oval conference table which was formally divided down the middle by a low barrier. The member sat behind the barrier and there was a large space between that part of the table occupied by the member, and that in which the applicant, adviser and interpreter were seated.

The use of hearing attendants also impinged on the hearing style. Hearing attendants were present throughout the entire hearing at the AAT and at the general list VCAT hearings, leading to a heightened sense of formality. By contrast, in the MRT, the RRT, the VRB and the ADT attendants were present only at the start and finish although they were available at other times via pagers. In the SSAT, the NSW GT and VCAT guardianship list, hearings attendants were not used at all with members conducting the preliminary introduction of each matter. The hearings in these tribunals were noticeably less formal.

V INTERVIEWS WITH TRIBUNAL STAFF AND MEMBERS

In addition to observing hearings, interviews were held with a sample of thirty-eight members and staff at each of the tribunals included in this study. In order to encourage full and frank participation, specific comments are not attributed to named members, staff or tribunals. The following comments are based on the information obtained during the course of these interviews.

(a) The gap between the existence of legislatively conferred powers and their actual use

Members and staff remarked often on the gap between the legislatively conferred investigative powers and the actual use of such powers. For example, almost all
tribunals have the power to summons witnesses or documents, but this power was invoked infrequently. Whether this suggests a deficiency in inquisitorial practice is doubtful. The failure to make more use of their coercive powers may be an indication of the ability of tribunals to gain the cooperation of people without having to resort to technical powers of compulsion, or their concern about the need for a speedy resolution of the matter.

Similarly, many tribunals have the ability to constitute panels with a variety of members but tend to use this power infrequently. Instead there appeared to be a general pattern within most of the tribunals of panels constituted by a relatively fixed number of members. Adoption of such a practice detracts from the ability of a tribunal to constitute a panel according to the complexity or precedential value of the matter, thereby capitalising on the flexibility of its processes.

(b) Constraints on the adoption of investigatory practices

Several themes emerged during the interviews regarding constraints on the exercise of their investigative powers by tribunals. These included concerns about legal challenges to decisions for actual or apprehended bias, particularly where credibility was an issue and irregularities in evidence need to be tested. For example one interviewee commented:

I do not think tribunal members should have a power to investigate, rather they should have the power to request the government agency to investigate. The process of investigation may tend to require decisions to be made that might be seen to compromise the tribunal’s impartiality, for example, the selection of a particular expert to produce a report.

The concerns arose more often in tribunals where a single member constituted the tribunal compared to those matters where the hearing was by a multi-member panel. In a multi-member panel generally all members sought information and over-bearing patterns of questioning leading to bias allegations did not emerge so frequently. The interviews indicated that all members were conscious of their obligations regarding natural justice, and the concomitant obligation to ensure that applicants were aware of any adverse material and irregularities that might be relied upon in the ultimate determination of the matter.

(c) Expertise in investigative techniques

In some tribunals, part-time members sat less than once a week. This may inhibit those members from building up a body of experience and confidence in utilising
inquisitorial techniques in hearings. Comments from tribunal members were varied in this regard:

Membership status [full or part-time] has no effect on independent investigation.

and from another tribunal:

There is a large proportion of part-time members at the tribunal and this does impact on their ability to build up a large body of experience in different types of applications and hearings more generally.

and another:

The Tribunal prefers part-time members because it is desirable for professional members to remain active in their profession. Likewise it is desirable for community members to remain active in the community sector.

In a paper considering the amalgamation of tribunals, Bacon noted that a high proportion of part-time members ‘had a significant impact on the structural integrity of the Tribunal.’

The potential for part-time members to find that a hearing involves them in a conflict of interest or could give rise to a reasonable apprehension of bias was also considered in the Administrative Review Council’s *A Guide to Standards of Conduct for Tribunal Members*. This issue was described in the Guide as:

… perhaps more difficult for part-time members of tribunals. Because members of tribunals are often drawn from the field of interest in which the tribunal operates, they may be members of social and professional organisations that also have an interest in tribunal proceedings.

Another factor bearing upon the ability of tribunal members to exercise inquisitorial powers is the type and extent of training provided to members in inquisitorial techniques, for example questioning techniques, active listening skills and cross-cultural sensitivity. This has been identified and discussed in detail by a

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114 Ibid, 9.
Senior Member of the AAT, Joan Dwyer, who has provided a detailed list of the skills tribunal members should acquire.115

(d) Resourcing issues for investigative hearings

A closely related factor that was a recurring theme in interviews at all tribunals was the inadequate resourcing of the tribunals. The recurring view was that absence of resources inhibits members or staff from properly undertaking an investigative role. For example, one interviewee noted:

You can either adopt an all or nothing investigative approach (and fund appropriately) or accept the present adversarial approach. However, with the increasing problem of unrepresented litigants, there is a need for more intervention. However, the tribunal has limited capacity to do this. Problem is advocate vs decision-maker role. This presents a natural justice tension in that the Tribunal’s role is to be a decision-maker and not to provide assistance to one party.

VI JUDICIAL OBSERVATIONS ON ‘INQUISITORIAL’

This element of the paper examines the hypothesis that courts accustomed to adversarial process may fail, when reviewing their decisions, to appreciate and make due allowance for a different procedural regime imposed on tribunals. In other words, the courts may impose standards in relation to matters of fact-finding, evidence testing, and the levels of natural justice which are inappropriate for tribunals required to operate at the inquisitorial end of the procedural spectrum.

In describing a tribunal as ‘inquisitorial’ Australian courts typically focus on these aspects of the tribunal’s operations:

- The absence of a contradictor in the hearing;116
- The ability to disregard the formal rules of evidence;117
- The responsibility of the tribunal to make the correct or preferable decision;118

115 J Dwyer, above, n 171.
117 Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002 (2003) 201 ALR 437 (the rule in Brown v Dunn (1893) 6 R 67 not to apply); Deckana Pty Ltd v Northern Territory of Australia (1998) 145 FLR 71.
• The need, on occasion, for evidence other than that provided by the parties;¹¹⁹
• The absence of an onus of proof or burden of proof on the parties;¹²⁰ and
• The need for the tribunal itself, when faced with conflicting evidence, to be ‘satisfied’ of the outcome on an issue for decision.¹²¹

For the purposes of this paper, discussion is limited to the attitude of the courts to three matters. These are the impact of the particular statutory framework on decision-making, the obligations of natural justice including the circumstances in which tribunal members face calls for disqualification on grounds of bias; and the extent to which the inquisitorial role imposes a duty of inquiry on tribunal members.

The courts focus predominantly on the particular statutory framework for decision-making imposed on tribunals. As the ALRC noted, the cases ‘do not set out general guidance on the obligation to investigate’ preferring rather to ‘review the processes undertaken in particular cases’.¹²² Given the variety of tribunals in Australia, that is understandable. Nonetheless, it could be expected that the courts would at least acknowledge that the fundamental premise on which tribunal processes are predicated has a different orientation to that of the judicial system. This study indicates that this form of guidance is emerging. The courts have begun to recognise that inquisitorial bodies operate according to different processes. However, the comments on inquisitorial methodology have been limited to certain judicial officers and, indeed, as the next section demonstrates, to particular tribunal members also. With the endorsement by the High Court in Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (Applicant VEAL)¹²³ of a duty of inquiry on tribunals, this position can be expected to change.

(a) Impact of statutory framework for inquisitorial tribunals

A predominant trend in Australian jurisprudence, particularly at the High Court, is the focus on the architecture of the statute to guide the application of particular provisions.¹²⁴ However, that approach is not confined to the statutory framework for their procedures. Judicial commentary recognises that tribunal processes are based

¹²² ALRC, above n 46 [12.143].
on a combination of their statutory powers overlaid with the interpretation by the courts of key administrative law concepts associated with tribunal operations.

Attachments 2 and 3 indicate that the statutory framework for the procedures of inquisitorial tribunals can be elaborate. Not surprisingly, therefore, the courts have regularly made observations on key legislative expressions. These have included the concept of inquisitorial process; the standard and onus of proof; and what it means for Australian tribunals to be required to operate in a ‘fair, just, informal, economical and quick’ manner.

(i) ‘Inquisitorial’

A classic description of ‘inquisitorial’ was provided by Brennan J in Bushell v Repatriation Commission:126

Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant’s case but in substance the review is inquisitorial. Each of the Commission, the Board and the AAT is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it. If the material is inadequate, the Commission, the Board or the AAT may request or itself compel the production of further material.127

Noticeably, in this formulation, the inquisitorial task could be carried out either by the tribunal seeking the information or by requiring others to do so on its behalf.

This statement was made in relation to the scheme for granting pensions to war veterans. In the context of the veterans’ entitlements legislation the indicators about onus of proof are particularly clear.128 The Act denies that there is an onus of proof on either party129 and in substitution imposes a statutory obligation on the head of the veterans’ agency to investigate a claim.130 This led, as Brennan J noted, to:

… the expectation that a claim will be investigated by the Secretary, the Commission, the Board and the AAT and that the relevant facts will be revealed by the investigation. There is no responsibility resting on the ‘parties’ to the administrative proceeding to lay before the decision-maker any material in

125 A matrix of the provisions covering the Commonwealth and State tribunals in our study is included as attachment 1 to this paper.
127 Ibid, 424 – 425. This comment was adopted, in the context of VCAT proceedings, by Eames J in Bausch v Transport Accident Commission (1996) 11 VAR 117.
128 Veterans’ Entitlements Act 1986 (Cth).
129 Veterans’ Entitlements Act 1986 (Cth) s 15(4).
130 Veterans’ Entitlements Act 1986 (Cth) s 17.
addition to the results of the Secretary’s investigation.\textsuperscript{131}

It is arguable, therefore, that Brennan J’s description should be confined to veterans’ legislation.

The frequency with which the description is cited suggests otherwise. Nor does it appear that Brennan J intended his discussion of ‘inquisitorial’ to be so confined. His reference to ‘a duty to arrive at the correct or preferable decision’, a notion which has emerged from the case law and has come to epitomise the merit review jurisdiction, suggests he was referring to tribunals generally.\textsuperscript{132} Since most Australian tribunals, including all involved in this study, are merit review bodies and since Brennan J, as the first President of the Commonwealth Administrative Appeals Tribunal, had been a pioneer in the merit review field it is clear he intended his description of ‘inquisitorial’ to be applied universally to such bodies in Australia.

The courts also interpret statutes setting up tribunals by calling on common law concepts to flesh out the meaning of particular provisions. For example, the merit review status of a tribunal is commonly indicated by the grant of statutory powers to ‘affirm, set aside and substitute, or vary’ an administrative decision.\textsuperscript{133} On that skeletal foundation the courts have built a complex picture of what it means to be a merit review body and how this differs from the role of courts exercising judicial review.\textsuperscript{134} Another feature of the statement by Brennan J illustrates that the common law overlay is more likely to be based on indigenous concepts, such as ‘correct or preferable’, rather than jurisprudential notions borrowed from Europe. This finding too has significance for the meaning of ‘inquisitorial’ processes in an Australian context.

The indigenous statutory flavour to ‘inquisitorial’ is also indicated by the immigration tribunals, the archetypal inquisitorial bodies in Australia. Since they were set up as overtly inquisitorial bodies, it could be expected that European notions of inquisitorial might play a more significant role in relation to their procedures. Indeed that has been the case. However, the interpretation of the tribunal’s processes has again been given an Australian slant in light of its statutory context. As Kirby J noted in Muin v Refugee Review Tribunal (Muin) when he noted:

… the [Migration] Act provides a formal procedure with which the delegate (and when its jurisdiction is invoked, the Tribunal)

\textsuperscript{131} Bushell v Repatriation Commission (1992) 175 CLR 408, 426.
\textsuperscript{133} Veterans’ Entitlements Act 1986 (Cth) ss 139 (VRB review), 176 and the Administrative Appeals Tribunal Act 1975 (Cth) s 43 (AAT review).
\textsuperscript{134} R Creyke and J McMillan Control of Government Action: Text, Cases and Materials LexisNexis Butterworths, Sydney, 2005, Chapter 3.
and indeed all other named repositories of power must comply.\textsuperscript{135}

As Kirby J also pointed out in Muin, a major function of the procedures in the Migration Act 1958 (Cth) for the RRT and the MRT is to ensure that the primary decision-maker, once a decision is made, prepares a statement setting out the findings of fact, referring to the evidence on which those findings are based, and giving the reasons for the decision. The purpose of these standard statutory requirements is ‘to make effective the “review” by the Tribunal’.\textsuperscript{136} These procedural obligations are imposed, as Kirby J noted, because:

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\text{… the Tribunal has no contradictor, no respondent party, normally allows no legal representation and acts in an inquisitorial fashion, [hence] the importance of the foregoing materials is obviously magnified. … How can one body ‘review’ the decision of another effectively and justly when it does not have at least the same materials upon the basis of which the primary decision was made?}\textsuperscript{137}
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His Honour was clearly drawing here on his general understanding of the meaning of ‘inquisitorial’ to fill out the legislative framework.

This appreciation of the inquisitorial style of the migration tribunals is also apparent in the judgment of Merkel J\textsuperscript{138} in Paramananthan v Minister for Immigration & Multicultural Affairs.\textsuperscript{139} In a detailed examination of particular statutory provisions relating to the RRT, His Honour concluded:

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\text{Save for the applicant, the Tribunal has a discretion as to who it will hear and in relation to what matters. As the Act does not provide for there to be any respondent to proceedings before the RRT, the applicant is the only party to the application. The Act also excludes certain characteristic features of the adversarial system, such as an enforceable right of a party to call witnesses and the right to be represented, or to cross-examine witnesses. These inquisitorial powers of the RRT are reinforced by powers to have investigative procedures conducted on its behalf. … The provisions to which I have referred provide for the tribunal to operate in an inquisitorial, non-adversarial manner. Concepts such as onus of proof and burden of proof have no role to play before the tribunal.}\textsuperscript{140} \text{(section numbers omitted)}
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\textsuperscript{135} Muin v Refugee Review Tribunal (2002) 68 ALD 257, [205].
\textsuperscript{136} Ibid at [208].
\textsuperscript{137} Ibid.
\textsuperscript{138} With whose orders, Wilcox and Lindgren JJ agreed.
\textsuperscript{139} By implication these comments apply also to the MRT since their processes are alike but not identical.
\textsuperscript{140} (1998) 94 FCR 28, 62.
These extracts illustrate that the courts do have a general appreciation of the key indicia of the classic European inquisitorial process, and are prepared to accept that tribunals set up as inquisitorial bodies should operate in a different fashion from common law courts. At the same time the courts’ conclusions as to the inquisitorial orientation of Australian tribunals appear to be based more on gaps in the procedural statutory framework rather than explicit statements of the inquisitorial or inquisitorial nature of the bodies.

(ii) Standard and onus of proof

In general, the legislation establishing the tribunals in this study does not spell out the standard of proof or the onus of proof for the purposes of tribunal hearings. The most statutes generally provide on the topic of standard of proof is that a precondition to a finding is that the tribunal is ‘satisfied’ that an applicant meets the statutory criteria. In the face of this legislative vacuum, the courts have concluded that the standard of proof is generally the civil or balance of probabilities standard.

Similarly, as Brennan J noted in Bushell ‘The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings.’ Nonetheless, although there is generally no legal onus on the parties, in practical terms, it is inadvisable for an applicant not to provide evidence to support the claim. This conclusion flows from curial statements at the highest level that the tribunal is entitled to rely on the case the applicant presents. Indeed, as Gleeson CJ said in Dranichnikov v Minister for Immigration and Multicultural Affairs, the inquisitorial role of the tribunal does not ‘mean that a party before [a tribunal] can simply present the facts and leave it to the Tribunal to search out, and find, any available basis which theoretically the Act provides for relief.’ As a consequence, a claimant cannot assume from the fact that the proceedings are inquisitorial that the burden of providing the evidence in support of a claim is borne by the tribunal.

So although superficially the legislative indicators align with classic inquisitorial method, the Australian courts have adopted an indigenous and pragmatic approach to determine who provides the evidence needed by the tribunal. There is no indication in the seminal Australian cases that the conclusions were informed by notions borrowed from Europe. Rather, the finding was seen as a matter of statutory construction, informed by common law, not civil law, notions.

141 The Veterans’ Entitlements Act 1986 (Cth) being a signal exception (see ss 19, 120). See for other tribunal, the legislation listed in Attachments 2 and 3.
144 McDonald v Director-General of Social Security (1984) 1 FCR 354.
146 (2003) 197 ALR 389, [78].
147 Ibid.
(iii) ‘Fair, just, informal, economical and quick’

The amalgam of statutory indicators with common law and, on occasions, European inquisitorial notions which has been identified in Part VI (a)(i) and (ii) does not always provide guidance to courts interpreting the processes of Australian inquisitorial tribunals. They are still faced with the issues posed by certain statutory formulae. One common statutory expression is that tribunals must operate in a manner described as ‘fair, just, informal, economical and quick’.

The difficulty of how to give appropriate weight to these adjectives was described by Lindgren J in *Sun Shan Qui v Minister for Immigration and Ethnic Affairs*, in terms approved by the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu*, as follows:

> First, the objectives referred to in [s] 420(1) will often be inconsistent as between themselves. In particular, a mechanism of review that is ‘economical, informal and quick’ may well not be ‘fair’ or ‘just’.

The adjectives reflect the discussion in Part I of the imperatives for the introduction of tribunals in Australia, namely, the desire to further the speediness and efficiency of hearings while not abandoning the traditional adjudicative virtues of fairness and justice. In failing to indicate which of the alternatives – being ‘economical, informal and quick’ or being ‘fair or just’ - should take precedence, parliaments have created a conundrum for tribunals. Nor have the courts been helpful in assisting tribunal members to weigh up which of these competing objectives should receive preference in a particular case. While courts have held that it is for the decision-maker to allocate weight to particular statutory objectives, and that this requirement is imperative in cases where the objectives are in competition, guidance ceases at this point.

Nor have courts sought assistance from European models. If, as the discussion in Part I indicated, truth-elicitation has been a primary concern in European inquisitorial process, it could have been expected that fairness and justice would be given greater weight than cheapness, informality and speed. This has not been the Australian judicial message. Rather, by grafting on to the requirement for ‘fair and just’ processes that tribunals also be ‘economical, informal and quick’ Australian parliaments have blurred the focus of the European model.

The resulting difficulties were illustrated in *SAAP v Minister for Immigration, and Multicultural and Indigenous Affairs* (SAAP). By a 3:2 majority (Kirby, McHugh, and Hayne JJ; Gleeson CJ and Gummow J dissenting), the High Court found jurisdictional error when, at a hearing of a woman in detention, oral, but not

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148 For example, see *Migration Act 1958* (Cth) ss 353(1), 420(1).
150 (1999) 197 CLR 611, 643 (Gummow J). See also 628 (Gleeson CJ and McHugh); and 668 (Callinan J).
written notice as the *Migration Act* 1958 (Cth) s 424A requires, was given about adverse comments made about the applicant by her daughter. In criticizing the failure to give written notice, Kirby J, without explaining the reason for his choice, emphasized the need to be ‘fair and just’ at the expense of being ‘economical, informal and quick’.

By contrast Gleeson CJ adopted a more practical approach, in effect applying the ‘economical, informal and quick’ elements of the list. As His Honour pointed out:

> It is agreed on all sides that the hearing contemplated … is not a trial. Subject always to the overriding requirement of procedural fairness, the object of the occasion is to hear evidence and receive arguments in the most useful and efficient manner. This will often involve flexibility in the order of proceedings. There seems to be an incongruity in the intrusion of an inflexible requirement for written communication at a ‘hearing’. The incongruity is heightened in a case such as the present where any such written communication would require oral translation and explanation. Such a case would not be unusual. No doubt many applicants who can read and write in a language other than English cannot read English. Presumably, on the appellant’s argument what the Tribunal should have done was prepare a letter to the first appellant, fax it to Woomera, then have it translated orally by the interpreter. Having done that, on the findings in the Federal Court about fairness, the Tribunal could then have proceeded as it did. On those findings, the letter would have been pointless. That indeed is why the Federal Court decided the case it did. And I would add why the migration adviser thought there was nothing further which could usefully be said.

As these exchanges indicate, the statutory formula can give comfort to both sides of the debate. That may be argued to be advantageous since it leaves it open to tribunal members to give greater weight to one cluster of adjectives at the expense of the other. By so doing, the Parliament has permitted flexibility in tribunal procedures which arguably is valuable. This may be particularly appropriate given the breadth of matters which come before the tribunals, notably those which have a combined civil and administrative jurisdiction.

The contrary view, however, is directed at the next level of inquiry. How does a tribunal decide whether to emphasise the need for ‘speed, informality and economy’ over ‘fairness and justice’? That is the real issue. It is here, that the failure by the

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153 Mansfield J at first instance in the Federal Court had found, in the words of Gleeson CJ, ‘that there had been no failure to accord procedural fairness … [T]he first appellant was made aware of the nature and possible significance of her daughter’s evidence and had a fair opportunity to comment on it, both during the hearing or later by further submissions had that been desired’. *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24 per Gleeson CJ at [12]. This view was accepted by the Full Court.

154 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24 per Gleeson CJ at [21].
courts to give guidance to tribunals on the circumstances in which they should give weight to one set of adjectives over the other becomes apparent.

The presence of these statutory objectives sharply distinguishes the Australian model from its European counterpart. What they also illustrate is that the emphasis on achieving a speedy and economical resolution of disputes has undermined the ability of tribunals to fully embrace a classic inquisitorial model.

(b) Natural justice

Natural justice is a principle found in all legal major systems. Nonetheless, the meaning of the concept varies with the jurisdiction and the circumstances. At common law, the chameleon-like character of this ground causes difficulties in the context of the adversarial biases of the courts and the inquisitorial mode of tribunals. On the one hand, courts clearly accept the inquisitorial role imposes an obligation on tribunal members to make inquiries and to assist applicants to tell their story. On the other, the mode of questioning and even questioning at all can be seen as too interventionist or partisan, leading either to a claim of bias, or to a breach of other aspects of the fair hearing rules. In particular, the claim may be that questioning has inhibited the applicant from giving evidence in the manner which best suits their case. In addition, combining the ‘investigative, facilitative and adjudicative roles’ in the tribunal itself may raise a perception of lack of impartiality. As the cases illustrate, the courts have been ambivalent about whether either of these inquisitorial features breaches natural justice.

The issue is complicated by the fact that a breach of natural justice is a jurisdictional error and entitles an applicant to a hearing under s 75(v) of the Constitution. Although the High Court has conceded that the scope of natural justice must be assessed in its particular factual setting, the Justices appear to be reluctant to permit different standards of fair process according to whether the matter involves action by an inquisitorial or an adversarial body.

These competing pressures may explain, but not excuse, the ambivalence of the courts in their response to claims that a tribunal member has breached natural justice. On the one hand, the courts accept that there is no necessary breach of the bias rules when the tribunal member takes a pro-active approach and asks leading questions of applicants or witnesses, or tests the evidence where credibility is in

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155 For example, see Administrative Procedure Act 1991 (Indonesia) s 53; South African Constitution s 33(1); European Convention on Human Rights and Fundamental Freedoms, Art 6.
157 ALRC, above n 46, [12.138].
159 Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka (2001) 206 CLR 128, 149 (Kirby J).
question. The fulfilment of the inquisitorial duty may require the tribunal, on occasion, to express doubts about aspects of an applicant’s claim, particularly where these are related to a critical issue. It is equally clear that a level of intervention is permitted to inquisitorial tribunals which might not be tolerated in a court.

Hence the majority of the High Court pointed out in Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka that:

The kind of conduct on the part of the Tribunal that might give rise to a reasonable apprehension of bias needs to be considered in the light of the Tribunal’s statutory functions and procedures. Conduct which, on the part of a judge in adversarial litigation, might result in such an apprehension, might not have the same result when engaged in by the Tribunal. In particular it has been recognised that the difference between adversarial and represented court proceedings and unrepresented tribunal hearings must be taken into account when considering whether bias has occurred.

At the same time, courts have warned about the extent of the questioning role without necessarily advising where to draw the line. In Re Refugee Review Tribunal; Ex parte H the High Court acknowledged the difficulties, while identifying one useful indicator about how far a tribunal member may go. Gleeson CJ, Gaudron and Gummow JJ said:

Where, as in the present case, credibility is in issue, the person conducting the inquisitorial proceedings will necessarily have to test the evidence presented - often vigorously. Moreover, the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that he or she be plainly confronted with matters which bear adversely on his or her credit or which bring his or her account into question…

Where, however, parties are not legally represented in inquisitorial proceedings, care must be taken to ensure that vigorous testing of the evidence and frank exposure of its weaknesses do not result in the person whose evidence is in question being overborne or intimidated. If that should happen, a fair minded lay observer or properly informed lay person might readily infer that there is no

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164 Gleeson CJ, McHugh, Gummow and Hayne JJ.
166 Ibid at 138 (Gleeson CJ, McHugh, Gummow and Hayne JJ).
167 Riley v Racing Appeals Tribunal (2001) 179 ALR 259 (Balmford J); Simjanoski v La Trobe University [2004] VSC 180.
Another area of difficulty is whether a differential standard for natural justice should apply to inquisitorial tribunals because they have an evidence-collection role. In *Epeabaka*, the Minister had argued as follows:

…natural justice rules, applicable to a court or a body conducting its proceedings according to adversarial procedures, were substantially modified in the case of an administrative decision-maker like the Tribunal. Such a person was entitled (perhaps expected) to gather information informally from many sources and to keep up to date with a vast range of information. Administrators were not confined to the more formal procedures of a court where contested material facts would normally be ignored unless proved. According to this branch of his argument, the Minister submitted that the Tribunal was more like an administrative decision-maker of the ordinary kind than a formal court-like body.170

Kirby J rejected that argument, at least to the extent that it suggested that a tribunal member was free of the obligation to be impartial or unbiased. Indeed, His Honour suggested that rather than negating any such obligation, there may indeed be a higher standard imposed on tribunal members, a suggestion which only compounds the problems for tribunals. As he said:

In some ways, the freer hand given to an independent member of the Tribunal, to secure information and to use it without necessarily disclosing it to the person affected, imposes practical requirements of manifest impartiality greater than in the case of judges and like decision-makers. Judicial office is controlled by centuries of tradition. Judges are obliged to sit in public. They are required to accept the legal representatives of the parties. They are controlled by settled procedures and rules of evidence. Their orders are reviewable by superior courts. If members of the Tribunal are authorised to act in some respects by inquisitorial procedures, that fact does not, of itself, exempt them from the rules of natural justice prohibiting bias.171

How do tribunal members elicit information and test evidence without transgressing fair process requirements? There are no easy answers. Their competing roles - active investigator and impartial decision-maker - require sensitive handling by all concerned. Only if courts accept that investigation is a key element of the inquisitorial process will they be slow to criticise when a tribunal member performs

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169 Id at 435 [30]. For a graphic illustration of a case in which apprehended bias was found to be present see *VFAB v Minister for Immigration and Multicultural Affairs* (2003) 131 FCR 102 (Kenny J).

170 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 146 [51] (Kirby J).

171 Id at [66].
this function. At the same time, tribunal members need to accept that the intensity of their questioning should take account of the level of representation of the person, the quality of the evidence, and the potential outcome for the individual concerned. Tribunal members must also be trained in evidence-gathering techniques, including when to practise restraint when asking questions, if they are to avoid the fair process pitfalls to which they might otherwise be exposed.172

(c) Duty of inquiry

One of the clearest departures from the European model has been the failure by Australian courts to accept unequivocally that tribunals have a duty of inquiry. Although this earlier hardline view173 of the courts has now been modified,174 there is as yet no indication as to how courts and tribunals will embrace this development. At the same time, the earlier attitude of the adjudicative bodies was counter-intuitive. After all, it is logical to expect that an inquisitorial tribunal would undertake inquiries including of its own volition. Following the High Court's decision in Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (Applicant VEAL),175 courts and tribunals must now accept that they have an obligation to enquire if they are not to breach fair process requirements. What that obligation will entail in practice is yet to be determined.

The initial position taken in Sullivan v Department of Transport176 was that although fair process required that a person be given a reasonable opportunity to present their case, the tribunal was under no duty to ensure that a party took the best advantage of that opportunity.177 In other words, the presentation of evidence and arguments was largely left to the applicant.178 That view has been modified in two respects. There is a duty of inquiry in relation to matters which are critical to a decision - matters which are 'credible, relevant and significant' - and where it is not an unreasonable burden for the tribunal to seek further information.179 Such cases

173 Sullivan v Department of Transport (1978) 20 ALR 323. See also Fintron Pty Ltd v Registrar, Consumer Claims Tribunal (1998) ASAL (55-002) (Graham AJ); Bayram v Benton (t/as digital Dynatronics Australia) (1994) 98 NTR 1, 7 (Kearney J).
175 Ibid.
176 Sullivan v Department of Transport (1978) 20 ALR 323.
177 Ibid 343 (per Deane J).
have more commonly arisen when an applicant was not represented.\textsuperscript{180} As Merkel J noted in \textit{Paramananthan v Minister for Immigration and Multicultural Affairs;\textsuperscript{181}}

Material and evidence, as well as arguments, may be presented to the tribunal but its inquisitorial procedures or inquiries are not limited to or by the materials, evidence, or arguments presented to it. In an appropriate case the tribunal may undertake its own inquiries and, in some instances, may be obliged to do so. \textsuperscript{182}

It is clear, however, that both preconditions must be satisfied. Hence in \textit{Minister for Immigration and Multicultural Affairs v Rajalingam\textsuperscript{183}} a failure to inquire into the authenticity of an arrest warrant did not amount to a legal error for failure to enquire even though the authenticity of the warrant was central to the decision. Arrest warrants were unlikely to be in a uniform format throughout the country from which the applicant had fled (Turkey), and the applicant, for confidentiality reasons, was not prepared to authorise inquiries from the particular Turkish court from which the warrant was said to have issued. In other words, it would have been unreasonable in these circumstances to expect the tribunal to make the necessary further inquiries.

The second development is more contentious. A tribunal may be under a positive duty to explore other avenues of eligibility for an applicant, in other words, not to limit its determination to the ‘case’ articulated by the applicant. For example, would an applicant be entitled to a different class of visa than the one claimed, or to receive pension for a disability other than the one presented?\textsuperscript{184}

Although a duty to explore an option of this nature was accepted by Merkel J in \textit{Paramananthan} his views were not universally accepted. His Honour said:

\begin{quote}
... the tribunal is not to limit its determination to the ‘case’ articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant. That obligation arises by reason of the nature of the inquisitorial process and is not dependent upon whether the applicant is or is not represented. \textsuperscript{185}
\end{quote}

Representation can be

\begin{footnotes}
\item[183] For example, \textit{Minister for Immigration and Multicultural Affairs v Rajalingam} (1999) 93 FCR 220.
\item[185] Merkel J quoted \textit{Bouianov v Minister for Immigration and Multicultural Affairs} (FCA, Branson J, 26 October 1998) at 2; \textit{Saliba v Minister for Immigration and Ethnic Affairs} (1998) 89 FCR 38 at 49-50 per Sackville J.
\end{footnotes}
relevant to the content of a duty to act according to ‘substantial justice’ or fairly in a particularly [sic] case, but cannot affect the fundamental duty of the tribunal, acting inquisitorially, to review the decision before it according to the ‘merits of the case’.  

Nonetheless, it had been apparent for some time that particular justices were softening their stance on the rejection of any general duty of inquiry for inquisitorial tribunals. For example, in Applicant S154/2002 it was claimed that the RRT’s failure to ask further questions of a female applicant for refugee status about a rape allegation created the misleading impression that the tribunal had accepted her story. To which Gleeson CJ’s response was:

I do not accept that contention. … Further, there is no complaint that the prosecutrix received insufficient assistance or encouragement from the Tribunal Member. If any such complaint were made, there would be a serious question to be considered as to the relationship between a complaint of that nature and the requirements of procedural fairness. (Italics supplied.)

Kirby J, who dissented, would, by inference, also have supported Gleeson CJ’s view. As his Honour noted: ‘A tribunal member, with obligations to perform his functions in an inquisitorial manner, failed to elicit facts relevant to the exercise of the tribunal’s jurisdiction’. By contrast, Gummow and Heydon JJ concluded on this issue that ‘The tribunal conducting an inquisitorial hearing is not obliged to prompt and stimulate an elaboration which the applicant chooses not to embark on.’ Callinan J did not directly allude to this issue, although clearly finding that there had been no breach of fair process.

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186 Ibid 33-34. These comments of Merkel J were based on the alternative grounds: the non-adversary nature of the proceedings of the Refugee Review Tribunal, and the terms of the Migration Act 1958 (Cth) s 420(1) which required the Tribunal to act according to ‘substantial justice’. Although the High Court in Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 denied that the requirement that a tribunal act according to ‘substantial justice’ incorporated an obligation to apply principles of procedural fairness, the Court conceded that that finding was subject to the statutory context. In the context of grounds of review in Part 8 of the Migration Act 1958 (Cth) which exclude the principles of natural justice, other than actual bias, the exclusion has considerable force. In the context of Acts which have no such prohibition, the fair process requirements which the expression enjoins may more closely align with the principles expressed by Merkel J in Paramananthan. See now Gleeson CJ in Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002 (2003) 201 ALR 437, discussed below; French J in Rahman v Minister for Immigration & Multicultural Affairs [2000] FCA 1277 and Ahamed v Minister for Immigration & Multicultural Affairs [2000] FCA 1325.

187 Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte S154/2002 (2003) 201 ALR 437.


189 Ibid, 438.


191 Ibid, 468-469.
Similarly, in Applicant S v Minister for Immigration and Multicultural Affairs\(^ {192}\) McHugh J said:

The Full Court of the Federal Court allowed the Minister’s appeal on the ground that there was no evidence that Afghan society perceived ‘able-bodied young men’ as comprising ‘a particular social group’. With respect, in the context of the Tribunal’s error, this was not a ground for allowing the Minister’s appeal. If the Tribunal had considered the issue that it was legally required to consider, it was open to the Tribunal to investigate whether such a perception existed, whether within Afghan society or some section of it, or objectively. Indeed, arguably in the context of its inquisitorial process, the Tribunal had a duty to seek evidence concerning this vital matter. This may require the consideration of legal, social, cultural and religious norms prevalent in Afghan society to determine whether young, able-bodied Afghan men comprise a particular social group that may be distinguished from society at large.\(^ {193}\)

These members of the High Court were not alone. The view had been taken in other superior courts that if the issue on which a tribunal must be satisfied involved a jurisdictional fact, and there was insufficient material on which the tribunal could achieve the required state of satisfaction, this invited the tribunal to seek further information.\(^ {194}\)

The absence of clear guidance as to when such an obligation of inquiry arises has created difficulties for tribunals. There was clearly a dissonance between the notion of a tribunal with a duty to be satisfied that it had made the correct or preferable decision, and the absence of any obligation on the tribunal to seek further information in order to reach that state of satisfaction. Moreover, despite the general principle that tribunals were not under a duty to assist the applicant or to seek information for themselves,\(^ {195}\) the exceptions to this principle cast doubt on its continuing efficacy.\(^ {196}\) The ALRC, during its federal civil justice inquiry, was clearly


\(^{193}\) Ibid, 262, [76].

\(^{194}\) Northern Territory v Doepel (2003) 133 FCR 112, was a case involving a challenge to the acceptance of an application for registration under s 190A of the Native Title Act 1993 (Cth). The issue was whether the Registrar was required to be satisfied in fact of due authorisation of native title claimants. See also Italiano v Carbone [2005] NSWCA 177 where it was found that there was a breach of natural justice by the Consumer Trader and Tenancy Tribunal in that it failed to ensure that Mr Carbone was fully aware that the proceedings were being brought against him personally and not just as a Director of a company.

\(^{195}\) For example, Ahvazi v Minister for Immigration and Multicultural Affairs [2002] FCA 279 (Hill J).

\(^{196}\) The examples usually illustrate that factors taken into account include the seriousness of the outcome for the individual, the ease of obtaining the information, its centrality to the outcome and whether the applicant was a person suffering some form of disability. See Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155, 170 (Wilcox J); Lau v Renevier (1989) 91 ALR 39, 49-50 (Davies, Wilcox and Pincus JJ); Sun Zhan Qui v Minister for Immigration and Ethnic Affairs (1997) 151 ALR 505, 547-548 (Wilcox J); Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28; W404/01A of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 255; Goldie v Commonwealth (2002) 117 FCR 566 at 568-9 (authorities should make due inquiries before placing a person in detention).
in favour of the imposition of such a duty, although that initial enthusiasm was muted in the face of opposition from the federal tribunals.\(^{197}\)

At one level the reluctance of the courts to embrace such a duty is understandable. To expose a tribunal to a claim of error of law on the basis that the tribunal did not leave any legal stone unturned would impose a heavy evidentiary burden and add considerably to the time and cost involved.\(^{198}\) Australian tribunals are not resourced for such a task,\(^{199}\) nor are their members, most of whom work part-time, able to undertake intensive investigation. Indeed, to expect this of tribunals flies in the face of the avowed purpose of establishing tribunals to be an efficient and speedy adjudicative mode of dispute resolution. At the same time, tribunals have been equipped with the coercive powers to compel witnesses and documents, powers traditionally associated with fully investigative bodies.\(^{200}\)

This issue also highlighted the awkwardness of a system in which the decisions of an inquisitorial tribunal are reviewed by courts operating according to procedures which are adversarial in nature. As the Australian Law Reform Commission noted of the Federal Court, in words which could apply to all Australian superior courts:

… the Federal court often starts from the position that tribunal processes can be expected to follow a basically adversarial model, where the parties have responsibility to define and present their case. Yet, as against this adversarial assumption, review tribunal enabling legislation devolves significant investigative powers onto tribunals and, in certain instances, significantly constrains the parties’ abilities to define and present their case at a hearing.\(^{201}\)

Siting the tribunal system within a hierarchy in which a right of statutory appeal and of judicial review was undertaken by courts operating in an adversarial manner was not conducive to acceptance of the obligation on a tribunal to inform itself in order that it may come to a decision. Tribunals were understandably reluctant, particularly in the face of the procedural fairness pitfalls identified earlier, to assert such a right. The reluctance highlighted the dissonance created by the grafting on to the existing adversarial system of a model that was intended to operate in an inquisitorial mode. As the next Part indicates, this systemic fault-line has undermined the intentions behind the adoption of an inquisitorial model.

The situation has changed with the decision of the High Court in Applicant VEAL. The issue was whether the failure to disclose to an applicant for a protection visa the adverse allegations in a ‘dob-in’ letter was a breach of the common law ground

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\(^{197}\) There was no support from tribunals for the imposition of a general duty to investigate case facts and issues’, ALRC, above n 46, [12.147]. See also ALRC, above n 1, [9.61].

\(^{198}\) ALRC, Federal Tribunal Proceedings Issues Paper 24, [6.5].

\(^{199}\) In this context it is interesting to note that the Kerr Committee report, above n 17, had recommended that the AAT should have a research arm comprising a small staff to make preliminary inquiries. The proposal was, unfortunately, not implemented.

\(^{200}\) ALRC, Federal Tribunal Proceedings Issues Paper 24 [6.20]-[6.21].

\(^{201}\) ALRC, Review of the adversarial system of litigation: Federal tribunal proceedings (1998) IP 24, [6.76].
of natural justice. The RRT had stated in its reasons that it gave no weight to the letter. For the first time, the High Court acknowledged (5:0) that there is a duty of inquiry on tribunals. As an investigative or inquisitorial, not an adversarial body, natural justice required the RRT to make further inquiries. As the High Court said:

The Tribunal was not an independent arbiter charged with deciding an issue joined between adversaries. The Tribunal was required to review a decision of the Executive made under the Act and for that purpose the Tribunal was bound to make its own inquiries and form its own views upon the claim which the appellant made.²⁰²

The decision means that if tribunals are to meet common law natural justice obligations they are under an obligation to be satisfied that their decision is 'correct or preferable'. In order to achieve that state of satisfaction, the tribunal may need to make further inquiries. That is, they are under a duty of inquiry. Since the High Court in Applicant VEAL, for example, had decided the information in the 'dob-in' letter was 'credible, relevant, and significant' the tribunal should have sought further information from the appellant about the significance of the information, rather than choosing to give it no weight.

So what will this new obligation require? In Applicant VEAL, the answer was only that the substance of the letter be disclosed to the appellant. However, if the tribunal had been in doubt about the responses it may have needed to seek corroboration of the information. Indeed the Tribunal had noted in its reasons that it had been unable to test the claims in the letter. In cases in which a 'dob-in' letter is anonymous that will invariably be the position. However, even if the writer of the letter, as in Applicant VEAL, supplied a name and address, the credibility of the 'dobber' must also be tested. And these are not the only kinds of circumstances in which a duty of inquiry may be imposed. The tribunal may be required to resolve conflicts in expert evidence, to fill gaps in information, as well as test witnesses or parties for credibility.

There are resource and timeliness implications from this finding. The tribunals in this country are generally not equipped to undertake investigations (see Part VII). The refugee tribunal may be an exception in that it does have case officers who routinely seek further information from sources such as the Department of Foreign Affairs and Trade, Amnesty International, and the United Nations High Commissioner for Refugees. It is funded to do so. Other tribunals are not so fortunate. The upshot may be that the tribunals resort to the practices which they already apply of asking the parties or their representatives to supply further information. Alternatively, the tribunal can request that further evidence be supplied by the parties. Some indication of these approaches is apparent from the discussion of the cases in Part VII.

²⁰² Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72 at [26].
VII TRIBUNAL OBSERVATIONS ON ‘INQUISITORIAL’

This final part of the paper discusses the response of tribunals to their legislation and matters such as their duty of inquiry, the inadequacy of resources, and the fair process issues arising from the inquisitorial processes to which they are subject. These responses have been elicited from a limited survey of cases at the key tribunals: the Commonwealth AAT, the migration tribunals, the ADT and the VCAT. The purpose was to identify what the tribunals understand by the requirement that they operate in an inquisitorial manner and how they have determined what weight should be accorded the competing objectives with which they are faced. These cases were decided prior to the High Court’s decision in Applicant VEAL.

The background to these findings is that the procedural obligations on an inquisitorial tribunal are different from and at times more onerous than for courts. In particular, the decision-making tribunal has to take the role of the parties to ensure that legal issues are properly framed and argued. These steps are a substitute for the safeguards provided for by adversarial proceedings. To paraphrase, ‘[t]he [tribunal] must descend into the fray and have [its] vision clouded by the dust of conflict’.

Considerations affecting extent of obligation

The considerations which affect the extent of the obligations on tribunals to adopt inquisitorial elements of process are influenced by:

- The terms of the statute and whether it explicitly or impliedly imposes such a duty;
- The basic obligation of the tribunal to reach the ‘correct or preferable’ decision; and
- The respective rights and interests of parties to a dispute and how these are affected by the tribunal’s processes.

The issues are considered in relation to the:

- Statutory evidential role of tribunals including their responsibility to elicit evidence in order that the tribunal is able to be ‘satisfied’ that it has reached the ‘correct or preferable’ decision;
- A superimposed ‘duty of inquiry’ based on the fact that the tribunal is inquisitorial;
- Management of the proceedings including the rules of evidence. That is, what information to elicit and when, and how it is relevant;

203 Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12, [73].
205 For example, in the context of the Migration Act 1958 (Cth) see Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12 per Gleeson CJ at [19]; Gummow and Hayne JJ at [45]; Callinan J at [123]-[124].

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The role of the parties vis-a-vis the tribunal;

The onus of proof;

The rights and interests of the parties; and

Pragmatic considerations.

(a) Statutory evidential role of tribunal members

The following description reflects the position pre-Applicant VEAL. As mentioned earlier, it is premature to predict what impact that decision will have on court and tribunal practice. When there is an explicit statutory duty on a tribunal, for example, to elicit information, the courts enforce that duty. How extensive is the obligation may depend on the client group or the circumstances. For instance, in the veterans’ jurisdiction, the failure to comply with the obligation on the head of the veterans’ agency to investigate a claim has been criticized by the courts not least because of the special respect accorded this group by Australians.206 The obligation may be imposed by the statute setting up the tribunal or by legislation giving the tribunal jurisdiction. In the latter context, for example, in Re Apple and Pear Australia Ltd and Secretary, Department of Agriculture, Fisheries and Forestry207 the AAT found that the inquisitorial role was mandated by a combination of ss 56(1)(a) and 56(1)(b) of the Freedom of Information Act 1982 (Cth). Specifically, the AAT was empowered to enquire whether any documents existed that should have been given to the applicant at first instance and whether there was any valid ground on which the Department might have denied access.

By contrast in the migration jurisdiction, despite a provision in the Migration Act 1958 (Cth) giving the RRT the power to require the Secretary of the Department of Immigration to obtain a medical examination and report,208 the majority of the High Court in Minister for Immigration and Multicultural and Indigenous Affairs v SGLB209 were not prepared to require the RRT to obtain a second psychologist’s report in order to assess whether the applicant’s accepted medical condition of post traumatic stress disorder could have affected his ability to present his case to best advantage. In other words, in the migration context, the authority to seek information only meant the tribunal must respond to the applicant’s case. It did not mean that the tribunal takes the initiative to seek out further evidence.210

The legislation does impose an explicit duty of inquiry on the ADT.211 Nonetheless, the Tribunal has taken a practical view of how extensive that duty should be. As

207 Re Apple and Pear Australia Ltd and Secretary, Department of Agriculture, Fisheries and Forestry [2004] AATA 1368.
208 Migration Act 1958 (Cth) s 427.
211 Administrative Decisions Tribunal Act 1997 (NSW) 73(5)(b) provides: ‘The Tribunal is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine off of the relevant facts in issue in any proceedings’. 
the Tribunal noted in *Re Battenberg and The Union Club*\(^{212}\) in the context of a refusal to call a witness in a claim of discrimination and victimisation by Mr Andrew Battenberg following his expulsion from the Union Club:

The Tribunal’s broad inquisitorial powers do not impose upon it an obligation to inquire into every matter a party asserts might be relevant to the facts in issue. The duty of the Tribunal is to ensure that a party is given a reasonable opportunity to present its case. That duty does not extend to acceding to every application for evidence to be admitted out of time, which a party believes might assist the Tribunal’s knowledge of its case. One of the directives in s 73 is that the Tribunal act as quickly as possible. The practical effect of granting this application would have been to require a further hearing day to be set aside. For these reasons the application was not granted.\(^{213}\)

In other words, the tribunal will only adopt an interventionist approach when it believes the results will be worthwhile and where the material is relevant. That situation appears to be little different from the standard obligation on tribunals which is to 'inform [themselves] on any matter as [‘they] see fit’, a provision which imposes no duty to initiate action. This position may need modification in the face of the Applicant VEAL.

In deciding what is ‘relevant material’ for these purposes, the tribunal considers all the available evidence and whether it is sufficient to enable the tribunal to be satisfied of an outcome. The failure to meet the threshold test of relevance arose in *Re Neary and The Treasurer, NSW*.\(^{214}\) An assertion by the applicant, based on information in a news story and related press release, that the Treasurer and other Ministers and officers in New South Wales must have documents relating to a matter other than those already released under the *Freedom of Information Act 1989* (NSW) was not sufficient to persuade the Tribunal to issue a summons to see whether further information could be obtained. In other words, fishing expeditions to find potentially relevant material are not permitted.\(^{215}\)

The issue of relevance is also affected by the requirement in the *ADT Act* that the ADT take account of the public interest as a dominant consideration.\(^{216}\) Public interest is an elusive expression. There could be a public interest in the speedy resolution of a matter. There could equally be a public interest in ensuring that a hearing is fair. In *Re New South Law Society and Carver*\(^{217}\) the ADT emphasised the fairness requirement in finding that before accepting an application to dismiss by consent a claim of professional misconduct by a solicitor, that it be satisfied that

\(^{212}\) *Re Battenberg and The Union Club* [2004] NSWADT 285.

\(^{213}\) At [23]-[24].

\(^{214}\) *Re Neary and The Treasurer, NSW* [2002] NSWADT 123.

\(^{215}\) All tribunals possess the power to summon documents or witnesses. These provisions impliedly suggest that the tribunal may take action to obtain further evidence. However, the power will only be exercised in circumstances where the information will be relevant.

\(^{216}\) *Administrative Decisions Tribunal Act 1997* (NSW) s 60(3)(c).

\(^{217}\) *Re New South Law Society and Carver* [2004] NSWADT 275.
there were grounds or reasons advanced in support. Absent such reasons, the public interest in ensuring that the consent order was not contrived would have meant that the tribunal was not prepared to accede to the application for dismissal.

By contrast in Re KO and Commissioner of Police\(^\text{218}\) in which there was a suspected disclosure of personal information about an individual as between an agency officer and a third person, as the agency did not willingly supply a statement or affidavit from the officer the Appeal Panel of the ADT required the tribunal to give a direction that the information be supplied.\(^\text{219}\) As the tribunal noted, the applicant should not be left with the task of disclosing precisely the nature of the conduct about which the complaint was made.

Generally, however, even for a tribunal under a statutory obligation to seek information, other considerations such as the public interest, and the degree of relevance of the material has intruded to limit the obligation. This position will need modification in the light of Applicant VEAL. The former result appears to differ little from the position of most tribunals, faced only with a statutory obligation to ‘inform itself on any manner as it sees fit’. That authority to seek information has also been subject to other considerations of the kind listed in the following material.

(b) Duty of inquiry

The inquisitorial nature of the tribunal imposes two elements relevant to any duty of inquiry. These are superimposed on the statutory framework. The first relates to the processes of factual information-gathering; the second, involves the tribunal actively exploring other legal avenues into which a claim might be channelled. The resource implications of a duty of inquiry have inhibited any whole-hearted acceptance of the obligation, a position which will be affected by Applicant VEAL. Attitudes of tribunal members have also been influential. The survey illustrated that not all tribunal members would readily accept either of these additional roles. Again, the impact of Applicant VEAL must now be taken into account.

The existing practices are illustrated by the discussion of the following cases. For example, in Re Campbell and Port Phillip City Council\(^\text{220}\) the member sitting on VCAT noted somewhat acidly that although Eames J in Bausch v Transport Accident Commission\(^\text{221}\) had ‘enthusiastically embraced’ the concept of the tribunal as ‘inquisitorial’ in the terms described earlier by Brennan J in Bushell v Repatriation Commission,\(^\text{222}\) the concept ‘was never enthusiastically embraced by the Tribunal itself’.\(^\text{223}\) It is also noticeable that reference to the tribunal’s inquisitorial nature by the AAT has often been confined to its longest serving or academic members.

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\(^{219}\) Id at [59].

\(^{220}\) Re Campbell and Port Phillip City Council [1999] VCAT 128.


\(^{222}\) Bushell v Repatriation Commission (1992) 175 CLR 408.

\(^{223}\) Re Campbell and Port Phillip Council [1999] VCAT 128 at [32].
**Information-gathering**

The essence of an inquisitorial approach is that the adjudicator has an obligation to ask questions. However, this obligation may lead into a legal quagmire. The failure to comply with the obligation may mean the adjudicator is not in a position to meet the ‘being satisfied’ standard or may breach common law natural justice requirements. However, seeking further information inevitably lengthens the process and may increase costs, thus breaching the ‘being economical’ imperative.

Examples of a tribunal gathering further information, either itself or by suggesting further evidence a party should provide, are:

- In *Re Ross and Repatriation Commission*, in which Senior Member Handley noted: ‘Having regard to the inquisitorial duty as a Tribunal of review, Associate Professor Maynard obtained samples of salt and caused them to be measured scientifically by reason of his position at the Victorian Institute of Forensic Pathology,’ to supplement the evidence provided by the applicant;

- In *Re Bessey and Australian Postal Corporation* the absence of an interest in cross-examining a witness was not sufficient to prevent the tribunal doing so, despite the threat by one party that it would not be responsible for the cost;

- In *Re Heard and Repatriation Commission* it was pointed out that the obligation on the tribunal to be ‘satisfied’ that its decision was ‘correct or preferable’ might compel the prolongation of the proceedings to obtain further evidence; and

- In *Australian Postal Commission v Burgazoff* Davies J said: ‘Because of the nature of its function and the fact that it proceeds by way of a hearing at which parties are entitled to appear and be represented, the Administrative Appeals Tribunal itself rarely calls evidence and never itself makes investigations outside the conduct of the hearing. But an Administrative Appeals Tribunal, as an administrative body, will feel free to suggest to the parties other additional information which ought to be obtained and sometimes appropriate means of obtaining the information and bringing it into evidence. An Administrative Appeals Tribunal may also, in the course of its proceedings, make it clear to one or other of the parties what the position would be if the evidence before the Tribunal were left in its then state. If it does so it is not then placing a legal onus of proof upon a party but merely making it clear to a party what would be the Tribunal’s state of satisfaction as to relevant matters if no further evidence were called’.

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225 *Re Bessey and Australian Postal Corporation* [2003] AATA 12.
228 Id at 298.
However, no such duty was imposed on the Superannuation Complaints Tribunal in *Hourn v Farm Plan Pty Ltd*. The information said to be required – information about financial and living arrangements to establish whether a couple should be regarded as being in a de facto relationship – did not fall within any of the established categories when a duty of inquiry might arise, namely:

- The statute did not mandate the inquiry;
- The material was not readily available, centrally relevant, or would only involve a simple investigation;
- There was no failure to take account of relevant considerations, including updating of material which was out-of-date or misleading;
- There had been no request by the applicant to the tribunal to exercise its investigative powers;
- None of the usual circumstances, such as incapacity on the part of the applicant, were present;
- This was not a case in which a specific matter had been raised and the matter could not properly be considered without further inquiry; and
- Nor was the absence of information because officials had misled the applicant.

(ii) Exploring other avenues of eligibility

This second element is more contentious. A tribunal may be under a positive duty to explore other avenues of eligibility for an applicant. In other words, the tribunal should not limit its determination to the ‘case’ articulated by the party seeking relief. For example, would a party be entitled to a different class of visa than the one claimed, or to receive pension for a disability other than the one put forward, or to claim losses not raised at the time of an initial application. To explore such options is to move beyond the position established in *Sullivan v Minister for Transport* that the tribunal is under no obligation to make the case for the applicant.

It is clear that the duty to seek further information applies most commonly in relation to material which is centrally relevant and relatively easily to obtain. Simple, short inquiries may be undertaken. For example, in *Re Sakkos* in an application for a distinguished sporting talent visa for the sport of futsal (or indoor soccer), the tribunal undertook an internet search for futsal in Australia, an example

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229 *Hourn v Farm Plan Pty Ltd* [2003] FCA 1122.
230 *Hourn v Farm Plan Pty Ltd* [2003] FCA 1122 at [43] - [61].
234 See n 176.
of member-initiated research with little cost and no practical consequences in terms of delay.

However, the resource implications still inhibit the tribunal’s willingness to seek additional evidence. The competing pressures are illustrated by Re Rowlands and Commissioner for Superannuation\(^\text{236}\) where the tribunal made the following comment:

The [Tribunal] does not have the resources to be a fully inquisitorial body, but it has a duty to seek out information it regards as necessary for the decision of the case in hand, and when it identifies this need it will seek that information through the parties or, having obtained it aliter or through its own expertise, will expose it to the parties for comment.\(^\text{237}\)

Following Applicant VEAL, tribunal management will need to determine how to tackle the resource issue, and this may mean, as in Re Rowlands, imposing this obligation on either the agency or the applicant. Alternatively, it may be that tribunals will need to seek funding to expand their in-house investigative capacity.\(^\text{238}\)

(c) Management of proceedings including rules of evidence

- The statutory formula relating to a tribunal’s processes generally contains three elements:
  - that the procedure of the tribunal, subject to the legislation, is within its discretion;
  - that the tribunal is not bound by the rules of evidence and may enquire into and inform itself in any manner it sees fit; and
  - that the tribunal is to act with as little formality and technicality, and with as much expedition as the circumstances permit, according to equity, good conscience and the substantial merits of the case.
- The legal effect of these requirements has been the subject of some judicial comment.

(i) ‘Not bound by rules of evidence’

Not being bound by the rules of evidence does not mean that a tribunal is bound not to apply them.\(^\text{239}\) Nor does it mean that the tribunal may disregard other fundamental principles for the protection of an individual such as the privilege against self-incrimination. Principles were enunciated by the Administrative Appeals Tribunal in Ileris v Comcare\(^\text{240}\) as follows:

\(^{237}\) Id at 600.
\(^{238}\) See (d) following.
\(^{240}\) Ileris v Comcare (1999) 56 ALD 301.
A provision permitting a tribunal to dispense with the formal rules of evidence dispenses with the need for material to meet strict criteria of admissibility;

The primary rule of evidence for tribunals is that what is not relevant is not admissible;

Material is relevant if it has probative value and is capable of establishing the existence of facts by establishing a logical connection between the evidence and the facts;

Dispensation from the rules of evidence does not justify departure from the rules of natural justice. Natural justice obliges the tribunal to give a party a fair opportunity to respond to material adverse to the person’s interests upon which the tribunal proposes to rely; and

This may apply to hearsay evidence. The extent to which a party cannot adequately test hearsay evidence will affect its weight if admitted, and in some cases, may preclude its admissibility. 241

(ii) ‘Equity, good conscience and the substantial merits of the case’

It has been said of the ‘equity, good conscience and the substantial merits of the case’ rubric: "The precise effect of [the section] is not immediately clear". 242 At the same time it is accepted that such provisions do raise two issues: what is their general effect on the procedure of tribunals; and does the ‘substantial justice’ element of the test superimpose the common law rules of natural justice.

As to first issue - the general impact of this expression - it has been accepted that the provisions indicate the administrative, not the formal legal, nature of the review processes of tribunals. In other words, subject to the terms of the legislation, breach of specific statutory procedures is generally not intended to give rise to a cause of action. 243 As Gleeson CJ and McHugh J noted of the equivalent requirements in the Migration Act 1958 (Cth) s 420:

They are intended to be 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. The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question. 244

As to the second issue, in Eshetu, the terms ‘substantial justice and the merits of the case’ did not import a common law requirement of procedural fairness in the face of the explicit removal of that ground of review from Part 8 of the Migration

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241 Id 301-310.
243 Id at 30E. See also Moses v Parker; Ex parte Moses [1896] AC 245.
244 Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 at [49].
Act 1958 (Cth). However, it was acknowledged that in other statutory contexts the expression might have a different impact.\textsuperscript{245} The degree to which the statutory provisions do control the tribunals’ processes is apparent from the following discussion.

In theory, a tribunal’s flexible mode of operations is limited only by the minimum standards of fairness, that is, the need to accord natural justice.\textsuperscript{246} In practice there are other considerations relating to the onus of proof, the nature of the interests involved, and pragmatic considerations which impact on the obligation.

The implication of the flexibility accorded tribunals is that they must decide for themselves how the proceedings will be conducted. As Woodward J noted in *McDonald v Director-General of Social Security*:\textsuperscript{247}

\begin{quote}
… a tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts.\textsuperscript{248}
\end{quote}

In the absence of some ordered process, as counsel in *Golem v Transport Accident Commission* ‘trenchantly observed’: ‘Some procedure, some order of receiving evidence, must be established or we will all simply sit looking at each other in silence’.\textsuperscript{249} The practical issues include providing for the commencement and the end to the receipt of evidence.

If one turns for guidance to the legislation governing tribunal processes, all that is provided is that tribunals are ‘not bound by rules of evidence’. This does not mean, however, that the tribunal cannot rely on rules of evidence. They are, after all, the principles which have been developed over centuries in an effort to ensure a fair hearing and to provide assistance in the practical issues facing tribunals just as much as courts.\textsuperscript{250} As Evatt J noted in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott*:\textsuperscript{251}

\begin{quote}
Some stress has been laid by the present respondents upon the
\end{quote}

\begin{footnotesize}
\textsuperscript{247} (1984) 1 FCR 354.
\textsuperscript{248} Id at 356.
\textsuperscript{249} *Re Golem and Transport Accident Commission* [2002] VCAT 319 at (vii) on p 4.
\textsuperscript{250} *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186 at 199; *Re Jacques Nominees Pty Ltd and National Mutual Trustees Pty Ltd* (2000) 16 VAR 152; *Re Buffalo Corporation Pty Ltd and Bulla Road Pty Ltd* (VCAT, unreported, 26 May 2000).
\textsuperscript{251} *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228. See also *Re Golem and Transport Accident Commission* [2002] VCAT 319.
\end{footnotesize}
provision that the tribunal is not, in the hearing of appeals, ‘bound by any rules of evidence’. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although the rules of evidence, as such, do not bind, every attempt must be made to administer ‘substantial justice’. 252

In other words, since fairness in the abstract is insufficient to prevent ‘Rafferty’s Rules’ applying, it is clearly sensible to rely on the established evidential practices to avoid this outcome. 253 As the VCAT warned in Golem, the dispensation of rules of evidence and procedure altogether in an ‘endeavour to provide some form of rough justice may mean that justice becomes so rough that it ceases to be justice’. 254

That does not mean, however, that the rules of evidence are always applicable. As the cases illustrate, the tendency is to rely on the standard rules of evidence for cases at the adversarial end of the spectrum, when both parties are represented and the case is being contested in a ‘vigorous, adversarial fashion’. 255 Matters involving occupational licences, which have the potential to impact heavily on someone’s interests, are also likely to be handled with a degree of formality. 256

However, adoption of the adversarial court-like process is not the norm in tribunals. Generally the process is more informal as the nature of many of the claims raised before tribunals require. The reasons for adopting this more flexible approach were described by Justice Morris, President of VCAT:

First, the method of bringing cases before the tribunal is relatively simple; complex pleadings are unnecessary. Second, the tribunal engages a substantial registry staff to assist parties and to perform work which would ordinarily be done by solicitors in courts of law. Third, hearings are conducted in an ordered manner, but with as little formality and technicality as is practicable. Fourth, the tribunal is empowered to inform itself on any matter as it sees fit and this power is used to promote the fair conduct of a case as well as to achieve a just outcome according to law. For example, tribunal members often ask questions or raise issues in order to overcome an inability of a party to articulate its true case. 257

252 R v War Pensions Entitlement Appeal Tribunal; Ex part Bott (1933) 50 CLR 228 at 256.
254 Id at 3.
255 Id at (v) at 3.
256 Re Curcio and Business Licensing Authority [2001] VCAT 423.
257 Re Ogawa and University of Melbourne [2005] VCAT 197 per Morris J at [21].
Golem illustrates the application of the overall ‘substantial fairness’ requirement to tribunals at the expenses of the more formal rules of evidence. For example, the tribunal accepted that it was the respondent, the Transport Accident Commission (TAC), which should present evidence first. Factors leading to that conclusion were that it was the TAC which had accepted liability for benefits and some six years later revoked them with little in the way of explanation. In other words it was the TAC which was seeking to alter the status quo. And it was the TAC which had an obligation, as the primary administrative decision-maker, to assist the tribunal and not to behave in an adversarial fashion. For these reasons the TAC was required to present its evidence first, including the reasons it made its decision. As the tribunal pointed out, that was fair, not least because it meant that the applicant need not face cross-examination at the evidence-gathering stage, thus giving a further forensic advantage to the TAC. This practice of requiring the decision-maker to give evidence first is also applied at the Western Australian State Administrative Tribunal and at the New South Wales ADT.

The absence of rules of evidence also means that material which would be inadmissible in a court, for instance ‘hearsay’ evidence, can be admitted in a tribunal. At the same time, the admissibility of such evidence does not suggest that the tribunal will not give the matter reduced weight. Other evidential principles, such as estoppel, which limit opportunities for re-litigation of matters in a court, are also rarely, if ever, applied. And too there are signals from the High Court that certain forensic behaviour is not appropriate in a tribunal context. So in Re Ruddock; Ex parte Applicant S154/2002, two Justices (Gummow and Heydon JJ) commented:

… the rule in *Browne v Dunn* [(1893) 6 R 67 (Browne v Dunn)] has no application to proceedings in the Tribunal. Those proceedings are not adversarial, but inquisitorial; the Tribunal is not in the position of a contradicitor of the case being advanced by the applicant. The Tribunal Member conducting the inquiry is not an adversarial cross-examiner, but an inquisitor obliged to be fair. The Tribunal Member has no ‘client’, and has no ‘case’ to put against the applicant. Cross-examiners must not only comply with *Browne v Dunn* by putting their client’s cases to the witnesses; if they want to be as sure as possible of success, they have to damage the testimony of the witnesses by means which are sometimes confrontational and aggressive, namely means of a kind which an inquisitorial Tribunal Member could not employ without running a risk of bias being inferred. Here, on the other

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258 A similar approach was adopted in comparable circumstances in *Bausch v Transport Accident Commission* (1996) 11 VAR 117.
259 Information provided by Justice Barker, President of SAT, and Justice O’Connor (President of the ADT) at the Eighth Annual AIJA Tribunals’ Conference, Sydney, 8-9 June 2005. See also the Commonwealth’s ‘Model Litigant Policy’ (Commonwealth Attorney-General’s Department Legal Services Directions (2000)).
260 Re Freeman and Transport Accident Commission [2004] VCAT 40 at [27].
hand, it was for the prosecutrix to advance whatever evidence or argument she wished to advance, and for the Tribunal to decide whether her claim had been made out; it was not part of the function of the Tribunal to seek to damage the credibility of the prosecutrix's story in the manner a cross-examiner might seek to damage the credibility of a witness being cross-examined in adversarial litigation.263

This practice exemplifies how Australian tribunals take advantage of that flexibility which is a key feature of their inquisitorial mode of operations.

(d) Role of parties vis-a-vis the tribunal

To what extent do their inquisitorial processes impact on the role of the parties and of the tribunal itself? A distinctive aspect of the management of tribunal hearings is that evidence may be obtained in a different manner from the processes in courts. There is no discovery, nor the same reliance on cross-examination to elicit information and ensure its accuracy, nor the same need to discredit the testimony of a party.264 Instead, agencies are expected to provide the applicant’s file, including the reasons for the decision under challenge, the evidence on which the decision-maker relied, and the reasoning adopted to reach the conclusion. This is the principal source of evidence before the tribunal. As a consequence, the material and issues before the tribunal are not determined by the parties in the same manner as applies in the courtroom, and the parties too should not behave in a tribunal hearing as they would in a courtroom.265

Despite these principles, when parties are represented there is a tendency to expect that the parties play the predominant role. Indeed parties’ legal representatives have been criticized, for example, for not conducting a detailed analysis of medical records or seeking further evidence, thus forcing the tribunal to undertake the task.266 In general, it is expected that the parties will put before the Tribunal all the material which they consider relevant.

At the same time, the tribunal’s role is not simply to adjudicate on the merits of both cases, but itself to be satisfied that it can reach the ‘correct or preferable’ decision, after informing itself in any manner as it thinks fit.267 So how does the tribunal play its part? The answer was summed up by AAT Deputy President Forgie:

There are various ways in which the Tribunal may use its

263 Id at [57].
264 Id at [57] per Gummow and Heydon JJ, quoted in Dimian v Health Insurance Commission [2004] FCA 1615 at [55].
267 Re Hargreaves and Australian Community Pharmacy Authority (No 2) (1995) 41 ALD 147; Re Bessey and Australian Postal Corporation [2000] AATA 404.
inquisitorial powers. They range from questioning the parties’ witnesses, through asking the parties to procure or produce further material, to producing documentary material from its own research. In a rare case, it may call its own witnesses.\textsuperscript{268}

The circumstances in which the tribunal will exercise these powers to ‘request or itself compel the production of further material’\textsuperscript{269} have been contentious. Prolongation of the proceedings in the face of the requirement to be ‘quick’, resource implications for the tribunal, the subject matter of the hearing, and the culture of the tribunal, have impacted on the level of intervention.\textsuperscript{270} However, following Applicant VEAL, it may be that greater emphasis will need to be given to fairness over speed.

Taking account of resource implications, it has been noticeable that in veterans’ matters, in which the Repatriation Commission calls and pays for relevant medical specialists, there has been a general willingness by the VRB and the AAT to rely on the agency supplying or funding the applicants to obtain relevant evidence.\textsuperscript{271} The absence of this financial support in other cases has impacted on a tribunal’s willingness to call for or obtain further evidence.\textsuperscript{272} In practice, the tribunal will only take the initiative in the face of such a paucity of material that the tribunal is incapable of coming to a decision.

Other factors involved are the nature of the matters involved. As has been pointed out in relation to VCAT, the credit and planning jurisdictions are traditionally at the adversarial end of the spectrum, with most parties being legally represented. By contrast, in the area of small claims, residential tenancies and domestic building disputes, parties are less likely to be represented.\textsuperscript{273} Whether parties are represented, as noted earlier, also impacts on the level of intervention required of the tribunal.\textsuperscript{274} If both parties are legally represented, the tribunal will be reluctant to intervene. As the tribunal remarked in Golem:\textsuperscript{275}

\begin{quote}
...the closer one gets to something resembling an adversarial contest with experienced counsel representing the parties, the closer one gets to the system applied in the courts and the greater the reluctance on the part of the Tribunal to interfere and impose its own inquisitorial directions.\textsuperscript{276}
\end{quote}

\begin{footnotes}
\footnotetext{268}{Re Beer and Australian Telecommunications Commission [1990] AAT No 5974. See also Re De Brett Investments Ltd and Australian Fisheries Management Authority [2004] AATA 704 at [128].}
\footnotetext{269}{Bushell v Repatriation Commission (1992) 175 CLR 408 at 424-425.}
\footnotetext{270}{ALRC, Managing Justice Report No 89 (1999) [9.62].}
\footnotetext{271}{Eg Re Talma and Repatriation Commission [2003] AATA 866.}
\footnotetext{272}{Re Erdstein and Comcare [2004] AATA 798.}
\footnotetext{273}{Id at [13].}
\footnotetext{274}{Re Mustafay and Secretary, Department of Family and Community Services [2004] AATA 819; Re Hudson and Child Support Registrar [1998] AATA 863.}
\footnotetext{275}{Re Golem and Transport Accident Commission [2002] VCAT 319. See also Re Rzanovski and Transport Accident Commission (General) [2005] VCAT 652 at [7].}
\footnotetext{276}{Re Golem and Transport Accident Commission [2002] VCAT 319. See also Re Perring and Australian Postal Corporation (1993) 31 ALD 613.}
\end{footnotes}
(e) **Onus of proof**

In an inquisitorial proceeding if the tribunal adopts an interventional role this is capable of impacting on the onus of proof. As has been mentioned, the issue of onus in tribunal proceedings is often not dealt with explicitly in the legislation establishing the tribunal.\(^\text{277}\) Despite the absence of this statutory indicator, the general rule, as discussed in Part V of this paper, is that no party bears a legal onus of proof in tribunal proceedings. It has long been held, however, that this principle does not preclude there being a practical onus on one or other party.\(^\text{278}\) The intensity of that practical onus will depend on how adversarial, in practice, is the proceeding.\(^\text{279}\)

Nor does the fact that there is a practical onus on the parties prevent the tribunal itself taking on the evidence-producing role. This may occur in one of two ways. The tribunal commonly identifies and requires the parties to obtain evidence the tribunal needs in order to reach the correct or preferable decision.\(^\text{280}\) Preferably this is done at preliminary proceedings.\(^\text{281}\) Alternatively the tribunal can obtain the evidence itself. It should do so when, following provision of evidence by the parties, the tribunal is left in the position in which it is unable to make a correct or preferable decision. If that is due to the absence of a crucial witness, the tribunal may be obliged to call that witness.\(^\text{282}\) Equally if the tribunal identifies an issue not raised at the hearing, it may call for or provide evidence on that issue and adjourn the hearing until the evidence is obtained.\(^\text{283}\)

Which option it will adopt depends on the character of the proceedings and the assumed skills and resources of the applicant. Hence in a proposal for a development proposal, the tribunal commented:

\[\ldots \text{it seems to us generally fair that a development proponent who seeks approval for a development, no doubt with a view ultimately to obtaining a profit from the transaction, should bear the responsibility of placing before the decision-maker any expert opinion upon which he relies.}\]^\text{284}\]

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\(^\text{277}\) Veterans’ Entitlements Act 1986 (Cth) s 15(4). See also Transport Accident Act 1986 (Vic) s 76(2) which states: ‘A person claiming to be entitled to receive compensation under Part 3 during the first 18 months after the transport accident or under Division 1 of Part 10 bears the onus of proving the entitlement’. See also Micu v Ferretti [2000] VCAT 1283 at [40].


\(^\text{280}\) Bushell v Repatriation Commission (1992) 175 CLR 408 at 424-5.

\(^\text{281}\) CROSROMD review of the IRT at [3.4], and the recommendation at [27.2.2].


\(^\text{284}\) Re Campbell and Port Phillip City Council [1999] VCAT 128 at [32].
The general principles are clear-cut. There is a practical but not a legal onus on any party or the tribunal, but the level or representation, the type of matter, and the need for the tribunal to reach the correct or preferable decision will impact on who bears the practical burden at any hearing.

(f) Rights and interests of parties including the right to natural justice

This topic raises considerations concerning the nature of the substantive matter at issue, as well as the right to fair process before the decision-maker. Both aspects are considered.

(i) General principles

As to the substantive matter, the more serious the impact on a party, the more likely it is that the tribunal will adopt a formal, and hence less inquisitorial, process. For example, in occupational licence cases, the tribunal has noted that the seriousness of the initial decision to deny the applicant a licence indicates the necessity to adopt more formal processes. As the tribunal remarked in *Re Curcio and Business Licensing Authority*:

As a matter of procedure such matters ought proceed by way of proper notice to an estate agent with particulars in support being detailed and in circumstances where the case is put by the informant before the estate agent is called upon to answer the allegations. The tribunal also ruled as inadmissible a police summary which was substantially in the form of hearsay evidence on the basis that in a case such as this, the rules of evidence should be applied ‘unless for sound reason, their application is dispensed with’.

Similarly, in a denial of compensation case, the tribunal refused to override medical professional privilege despite the discretion available under the *VCAT Act s 80(3)* to require a party to produce a document.

(ii) Natural justice

The need for a fair hearing process is widely acknowledged in tribunal hearings. Even given the usual requirement that tribunals are not bound by the rules of evidence, it has never been doubted that the 'bottom line' for tribunal proceedings is

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285 *Re Curcio and Business Licensing Authority* [2001] VCAT 423.
286 *Re Curcio and Business Licensing Authority* [2001] VCAT 423.
287 Id at [24].
288 Id at [26].
that they comply with natural justice or fair process. As the tribunal remarked in Re A Taxpayer and Commissioner of Taxation:

> In the course of making its decision, the Tribunal is required to act judicially - meaning it must act fairly and with detachment, and observe the principles of natural justice: *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342 per Deane J. The duty to act judicially can be inferred from the nature and role of the Tribunal, and from s 39 [of the AAT Act] which says every party to the proceedings must be given the opportunity to present their case and inspect the documents on which the Tribunal proposes to rely. The parties must also be afforded the opportunity to make submissions. A denial of natural justice is an error of law that may be appealed to the Federal Court: see *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143.

Natural justice obligations mean the agency is required to provide to the tribunal and the parties the evidence supporting, and the reasons for, the decision in order that both parties may have access to this material at the hearing. In the same vein, if the tribunal itself acquires further evidence, both parties must be given an opportunity to comment on it, provided it is ‘credible, relevant and significant’.

At a general level, the cases on natural justice reveal the following. In *Re De Brett Investments Pty Ltd and Australian Fisheries Management Authority*, Deputy President Forgie noted that ‘In theory, its inquiries are limited only by [the tribunal’s] need to observe the rules of procedural fairness’. The tribunal was there referring to the need for evidence to be probative, and that there is no burden of proof on either party.

In *Re Beer and Australian Telecommunications Commission* the Tribunal took the step of contacting a doctor who identified research into a particular medical condition which was relevant to the case but had not been presented to the Tribunal. The member said he did so, bearing in mind the need to comply with natural justice principles, that is, that both parties would need to be given the material and an opportunity to comment on it. As Deputy President Todd of the AAT remarked in *Re Beer and Australian Telecommunications Commission* in relation to his calling of a witness:

> My action in contacting Dr Quintner was no doubt unusual, but

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290 *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342 per Deane J.
292 Id at [8].
293 *Re De Brett Investments Pty Ltd and Australian Fisheries Management Authority* [2004] AATA 704 at [130].
295 *Re De Brett Investments Pty Ltd and Australian Fisheries Management Authority* [2004] AATA 704.
296 *Re Beer and Australian Telecommunications Commission* [1990] AAT No 5974.
297 *Re Beer and Australian Telecommunications Commission* [1990] AAT No 5974.
the problem before me was very real. My action was consistent with the views expressed from time to time that the Tribunal should play a more ‘inquisitorial’ role, but in fact the inquisition was limited and was conducted well within the rules of natural justice and within the requirements of s 39 of the Administrative Appeals Tribunal Act 1975. The parties were given copies of the exchange of correspondence and of the material sent to me by Dr Quintner and were enabled to comment on it.298

A noticeable feature of the interviews with some members of the AAT was their concern that adopting a questioning approach to the elicitation of evidence might result in a claim of bias. That concern was illustrated by a comment about another large tribunal, the Queensland Commercial and Consumer Tribunal which was made by a regular advocate before that tribunal:

… because the Tribunal cannot be seen to be acting with any perception of bias, there is a limit to the assistance that it can provide to users and where appropriate, the Tribunal may make recommendations for parties to obtain legal representation so that their interests can be best protected.299

The cause of these concerns about bias has been illustrated by the cases discussed under Part V of this paper. For that reason, the cases will not be considered further at this point.

(g) Pragmatic considerations

(i) Speedy proceedings

A feature of the procedural model of Australian tribunals is that they have often been created to provide for speedier dispute resolution than the courts. The emphasis on a ‘quick’ resolution of the matter is frequently referred to as an answer to a complaint that the tribunal should have taken a more interventionist approach or called for others to provide evidence, a view which will need to be modified following Applicant VEAL.

For example, in Spano v Business Licensing Authority300 the tribunal pointed out, in an application to be a real estate agent’s representative:

Although the Tribunal takes an inquisitorial role, that role is one of review and it must to large degree rely upon the evidence presented to it if it is to operate efficiently and with some speed whilst ensuring fairness to the parties.301

298 Id at [58].
301 Id at [3]-[4].
In Spano, the applicant had conducted his case on the basis that he accepted all the factual matters, and consequently would not give evidence, but was available for cross-examination. The tribunal criticized this approach to the giving of evidence on the basis that it ‘caused disadvantage to the respondent and an unnecessary lengthening of the proceedings’. 302

Similarly, in Campbell v Port Phillip City Council303 the tribunal rejected any obligation on it to ‘commission its own building expert’ in a case in which an objection to a development proposal had been pending for more than two years, largely due to actions by the applicant. As it pointed out, natural justice obligations would require that any expert it called could be cross-examined on any evidence forming a key basis for a finding of fact, this would cause further delay as the report was commissioned and each party was granted time to consider the report, and this was unacceptable in the face of the statutory obligation to deal with the matter.

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302 Id at [6].
‘expeditiously’.

At the same time, the obligation on the tribunal to be ‘satisfied’ that its decision is the ‘correct or preferable one’ may compel the prolongation of the proceedings to obtain further evidence. Hence the AAT, for example, has commented from time to time that its members should seek out further legal avenues on which the applicant could base their claim:

- In *Re Richards and Australian Federal Police* Deputy President McDonald noted: ‘The Tribunal … has a duty to consider whether any exemption other than those relied on by a respondent may be relevant for consideration.’

- In *Re Gundry and Repatriation Commission* Senior Member Handley noted: ‘By reason of the inquisitorial nature and responsibility of the Tribunal, consideration should not be given only to the “case” the parties articulate.’

(ii) Resource limitations

The absence of resources - staff and members, as well as financial resources - has often been presented as a reason the tribunal is not able to undertake its own inquiries. In particular the tribunal may be reluctant to impose that obligation on the tribunal itself, or to put the parties to extra expense by calling for additional evidence, particularly when the parties are not seeking that evidence.

The resource imperative of undertaking a duty of inquiry is clearly apparent in the findings in the following AAT cases:

- In *Re Hargreaves and Australian Community Pharmacy Authority* Deputy President Forgie noted: ‘The Tribunal does not have the resources, either staff or financial, to carry out its own investigations … It cannot act as an inquisitorial body to any great degree.’

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304 Id at [32]. See for the need for proceedings to be conducted expeditiously the *Victorian Civil and Administrative Tribunals Act 1998* s 98(1)(d). Other tribunal hearings in which speed has been cited as the reason for a failure to make further inquiries include *Re Talma and Repatriation Commission* (2003) AATA 866.


308 *Re Hargreaves and Australian Community Pharmacy Authority* (No 2) (1995) 41 ALD 147; *Re De Brett Investments and Australian Fisheries Management Authority* (2004) AATA 704.


310 *Re Hargreaves and Australian Community Pharmacy Authority* (1995) 41 ALD 147 at [92].
- **In Re Talma and Repatriation Commission**\(^{311}\) Senior Member Dwyer said in relation to a case in which it was sought to establish a link between a veteran’s suffering of pneumonia and service: ‘But even bearing in mind the Tribunal’s responsibilities as an investigative or inquisitorial Tribunal, we have decided that we cannot prolong the information gathering process any longer. It has already lasted for more than one year since the hearing.’

- **In Re De Brett Investments Pty Ltd v Australian Fisheries Management Authority**\(^{312}\) Deputy President Forgie noted that: ‘whether the Tribunal chooses to exercise its inquisitorial powers [other than by asking questions] is dependent upon its assessment of whether or not its doing so will produce further evidence that will be relevant.’

- **In Re Achurch and Comcare,\(^{313}\)** Senior Member Dwyer commented: ‘However, it is simply not practical for the Tribunal to put the parties to the expense of a further hearing, especially one involving expert witnesses and video evidence, when neither party seeks such a further hearing.’

- **Similarly, in Re Erdstein and Comcare,\(^{314}\)** Senior Member Dwyer and Member, Associate Professor Maynard, pointed out: ‘although the Tribunal has power to call for further medical evidence, there are always practical problems to overcome such as who pays for the time of the specialist medical witnesses. There are also, of course, legal costs for any extra days of hearing.’

These comments underline an unsatisfactory situation for Australian tribunals. They clearly have insufficient funds of their own to undertake the inquiry task any more than to a minimal degree. As AAT Deputy President Bannon remarked of his inability to obtain further evidence in a hearing before the AAT:

> There is no available fund for the Tribunal to embark on inquisitorial proceedings outside the hearing room, and no power to take evidence on commission abroad as provided for example in the *Evidence by Commission Act*, 1885 (Imp), in the case of courts.\(^{315}\)

Deputy President Forgie noted the consequences of the AAT’s practice of relying largely on the material provided by the parties:

\(^{311}\) *Re Talma and Repatriation Commission* [2003] AATA 866 at [5].  
\(^{312}\) *Re De Brett Investments Pty Ltd v Australian Fisheries Management Authority* [2004] AATA 704 at [129].  
\(^{313}\) *Re Achurch and Comcare* (2003) 77 ALD 531 at [17].  
\(^{314}\) *Re Erdstein and Comcare* [2004] AATA 798 at [8].  
\(^{315}\) *Re LNC (Wholesale) Pty Ltd and Collector of Customs* [1988] AAT No 4818.
This approach may mean that the issues are not explored with the thoroughness that would be the hallmark of a perfect world. We can only do our best and the fact that we cannot do so in the detailed and thorough manner desired by the applicants does not entitle us to walk away from our duty to review the decision.\textsuperscript{316}

As indicated earlier, this position may need to be modified following the decision in Applicant \textit{VEAL}.

CONCLUSIONS

Australia has an extensive tribunal system of which it can be proud. Nonetheless, there are conceptual and systemic issues to which attention must be given. In labelling as ‘inquisitorial’ the processes imposed on tribunals, parliaments gave insufficient attention to the appropriateness of that descriptor. The term ‘inquisitorial’ is misleading to the extent that it suggests that tribunals operate in a mode akin to that practised in civil law systems. The traditional European notion of what ‘inquisitorial’ means does not translate precisely to the Australian scene, not least because of the need in Australia to provide a more efficient and cost effective form of adjudication than the courts. Australia has set up a hybrid adversarial-inquisitorial process with distinct features. These should be reflected in a title divorced from any civil law connotation. We need to develop an indigenous understanding of, and devote more thought to, an appropriate descriptor for Australian tribunals designed to operate in an investigative mode.

The need is the greater because generally speaking tribunals do not operate in an inquisitorial fashion. The culture of adversarialism in Australia is too strong for an alternative mode of procedure to be adopted. Although there is a range of processes which are adopted within tribunals, the trend in contested proceedings, particularly when parties are represented, is for the parties to behave much as they would in a courtroom. This result is in part the strength of legal culture, in part, the unwillingness to move from the known and well-established rules of evidence, and in part the fact that tribunals are sited in an adjudicative system the final tiers of which traditionally operate in an adversarial fashion. Too little thought was given to this aspect of the architecture of the system when inquisitorial tribunals were established for this experiment in procedure to be wholly successful.

The parliaments and the courts have also failed to identify and clarify the problems associated with an overarching requirement that tribunals adopt processes which are designed for high volume adjudication – tribunals must be economical and quick, while not unfair. The inherent conflict between these demands has not been helped by a failure on the part of parliaments and courts to provide guidance about the precedence which should be accorded to the conflicting imperatives. That position will now have to be addressed following the decision in Applicant \textit{VEAL}.

\footnote{\textit{Re De Brett Investments and Australian Fisheries Management Authority} [2004] AATA 704 at [131]. See also \textit{Re A Taxpayer and Commissioner of Taxation} [2004] AATA 398.}
Nor have legislatures or the courts fully confronted the consequences of an inquisitorial-style tribunal. This is demonstrated by their reluctance to acknowledge that there is duty of inquiry on tribunals. Tribunals have been set up with the functions and powers to be investigative bodies. They should be encouraged to exercise these powers, particularly when there is only one party at a hearing, when one or other party is not represented, or when critical evidence has not been provided to the tribunal. At present, the adoption of a more active role by tribunal members is inhibited by lack of resources and by concerns that taking such an approach will amount to a breach of natural justice. These deficiencies in the resources of tribunals should be acknowledged and remedied in order to reflect better the original intention behind tribunals’ intended mode of operation for those cases in which a more investigative approach is appropriate, and to take account of the High Court’s recognition of a duty of inquiry in Applicant VEAL.

Another facet of this problem is reflected in the requirements of procedural fairness. Following Applicant VEAL, courts will now need to accept that the evidence-gathering and evidence-testing powers of tribunals impose a requirement that tribunal members take control of the hearing. Provided these powers are exercised with sensitivity, tribunals members should not have to fear that adoption of these roles would be seen as indicating lack of impartiality or breach of other aspects of fair process. Accordingly courts will need to adopt a restrained approach to criticism of tribunal members on these counts.

On the practical front, legislatures need to ensure that tribunals are adequately resourced both in terms of staff and budgets to undertake the tasks expected of them and for which their legislation provides, particularly following the duty of inquiry now imposed on them. Without that assistance, the investigative powers and functions bestowed on tribunals will continue to be underutilised. In the absence of funds for tribunals to enable them to carry out inquiries, all tribunals should have the power to direct an agency or the applicant to obtain that information on the tribunal’s behalf.

Tribunal membership should be structured in a way that allows members to build up skills and experience and allows the opportunity for members to develop technical expertise in investigative practices. This practical experience needs to be reinforced by ongoing training of members. More consideration may need to be given to the best method of incorporating this training in a manner that allows the full participation of part-time members particularly in national tribunals and for tribunal members operating away from the principal registry. This may entail adjustments to case management targets for members reflecting the time spent and value obtained from member training.

In accordance with the recommendation contained in the Administrative Review Council’s Better Decisions report, a clear preference should be expressed for having multi-member panels in appropriate matters. The hearing observations undertaken in this study indicate that multi-member panels allow the greatest scope for a full and thorough investigation of the facts and evidence in investigative tribunal proceedings, without unnecessary prolongation of the proceedings.
It is desirable to have consistency of language in the legislation providing for inquisitorial tribunals. There should be no need for advocates, applicants and tribunal members to spend time learning different rules for individual tribunals. While tribunals should retain the flexibility to determine their own procedures and tailor approaches depending on the facts of the case, this is not inconsistent with having a template set of procedures for investigative bodies. This would enable common practices to develop which would benefit applicants and their representatives alike. To develop a general procedural guide would simplify, speed up, and reduce costs of tribunal hearings to the benefit of all users.

It is essential that Australia continue to develop, study and refine the tribunal network. It is an integral and frontline element of the Australian justice system. Enhancing the tribunal network and improving the standing and respect due to its members and staff is essential if tribunals are to take their rightful place in the framework of adjudication provided for in Australia. Not only will these moves recognise the important work performed by tribunal members but they will contribute to the public’s perceptions of the value of tribunals. These steps will also be reflected in the attitudes of the courts, the legal profession, and within public administration. A cultural change that accepts the development of the tribunal network and the benefit to be gained by society as whole from the use of investigative practices to aid in decision-making will only benefit further the large numbers of citizens who rely on this form of dispute resolution.
ATTACHMENTS
## ATTACHMENT 1

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#### QUICK REFERENCE TABLE OF INQUISITORIAL LEGISLATIVE POWERS

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<td>Whole Act</td>
<td>Whole Act</td>
<td>Whole Act, esp. Part 6</td>
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</tr>
<tr>
<td>1.</td>
<td>A duty to inquire</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
<td>73(5)</td>
<td>Nil</td>
<td>Nil</td>
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<tr>
<td>2.</td>
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<td>Power to compel witnesses</td>
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<td>4.</td>
<td>Power to compel documents</td>
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<td>Standard of proof</td>
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<td>cf. 65</td>
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<td>Nil</td>
<td>Nil</td>
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<tr>
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<td>Decision on papers</td>
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<td>425(2)(a)</td>
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<td>162</td>
<td>76</td>
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<td>Hearing type eg oral, video etc</td>
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<td>s.43(1). For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing: (a) affirming the decision under review; (b) varying the decision under review; or (c) setting aside the decision under review and: (i) making a decision in substitution for the decision so set aside; or (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.</td>
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<td>43(1) AAT</td>
<td></td>
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<tr>
<td>349 Migration Act - MRT</td>
<td>s.349, Powers of Migration Review Tribunal (1) The Tribunal may, for the purposes of the review of an MRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision. (2) The Tribunal may: (a) affirm the decision; or (b) vary the decision; or (c) if the decision relates to a prescribed matter—remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or (d) set the decision aside and substitute a new decision. (3) If the Tribunal: (a) varies the decision; or (b) sets aside the decision and substitutes a new decision; the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister. (4) To avoid doubt, the Tribunal must not, by varying a decision or setting a decision aside and substituting a new decision, purport to make a decision that is not authorised by the Act or the regulations.</td>
</tr>
<tr>
<td>415 Migration Act RRT</td>
<td>s.415, Powers of Refugee Review Tribunal (1) The Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision. (2) The Tribunal may: (a) affirm the decision; or (b) vary the decision; or (c) if the decision relates to a prescribed matter—remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or (d) set the decision aside and substitute a new decision. (3) If the Tribunal: (a) varies the decision; or (b) sets aside the decision and substitutes a new decision; the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister. (4) To avoid doubt, the Tribunal must not, by varying a decision or setting a decision aside and substituting a new decision, purport to make a decision that is not authorised by the Act or the regulation.</td>
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<tr>
<td>Section</td>
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<tr>
<td><strong>General</strong></td>
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| 139 & 148(7) VRB | s.139. Decision of Board  
(1) On review of a decision, the Board shall have regard to the evidence that was before the Commission when the decision was made and to any further evidence before the Board on the review that was not before the Commission, being further evidence relevant to the review.  
(2) It is the duty of the Board, in reviewing a decision of the Commission, to satisfy itself with respect to, or to determine, as the case requires, all matters relevant to the review.  
(3) For the purpose of reviewing a decision of the Commission, the Board may exercise all the powers and discretions that are conferred by this Act on the Commission in like manner as they are required by this Act to be exercised by the Commission, and shall make a decision, in writing:  
(a) affirming the decision under review;  
(b) varying the decision under review; or  
(c) setting aside the decision under review and making a decision in substitution for the decision so set aside.  
s.148. (7).  
In giving a direction or making a request under this section, the Principal Member or a presiding member shall have regard to the need for the review to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Board permit. |
| 149 & 151 SSAT | s.149. (1). If a person applies to the SSAT for review of a decision (other than a decision referred to in subsection (5)), the SSAT must:  
(a) affirm the decision; or  
(b) vary the decision; or  
(c) set the decision aside and:  
(i) substitute a new decision; or  
(ii) send the matter back to the Secretary or the CEO, as the case requires, for reconsideration in accordance with any directions or recommendations of the SSAT.  
s.151. Powers of the SSAT  
(1) Subject to subsection (2), the SSAT may, for the purpose of reviewing a decision under the social security law, exercise all the powers and discretions that are conferred by the social security law on the Secretary.  
(3) The SSAT may, for the purpose of reviewing a decision under the Health Insurance Act 1973, exercise all the powers and discretions conferred by that Act on the Secretary. |
| 3 & 63 NSW ADT | s.3. Objects of Act  
The objects of this Act are as follows:  
(a) to establish an independent Administrative Decisions Tribunal:  
(i) to make decisions at first instance in relation to matters over which it is given jurisdiction by an enactment, and  
(ii) to review decisions made by administrators where it is given jurisdiction by an enactment to do so, and  
(iii) to exercise such other functions as are conferred or imposed on it by or under this or any other Act or law,  
(b) to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair,  
(c) to enable proceedings before the Tribunal to be determined in an informal and expeditious manner...  
s.63. Determination of review by Tribunal  
(1) In determining an application for a review of a reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it... |
<table>
<thead>
<tr>
<th>Section</th>
<th>Text</th>
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<tbody>
<tr>
<td><strong>General</strong></td>
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</table>
| 51 VCAT | s.51. Functions of Tribunal on review  
(1) In exercising its review jurisdiction in respect of a decision, the Tribunal—  
(a) has all the functions of the decision-maker; and  
(b) has any other functions conferred on the Tribunal by or under the enabling enactment; and  
(c) has any functions conferred on the Tribunal by or under this Act, the regulations and the rules.  
(2) In determining a proceeding for review of a decision the Tribunal may, by order—  
(a) affirm the decision under review; or  
(b) vary the decision under review; or  
(c) set aside the decision under review and make another decision in substitution for it; or  
(d) set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal. |
| original jurisdiction | NSW GT |
| **Membership** | |
| 5, 6, 7 AAT | s.5. Establishment of Tribunal  
There is hereby established an Administrative Appeals Tribunal, which shall consist of a President, the other presidential members, the senior members, and the other members, appointed in accordance with this Act.  

s.6. Appointment of members of Tribunal  
(1) The members shall be appointed by the Governor-General.  
(2) A Judge who is to be appointed as a member (other than the President) of the Tribunal shall be appointed as a presidential member.  
(3) A person (other than a Judge) who is to be appointed as a member of the Tribunal shall be appointed as a Deputy President of the Tribunal, as a senior member of the Tribunal, or as a member of the Tribunal.  
(4) A member (other than a Judge) shall be appointed either as a full-time member or as a part-time member.  

s.7. Qualifications for appointment  
(1) A person shall not be appointed as the President unless he or she is a Judge of the Federal Court of Australia. |
| 394, 395 & 396 Migration Act - MRT | s.394. Establishment of the Migration Review Tribunal  
A Migration Review Tribunal is established.  

s.395. Membership of Migration Review Tribunal  
The Migration Review Tribunal consists of:  
(a) a Principal Member; and  
(b) such number (not exceeding the prescribed number) of Senior Members as are appointed in accordance with this Act; and  
(c) such number (not exceeding the prescribed number) of other members as are appointed in accordance with this Act.  

s.396. Appointment of members  
(1) The members of the Tribunal are to be appointed by the Governor-General.  
(2) The Principal Member and the Senior Members are to be appointed as full-time members.  
(3) Any other member may be appointed either as a full-time member or as a part-time member. |
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A Refugee Review Tribunal is established.  
s.458. Membership of Refugee Review Tribunal  
(1) The Refugee Review Tribunal consists of:  
(a) a Principal Member; and  
(b) a Deputy Principal Member; and  
(c) such number of Senior Members and other members as are appointed in accordance with this Act.  
(2) The total number of persons appointed under paragraphs (1)(b) and (1)(c) must not exceed the prescribed number.  
s.459. Appointment of members  
(1) The members of the Tribunal are to be appointed by the Governor-General.  
(2) The Principal Member is to be appointed as a full-time member.  
(3) Any other member may be appointed either as a full-time member or as a part-time member. |
| 158 VRB | s.158. Appointment of members of Board  
(1) The members of the Board shall be appointed by the Governor-General.  
(2) The Board must have at all times among its members persons selected from lists submitted to the Minister as requested under subsection (3).  
(3) The Minister may, from time to time, request organizations representing veterans throughout Australia to submit to the Minister lists of names of persons from which the organization concerned recommends that a selection be made of persons to serve as Services members of the Board.  
(4) The Principal Member shall be appointed as a full-time member.  
(5) A member other than the Principal Member may be appointed either as a full-time member or as a part-time member. |
| Schedule 3, clauses 1 & 3 SSAT | Schedule 3—Constitution and membership of the Social Security Appeals Tribunal  
Part 1—Membership of the SSAT  
1. Composition of the SSAT  
The SSAT consists of the following members:  
(a) an Executive Director; and  
(b) such number of Directors as are appointed in accordance with this Act; and  
(c) such number of other members as are appointed in accordance with this Act.  
3 Appointment of members  
(1) A member of the SSAT is to be appointed by the Governor-General.  
(2) The Executive Director is to be appointed as a full-time member.  
(3) Any other member may be appointed either as a full-time member or as a part-time member. |
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| 12 & 13 NSW ADT | s.12. Membership of Tribunal  
(1) The Tribunal consists of the following members:  
(a) a President,  
(b) Deputy Presidents,  
(c) non-presidential judicial members,  
(d) non-judicial members.  
(2) The President and the Deputy Presidents of the Tribunal are referred to in this Act as presidential judicial members. |
| | s.13. Appointment of members of Tribunal  
(1) Any presidential judicial member is to be appointed by the Governor by commission under the public seal of the State.  
(2) Any non-presidential judicial member or a non-judicial member is to be appointed by the Minister.  
(3) The instrument of appointment is to specify whether a member has been appointed as:  
(a) the President, or  
(b) a Deputy President, or  
(c) a non-presidential judicial member, or  
(d) a non-judicial member.  
(4) A member may be appointed on a full-time basis or a part-time basis. However, the President is taken to be appointed on a full-time basis. |
| 9, 10, 11, 11A, 12, 13 & 14 VCAT | s. 9. Membership  
The members of the Tribunal are a President and as many Vice Presidents, Deputy Presidents, senior members and ordinary members as are appointed in accordance with this Act.  
s.10. President  
(1) The President must be a judge of the Supreme Court who is recommended for appointment by the Minister after consultation with the Chief Justice.  
(2) Subject to this Act, the President holds office for the period, not exceeding 5 years, specified in his or her instrument of appointment.  
(3) The appointment of a judge of the Supreme Court as President does not affect his or her tenure of office or status as a judge nor the payment of his or her salary or allowances as a judge nor any other rights or privileges that he or she has as a judge.  
(4) Service in the office of President must be taken for all purposes to be service in the office of judge of the Supreme Court. |
| | s.11. Vice President…  
s.11A. Short term Vice Presidents…  
s.12. Deputy Presidents…  
s.13. Senior members…  
s.14. Ordinary members… |
| 49 NSW GT | s.49. Constitution of the Tribunal  
(1) There shall be a Guardianship Tribunal.  
(2) The Tribunal shall consist of at least 10 members who shall be appointed by the Governor.  
(3) Of the members of the Tribunal:  
(a) at least 3 shall be persons who are legal practitioners of at least 7 years’ standing, and  
(b) at least 3 shall be persons (such as medical practitioners, psychologists and social workers) who, in the opinion of the Minister, have experience in assessing or treating persons to whom Part 3, 4 or 5 relates, and  
(c) at least 4 shall be persons (other than those referred to in paragraph (a) or (b)) who, in the opinion of the Minister, have had experience with persons to whom Part 3, 4 or 5 relates. |
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| Single or multi member | 21AAT s.21. Constitution of Tribunal for exercise of powers  
(1AAA) This section does not apply in relation to proceedings in the Security Appeals Division.  
(1) Subject to subsections (1AA), (1AB) and (1A) and to any other provision made in this Act or in any other enactment with respect to the constitution of the Tribunal in relation to a particular proceeding, the Tribunal is, for the purposes of a proceeding, to be constituted by not more than 3 members.  
(1AA) The Tribunal as constituted for the purposes of a proceeding must not include more than one presidential member who is a judge.  
(1AB) If the Tribunal as constituted for the purposes of a proceeding consists of more than one member neither or none of whom is a presidential member, at least one of the members must be a senior member... |
| 354 Migration Act - MRT | s.354. Constitution of Tribunal for exercise of powers  
(1) For the purpose of a particular review, the Tribunal shall be constituted, in accordance with a direction under subsection (2), by:  
(a) a single member;  
(b) 2 members; or  
(c) 3 members. |
| 421 Migration Act RRT | s.421. Constitution of Refugee Review Tribunal for exercise of powers  
(1) For the purpose of a particular review, the Tribunal is to be constituted, in accordance with a direction under subsection (2), by a single member.  
(2) The Principal Member may give a written direction about who is to constitute the Tribunal for the purpose of a particular review. |
| 141 VRB | s.141. Constitution of Board for exercise of powers  
(1) Subject to this section, the Board shall, for the purposes of a review, be constituted by:  
(a) the Principal Member or a Senior Member;  
(b) a Services member; and  
(c) one other member.  
(1A) The Board may, for the purposes of a particular review, be constituted by:  
(a) the Principal Member; and  
(b) a Senior Member; and  
(c) a Services Member.  
(2) With the approval of the Minister, the Board may, for the purposes of a particular review, or of a review included in a particular class of reviews, be constituted by:  
(a) the Principal Member or a Senior Member; or  
(b) one member, not being the Principal Member or a Senior Member; only. |
| Schedule 3, clause 11SSAT | Schedule 3, cl. 11. Number of members for hearings  
The maximum number of members to constitute the SSAT for the purposes of a review is 4. |
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<td>22, 77 &amp; 78 NSW ADT</td>
<td>s.22. Constitution of the Tribunal for particular proceedings (including Appeal Panel for external appeals)</td>
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<td>(1) In exercising any of its functions (other than the functions of an Appeal Panel), the Tribunal is to be constituted by one or more Division members of the Division to which the function concerned is allocated.</td>
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<td>(1A) In exercising its functions in relation to an external appeal (other than an external appeal referred to in subsection (1B)), the Tribunal is to be constituted by an Appeal Panel consisting of at least 3 members assigned by the President to the Panel for the purpose of the proceedings.</td>
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<td>(1B) In exercising its functions in relation to an external appeal made under section 67A of the Guardianship Act 1987 or section 21A of the Protected Estates Act 1983, the Tribunal is to be constituted by an Appeal Panel consisting of:</td>
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<td>(a) 1 presidential judicial member, and</td>
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<td>(b) 1 other judicial member, and</td>
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<td>(c) 1 non-judicial member, appointed on the recommendation of the Minister…</td>
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<td>s.77. Presiding member</td>
<td>If the Tribunal is constituted by more than 1 member, the most senior member is to preside at the proceedings before the tribunal. Note: Clause 9 of Schedule 3 makes provision for the seniority of members.</td>
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<td>s.78. Tribunal divided in opinion</td>
<td>(1) If the Tribunal is constituted by more than 1 member for the purposes of the determination of any proceedings and the members are divided in opinion, the opinion of the majority is taken to be the decision of the Tribunal.</td>
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<td>(2) However, a question of law (including the question whether a particular question is a question of law) arising in proceedings constituted by 1 or more judicial members is to be decided in accordance with the opinion of the judicial member or the majority of the judicial members.</td>
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<td>(3) If the members are equally divided in their opinion, the opinion that prevails is:</td>
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<td>(a) the opinion of the President if the President is sitting, or</td>
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<td>(b) if the President is not sitting, but 1 or more other judicial members are sitting—the opinion of the judicial member or most senior judicial member (as the case may be) sitting, or</td>
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<td>(c) if only non-judicial members are sitting—the opinion of the most senior member sitting.</td>
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<td>64 VCAT</td>
<td>s.64. Constitution of Tribunal in proceedings</td>
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<td>(1) Subject to the rules, the Tribunal is to be constituted for the purposes of any particular proceeding by 1, 2, 3, 4 or 5 members.</td>
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<td>(2) If the Tribunal is to be constituted at a proceeding—</td>
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<td>(a) by one member only, that member must be a legal practitioner; and</td>
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<td>(b) by more than one member, at least one must be a legal practitioner.</td>
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<td>(3) The President determines how the Tribunal is to be constituted for the purposes of each proceeding.</td>
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| 51 & 51A NSW GT  | s.51. Composition of the Tribunal  
(1) The Tribunal shall, for the purpose of exercising its functions, be constituted by no fewer than 3 and no more than 5 of its members of whom:  
(a) at least 1 is a member referred to in section 49 (3) (a),  
(b) at least 1 is a member referred to in section 49 (3) (b), and  
(c) at least 1 is a member referred to in section 49 (3) (c).  
(2) The President of the Tribunal shall nominate the persons to constitute the Tribunal for the purposes of any particular sitting.  
(3) The presiding member at any sitting of the Tribunal shall be:  
(a) if the Tribunal is so constituted as to include the President of the Tribunal—the President of the Tribunal,  
(b) if the Tribunal is so constituted as not to include the President of the Tribunal but is so constituted as to include the Deputy President of the Tribunal—the Deputy President of the Tribunal, or  
(c) if the Tribunal is so constituted as to include neither the President nor the Deputy President of the Tribunal—the member of the Tribunal who is a member referred to in section 49 (3) (a) or, if there is more than one such member, such one of those members as the President of the Tribunal nominates.  
| s.51A. Fewer than 3 Tribunal members may deal with certain matters  
(1) Despite section 51 (1), the Tribunal may be constituted by one or two members if the Tribunal is exercising its functions in respect of:  
(a) giving consent to the carrying out of minor treatment (but not major treatment, special treatment or treatment in the course of a clinical trial) on a patient to whom Part 5 applies, or  
(b) any one or more of the following procedural matters:  
(i) the joining of a person as a party to a proceeding before the Tribunal,  
(ii) the granting of leave to appear in a proceeding,  
(iii) giving directions as to the conduct of a proceeding,  
(iv) the adjournment of a proceeding,  
(v) the withdrawal of an application to the Tribunal.  
(2) The persons who may constitute the Tribunal for the purposes of this section are the President and Deputy President of the Tribunal and such other members of the Tribunal as the President may nominate in writing for the purposes of this section.  
(3) In this section, “major treatment”, “minor treatment”, “special treatment” and “clinical trial” have the same meanings as in Part 5. |
| Adjourn proceedings 40(1)(c)AAT | s.40(1). For the purpose of reviewing a decision, the Tribunal may: ...(c) adjourn the proceeding from time to time. |
| 363(1) (b) Migration Act - MRT | s.363. Powers of the Tribunal etc.  
(1) For the purpose of the review of a decision, the Tribunal may:  
(b) adjourn the review from time to time; |
(1) For the purpose of the review of a decision, the Tribunal may:  
...  
(b) adjourn the review from time to time; or… |
| 151(1)(b) VRB     | s.151. Powers of Board  
(1) The Board may:  
...  
(b) adjourn a hearing of a review from time to time. |
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| **170 SSAT** | s.170. Adjournment of SSAT hearings  
(1) The SSAT may adjourn the hearing of a review of a decision from time to time.  
(2) Without limiting subsection (1), the SSAT may refuse to adjourn the hearing of a review if:  
(a) the hearing has already been adjourned on 2 or more occasions; or  
(b) the SSAT is satisfied that to grant an adjournment would be inconsistent with the pursuit of the objective laid down by section 141;  
(c) a declaration under section 131 or 145 is in force in relation to the decision under review. |
| **73(5)(f) NSW ADT** | s.73. Procedure of the Tribunal generally  
(5) The Tribunal:...  
(f) may adjourn proceedings to any time and place (including for the purpose of enabling the parties to negotiate a settlement), and... |
| **130(2)(c) VCAT** | s.130. Power to impose conditions and make further orders  
(1) A power of the Tribunal to make an order or other decision includes a power to make the order or decision subject to any conditions or further orders that the Tribunal thinks fit.  
(2) Conditions or further orders may include—  
(a) an adjournment of the proceeding; |
| **64 NSW GT** | s.64. Adjournments  
(1) The Tribunal may from time to time adjourn its proceedings to such times, dates and places, and for such reasons, as it thinks fit.  
(2) In the absence from a sitting of the Tribunal of one or more, but not all, of the members nominated to constitute the Tribunal at that sitting, the remaining member or members may exercise the Tribunal’s function of adjourning proceedings. |
| **Reasons** | |
| **43(2), (2A) AAT** | s.43. (2) Subject to this section and to sections 35 and 36D, the Tribunal shall give reasons either orally or in writing for its decision.  
(2A) Where the Tribunal does not give reasons in writing for its decision, a party to the proceeding may, within 28 days after the day on which a copy of the decision of the Tribunal is served on that party, request the Tribunal to furnish to that party a statement in writing of the reasons of the Tribunal for its decision, and the Tribunal shall, within 28 days after receiving the request, furnish to that party such a statement. |
| **368(1)(b) Migration Act - MRT** | s.368. Tribunal to record its decisions etc.  
(1) Where the Tribunal makes its decision on a review, the Tribunal must, subject to paragraphs 375A(2)(b) and 376(3)(b), prepare a written statement that:  
(a) sets out the decision of the Tribunal on the review;  
(b) sets out the reasons for the decision;  
(c) sets out the findings on any material questions of fact; and  
(d) refers to the evidence or any other material on which the findings of fact were based. |
| **430(1)(b) Migration Act - RRT** | s.430. Refugee Review Tribunal to record its decisions etc.  
(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:  
(a) sets out the decision of the Tribunal on the review; and  
(b) sets out the reasons for the decision; and  
(c) sets out the findings on any material questions of fact; and  
(d) refers to the evidence or any other material on which the findings of fact were based. |
| **140(1)(b) VRB** | s.140. Statements of decisions of the Board etc.  
(1) Where the Board reviews a decision of the Commission, the Board shall:  
(a) record its decision on the review in writing;  
(b) prepare a written statement setting out its reasons for that decision, including its findings on any material questions of fact, and referring to the evidence or other material on which those findings were based; |
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| 177(1)(a) SSAT | s.177. Procedure following SSAT decision  
(1) When the SSAT makes its decision on a review, the SSAT must:  
(a) prepare a written statement that:  
(i) sets out the decision of the SSAT on the review; and  
(ii) sets out the reasons for the decision; and  
(iii) sets out the findings on any material questions of fact; and  
(iv) refers to evidence or other material on which the findings of fact are based; ... |
| 89 NSW ADT | s.89. Tribunal to give decision determining application  
(1) If the Tribunal makes an original decision or determines an application for the review of a reviewable decision, the Tribunal is to cause a copy of its decision to be served on each party to the proceedings for the decision.  
(2) The Tribunal may give reasons either orally or in writing for its decision.  
(3) If the Tribunal does not give reasons in writing for its decision:  
(a) a party to the proceedings may, within 28 days after the day on which a copy of the decision of the Tribunal is served on that party, request the Tribunal to give the party a statement in writing of the reasons of the Tribunal for its decision, and  
(b) the Tribunal must, within 28 days after receiving the request, give the party such a statement.  
(4) For the purposes of compliance with subsection (3), it is sufficient if the Tribunal gives the party a copy of a transcript of oral reasons previously delivered that complies with subsection (5). |
| 117 VCAT | s.117. Reasons for final orders  
(1) The Tribunal must give reasons for any order it makes in a proceeding, other than an interim order, within—  
(a) 60 days after making the order; or  
(b) such other period as is specified by the rules or the President.  
(2) If the Tribunal gives oral reasons, a party, within 14 days, may request the Tribunal to give written reasons.  
(3) The Tribunal must comply with a request under sub-section (2) within 45 days after receiving it.  
(4) The President may extend the 45-day period referred to in sub-section (3), but must give reasons for the extension to the party who requested the written reasons for the order.  
(5) If the Tribunal gives written reasons, it must include in those reasons its findings on material questions of fact.  
(6) The reasons for an order, whether oral or written, form part of the order. |
| 68(1)(b) NSW GT | s.68. Decisions of Tribunal  
(1)(b) The Tribunal must also furnish each party to the proceedings with formal written reasons for the decision as soon as practicable after giving the decision. The reasons may be included in the instrument confirming the decision or in a separate instrument. |
| Decide on merits | |
| 43(1) AAT | s.43.(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:  
(a) affirming the decision under review;  
(b) varying the decision under review; or  
(c) setting aside the decision under review and:  
(i) making a decision in substitution for the decision so set aside; or  
(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal. |
| 353(2)(b) Migration Act - MRT | s.353. Tribunal's way of operating  
(1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.  
(2) The Tribunal, in reviewing a decision:  
(a) is not bound by technicalities, legal forms or rules of evidence; and  
(b) shall act according to substantial justice and the merits of the case. |
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| 420(2)(b) Migration Act - RRT | s.420. Refugee Review Tribunal's way of operating  
(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.  
(2) The Tribunal, in reviewing a decision:  
(a) is not bound by technicalities, legal forms or rules of evidence; and  
(b) must act according to substantial justice and the merits of the case. |
| 138(1) VRB | s.138. Board not bound by technicalities etc.  
(1) The Board, in conducting a review, in hearing a review or in making a decision on a review of a decision:  
(a) is not bound by technicalities, legal forms or rules of evidence; and  
(b) shall act according to substantial justice and the merits and all the circumstances of the case and, without limiting the generality of the foregoing, shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance… |
| 141 SSAT | s.141. SSAT objective  
In carrying out its functions under this Act, the SSAT must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick. |
| 63 NSW ADT | s.63. Determination of review by Tribunal  
(1) In determining an application for a review of a reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following:  
(a) any relevant factual material,  
(b) any applicable written or unwritten law.  
(2) For this purpose, the Tribunal may exercise all of the functions that are conferred or imposed by any relevant enactment on the administrator who made the decision.  
(3) In determining an application for the review of a reviewable decision, the Tribunal may decide:  
(a) to affirm the reviewable decision, or  
(b) to vary the reviewable decision, or  
(c) to set aside the reviewable decision and make a decision in substitution for the reviewable decision it set aside, or  
(d) to set aside the reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the Tribunal. |
| 97 VCAT | s.97. Tribunal must act fairly  
The Tribunal must act fairly and according to the substantial merits of the case in all proceedings. |
| 4 NSW GT - general principles | s.4. General principles  
It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:  
(a) the welfare and interests of such persons should be given paramount consideration,  
(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,  
(c) such persons should be encouraged, as far as possible, to live a normal life in the community,  
(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,  
(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,  
(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,  
(g) such persons should be protected from neglect, abuse and exploitation,  
(h) the community should be encouraged to apply and promote these principles. |
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<td>Presentation of case and submissions</td>
<td>39(1) AAT</td>
<td>s.39(1) Subject to sections 35, 36 and 36B, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.</td>
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<td>Migration Act - MRT</td>
<td>358. Documents to be given to the Tribunal</td>
<td>(1) An applicant for review by the Tribunal may give the Tribunal: (a) a written statement in relation to any matter of fact that the applicant wishes the Tribunal to consider; and (b) written arguments relating to the issues arising in relation to the decision under review. (2) The Secretary may give the Tribunal written argument relating to the issues arising in relation to the decision under review.</td>
</tr>
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<td>Migration Act - RRT</td>
<td>423. Documents to be given to the Refugee Review Tribunal</td>
<td>(1) An applicant for review by the Tribunal may give the Registrar: (a) a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider; and (b) written arguments relating to the issues arising in relation to the decision under review. (2) The Secretary may give the Registrar written argument relating to the issues arising in relation to the decision under review.</td>
</tr>
<tr>
<td>147(1) &amp; 148 VRB</td>
<td>s.147. Parties to review before Board</td>
<td>(1) The parties to a review by the Board of a decision of the Commission are: (a) the applicant for the review; and (b) the Commission.</td>
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<td>s.148. Procedure of Board</td>
<td>(1) The Principal Member shall, upon receipt of the relevant documents relating to a review of a decision of the Commission, cause to be served on each party to the review a notice informing the party that the Board is to review the decision of the Commission and requesting the party to inform the Principal Member, in writing, within a reasonable time specified in the notice, whether the party wishes to appear on the hearing of the review and, if the party wishes so to appear, whether the party intends to appear on the hearing personally or by another person under section 147.</td>
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<tr>
<td>156 &amp; 161 SSAT</td>
<td>s.156. Parties to SSAT review</td>
<td>(1) The parties to a review by the SSAT are: (a) the applicant; and (b) the Secretary; and (c) if the relevant decision was made by the CEO or an employee of the Agency in the exercise of a delegated power—the CEO; and (d) any other person who has been made a party to the review under subsection (4) or (5). (2) If a person has applied under section 142 for review of a decision, any other person whose interests are affected by the decision may apply to the Executive Director to be made a party to the review. (3) An application under subsection (2) must be in writing. (4) The Executive Director may order that a person who has applied under subsection (2) be made a party to the review.</td>
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<td>s.161. Submissions to SSAT</td>
<td>(1) Subject to section 162, a party to a review of a decision may make oral or written submissions to the SSAT or both oral and written submissions.</td>
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<td>70 NSW ADT</td>
<td>s.70. Opportunity of parties to make submissions</td>
<td>The Tribunal must ensure that every party to proceedings before the Tribunal is given a reasonable opportunity: (a) to present the party’s case (whether at a hearing or otherwise), and (b) to make submissions in relation to the issues in the proceedings.</td>
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<tr>
<td><strong>General</strong></td>
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| 98 VCAT | s.98. General procedure  
(1) The Tribunal—  
(a) is bound by the rules of natural justice;  
(b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;  
(c) may inform itself on any matter as it sees fit;  
(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.  
(2) Without limiting sub-section (1)(b), the Tribunal may admit into evidence the contents of any document despite the non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it.  
(3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure. |
| 59 NSW GT | s.59. Presentation of cases  
A party to proceedings before the Tribunal may:  
(a) call and examine any witness,  
(b) cross-examine any witness called by another party,  
(c) give evidence on oath,  
(d) produce documents and exhibits to the Tribunal, and  
(e) otherwise adduce, orally or in writing, to the Tribunal such matters, and address the Tribunal on such matters, as are relevant to the proceedings. |
| **Legal or other representation** | |
| 32 AAT | s.32. At the hearing of a proceeding before the Tribunal, a party to the proceeding may appear in person or may be represented by some other person. |
| 366A, 366B & 366D Migration Act - MRT | s.366A. Applicant may be assisted by another person while appearing before Tribunal  
(1) The applicant is entitled, while appearing before the Tribunal, to have another person (the assistant) present to assist him or her.  
(2) The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.  
(3) Except as provided in this section, the applicant is not entitled, while appearing before the Tribunal, to be represented by another person.  
(4) This section does not affect the entitlement of the applicant to engage a person to assist or represent him or her otherwise than while appearing before the Tribunal.  
(5) The Tribunal may regulate its own procedure. |
| 366B. Other persons not to be assisted or represented while appearing before Tribunal  
(1) A person, other than the applicant, is not entitled, while appearing before the Tribunal, to:  
(a) have another person present to assist him or her; or  
(b) be represented by another person.  
(2) This section does not affect the entitlement of the person to engage a person to assist or represent him or her otherwise than while appearing before the Tribunal. |
| s.366D. Examination and cross-examination not permitted  
A person is not entitled to examine or cross-examine any person appearing before the Tribunal to give evidence. |
(6) A person appearing before the Tribunal to give evidence is not entitled:  
(a) to be represented before the Tribunal by any other person; or  
(b) to examine or cross-examine any other person appearing before the Tribunal to give evidence. |
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| General | s.147. Parties to review before Board  
(2) A party to a review may:  
(a) appear in person, or be represented at the party's own expense by a person other than a legal practitioner, at any hearing of the review; and  
(b) make such submissions, in writing, to the Board as the party, or the party's representative, considers relevant to the review.  
Note: if the Principal Member gives an applicant a notice under subsection 155A(4) or 155AB(4) and the applicant wants to be represented by another person in relation to it, the applicant must so authorise the representative in writing after receiving the notice (see section 155AC).  
(3) In this section, a reference to a legal practitioner shall be read as including a reference to any person who:  
(a) holds a degree of Bachelor of Laws, Master of Laws or Doctor of Laws or Bachelor of Legal Studies; or  
(b) is otherwise qualified for admission as a barrister, solicitor, or barrister and solicitor, of the High Court or of the Supreme Court of a State or Territory. |
| 147(2) & (3) VRB | s.161. Submissions to SSAT  
(3) A party to a review of a decision may have another person make submissions to the SSAT on behalf of the party. |
| 161(3) SSAT | s.161. Submissions to SSAT  
(3) A party to a review of a decision may have another person make submissions to the SSAT on behalf of the party. |
| 71 NSW ADT | s.71. Representation of parties  
(1) A party to proceedings before the Tribunal may:  
(a) appear without representation, or  
(b) be represented by an agent, or  
(c) if the party is an incapacitated person—be represented by such other person as may be appointed by the Tribunal under subsection (4).  
(2) Despite subsection (1), the Tribunal may order that the parties to the proceedings before it may not be represented by an agent of a particular class for the purpose of the presentation of oral submissions to it (whether in relation to the whole proceedings or any part of the proceedings) if the Tribunal considers it appropriate to do so. |
| 62 VCAT | s.62. Representation of parties  
(1) In any proceeding a party—  
(a) may appear personally; or  
(b) may be represented by a professional advocate if—  
(i) the party is a person referred to in sub-section (2); or  
(ii) another party to the proceeding is a professional advocate; or  
(iii) another party to the proceeding who is permitted under this section to be represented by a professional advocate is so represented; or  
(iv) all the parties to the proceeding agree; or  
(c) may be represented by any person (including a professional advocate) permitted or specified by the Tribunal.  
(2) The following persons may be represented by a professional advocate in a proceeding… |
| 58 NSW GT | s.58. Right of appearance  
(1) In any proceedings before the Tribunal, the parties to the proceedings may appear in person or, by leave of the Tribunal, be represented by a barrister, solicitor or agent.  
(2) The Tribunal, in proceedings before it with respect to a prescribed person, may appoint a person to act as guardian ad litem for the person.  
(3) The Tribunal, in proceedings before it relating to a prescribed person, may, if it appears to the Tribunal that the person ought to be separately represented:  
(a) order that the person be separately represented, and  
(b) make such other orders as it thinks necessary for the purpose of securing separate representation for the person. |
| Evidence | s.40. (1) For the purpose of reviewing a decision, the Tribunal may:  
(a) take evidence on oath or affirmation;  
(b) make such other orders as it thinks necessary for the purpose of securing separate representation for the person. |
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<td><strong>General</strong></td>
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| 353(2)(a) Migration Act - MRT | s.353. Tribunal's way of operating  
(1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.  
(2) The Tribunal, in reviewing a decision:  
(a) is not bound by technicalities, legal forms or rules of evidence; and  
(b) shall act according to substantial justice and the merits of the case. |
| 420(2)(a) Migration Act - RRT | s.420. Refugee Review Tribunal's way of operating  
(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.  
(2) The Tribunal, in reviewing a decision:  
(a) is not bound by technicalities, legal forms or rules of evidence; and  
(b) must act according to substantial justice and the merits of the case. |
| 138(1)(a) VRB | s.138. Board not bound by technicalities etc.  
(1) The Board, in conducting a review, in hearing a review or in making a decision on a review of a decision:  
(a) is not bound by technicalities, legal forms or rules of evidence; … |
| 167(1)(a) SSAT | s.167. Hearing procedure  
(1) The SSAT, in reviewing a decision:  
(a) is not bound by legal technicalities, legal forms or rules of evidence; and  
(b) is to act as speedily as a proper consideration of the review allows; and  
(c) in determining what a proper consideration of the review requires, must have regard to the objective laid down by section 141. |
| 73(2) NSW ADT | s.73. Procedure of the Tribunal generally  
(2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice. |
| 98(1)(b) VCAT | s.98. General procedure  
(1) The Tribunal—  
(b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures; |
| 55(1) NSW GT | s.55. Proceedings generally  
(1) The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit. |
| Procedure in absence of party | 40(1)(b) AAT | s.40(1) For the purpose of reviewing a decision, the Tribunal may: …(b) proceed in the absence of a party who has had reasonable notice of the proceeding |
| **362B Migration Act - MRT** | s.362B Failure of applicant to appear before Tribunal  
(1) If the applicant:  
(a) is invited under section 360 to appear before the Tribunal; and  
(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear; the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it.  
(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled. |
### General

**426A Migration Act - RRT**

s.426A Failure of applicant to appear before Tribunal  
(1) If the applicant:  
(a) is invited under section 425 to appear before the Tribunal; and  
(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;  
the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it.  
(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled.

**148(3) & (4) VRB**

s.148. Procedure of Board  
...  
(3) The Principal Member may defer fixing a date, time and place for the hearing of a review under subsection (2) until the parties to the review have informed the Principal Member that they are ready to proceed at a hearing.  
(4) Where a party to a review of a decision of the Commission does not inform the Principal Member, within the time specified in the notice served on the party under subsection (1), that the party wishes to appear on the hearing of the review, the review may be heard and determined in the absence of that party.

**163 (2) & (3) SSAT**

s.163. SSAT hearings without oral submissions by party  
(1) If a party to a review has informed the Executive Director that the party does not intend to make oral submissions to the SSAT, the SSAT may proceed to hear the application for review without oral submissions from the party.  
(2) If:  
(a) the Executive Director has determined that oral submissions to the SSAT by a party or a party's representative are to be made by telephone or by means of other electronic communications equipment; and  
(b) on the day fixed for the hearing the presiding member has been unable to contact the party or the party's representative, as the case may be, after taking reasonable steps to do so;  
the Executive Director may authorise the SSAT to proceed to hear the application without oral submissions from the party or the party's representative, as the case may be.  
(3) If:  
(a) the Executive Director has not determined that oral submissions to the SSAT by a party or a party's representative are to be made by telephone or by means of other electronic communications equipment; and  
(b) the party or the party's representative, as the case may be, does not attend the hearing at the time fixed for the hearing;  
the Executive Director may authorise the SSAT to proceed to hear the application without oral submissions from the party or the party's representative, as the case may be.  
(4) If the Executive Director gives an authorisation under subsection (2) or (3), the SSAT may proceed to hear the application in accordance with the authorisation.  
(5) The Executive Director may revoke an authorisation under subsection (2) or (3).

**76 & 87 VCAT**

s.76. Summary dismissal for want of prosecution  
(1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding for want of prosecution.  
(2) The Tribunal's power to dismiss or strike out a proceeding under this section is exercisable by—  
(a) the Tribunal as constituted for the proceeding; or  
(b) a presidential member.  
(3) An order under sub-section (1) may be made on the application of a party or on the Tribunal's own initiative.

s.87. What happens if a party fails to attend a compulsory conference?  
If a party does not attend a properly convened compulsory conference—  
(a) the conference may proceed at the appointed time in the party's absence; and  
(b) if a member of the Tribunal is presiding and all the parties present agree, the Tribunal, constituted by that member, may—  
(i) determine the proceeding adversely to the absent party and make any appropriate orders; or  
(ii) direct that the absent party be struck out of the proceeding.
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<tr>
<td>65 NSW GT</td>
<td>s.65. Dismissal of frivolous proceedings etc</td>
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<td>If, before or during proceedings before it, the Tribunal is satisfied that the proceedings are frivolous or vexatious, it may:</td>
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<td>(a) dismiss the proceedings, and</td>
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<td>(b) order the person who brought the proceedings to pay the costs of the proceedings.</td>
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<td>Ability to inform oneself</td>
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<td>33(1)(c)AAT</td>
<td>s.33(1). In a proceeding before the Tribunal:... (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter</td>
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<td>in such manner as it thinks appropriate.</td>
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<td>359 Migration Act - MRT</td>
<td>s.359. Tribunal may seek additional information</td>
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<td>(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information,</td>
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<td>the Tribunal must have regard to that information in making the decision on the review.</td>
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<td>(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.</td>
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<td>(3) If an invitation is given to a person other than the Secretary, the invitation must be given:</td>
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<td>(a) except where paragraph (b) applies—by one of the methods specified in section 379A; or</td>
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<td>(b) if the invitation is given to a person in immigration detention—by a method prescribed for the purposes of giving documents to such a</td>
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<td>person.</td>
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<td>(4) If an invitation is given to the Secretary, the invitation must be given by one of the methods specified in section 379B.</td>
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<tr>
<td>424 Migration Act - RRT</td>
<td>s.424. Tribunal may seek additional information</td>
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<td>(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information,</td>
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<td>the Tribunal must have regard to that information in making the decision on the review.</td>
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<td>(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.</td>
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<td>(3) The invitation must be given to the person:</td>
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<td>(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or</td>
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<td>(b) if the person is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.</td>
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<td>139(1) &amp; (2) VRB</td>
<td>s.139. Decision of Board</td>
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<td>(1) On review of a decision, the Board shall have regard to the evidence that was before the Commission when the decision was made</td>
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<td>and to any further evidence before the Board on the review that was not before the Commission, being further evidence relevant to the</td>
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<td>review.</td>
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<td>(2) It is the duty of the Board, in reviewing a decision of the Commission, to satisfy itself with respect to, or to determine, as the case</td>
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<td>requires, all matters relevant to the review.</td>
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<td>167(2) SSAT</td>
<td>s.167. Hearing procedure</td>
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<td>(2) The SSAT may inform itself on any matter relevant to a review of a decision in any manner it considers appropriate.</td>
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<td>73(2) NSW ADT</td>
<td>s.73. Procedure of the Tribunal generally</td>
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<td>(2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks</td>
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<td>fit, subject to the rules of natural justice.</td>
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<td>98(1)(c)VCAT</td>
<td>s.98. General procedure</td>
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<td>(1) The Tribunal -</td>
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<td>(c) may inform itself on any matter as it sees fit;</td>
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<td>55(1) NSW GT</td>
<td>s.55. Proceedings generally</td>
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<td>(1) The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit.</td>
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<td>Require documents</td>
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<td>37(2) AAT</td>
<td>s.37(2). Where the Tribunal is of the opinion that particular other documents or that other documents included in a particular class of</td>
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<td>documents may be relevant to the review of the decision by the Tribunal, the Tribunal may cause to be served on the person a notice in</td>
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<td>writing stating that the Tribunal is of that opinion and requiring the person to lodge with the Tribunal, within a time specified in the</td>
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<td>notice, the prescribed number of copies of each of those other documents that is in his or her possession or under his or her control,</td>
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<td>and a person on whom such a notice is served shall comply with the notice.</td>
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<td><strong>General</strong></td>
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<td>363(3)(b) Migration Act - MRT</td>
<td>s.363. Powers of the Tribunal etc. (3) Subject to subsection (4), the presiding member in relation to a review may: (b) summon a person to produce to the Tribunal such documents as are referred to in the summons;</td>
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<td>427(3)(b) Migration Act - RRT</td>
<td>s.427. Powers of the Refugee Review Tribunal etc. (3) Subject to subsection (4), the Tribunal in relation to a review may: (b) summon a person to produce to the Tribunal such documents as are referred to in the summons; and…</td>
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<td>148(6A), 151(2)(a) &amp; 152 VRB</td>
<td>s.148. Procedure of Board ... (6A) The Principal Member may, in relation to a review, request the Secretary: (a) to give to the Principal Member further documents in the Secretary’s custody; or (b) to obtain, and give to the Principal Member, further documents; or (c) to arrange for the making of any investigation or medical examination and to give to the Principal Member a report of the investigation or examination. s.151. Powers of Board (1) The Board may: (a) take evidence on oath or affirmation for the purposes of a review; or (b) adjourn a hearing of a review from time to time. (2) The presiding member in relation to a review may: (a) summon a person to appear at any hearing of the review to give evidence and to produce such documents (if any) as are referred to in the summons; (b) require a person appearing at a hearing of the review for the purpose of giving evidence either to take an oath or to make an affirmation; and (c) administer an oath or affirmation to a person so appearing. s.152. Request to Secretary for documents etc. (1) The Board may, at any time, request the Secretary: (a) to forward to the Board further documents in the custody of the Secretary relating to a review; (b) to obtain, and forward to the Board, further documents relating to a review; or (c) to arrange for the making of any investigation, or any medical examination, that the Board thinks necessary with respect to a review, and to forward to the Board a report of that investigation or examination.</td>
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<td>165 &amp; 166 SSAT</td>
<td>s.165. Provision of further information by Secretary (1) The Executive Director may ask the Secretary to provide the SSAT with information or a document that the Secretary has and that is relevant to the review of a decision. (2) The Secretary must comply with a request under subsection (1) as soon as practicable and, in any event, not later than 14 days after the request is made. s.166. Exercise by Secretary of powers under section 192 (1) The Executive Director may ask the Secretary to exercise the Secretary’s powers under section 192 if the Executive Director is satisfied that a person has information, or has custody or control of a document, that is relevant to the review of a decision. (2) The Secretary must comply with a request under subsection (1) as soon as practicable and, in any event, within 7 days after the request is made.</td>
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<td>73(5)(b) NSW ADT</td>
<td>s.73. Procedure of the Tribunal generally (5) The Tribunal:... (b) is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings, and…</td>
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| General      | **81 VCAT** s.81. Obtaining information from third parties  
(1) On the application of a party to a proceeding, the Tribunal may order that a person—  
(a) who is not a party to the proceeding; and  
(b) who has, or is likely to have, in the person’s possession a document that is relevant to the proceeding—  
produce the document to the Tribunal or the party within the time specified in the order.  
(2) The Tribunal’s power to make an order under sub-section (1) is exercisable by any member. |
| Additional evidence | **38 AAT** s.38. (1) Where the Tribunal considers that a statement referred to in paragraph 37(1)(a) that is lodged by a person with the Tribunal does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for a decision, the Tribunal may order that person to lodge with the Tribunal, within a time specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons. |
|迁移审查等      | **359, 363 Migration Act - MRT** s.359. Tribunal may seek additional information  
(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.  
(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.  
(3) If an invitation is given to a person other than the Secretary, the invitation must be given:  
(a) except where paragraph (b) applies—by one of the methods specified in section 379A; or  
(b) if the invitation is given to a person in immigration detention—by a method prescribed for the purposes of giving documents to such a person.  
(4) If an invitation is given to the Secretary, the invitation must be given by one of the methods specified in section 379B.  
s. 363 Powers of the Tribunal etc.  
(1) For the purpose of the review of a decision, the Tribunal may:  
(a) take evidence on oath or affirmation;  
(b) adjourn the review from time to time;  
(c) subject to sections 377 and 378, give information to the applicant and to the Secretary; or  
(d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.  
(2) The Tribunal may combine the reviews of 2 or more reviewable decisions made in respect of the same person.  
(3) Subject to subsection (4), the presiding member in relation to a review may:  
(a) summon a person to appear before the tribunal to give evidence;  
(b) summon a person to produce to the tribunal such documents as are referred to in the summons;  
(c) require a person appearing before the tribunal to give evidence either to take an oath or to make an affirmation; and  
(d) administer an oath or affirmation to a person so appearing.  
(4) The presiding member shall not, for the purposes of a review that is being conducted in Australia, summon a person under paragraph (3)(a) or (b) unless the person is in Australia.  
(5) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the evidence that the person will give will be true. |
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| General | s.424. Tribunal may seek additional information  
(1) In conducting the review, the tribunal may get any information that it considers relevant. However, if the tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.  
(2) Without limiting subsection (1), the tribunal may invite a person to give additional information.  
(3) The invitation must be given to the person:  
(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or  
(b) if the person is in immigration detention—by a method prescribed for the purposes of giving documents to such a person. |
| 424, 427 Migration Act - RRT | s.427. Powers of the Refugee Review Tribunal etc.  
(1) For the purpose of the review of a decision, the tribunal may:  
(a) take evidence on oath or affirmation; or  
(b) adjourn the review from time to time; or  
(c) subject to sections 438 and 440, give information to the applicant and to the Secretary; or  
(d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the tribunal thinks necessary with respect to the review, and to give to the tribunal a report of that investigation or examination.  
(2) The tribunal must combine the reviews of 2 or more RRT-reviewable decisions made in respect of the same non-citizen.  
(3) Subject to subsection (4), the tribunal in relation to a review may:  
(a) summon a person to appear before the tribunal to give evidence; and  
(b) summon a person to produce to the tribunal such documents as are referred to in the summons; and  
(c) require a person appearing before the tribunal to give evidence either to take an oath or affirmation; and  
(d) administer an oath or affirmation to a person so appearing.  
(4) The tribunal must not summon a person under paragraph (3)(a) or (b) unless the person is in Australia.  
(5) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the person will give will be true.  
(6) A person appearing before the tribunal to give evidence is not entitled:  
(a) to be represented before the tribunal by any other person; or  
(b) to examine or cross-examine any other person appearing before the Tribunal to give evidence.  
(7) If a person appearing before the Tribunal to give evidence is not proficient in English, the tribunal may direct that communication with that person during his or her appearance proceeds through an interpreter. |
| 148(6A) VRB | s.148. Procedure of Board  
(6A) The Principal Member may, in relation to a review, request the Secretary:  
(a) to give to the Principal Member further documents in the Secretary's custody; or  
(b) to obtain, and give to the Principal Member, further documents; or  
(c) to arrange for the making of any investigation or medical examination and to give to the Principal Member a report of the investigation or examination. |
| 165 & 166 SSAT | s.165. Provision of further information by Secretary  
(1) The Executive Director may ask the Secretary to provide the SSAT with information or a document that the Secretary has and that is relevant to the review of a decision.  
(2) The Secretary must comply with a request under subsection (1) as soon as practicable and, in any event, not later than 14 days after the request is made.  

s.166. Exercise by Secretary of powers under section 192  
(1) The Executive Director may ask the Secretary to exercise the Secretary's powers under section 192 if the Executive Director is satisfied that a person has information, or has custody or control of a document, that is relevant to the review of a decision.  
(2) The Secretary must comply with a request under subsection (1) as soon as practicable and, in any event, within 7 days after the request is made. |
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| General | 83 & 84 NSW ADT | s.83. Powers in relation to witnesses  
(1) The Tribunal may:  
(a) call any witness of its own motion in any proceedings, and  
(b) examine any witness on oath or affirmation, or by use of a statutory declaration, in any proceedings, and  
(c) examine or cross-examine any witness to such extent as the Tribunal thinks proper in order to elicit information relevant to the exercise of the functions of the Tribunal in any proceedings, and  
(d) compel any witness to answer questions which the Tribunal considers to be relevant in any proceedings before it.  

s.84. Issue of summons  
(1) A summons for the purposes of this Act may be issued by the Registrar:  
(a) on the application of a party to proceedings before the Tribunal, or  
(b) at the direction of the Tribunal.  
(2) Any such summons must be signed by the Registrar or as otherwise provided by the rules of the Tribunal.  
(3) Any such summons may require a person to do any one or more of the following:  
(a) attend and give evidence.  
(b) attend and produce documents or other things.  
(4) A person who, without reasonable excuse, fails to comply with the requirements of a summons is guilty of an offence.  
Maximum penalty: 100 penalty units.  
(5) A summons may be served within or outside the State. |
| 81 VCAT | s.81. Obtaining information from third parties  
(1) On the application of a party to a proceeding, the Tribunal may order that a person—  
(a) who is not a party to the proceeding; and  
(b) who has, or is likely to have, in the person's possession a document that is relevant to the proceeding—  
produce the document to the Tribunal or the party within the time specified in the order.  
(2) The Tribunal's power to make an order under sub-section (1) is exercisable by any member. |
| 61 NSW GT | s.61. Witnesses to answer questions  
(1) A member of the Tribunal may require a person who appears before the Tribunal to answer a question that is reasonably related to the proceedings before the Tribunal.  
(2) A person is not excused from answering such a question on the ground that the answer might tend to incriminate the person but, where the person claims (before answering the question) that the answer might tend to incriminate the person, neither the question nor the answer is admissible in evidence against the person in criminal proceedings, other than proceedings under section 62 or proceedings in relation to a charge of perjury in respect of the answer. |
| Summons witnesses | 40(1A) AAT | s.40. (1A) Subject to subsection (1B), for the purposes of the hearing of a proceeding before the Tribunal, the member presiding at the hearing, the Registrar, a District Registrar or a Deputy Registrar may summon a person to appear before the Tribunal at that hearing:  
(a) to give evidence; or  
(b) to give evidence and produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons; or  
(c) to produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons. |
| 363(3)(a) Migration Act - MRT | s.363. Powers of the Tribunal etc.  
(3)Subject to subsection (4), the presiding member in relation to a review may:  
(a) summon a person to appear before the Tribunal to give evidence; |
(3) Subject to subsection (4), the Tribunal in relation to a review may:  
(a) summon a person to appear before the Tribunal to give evidence; and... |
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| 151(2)(a) VRB | s.151. Powers of Board  
...  
(2) The presiding member in relation to a review may:  
(a) summon a person to appear at any hearing of the review to give evidence and to produce such documents (if any) as are referred to in the summons;... |
| 165 & 166 SSAT | s.165. Provision of further information by Secretary  
(1) The Executive Director may ask the Secretary to provide the SSAT with information or a document that the Secretary has and that is relevant to the review of a decision.  
(2) The Secretary must comply with a request under subsection (1) as soon as practicable and, in any event, not later than 14 days after the request is made.  

s.166. Exercise by Secretary of powers under section 192  
(1) The Executive Director may ask the Secretary to exercise the Secretary’s powers under section 192 if the Executive Director is satisfied that a person has information, or has custody or control of a document, that is relevant to the review of a decision.  
(2) The Secretary must comply with a request under subsection (1) as soon as practicable and, in any event, within 7 days after the request is made. |
| 83 & 84 NSW ADT | s.83. Powers in relation to witnesses  
(1) The Tribunal may:  
(a) call any witness of its own motion in any proceedings, and  
(b) examine any witness on oath or affirmation, or by use of a statutory declaration, in any proceedings, and  
(c) examine or cross-examine any witness to such extent as the Tribunal thinks proper in order to elicit information relevant to the exercise of the functions of the Tribunal in any proceedings, and  
(d) compel any witness to answer questions which the Tribunal considers to be relevant in any proceedings before it.  
(2) If the Tribunal decides to call a person as a witness under subsection (1) (a), the Tribunal may:  
(a) seek to procure the voluntary attendance of the person before it by notifying the person in such manner as it thinks appropriate in the circumstances, or  
(b) direct the Registrar to issue a summons to compel the attendance of the person before it.  
(3) Nothing in subsection (1) enables the Tribunal to compel a witness to answer a question if the witness has a reasonable excuse for refusing to answer the question.  

s.84. Issue of summons  
(1) A summons for the purposes of this Act may be issued by the Registrar:  
(a) on the application of a party to proceedings before the Tribunal, or  
(b) at the direction of the Tribunal.  
(2) Any such summons must be signed by the Registrar or as otherwise provided by the rules of the Tribunal.  
(3) Any such summons may require a person to do any one or more of the following:  
(a) attend and give evidence;  
(b) attend and produce documents or other things.  
(4) A person who, without reasonable excuse, fails to comply with the requirements of a summons is guilty of an offence.  
Maximum penalty: 100 penalty units.  
(5) A summons may be served within or outside the State. |
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| General | s.104. Witness summons  
(1) The principal registrar—  
(a) may; and  
(b) if directed by the Tribunal, must—  
issue a summons to a person to attend the Tribunal to give evidence and produce any documents that are referred to in the summons.  
(2) A summons may be issued, or a direction given, under sub-section (1) at the request of a party or on the principal registrar's or Tribunal's own initiative.  
(3) The Tribunal's power to make a direction under sub-section (1)(b) in a proceeding is exercisable by a presidential member or the presiding member.  
(4) A person who attends in answer to a summons is entitled to be paid the prescribed fees and allowances or, if no fees and allowances are prescribed, the fees and allowances (if any) determined by the Tribunal.  
(5) The fees and allowances are to be paid—  
(a) if the person was summoned at the request of a party, by that party; or  
(b) if the person was summoned on the initiative of the Tribunal, by the parties in the proportion determined by the Tribunal. |
| 60(1) NSW GT | s.60. Compulsion of witnesses  
(1) The President or Deputy President of the Tribunal or the member presiding at a sitting of the Tribunal, or any other member appointed under section 49 (3) (a) and nominated in writing by the President for the purposes of this section, may:  
(a) by instrument in writing require any person on whom the instrument is served personally or by post:  
(i) to appear before the Tribunal for the purpose of giving evidence, or  
(ii) to produce to the Tribunal any document that is relevant to the proceedings before the Tribunal,  
(b) require a person who appears before the Tribunal to be sworn for the purpose of giving evidence on oath, and  
(c) administer such an oath. |
| Penalty for non-compliance by witness | s.62. Refusal to be sworn or to answer questions  
A person appearing as a witness before the Tribunal shall not, without reasonable excuse:  
(a) when required in pursuance of section 40 either to take an oath or make an affirmation—refuse or fail to comply with the requirement;  
(b) refuse or fail to answer a question that he or she is required to answer by the member presiding at the proceeding; or  
(c) refuse or fail to produce a document that he or she was required to produce by a summons under this Act served on him or her as prescribed.  
Penalty: $1,000 or imprisonment for 3 months. |
| Procedural Powers | |
| Investigatory powers | s.33 (1) In a proceeding before the Tribunal:  
(a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;  
(b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and  
(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate. |
| 359 Migration Act - MRT | s.359. Tribunal may seek additional information  
(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.  
(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.  
(3) If an invitation is given to a person other than the Secretary, the invitation must be given:  
(a) except where paragraph (b) applies—by one of the methods specified in section 379A; or  
(b) if the invitation is given to a person in immigration detention—by a method prescribed for the purposes of giving documents to such a person.  
(4) If an invitation is given to the Secretary, the invitation must be given by one of the methods specified in section 379B. |
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<td>General</td>
<td><strong>424 Migration Act - RRT</strong>&lt;br&gt;s.424. Tribunal may seek additional information&lt;br&gt;(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.&lt;br&gt;(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.&lt;br&gt;(3) The invitation must be given to the person:&lt;br&gt;(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or&lt;br&gt;(b) if the person is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.</td>
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<td><strong>138(1) VRB</strong>&lt;br&gt;s.138(1). Board not bound by technicalities etc.&lt;br&gt;(1) The Board, in conducting a review, in hearing a review or in making a decision on a review of a decision:&lt;br&gt;(a) is not bound by technicalities, legal forms or rules of evidence; and&lt;br&gt;(b) shall act according to substantial justice and the merits and all the circumstances of the case and, without limiting the generality of the foregoing, shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance, including any reason attributable to:&lt;br&gt;(i) the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; or&lt;br&gt;(ii) the absence of, or a deficiency in, relevant official records including an absence or deficiency resulting from the fact that an occurrence that happened during the service of a veteran, or of a member of the Forces, or a member of a Peacekeeping Force, as defined by subsection 68(1), was not reported to the appropriate authorities.&lt;br&gt;(2) The Commission may make available to the Board:&lt;br&gt;(a) statements of principles applied by the Commission in deciding claims for pension and applications for pension and attendant allowance and increased pension and in conducting reviews under section 31; and&lt;br&gt;(b) such other material as the Commission considers may be of assistance to the Board in the exercise of its powers or the performance of its functions under this Act.&lt;br&gt;(3) Nothing in this section authorizes the Commission to direct the Board with respect to its consideration of a particular review by the Board.</td>
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<td><strong>167(2) SSAT</strong>&lt;br&gt;s.167. Hearing procedure&lt;br&gt;(2) The SSAT may inform itself on any matter relevant to a review of a decision in any manner it considers appropriate.</td>
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<td><strong>73 &amp; Part 5 NSW ADT</strong>&lt;br&gt;s.73. Procedure of the Tribunal generally&lt;br&gt;(1) The Tribunal may, subject to this Act and the rules of the Tribunal, determine its own procedure.&lt;br&gt;(2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.&lt;br&gt;Part 5 Assessors</td>
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<td><strong>98 VCAT</strong>&lt;br&gt;s.98. General procedure&lt;br&gt;(1) The Tribunal—&lt;br&gt;(a) is bound by the rules of natural justice;&lt;br&gt;(b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;&lt;br&gt;(c) may inform itself on any matter as it sees fit;&lt;br&gt;(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.&lt;br&gt;(2) Without limiting sub-section (1)(b), the Tribunal may admit into evidence the contents of any document despite the non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it.&lt;br&gt;(3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure.&lt;br&gt;(4) Sub-section (1)(a) does not apply to the extent that this Act or an enabling enactment authorises, whether expressly or by implication, a departure from the rules of natural justice.</td>
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<tr>
<td>55 NSW GT</td>
<td>s.55. Proceedings generally&lt;br&gt;(1) The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit.&lt;br&gt;(2) Proceedings before the Tribunal shall be conducted with as little formality and legal technicality and form as the circumstances of the case permit.</td>
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<td><strong>Public or private hearings</strong></td>
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<td>35(1), (2) AAT</td>
<td>s.35(1). Subject to this section, the hearing of a proceeding before the Tribunal shall be in public.&lt;br&gt;(2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order:&lt;br&gt;(a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; ...</td>
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<td>365 Migration Act - MRT</td>
<td>s.365. Review to be in public&lt;br&gt;(1) Subject to this section, any oral evidence that the Tribunal takes while a person is appearing before it must be taken in public.&lt;br&gt;(2) Where the Tribunal is satisfied that it is in the public interest to do so, the Tribunal may direct that particular oral evidence, or oral evidence for the purposes of a particular review, is to be taken in private.&lt;br&gt;(3) If the Tribunal is satisfied that it is impracticable to take particular oral evidence in public, the Tribunal may direct that the evidence is to be taken in private.&lt;br&gt;(4) Where the Tribunal gives a direction under subsection (2) or (3), it may give directions as to the persons who may be present when the oral evidence is given.</td>
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<td>429 Migration Act - RRT</td>
<td>s.429. Review to be in private&lt;br&gt;The hearing of an application for review by the Tribunal must be in private.</td>
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<td>150 VRB</td>
<td>s.150. Hearing to be in private except in special circumstances&lt;br&gt;(1) Subject to this section, the hearing of a review shall be in private.&lt;br&gt;(2) The presiding member may give directions (whether in writing or otherwise) as to the persons who may be present at any hearing of a review.&lt;br&gt;(3) If requested to do so by the applicant, the presiding member may permit a hearing, or a part of a hearing, of a review to take place in public.</td>
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<td>168 SSAT</td>
<td>s.168. Hearing in private&lt;br&gt;(1) The hearing of a review is to be in private.&lt;br&gt;(2) The Executive Director may give directions, in writing or otherwise, as to the persons who may be present at any hearing of a review.&lt;br&gt;(3) In giving directions under subsection (2), the Executive Director must have regard to the wishes of the parties and the need to protect their privacy.</td>
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<td>75 NSW ADT</td>
<td>s.75. Proceedings on hearing to be conducted in public&lt;br&gt;(1) If proceedings before the Tribunal are to be determined by holding a hearing, the hearing is to be open to the public.&lt;br&gt;(2) However, if the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may (of its own motion or on the application of a party) make any one or more of the following orders:&lt;br&gt;(a) an order that the hearing be conducted wholly or partly in private,&lt;br&gt;(b) an order prohibiting or restricting:&lt;br&gt;(i) the disclosure of the name, address, picture or any other material that identifies, or may lead to the identification of, any person (whether or not a party to proceedings before the Tribunal or a witness summoned by, or appearing before, the Tribunal), or&lt;br&gt;(ii) the doing of any other thing that identifies, or may lead to the identification of, any such person,&lt;br&gt;(b1) an order prohibiting or restricting the publication or broadcast of any report of proceedings before the Tribunal,&lt;br&gt;(c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,&lt;br&gt;(d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.&lt;br&gt;(2A) The Tribunal cannot make an order under subsection (2) (b) in respect of any proceedings to which section 126 applies.&lt;br&gt;(2B) The Tribunal may from time to time vary or revoke an order made under subsection (2).&lt;br&gt;(3) Mediation sessions and neutral evaluation sessions under Part 4 are to be conducted in private.</td>
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| 101 VCAT | s.101. Hearings to be public unless otherwise ordered  
(1) Unless another provision of this Act provides otherwise, all hearings of the Tribunal must be held in public.  
(2) The Tribunal, on its own initiative or on the application of a party, may direct that a hearing or any part of it be held in private.  
(3) In the circumstances set out in sub-section (4) the Tribunal may order—  
(a) that any evidence given before it;  
(b) that the contents of any documents produced to it;  
(c) that any information that might enable a person who has appeared before it to be identified—  
must not be published except in the manner and to the persons (if any) specified by the Tribunal.  
(4) The Tribunal may make an order under sub-section (3) if the Tribunal considers it is necessary to do so—  
(i) endangering the national security or international security of Australia; or  
(ii) prejudicing the administration of justice; or  
(iii) endangering the physical safety of any person; or  
(iv) offending public decency or morality; |
| 56 NSW GT | s.56. Proceedings to be open to the public  
Proceedings before the Tribunal shall be open to the public unless the Tribunal, in any particular case, determines that the proceedings shall be conducted wholly or partly in the absence of the public. |
| Direct preliminary conference | |
| 34 AAT | s.34(1). Where an application is made to the Tribunal for a review of a decision, the President may, if he or she thinks it desirable to do so, direct the holding of a conference of the parties or their representatives presided over by the President or another presidential member, by non-presidential member assigned to the relevant Division or by an officer of the Tribunal. ... |
| 74 NSW ADT | s.74. Preliminary conferences  
(1) The Tribunal may, before formally commencing to determine an application, confer informally with, or arrange for a member or assessor to confer informally with, the parties to the proceedings in a preliminary conference and make any determination with respect to the proceedings that is agreed to by the parties.  
(2) If proceedings are referred under this section to a member or an assessor and the parties agree to the determination of the member or assessor, the determination has effect as a decision of the Tribunal.  
(3) A determination is not to be made under this section unless the Tribunal, or the member or assessor making the determination, is satisfied that the determination is in the best interests of the person whose interests are considered by the Tribunal, member or assessor to be paramount.  
(4) If the proceedings are not determined under this section and proceed for a formal determination by the Tribunal:  
(a) evidence is not to be given, and statements are not to be made, concerning any words spoken or acts done at a conference held in accordance with this section unless the parties otherwise agree, and  
(b) any member or assessor who presided over a preliminary conference in respect of the proceedings is not entitled to be a member of the Tribunal determining the proceedings, or an assessor in those proceedings, if any party to the preliminary conference objects to the member or assessor further participating in the proceedings.  
(5) For the purposes of subsection (4) (b), a party objects to a member or assessor further participating in proceedings only if:  
(a) the objection is lodged with the Registrar within 14 days after the conclusion of the preliminary conference (or within such other period as may be prescribed by the rules of the Tribunal), and  
(b) the objection is in such form as may be prescribed by (or approved under) the rules of the Tribunal.  
(6) The President may direct that a preliminary conference is to be held under this section in the case of any applications made to the Tribunal of a kind specified in the direction. |
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| 83 VCAT | s.83. Compulsory conferences  
(1) The Tribunal or the principal registrar may require the parties to a proceeding to attend one or more compulsory conferences before a member of the Tribunal or the principal registrar before the proceeding is heard by the Tribunal.  
(2) The functions of a compulsory conference are—  
(a) to identify and clarify the nature of the issues in dispute in the proceeding;  
(b) to promote a settlement of the proceeding;  
(c) to identify the questions of fact and law to be decided by the Tribunal;  
(d) to allow directions to be given concerning the conduct of the proceeding.  
(3) Notice of a compulsory conference must be given to each party in accordance with the rules.  
(4) Unless the person presiding otherwise directs, a compulsory conference must be held in private.  
(5) Subject to this Act and the rules, the procedure for a compulsory conference is at the discretion of the person presiding. |
| 66 NSW GT | s.66. Conciliation to be attempted  
(1) The Tribunal shall not make a decision in respect of an application made to it until it has brought, or used its best endeavours to bring, the parties to a settlement.  
(1A) Subsection (1) does not apply in respect of an application if the Tribunal considers that it is not possible, or appropriate, to attempt to bring the parties to a settlement.  
(2) Any meetings conducted or proceedings held in the course of attempting to bring or bringing the parties to a settlement shall not be conducted or held in public.  
(3) Any statement or admission made during the course of a conciliation hearing is not, except with the consent of all the parties, admissible as evidence in proceedings before the Tribunal or in any court. |
| Discretion to create own procedure | 33(1)(b) AAT | s.33(1). In a proceeding before the Tribunal:... (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; |
| 353A Migration Act - MRT | s.353A. Principal Member may give directions  
(1) The Principal Member may, in writing, give directions, not inconsistent with this Act or the regulations, as to:  
(a) the operation of the Tribunal; and  
(b) the conduct of reviews by the Tribunal.  
(2) In particular, the directions may relate to the application of efficient processing practices to the conduct of reviews by the Tribunal.  
(3) The Tribunal should, as far as practicable, comply with the directions. However, non-compliance by the Tribunal with any direction does not mean that the Tribunal's decision on a review is an invalid decision.  
(4) If the Tribunal deals with a review of a decision in a way that complies with the directions, the Tribunal is not required to take any other action in dealing with the review. |
| 420A(1) Migration Act - RRT | s. 420A. Principal Member may give directions  
(1) The Principal Member may, in writing, give directions, not inconsistent with this Act or the regulations as to:  
(a) the operations of the Tribunal; and  
(b) the conduct of reviews by the Tribunal.  
(2) In particular, the directions may relate to the application of efficient processing practices to the conduct of reviews by the Tribunal.  
(3) The Tribunal should, as far as practicable, comply with the directions. However, non-compliance by the Tribunal with any direction does not mean that the Tribunal's decision on a review is an invalid decision.  
(4) If the Tribunal deals with a review of a decision in a way that complies with the directions, the Tribunal is not required to take any other action in dealing with the review. |
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| General | s.142. Principal Member responsible for arrangement of business  
(1) The Principal Member is responsible for the efficient operation of the Board.  
(2) The Principal Member may give directions:  
(a) for the purpose of increasing the efficiency of the operations of the Board; and  
(b) as to the arrangement of the business of the Board.  
s. 148 Procedure of Board  
...  
(5) The Principal Member:  
(a) may give general directions, not inconsistent with subsections (1), (2), (3) and (4) as to the procedure of the Board with respect to reviews before it, including reviews the hearings of which have not been commenced; and  
(b) may give directions, not inconsistent with subsections (1), (2), (3) and (4), as to the procedure of the Board with respect to a particular review before the Board, either before or after the hearing of the review has commenced.  
(6) The presiding member in respect of a particular review may, in respect of a matter not dealt with by directions under subsection (5), give directions, not inconsistent with subsections (1), (2), (3) and (4), as to the procedure to be followed on a hearing of the review, either before or after the hearing of the review has commenced. |
| Sched 3, clause 2 SSAT | Schedule 3, clause 2 The Executive Director  
(1) The Executive Director is responsible for the overall operation and administration of the SSAT.  
(2) The Executive Director is to:  
(a) monitor the operations of the SSAT; and  
(b) take reasonable steps to ensure that decisions of the SSAT are consistent; and  
(c) take reasonable steps to ensure that the SSAT efficiently and effectively performs its functions.  
(3) The Executive Director may give directions:  
(a) for the purpose of increasing the efficiency of the operations of the SSAT; and  
(b) as to the arrangement of the business of the SSAT. |
| 73(1) NSW ADT | s.73. Procedure of the Tribunal generally  
(1) The Tribunal may, subject to this Act and the rules of the Tribunal, determine its own procedure.  
s. 102 Referral by Tribunal  
(1) The Tribunal may, by order, refer a matter arising in proceedings before it for mediation or neutral evaluation if:  
(a) the Tribunal considers the circumstances appropriate, and  
(b) the parties to the proceedings consent to the referral, and  
(c) the parties to the proceedings agree as to who is to be the mediator or neutral evaluator for the matter.  
(2) The mediator or neutral evaluator may, but need not be, a person whose name is on a list compiled under this Part. |
| 98(3) VCAT | s.98. General procedure  
(3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure. |
| 53 NSW GT | s.53. Procedure at sittings of Tribunal  
(1) The procedure for the arranging of, and for the conduct of business at, any sitting of the Tribunal shall, subject to this Act, the regulations and the rules of the Tribunal, be as determined by the Tribunal. |
<p>| Mediation or preliminary conference 34A AAT | s.34A (1) Where an application is made to the Tribunal for a review of a decision, the President may, if he or she thinks it desirable to do so and the parties consent, direct that the proceeding, or any part of the proceeding or any matter arising out of the proceeding, be referred to a mediator for mediation. ... |</p>
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| 74 & Part 4 NSW ADT | s.74. Preliminary conferences  
(1) The Tribunal may, before formally commencing to determine an application, confer informally with, or arrange for a member or assessor to confer informally with, the parties to the proceedings in a preliminary conference and make any determination with respect to the proceedings that is agreed to by the parties.  
(2) If proceedings are referred under this section to a member or an assessor and the parties agree to the determination of the member or assessor, the determination has effect as a decision of the Tribunal.  
(3) A determination is not to be made under this section unless the Tribunal, or the member or assessor making the determination, is satisfied that the determination is in the best interests of the person whose interests are considered by the Tribunal, member or assessor to be paramount.  
(4) If the proceedings are not determined under this section and proceed for a formal determination by the Tribunal:  
(a) evidence is not to be given, and statements are not to be made, concerning any words spoken or acts done at a conference held in accordance with this section unless the parties otherwise agree, and  
(b) any member or assessor who presided over a preliminary conference in respect of the proceedings is not entitled to be a member of the Tribunal determining the proceedings, or an assessor in those proceedings, if any party to the preliminary conference objects to the member or assessor further participating in the proceedings.  
(5) For the purposes of subsection (4) (b), a party objects to a member or assessor further participating in proceedings only if:  
(a) the objection is lodged with the Registrar within 14 days after the conclusion of the preliminary conference (or within such other period as may be prescribed by the rules of the Tribunal), and  
(b) the objection is in such form as may be prescribed by (or approved under) the rules of the Tribunal.  
(6) The President may direct that a preliminary conference is to be held under this section in the case of any applications made to the Tribunal of a kind specified in the direction. |
| 88 VCAT | s.88. Mediation  
(1) The Tribunal or the principal registrar may refer a proceeding or any part of it for mediation by a person nominated by the Tribunal or principal registrar (as the case requires).  
(2) A referral may be made under sub-section (1) with or without the consent of the parties.  
(3) The principal registrar must give notice of the mediation to each party in accordance with the rules.  
(4) A party must pay the prescribed fee (if any) for mediation, whether or not the party consented to the referral for mediation.  
(5) The Tribunal may refuse to continue with a proceeding if a fee payable for mediation has not been paid.  
(6) If a member of the Tribunal is a mediator in a proceeding, he or she cannot constitute the Tribunal for the purpose of hearing the proceeding.  
(7) Subject to this Act and the rules, the procedure for mediation is at the discretion of the mediator. |
| 34B AAT | s. 4B If:  
(a) it appears to the Tribunal that the issues for determination on the review of a decision can be adequately determined in the absence of the parties; and  
(b) the parties consent to the review being determined without a hearing:  
the Tribunal may review the decision by considering the documents or other material lodged with or provided to the Tribunal and without holding a hearing. |
| 360(2)(a) Migration Act - MRT | s.360. Tribunal must invite applicant to appear  
(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.  
(2) Subsection (1) does not apply if:  
(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or  
(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or  
(c) subsection 359C(1) or (2) applies to the applicant.  
(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal. |
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<td>425(2)(a) Migration Act - RRT</td>
<td>(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review. (2) Subsection (1) does not apply if: (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or (c) subsection 424C(1) or (2) applies to the applicant. (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.</td>
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<td>162 SSAT</td>
<td>(1) The Executive Director may direct that a hearing be conducted without oral submissions from the parties if: (a) the Executive Director considers that the review hearing could be determined fairly on the basis of written submissions by the parties; and (b) all parties to the review consent to the hearing being conducted without oral submissions. (2) If the Executive Director gives a direction under subsection (1), the Executive Director must give each of the parties to the review written notice: (a) informing the party of the direction; and (b) inviting the party to submit written submissions; and (c) specifying the address to which the written submissions are to be delivered; and (d) specifying the time within which the written submissions are to be delivered. (3) The time specified under paragraph (2)(d) must be such as to allow a reasonable period for the parties to make written submissions. (4) Despite subsection (1), the SSAT, as constituted for the hearing, may, if it thinks necessary after considering the written submissions made by the parties, make an order permitting the parties to make oral submissions to the SSAT at the hearing of the review. (5) A reference in subsection (4) to a party does not include a reference to the Secretary or the CEO.</td>
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<tr>
<td>76 NSW ADT</td>
<td>(1) The Tribunal may determine proceedings by considering the documents or other material lodged with or provided to the Tribunal and without holding a hearing if it appears to the Tribunal that the issues for determination can be adequately determined in the absence of the parties.</td>
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<td>100(2) VCAT</td>
<td>(2) If the parties to a proceeding agree, the Tribunal may conduct all or part of a proceeding entirely on the basis of documents, without any physical appearance by the parties or their representatives or witnesses.</td>
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<td>Hearing type</td>
<td>35A AAT</td>
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<td>366 Migration Act - MRT</td>
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<td><strong>General</strong></td>
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<td>429A Migration Act - RRT</td>
<td>For the purposes of the review of a decision, the Tribunal may allow the appearance by the applicant before the Tribunal, or the giving of evidence by the applicant or any other person, to be by: (a) telephone; or (b) closed-circuit television; or (c) any other means of communication.</td>
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| 161(4) & (5) SSAT               | (1) Subject to section 162, a party to a review of a decision may make oral or written submissions to the SSAT or both oral and written submissions.  
(2) The Secretary or CEO may make written submissions to the SSAT.  
(3) A party to a review of a decision may have another person make submissions to the SSAT on behalf of the party.  
(4) The Executive Director may determine that submissions to the SSAT by a party or a party's representative are to be made by telephone or by means of other electronic communications equipment.  
(5) Without limiting subsection (4), the Executive Director may make a determination under subsection (4) in relation to an application if: (a) the application is urgent; or (b) the party lives in a remote area and unreasonable expense would be incurred if the party or the party's representative had to travel to the place at which the hearing is to be held; or (c) the party has failed to attend the hearing and has not indicated that he or she intends to attend the hearing; or (d) the applicant is unable to attend the hearing because of illness or infirmity.  
(6) If a party is not proficient in English, the Executive Director may give directions in relation to the use of an interpreter in connection with the hearing of the review.  
(7) A reference in this section to a party does not include a reference to the Secretary or the CEO. |
| 100(1) VCAT                     | (1) If the Tribunal thinks it appropriate, it may conduct all or part of a proceeding by means of a conference conducted using telephones, video links or any other system of telecommunication. |
ATTACHMENT 4

INQUISTITORIAL v ADVERSARIAL INQUIRY

QUESTIONS FOR TRIBUNALS

Does the legislation setting up your tribunal indicate that the tribunal should operate in an investigative or an adversarial manner, or both depending on the circumstances of the claim?

In your answer indicate which provisions of the legislation are indicative (eg provisions for case managers, use of assessors, representation, onus of proof, parties, investigative obligations on panel members, right to representation, right to call witnesses, right to cross-examine).

What do you understand by the terms 'inquisitorial', investigative and 'adversarial'?

How many stages of decision-making does the tribunal undertake (eg preliminary conference, directions hearing, final hearing)? If these are specified in the legislation please refer to the specific provisions.

How many parties generally appear before the tribunal? One? Two? More? Specify the circumstances in which only one party/ more than two parties appear.

Does the tribunal provide the final form of merit review of the matter? If not, specify what other higher forms of merit review exist?

Is there an onus of proof on any party or all parties to the review? If so, please refer to provision(s).

How would you describe the role of members of the Tribunal? That is, do they routinely, often, infrequently or never, seek further evidence from applicants or respondents?

If further information is sought from either party, in what circumstances does this occur?

Is there a statutory obligation to seek further information from either party? If so, please refer to the provision(s). In what circumstances does this obligation arise?

In your view in what circumstances should tribunal members have a duty to investigate?

Is there a statutory power to call for further evidence/witnesses? If so, please refer to the provision(s). In what circumstances is the power used?

How often is the power used? Often (est %age of cases). Infrequently (est %age of cases) Never. If never, please specify why not.
Are parties before the tribunal represented by legal representatives? Others? If others please specify.

How frequently are parties represented?

Always? Often (est %age of cases) Infrequently (est %age of cases) Never

Applicants:

Respondent:

If parties are represented, please specify in which types of matters representation is used? (eg complex matters, technical matters, matters which predominantly involve issues of law, other).

If your tribunal undertakes independent investigation in a matter what resources are used? (eg staff to undertake the investigation? Assessors? Case managers? Other?)

Are investigative staff provided for in the legislation? If so refer to provision(s).

Do tribunal members undertake independent investigation? If so, in what kind of matters? How often? Always Often (est %age of cases) Infrequently (est %age of cases) Never

What proportion of the annual budget is used on independent investigation?

How many tribunal members are full-time? Part-time? Does this balance impact on the level of independent investigation? If so, please explain.

What training does the tribunal provide to staff/tribunal members for undertaking independent investigation? How often does such training occur? Who attends?

What is the investigation caseload of a staff member per annum?