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Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal's Use of Inquisitorial Procedures

Senior Member Joan L. Dwyer*

The Administrative Appeals Tribunal Act of 1975¹ was an innovative and internationally acclaimed piece of legislation. The Act created the Administrative Appeals Tribunal (“AAT”) as a specialised merits review tribunal with jurisdiction to review decisions made under a broad range of Commonwealth legislative provisions.² By 1997, the AAT had jurisdiction to review decisions made under 286 different pieces of legislation.³

Over the years, the AAT's performance has been monitored. In Osborne's paper, *Inquisitorial Procedure in the Administrative Appeals Tribunal - A Comparative Perspective*, she pointed out that the AAT was well established to pioneer the use of inquisitorial procedures and to influence their adoption in the court system.⁴ She wrote:

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1. Administrative Appeals Tribunal Act, 1975 (Austl.), available at http://www.austlii.edu.au/legis/cth/consol_aata1975323/ (last visited Sept. 6, 2002).

2. *Id.* The Administrative Appeals Tribunal Act 1975 was one of a number of Commonwealth Acts passed that year which together introduced a new system of Federal Administrative Law in Australia. The Tribunal conducts a review on the merits of administrative decisions made under over 300 separate Commonwealth Acts. The membership of the Tribunal comprises Federal Judges, senior lawyers and other Members whose qualifications, expertise or experience are relevant to the work of the Tribunal. The Members of the Tribunal include doctors, engineers, veterans, pilots and business people.

3. *Id.*

4. Gillian Osborne, *Inquisitorial Procedure in the Administrative Appeals Tribunal – A Comparative Perspective*, 13 FED. L. REV. 150, 150 (1982).

There have even been calls for the use of some inquisitorial procedures in ordinary courts of law. A radical change in the ordinary courts seems at present to be impracticable. On the other hand, the Administrative Appeals Tribunal is still in a position to set its own pattern of development. It has been given almost *carte blanche* as to procedure and some wide inquisitorial powers There is a chance that successful innovations in procedure in the area of administrative law could eventually have an influence on procedure in the ordinary courts.⁵

I pointed out some of the reasons for our failure to be as inquisitorial as some might have expected in my paper, *Overcoming the Adversarial Bias in Tribunal Procedures*.⁶ First, there is a lack of a clear statutory mandate for an inquisitorial approach. Further, we have received muted support on the issue from the Federal Court, however, that has changed to some extent since *Bushell v. Repatriation Commission*.⁷ Also attributing to our inquisitorial failure are the expectations of the parties, the lack of budget allocation for expenses such as calling tribunal witnesses, and insufficient staff to conduct investigations on the tribunals' behalf.⁸

In a recently published paper, *Adversarial and Inquisitorial Procedures in the Administrative Appeals Tribunal*,⁹ Thawley echoed my concern about the muted support given by the Federal Court to the AAT's use of inquisitorial procedures.¹⁰ Parallel to De Maria, Thawley concluded that the AAT's procedures were more appropriately described as modified adversarialism than as inquisitorial.¹¹ He suggested that the quality of justice which applicants, particularly unrepresented applicants, receive would be improved by a move towards the type of procedures adopted by the Refugee Review Tribunal.¹² Thawley acknowledged that this would have significant cost implications, stating,

5. *Id.*

6. Joan Dwyer, *Overcoming the Adversarial Bias in Tribunal Procedures*, 20 FED. L. REV. 252 (1991).

7. (1992) 175 C.L.R. 408, available at http://www.austlii.edu.au/au/cases/cth/high_ct/175clr408.html (last visited Sept. 6, 2002).

8. Dwyer, *supra* note 6, at 252.

9. Tom Thawley, *Adversarial and Inquisitorial Procedures in the Administrative Appeals Tribunal*, 4 AUSTL. J. ADMIN. L. 61 (1997).

10. *Id.* at 75.

11. *Id.*

12. *Id.*

“[t]he adversarial system may be characterised as an unfair one from a public policy/social justice perspective, but it is cheaper in terms of public revenue.”¹³

The last section of Thawley’s paper recounts his observations as to the current functioning of the AAT.¹⁴ He comments on the inconsistencies in the practices adopted by different members.¹⁵

It is uncertain whether there is more inconsistency between AAT members than between court judges, but if so, I suggest some explanations. First, in a strict adversary system, the rules are reasonably clear. The room for individual variations is much less than in an area such as administrative review where there are inquisitorial powers which may, but need not, be used. There is no established culture as to what is appropriate in a tribunal, and there are conflicting messages from the courts. In addition, we were all taught and trained in an adversary system. We therefore have had no training in the use of inquisitorial powers. Further, there is no budget for that purpose, and those legal professionals who appear before us do not expect us to adopt an inquisitorial approach. There are also individual personalities and cultural differences between members which, in this area of greater flexibility, emerge more than in a strict adversarial system.

In spite of the hindrance to the development of an inquisitorial approach, a search of the Tribunal’s AATDEX computerised index of decisions (for which I thank the AAT Melbourne Librarian, Ken Birch, and my Associate Martin Clutterbuck) revealed over one hundred decisions in which “inquisitorial procedures” were indexed. Thawley’s paper did not make reference to any decision where the AAT had adopted inquisitorial procedures, nor, so far as I am aware, has any academic work been done on an analysis of those decisions.¹⁶ I consider it a worthwhile exercise to record some of those decisions which illustrate ways in which the AAT has used its inquisitorial powers over the years, particularly because I am writing at a time when the survival of the AAT is in doubt.

The Administrative Review Council, in its report *Better Decisions: Review of Commonwealth Merits Review Tribunals* recommends drastic structural change to the system of Review Tribunals, including the substitution of a new tribunal, the Administrative Review Tribunal

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

(“ART”) for the AAT.¹⁷ The proposal involves absorbing existing first-tier tribunals into the ART; substantially limiting the right of second-tier review, removing any requirement of legal qualification for ART members, save for the President of the ART, and limited term appointments, with appointment of members to no more than one division of the ART.¹⁸ On March 20, 1997, the Attorney-General and Minister for Justice, the Honourable Daryl Williams, stated in Parliament that the Cabinet agreed in principle to amalgamate the AAT, the Social Security Appeals Tribunal, the Veterans Review Board, the Immigration Review Tribunal and the Refugee Review Tribunal.¹⁹ He explained that the creation of divisions within the ART “would develop and maintain flexible, cost effective and non-legalistic procedures relevant to their jurisdiction.”²⁰

Criticism that the AAT was too adversarial has contributed to these proposals for change. In that context, it is relevant to identify instances where the AAT has taken inquisitorial steps which would not have been appropriate in an adversarial system.

I intend to refer briefly to the differences between an adversarial and an inquisitorial system. I will then look at how the role of the AAT has been perceived, before providing examples of the AAT adopting a non-adversarial approach to decision-making. In conclusion, I will offer some thoughts on how to assist and encourage tribunal members to adopt inquisitorial procedures with confidence.

1. THE DIFFERENCES BETWEEN THE ADVERSARIAL AND INQUISITORIAL SYSTEMS

Lord Denning upheld a judicial ideal in a well known passage from his judgment in *Jones v. National Coal Board*.²¹

17. BETTER DECISIONS: REVIEW OF COMMONWEALTH MERITS REVIEW TRIBUNALS, REP. NO. 39, REP. FOR THE MINISTER OF JUSTICE, (Admin. Rev. Council, Austl. 1995), at 140, available at http://www.ag.gov.au/publications/better_decisions/Welcome.html (last visited Sept. 1, 2002).

18. *Id.* at 141.

19. Honourable Daryl Williams, Address to the Australian Parliament on Merit Review Bodies: Amalgamation (Mar. 20, 1997), available at <http://www.aph.gov.au/library/intguide/law/adminlaw.htm#key> (last visited Sept. 1, 2002).

20. *Id.* It is not clear what the Attorney-General means by “non-legalistic procedures” in the context of a review process which interprets and applies legislation, the construction of which is often not clear.

21. (1957) 2 Q.B. 55 (Eng. C.A.).

In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries

So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties. So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other. The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal."²²

But not all judges have shared Lord Denning's view of the judicial ideal. Justice Frankfurter explained in a dissenting opinion in *Johnson v. United States*.²³

A trial is not a game of blind man's buff; and the trial judge—particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law—need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony. Federal judges are not referees at prize fights, but functionaries of justice.²⁴

22. *Id.* at 63-64 (citations omitted).

23. 333 U.S. 46 (1948).

24. *Id.* at 54.

Judge Sheppard of the Federal Court quoted Lord Chancellor Bacon with approval in his thoughtful paper, *Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System*.²⁵ In his paper, His Honour raised significant doubts as to whether the traditional adversary system was really the best way to get to the truth of a matter.²⁶ He illustrated his concerns by reference to three cases which he had heard.

The first case Judge Sheppard discussed was *Caltex Oil v. The Dredge Willemstad*.²⁷ He wrote:

The plaintiff had to prove that those on the bridge of the dredge were relying on the track plotter chart. The dredge company brought to Australia from Holland the deck officers who had been on duty. These were not called by any party notwithstanding that they remained in the precincts of the Court for the period of the hearing. The plaintiff's case was found proved against Decca upon the basis of inferences which were drawn, but those who could tell the Court whether they had been relying upon the track plotter were denied to it as witnesses.²⁸

He further commented:

The plaintiff was afraid to call them in case they proved adverse. No criticism of Decca for not calling them could be made; they were not its witnesses. It did not occur to me to ask counsel what their attitude to my calling them would have been, but it seems doubtful whether both would have consented.²⁹

The second case Judge Sheppard referred to was *Patton v. Commissioner for Railways*.³⁰ His Honour described that he called two eyewitnesses to an accident, *sua sponte*.³¹ Although they had been present at the hearing, neither Counsel had been prepared to call them.³² They were the only witnesses who could describe the plaintiff's

25. I.F. Sheppard, *Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System*, 56 A.L.J. 234 (1982).

26. *Id.* at 234.

27. *Id.* at 238 (citing *Caltex Oil (Australia) Pty. Ltd. v. Dredge Willemstad* (1976) 136 C.L.R. 529 available at <http://scaleplus.law.gov.au/html/highcourt/0/76/0/HC000550.htm> (last visited Sept. 6, 2002)).

28. *Id.*

29. *Id.*

30. *Id.* at 239 (citing *Patton v. Comm'r for Railways* (1974) N.S.W.S., *unreported*, June 3, 1974).

31. *Id.*

32. *Id.*

behavior before he fell from a train.³³ It seems to me that His Honour was quite brave and innovative to have called the witnesses, on his own accord, particularly bearing in mind that the hearing was in 1974. On appeal, the court held the trial a miscarriage on other grounds.³⁴ Judge Sheppard insists in his article that his actions were appropriate.³⁵

The third case Judge Sheppard described concerned a matter where medico-legal experts were called by both parties, but neither called the treating medical practitioner whose report was in evidence.³⁶ Apparently, each party wanted the other to call the doctor in order to be able to cross-examine him.³⁷ Judge Sheppard suggested that he call the doctor as a witness of the court, which was done. Each party cross-examined him and the treating doctor's evidence was accepted.³⁸

Judge Hope of the New South Wales Court of Appeal expressed concerns about the inadequacies of the adversary system in the matter of *Bassett v. Host*.³⁹ The plaintiff was injured in a motor cycle accident and sought damages for negligence.⁴⁰ He suffered amnesia as a result of the accident.⁴¹ There was a question whether the plaintiff or the passenger had been driving the motor cycle.⁴² Once again, the passenger was present at court, but was not called by either side as a witness.⁴³ Judge Hope explained:

A trial is not a game; it is an attempt, on behalf of the community, to resolve in accordance with the law the questions at issue between the parties. A system which requires courts to resolve those issues in the circumstances in which the issues in this case have had to be resolved is surely deficient, for instead of assisting the finding of the truth, the system has prevented the court from having before it the only witnesses who could have spoken directly as to what the truth was. In some other parts of the world where the adversary system prevails, this patent defect has been remedied as regards

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (citing *Naanouh v. Naanouh* (1979) N.W.W.S. *unreported*, Oct. 19, 1979).

37. *Id.*

38. *Id.*

39. (1982) 1 N.S.W.L.R. 206.

40. *Id.* at 207.

41. *Id.*

42. *Id.*

43. *Id.*

civil cases by enabling courts to call, or to require the calling of, witnesses with adequate protection to the parties by the giving of directions as to examination and cross-examination, either generally or in respect of particular issues. *The present case highlights the need for some such remedial measures in this state.*⁴⁴

In *Saif Ali v. Sydney Mitchell & Co.*,⁴⁵ Lord Wilberforce said, "Judges are more than mere selectors between rival views - they are entitled to and do think for themselves."⁴⁶ In *Accident Towing and Advisory Committee v. Combined Motor Industries*,⁴⁷ Judge McGarvie of the Supreme Court of Victoria quoted Lord Wilberforce's comment in a pertinent response to a submission by Counsel that it was not appropriate for the court to adopt a construction of the legislation which the parties had not supported in argument.⁴⁸

Lawyers' interest in trying new approaches and their commitment to traditional procedures vary. Although the legal system requires judges and other decision-makers to continue improving the legal system, there is also value in the approach to the law which emphasises the need for consistency, so that parties can have realistic expectations of the legal consequences of their actions. Once a lawyer becomes a judge or tribunal member, he or she will be engaged in balancing those approaches. While the law must develop, these developments must be at a pace, and in a manner, which is acceptable to the community it serves. Our roles as decision-makers give us difficult decisions at times. We may be required to balance conflicting values, all of which have importance. The way we balance our conflicting values will depend on our individual personalities and backgrounds.

An example of that balancing process arises where there is a non-binding precedent that the decision-maker believes is not correct. Should it be followed? In other words, is it better to be consistent or to be correct? Both views have been expressed by high authority. Judge Brennan, the first President of the AAT, argued that "[i]nconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice."⁴⁹

44. *Id.* (emphasis added).

45. (1980) A.C. 198.

46. *Id.* at 212.

47. (1986) V.R. 529.

48. *Id.* at 547.

49. *Drake v. Minister for Immigration and Ethnic Affairs* [No. 2] (1979) 24 A.L.R. 634,

However, Judge Deane pointed out that the matter is complex:

There are many reasons for the desirability of consistency in the making of decisions affecting rights, opportunities and obligations under the law. Paramount among them is the fact that inconsistency in the treatment of those amenable to the law involves an element of injustice. Particularly where there is competition or correlativity between right[s], advantages, obligations and disadvantages, equality of treatment under the law is an ingredient of modern concepts of justice and the rule of law

On the other hand, while consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it Decision makers may be consistently wrong and consistently unjust. The Tribunal is not bound by either its own previous decisions or by the content of government policy. There have been and will be cases in which the Tribunal concludes that it should refuse to follow a previous decision of the Tribunal or reject or disregard the dictates of a relevant policy of the government. The existence of such cases serves to emphasise the fact that each applicant to the Tribunal is entitled to have his or her application for review decided on its own particular merits. The desire for consistency should not be permitted to submerge the ideal of justice in the individual case.⁵⁰

There is a similar divergence of views about whether a judge or tribunal member should act as an umpire, as stated by Lord Denning in *Jones v. National Coal Board*,⁵¹ or a truth-seeker as suggested by Judge Hope in *Bassett v. Host*.⁵²

In my 1991 paper *Overcoming the Adversarial Bias in Tribunal Procedures*,⁵³ I made it clear where I stood. I wrote:

[W]here . . . a matter proceeds to a hearing or an

639, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep194.html> (last visited Sept. 6, 2002).

50. *Nevistic v. Minister for Immigration and Ethnic Affairs* (1981) 34 A.L.R. 639, 646, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep361.html (last visited Sept. 2, 2002).

51. See (1957) 2 Q.B. 55 (Eng. C.A.).

52. See (1982) 1 N.S.W.L.R. 206.

53. Dwyer, *supra* note 6.

arbitration I consider that the Court or Tribunal should, in order to do justice between the parties, see the ascertainment of the truth as its aim in making findings on contested facts . . . in so far as I suggest the use of inquisitorial procedures I do so because I believe they will assist in achieving the aim of getting at the truth.⁵⁴

In addition, I suggested some factors which make the adversarial system particularly inappropriate in the realm of administrative review. The most important were:

- (i) Parties are not necessarily adversaries;⁵⁵
- (ii) There is likely to be inequality of power and legal skills between the parties;⁵⁶
- (iii) Administrative review on the merits aids good government;⁵⁷
- (iv) The interests of good administration require that the correct or preferable decision be made, not only for the parties but to provide guidance for the future.⁵⁸

Finally, I endorsed the comments of Sir Richard Eggleston in his article, *What Is Wrong With The Adversary System?*,⁵⁹ where he wrote:

To sum up, if the proceedings were seen as an attempt by the court to get at the truth, and the lawyers on each side were regarded as helping the court in its task, instead of as independent actors, not responsible to the court either for producing the best evidence available, or for justifying any settlement reached, I believe that litigants would receive better service from the legal profession than they now get.⁶⁰

2. PERCEPTIONS OF THE ROLE OF THE AAT

I have characterized the Tribunal as engaged in a task that requires it to adopt inquisitorial procedures. As set out in my 1991 paper, the Federal Court had previously only mutedly supported that analysis.

54. *Id.* at 253.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Richard Eggleston, *What Is Wrong With The Adversary System?*, 49 AUSTL. L.J. 428 (1975).

60. *Id.* at 431.

In *Sullivan v. Department of Transport*,⁶¹ Justice Deane, with whom Justice Fisher agreed, said:

Section 33(1)(b) of the Act requires that the proceedings of the Tribunal shall be conducted with as little formality and technicality, and with as much expedition as the requirements of the Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit In the ordinary case, a tribunal which is under a duty to act judicially and which has the relevant parties before it will be best advised to be guided by the parties in identifying the issues and to permit the parties to present their respective cases in the manner which they think appropriate. Circumstances may, of course, arise in which such a statutory tribunal, in the proper performance of its functions, will be obliged to raise issues which the parties do not wish to dispute and to interfere, either by giving guidance or by adverse ruling, with the manner in which a particular party wishes to present his case. Ordinarily, however, in the absence of a request for assistance or guidance by a party who is appearing in person, a tribunal under a duty to act judicially should be conscious of the fact that undue interference in the manner in which a party conducts his case may, no matter how well intentioned, be counter-productive and, indeed, even overawe and distract a party appearing in person to the extent that it leads to failure to extend to him an adequate opportunity of presenting his case.⁶²

Justice Smithers gave the Tribunal somewhat more scope:

The duty of the Tribunal is to satisfy itself whether a decision in respect of which an application for review is duly instituted is a decision which in its view was objectively the right one to be made. Merely to examine whether the administrator acted reasonably in relation to the facts, either as accepted by him or as found by the Tribunal may not reveal this. In this connection the observations of Sheppard J in *Horne v. Locke* are in point. *It is to permit implementation of the function of the Tribunal, as so understood, that there has been conferred upon the Tribunal extensive powers of*

61. (1978) 20 A.L.R. 323.

62. *Id.*

*investigation. These powers are conferred so that the Tribunal may equip itself to make an appropriate recommendation or affirm the decision.*⁶³

Justice Fisher, as in *Sullivan*, agreed with the views of Justice Deane in *Commonwealth v. Scott*.⁶⁴ Justice Smithers repeated the views he had expressed in *Sullivan*, in *Drake v. Minister for Immigration and Ethnic Affairs*.⁶⁵

By 1981, the prevailing Federal Court view of the role of the Tribunal had moved somewhat away from a strict adherence to the adversary system and along the lines suggested by Justice Smithers. In *Kuswardana v. Minister for Immigration and Ethnic Affairs*,⁶⁶ Justice Fox said:

The other matter tending to obfuscation was that the argument had not been presented to the Tribunal. . . . There is not, however, any requirement that 'the point be taken' before the Tribunal, and we should be cautious in trying to apply to procedures and practices operating in an administrative setting those which apply in a judicial setting. This is not to say that an administrative tribunal may not, subject to the regulations governing it, find it convenient or helpful to follow in some respects procedures which over the span of many years have been found by courts of law to be most conducive to the interests of justice. They plainly must be able to accept concessions of fact, but so to express the matter is to confuse their function, which is one of administrative inquiry, without rules of evidence. . . .

Where there is material suggesting that the applicant has at, or before, the relevant time become a member of the Australian community it is in my opinion incumbent upon the Tribunal to investigate the matter and to form and record its decision.⁶⁷

By 1985, in *Adamou v. Director-General of Social Security*,⁶⁸ Justice

63. *Drake v. Minister for Immigration and Ethnic Affairs* [No.2] (1979) 2 A.L.J. 634 (emphasis added) (citations omitted), available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep194.html> (last visited Sept. 6, 2002).

64. (1979) 41 F.L.R. 405.

65. *Drake*, 2 A.L.J. 634.

66. (1981) 35 A.L.J. 186.

67. *Id.* at 199-200.

68. (1985) 7 A.L.J. 203, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep1704.html (last visited Sept. 2, 2002).

Wilcox went so far as to criticise the AAT for not seeking further evidence, when the evidence put before it by the parties was not sufficient to allow it to decide a relevant issue.⁶⁹ His Honour said:

In fairness to the Tribunal, it should be said that little assistance was given to it in relation to work prospects. Neither party led evidence as to the job opportunities which would be available to a person in the appellant's position. Nevertheless it was the duty of the Tribunal to address this matter, doing the best it could upon the material which it had. If this material was thought to be so inadequate as to provide no proper basis for a conclusion, the Tribunal could have adjourned the hearing for the purpose of having the parties place relevant evidence before it. Subject to providing to the parties an opportunity of dealing with any information which it obtained, the Tribunal could have directly informed itself upon the matter. However the problem was to be managed it was incumbent upon the Tribunal to make a finding on this question. Its failure to do so constitutes an error of law in respect of the finding of lack of incapacity of work.⁷⁰

Yet that was an isolated occasion. In *New Broadcasting Ltd. v. Australia Broadcasting Tribunal*,⁷¹ Justice Davies again expressed reservations about the Tribunal taking an active role in questioning witnesses or adducing evidence.⁷² He said, "[s]uch a role does not stand well with the AAT's function of providing a hearing to parties, including the decision-maker, and of coming to an impartial and informed decision after hearing what the parties before it put forward at the hearing by way of evidence and submissions."⁷³

However, the characterization I suggested to the AAT in 1991, as engaged in a task which requires it to adopt inquisitorial procedures, has now received endorsement by the High Court in *Bushell v. Repatriation Commission*.⁷⁴ *Bushell* concerned the reasonable hypothesis standard of proof in a claim by a veteran for pension under the Veterans'

69. *Id.* at para. 18.

70. *Id.* (citations omitted).

71. (1987) 73 A.L.R. 420, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep2817.html> (last visited Sept. 6, 2002).

72. *Id.* at para. 35.

73. *Id.* at 431 (citations omitted).

74. (1992) 175 C.L.R. 408.

Entitlements Act of 1986.⁷⁵ In that context, Justice Brennan said:

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 of the AAT may request or itself compel the production of further material. 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.⁷⁶

In spite of Justice Brennan's comments in *Bushell*, Justice Einfeld, in *Repatriation Commission v. Levi*,⁷⁷ still stated that the Tribunal was "not permitted . . . to go searching for solutions to issues which the parties themselves do not raise or have an opportunity to meet."⁷⁸

Levi was another matter concerning the payment of pension to a veteran. Kenneth Levi was suffering from a heroin addiction, which he claimed was due to the fact that he had carried out an order to kill an unarmed, wounded and pregnant Vietnamese nurse who was a prisoner of war.⁷⁹ One issue was whether the veteran was disqualified from receiving pension because his condition was due to a "serious default or wilful act" or "a serious breach of discipline."⁸⁰ The Repatriation Commission argued that the taking of heroin and the killing of the nurse brought the veteran within the disqualifying grounds.⁸¹

The Tribunal found that the veteran had an entitlement to pension and the Repatriation Commission appealed. On appeal, the Repatriation Commission claimed that the Tribunal should have considered whether the killing of the nurse was a breach of the Army Act of 1881 (Imp),⁸²

75. *Id.* (Veterans' Entitlement Act available at http://www.austlii.edu.au/au/legis/cth/consol_act/vea/986261/index.html) (last visited Sept. 6, 2002).

76. *Id.* at 424-25 (emphasis added).

77. (1994) 33 A.L.J. 79, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep6658.html (last visited Sept. 3, 2002).

78. *Id.* at para. 46 (emphasis added).

79. *Id.* at para. 20.

80. *Id.* at para. 57.

81. *Id.* at para. 51.

82. *Id.* at para. 42.

which applied to the Australian Army, or a breach of the Geneva Conventions Act of 1957 which set out the rules of war for the treatment of combatants and civilians.⁸³ Justice Einfeld said:

No evidence or submission of any kind relevant to this issue was presented to the Tribunal on either of these pieces of legislation, and no issue raised before it of the interrelationship between the Army and Geneva Conventions Acts on the one hand and the provisions of section 9(3) of the other. Nevertheless the Commission's submission in this appeal was that the veteran should have been found by the Tribunal, and should be held by this Court, to have by reason of that interaction disqualified himself from entitlement to a pension by killing the nurse.

This submission raises two issues for decision—first, whether it is and should be held to have been a relevant error of law by the Tribunal not to have dealt with serious matters of this kind not put to it; and second, whether the substantive argument is correct in any event.⁸⁴

His Honour may well have thought that the submission sought to place too onerous a duty on the Tribunal, but I would suggest that he may have overreacted in his response. He said:

It goes without saying that the Tribunal must apply itself to the particular facts of each case and the law which applies to them. But it is not required—indeed except in a blatant case it is not permitted—to go searching for solutions to issues which the parties themselves do not raise or have an opportunity to meet. The Tribunal simply could not operate in such circumstances. Of course if an essential or obvious matter is not addressed, a criticism might be appropriate. But if complex and quite remote legal issues not raised at a hearing could form the basis of the judgment, as the Commission has submitted on this appeal should have been the case, the party affected would simply have been deprived of the opportunity of dealing with them, and the whole proceeding would be invalid and abortive.⁸⁵

83. *Id.*

84. *Id.* at para. 44-45.

85. *Id.* at para. 46.

With respect, it seems that His Honour confused two issues. The AAT is permitted, not *obliged*, to go searching for solutions which the parties themselves do not raise, but it is not *permitted* to adopt solutions which the parties do not have an opportunity to meet. There is no problem with the Tribunal adopting an inquisitorial stance as long as the parties are given natural justice or procedural fairness.

Another interesting case is *Perpetual Trustee Co. Canberra Ltd. v. Commissioner ACT Revenue*.⁸⁶ In that matter, both Justice Davies and Justice Wilcox commented that the agreed facts before the Tribunal were inadequate to allow an administrative decision-maker to deal with all the matters to which it should have had regard.⁸⁷ Justice Davies joined with Justice Wilcox, in stating that the Tribunal does not adequately perform its task of review of the administrative decision if it leaves the task of identifying the salient issues solely to the parties.⁸⁸ Justice Wilcox in a strong, concise judgment said:

However, I agree with Davies J that the procedure adopted in this case by the Administrative Appeals Tribunal was unsatisfactory. The Tribunal agreed to determine the critical question in the case on the basis of a statement of agreed facts that was patently inadequate. If we were concerned with a decision of a court, made on the basis of issues framed by the parties' pleadings, there would be much force in an argument that, the case having been fought on those issues, the unsuccessful party should not be allowed a second chance. However, we are not concerned with such a decision, but with the decision of a body whose function was "to review the administrative decision that is under attack before it". Those words were used by Bowen CJ and Deane J in *Drake v Minister for Immigration and Ethnic Affairs* in relation to the Commonwealth Administrative Appeal Tribunal, but they apply equally to its Australian Capital Territory counterpart. The statutory function of the Tribunal requires that it form its own view about the matter in issue. In approaching that task, it is legitimate for the Tribunal to be guided by the parties as to the salient issues and to accept relevant admissions of fact, *but the Tribunal should never permit parties to place it*

86. (Austl. 1994) 28 A.T.R. 307, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep6866.html (last visited Sept. 5, 2002).

87. *Id.* at para. 4 (Davies J.) & para. 2 (Wilcox J.).

88. *Id.* at para. 4.

*in the position of deciding a case on an artificial or inadequate factual basis.*⁸⁹

3. THE ADOPTION OF AN INQUISITORIAL ROLE BY THE AAT.

Since the publication of my article on *Overcoming Adversarial Bias in Tribunal Procedures*,⁹⁰ I have found it easier to introduce inquisitorial procedures in matters before me. Until I had “come out,” lawyers appearing before me may have thought that if they characterized some suggestion I had made as to the running of a matter as “descending into the arena,” I would immediately scuttle back to my seat on the bench and abandon my suggestion. However, once I have written that I believe in using inquisitorial procedures to try to get to the truth of a matter, I will not be frightened by the comment that I am doing so. Certainly, the procedure I adopt must be fair and give both parties natural justice. A course which will allow the Tribunal to be better informed as to relevant facts, while allowing the parties to cross-examine any additional witness or make submissions about additional material does not conflict with the principles of fairness or natural justice. I have encountered very little opposition from parties to my frequent adoption of an inquisitorial role. I doubt if I can claim that the AAT as a whole adopts an inquisitorial approach, but there are many examples of the Tribunal doing so.

(i) *Formulation of the Issues*

Even though in an adversary system the formulation of the issues is generally left to the parties, there are some issues such as jurisdiction which not even a court can overlook.⁹¹ As was pointed out in *Kuswardana v. Minister for Immigration and Ethnic Affairs*,⁹² an administrative tribunal is under a duty to investigate a matter, and also to affirm a decision if it is satisfied of all the critical ingredients. What do we do when we are not so satisfied, but neither of the parties has raised any challenge to our jurisdiction or to the basic findings?

89. *Id.* at para. 2 (emphasis added) (citations omitted).

90. See Dwyer, *supra* note 6.

91. See *Minister for Health v. Charvid*, (1986) 10 A.L.J. 124, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep2369.html (last visited Sept. 1, 2002).

92. (1981) 54 F.L.R. 335, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep415.html (last visited Sept. 1, 2002).

I confronted that issue in *Nicholls v. Secretary to the Department of Primary Industry*.⁹³ We sat as a three member tribunal for ten days and heard evidence. The issue regarded the issuance of a fishing license to a particular vessel.⁹⁴ The legislation applied only to “an Australian vessel.” As I was writing the draft reasons for judgment, working through the issues point by point, it became apparent that, though no party took issue as to the application of the legislation, the vessel in question was not “an Australian vessel” as defined in the legislation. I requested the Registrar to write the parties outlining the difficulty. The matter then came on for further hearing on the jurisdiction issue. The parties could not satisfy the Tribunal that it had jurisdiction, so the Tribunal held that it could not review the refusal of the license.

Another matter the Tribunal raised, which the parties had not addressed, stems from *Rowlands v. Commissioner for Superannuation*.⁹⁵ One issue was whether, if the applicant disclosed symptoms of her tenosynovitis condition at a pre-employment medical examination, the commissioner would have issued her a benefit classification certificate (“BCC”) specifying that condition.⁹⁶ The effect of a BCC is to limit the superannuation payment made to the employee if he or she retires early because of the specified condition.⁹⁷ Because the examination was in 1979, the Tribunal said it needed to have evidence as to the administrative practice in relation to the issue of benefit classification certificates for tenosynovitis in 1979.⁹⁸ The parties had not addressed that point. When the Tribunal “pressed the point,” a witness, the director of the superannuation classification section of the Australian Government Retirement Benefits office, agreed to do a computer search to identify how many, if any, certificates specifying that condition had been issued prior to 1980.⁹⁹ On the evidence resulting from the search, the Tribunal concluded that it would be quite unsafe to find that a BCC would have issued within the appropriate time frame.¹⁰⁰ The Tribunal commented:

93. (1988) 22 A.L.D. 596, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep3289.html> (last visited Sept. 1, 2002).

94. *Id.* at para. 1.

95. (1988) 16 A.L.D. 589, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep3495.html> (last visited Sept. 1, 2002).

96. *Id.* at para. 14.

97. *Id.* at para. 25.

98. *Id.* at para. 26.

99. *Id.* at para. 25.

100. *Id.* at para. 27.

[i]n private duty bound, the Tribunal does also wish to draw attention to its own role in the matter. The Administrative Appeals Tribunal does not have the resources to be a fully inquisitorial body, but it has a duty to seek out information which 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. Any suggestion that the Tribunal simply remains content with the information proffered to it by the parties is quite wrong.¹⁰¹

Much more recently, the problem arose again in *Secretary, Department of Social Security v. Southcott*.¹⁰² The Secretary had given a garnishee notice to Mr. Southcott's employer in respect of a debt which arose because of an overpayment of unemployment benefit and job search allowance.¹⁰³ The issue before me was whether the debt should be waived because Mr Southcott had not knowingly made a false statement. It was apparent from the documents that Mr. Southcott was an undischarged bankrupt, but no the Tribunal gave no consideration to whether the bankruptcy prevented the Secretary recovering the debt by garnishee notice. I raised the issue at the hearing and asked the Secretary to prepare a written submission on the point. I also asked the Secretary to consider whether a notice given to Mr. Southcott had adequately complied with the Data Matching Act Program (Assistance and Tax) Act 1990. I decided that the Secretary could not recover the debt by garnishee notice, both because of the bankruptcy and because of the lack of compliance with the Data Matching Act. That decision is now under appeal.

A similar situation arose in *Howarth v. Commissioner of Superannuation*.¹⁰⁴ In that matter, the issue was whether the Commissioner should have given Mrs. Howarth an extension of time under section 154(2) of the Superannuation Act 1976 to apply for reconsideration of a decision denying a benefit classification certificate.¹⁰⁵ The certificate issued allegedly limited the benefits that

101. *Id.* at para. 28 (emphasis added).

102. (1997) No. V96/251 A.A.T. No. 11741, available at <http://www.austlii.edu.au/cases/cth/aat/unrep6634.html> (last visited Sept. 1, 2002).

103. *Id.* at para. 1.

104. (1997) No. V96/486 A.A.T. No. 11743, available at <http://www.austlii.edu.au/cases/cth/aat/unrep6635.html> (last visited Sept. 2, 2002).

105. *Id.* at para. 1.

she was entitled to due to an early ill-health retirement.¹⁰⁶ Mrs. Howarth applied for reconsideration approximately 14 years after the initial issuance of the certificate.¹⁰⁷ The Tribunal questioned when the decision to issue the certificate first “came to the notice of” Mrs. Howarth.¹⁰⁸ However, as the Tribunal considered the matter during the hearing, I noticed section 16(6) of the Superannuation Act 1976 stated that an eligible employee could apply for reconsideration of a decision to issue a benefit classification certificate.¹⁰⁹ Section 16(6) specified no time limit.¹¹⁰ The parties were made aware of section 16(6). The Tribunal asked the respondent’s representative why Mrs. Howarth’s application for reconsideration was not accepted and dealt with under section 16(6). The Commissioner for Superannuation did not provide a satisfactory response. The Tribunal decided that section 16(6) applied to the matter and set aside the decision refusing the request for reconsideration.¹¹¹ Upon remitter, the Commissioner was directed to reconsider the matter under section 16(6).¹¹²

Sometimes the matter which concerns the Tribunal is not a matter which the parties have overlooked, but something to which they have agreed. In *Calderaro v. Secretary, Department of Social Security*,¹¹³ the respondent conceded the matter, which seemed inconsistent with the evidence.¹¹⁴ The Tribunal considered whether it should regard itself as bound to act on the concession made by the respondent in this matter. In *R v Moodie . . .* the Full Court of the High Court in a joint judgment made it very clear that it is the duty of a Tribunal (in that case the Student Assistance Review Tribunal) to satisfy itself on the matters alleged before it, without reference to any concessions purported to be made by the decision-maker whose decision is under review. Their Honours said:

Once the review had been instituted then it is only the Tribunal itself that had any function to perform or any powers to exercise under the Act. What the Tribunal must do is to give its own decision accompanied by its

106. *Id.* at para. 5.

107. *Id.* at para. 10.

108. *Id.*

109. *Id.* at para. 6.

110. *Id.* at para. 9.

111. *Id.* at paras. 70-71.

112. *Id.* at para. 71.

113. (1991) 23 A.L.J. 358, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep4313.html> (last visited Sept. 5, 2002).

114. *Id.* at para. 28.

own reasons for its findings. It would not, on this view, be open to the Tribunal to make an order by consent of the authorised person and the applicant. Its functions can only be discharged by giving its own decision.

The point arose in relation to this Tribunal in *Kuswardana v. Minister for Immigration and Ethnic Affairs*. Bowen C.J. said:

“The case before this court is not merely one of parties agreeing upon what facts should be decided by the trier of fact, nor a case of facts, peculiarly within the knowledge of the party, being conceded. Rather, there was a clear statutory precondition upon which the Tribunal had to be satisfied and enough material and evidence before it to raise the issue independently of the parties’ submissions. In these circumstances it was an error of law not to consider and decide the issue of immigrant status.”

The Federal Court recently again considered the point in *Minister for Health v Charvid Pty Ltd*. Woodward J., although he acknowledged that counsel for the minister had dealt with a relevant consideration “in . . . economical terms,” in failing to consider that relevant matter the Tribunal had fallen into error.

These decisions establish that there is an obligation on the Tribunal to satisfy itself as to all relevant matters, particularly those that go to the jurisdiction of the Tribunal or qualifications of an applicant, notwithstanding the fact that counsel for both parties join in a submission or a concession. If it had been necessary for us to either reject the concession or accept it, we would have given notice to both parties of the fact that we were inclined not to accept it and would asked for written submissions on the point. Such a course was adopted by the Tribunal in *Re Nicholls and Secretary to the Department of Primary Industry*. It appears to us to be the preferable course to adopt although the High Court held in *R v Moodie* that it was not a necessary step to take.

We decided not to take that step because, even if we were to accept the concession made by the respondent, there are a number of reasons why we still would not consider it reasonable to deem the claim for sickness benefit to be a claim for invalid pension so as to justify backdating the payment of invalid pension for 13 years.¹¹⁵

Although successfully appealed,¹¹⁶ Justice Gray expressly approved the

115. *Id.* at paras. 30-34 (citations omitted).

116. *Calderaro v. Sec’y Dep’t of Soc. Sec.* (1992) 27 A.L.D. 393, at para. 46, *available at*

Tribunal's comments to the effect that it was not bound by concessions made by the parties.¹¹⁷

Similarly, in *Bond v. Trustee of the Property of Alan Bond, A Bankrupt*,¹¹⁸ the Tribunal referred to the fact that both counsel had joined in asking the Tribunal to treat certain advances made to Mr. Bond "as if they were gifts."¹¹⁹ The Tribunal said:

We are not prepared to proceed on that basis. In *Sullivan v. Department of Transport*, Deane J said:

"In the ordinary case, a tribunal which is under a duty to act judicially and which has the relevant parties before it, will be best advised to be guided by the parties in identifying the issues and to permit the parties to present their respective cases in the manner which they think appropriate."

In *Australian Postal Commission v. Burgazoff*, Davies J affirmed that this tribunal should not follow an inquisitorial process and added that the tribunal "never itself makes investigations outside the conduct of the hearing." Nevertheless we are bound by section 43 of the AAT Act to bring in findings on material questions of fact and must make a reference to the evidence or other material on which those findings are based. We can not proceed on supposed facts. To do so would amount to giving an advisory opinion, a procedure which is beyond the power of this tribunal. We are not bound to accept concessions made by the parties: If it is necessary in reviewing the decision before us, we are entitled to consider issues not raised by the parties.¹²⁰

The Tribunal concluded that it was in a position to find as a fact that the payments in question were gifts.¹²¹ It therefore made its decision on that basis.¹²²

<http://www.austlii.edu.au/au/cases/cth/aat/unrep4665.html> (last visited Sept. 5, 2002).

117. *Id.* at para. 5.

118. (1993) 30 A.L.D. 232, 235, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep5174.html> (last visited Sept. 5, 2002).

119. *Id.* at para. 11.

120. *Id.* (citations omitted).

121. *Id.* at para. 13.

122. *Id.* at para. 35.

(ii) *The Decision as to What Witnesses will be Called*

In a traditional adversarial proceeding, only the parties call witnesses. Although Justice Davies stated in *Australian Postal Commission v. Burgazoff*¹²³ that the AAT “rarely calls evidence and never itself makes investigations outside the conduct of a hearing,” he indicated that the Tribunal felt 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.¹²⁴ That is generally accurate, but there have been some matters where the Tribunal has gone further and called witnesses or obtained information to put before the parties.

In Tribunals where I presided, I have twice asked an ear, nose and throat specialist to examine an unrepresented applicant suffering hearing loss, prepare a report, and give evidence at the Tribunal.¹²⁵ The Tribunal paid the witness fees on both occasions, although the Tribunal could have ordered that they be paid by the Commonwealth under section 67(3) of the AAT Act. In *Oakley v. Commonwealth*, I said:

This matter depended on careful analysis of medical evidence. Mr. P. Oakley in opening said that it was not intended to call any medical evidence. He gave the impression that this was because of the expense of calling medical witnesses. The Tribunal indicated that it would consider calling a medical witness itself if it felt that was necessary. After having heard from the two medical witnesses called on behalf of the respondent, the Tribunal decided to use its powers under sections 33(1)(e), 40(1A) and 67 of the AAT Act to call a further medical witness. The Tribunal took this course because the applicant’s argument depended on an interpretation of the medical evidence contrary to that of the respondent’s medical witnesses. Thus unless other medical evidence was called there would be no medical support for the view put forward on behalf of the applicant.¹²⁶

The evidence called in the above case did not help the applicant to establish a connection between his sudden deafness in the left ear and

123. (1989) 10 A.A.R. 296.

124. *Id.* at 298.

125. *Trott v. Commonwealth* (1985) 9 A.L.N. 131; *Oakley v. Commonwealth* (1985) A.A.T 6670.

126. (1985) A.A.T. 6670.

his firing practice in the CMF. Mr. Oakley and the Tribunal were nonetheless satisfied with the thoroughness of the investigation of the claim.¹²⁷ In the final analysis, the Tribunal had to decide the matter on the medical evidence which suggested that Mr. Oakley deafness was not that which resulted from noise exposure.¹²⁸

In *Willey v. Repatriation Commission*,¹²⁹ the Tribunal suggested to the representative of the Repatriation Commission that because of the unsatisfactory state of the evidence, a report from a neurosurgeon chosen by the Tribunal was needed.¹³⁰ Again, the report was not helpful to the applicant, but at least she and the Tribunal knew that her claim had been thoroughly investigated. On numerous other occasions, the Tribunal has arranged for a medical witness who has already seen an unrepresented applicant to give evidence over the telephone when the applicant could not afford to call the witness.

Attorneys in *Donath v. Secretary to the Department of Social Security*¹³¹ called a different kind of witness.¹³² The issue was whether Nazi restitution payments paid under Austrian legislation were “income” within the meaning of that term in the Social Security Act 1947.¹³³ The witness called by the Tribunal was the executive vice-president of the Federation of Australian Jewish Welfare Societies.¹³⁴ A Ministerial statement explaining why such payments when made by the German government were not to be treated as “income.”¹³⁵ The Tribunal asked the witness whether he could explain the distinction in the legislation between restitution payments made by the German government for Nazi persecution and payments made by the Austrian government for Nazi persecution.¹³⁶ The evidence did not allow the Tribunal to set aside the decision affecting Mr. Donath, but it did expose an anomaly in the legislation.¹³⁷ Within days of the witness giving evidence in the matter

127. *Id.*

128. *Id.*

129. (1989) 17 A.L.D. 314, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep3660.html> (last visited Sept. 5, 2002).

130. *Id.* at paras. 37, 40.

131. (1989) 19 A.L.D 124, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep3812.html> (last visited Sept. 5, 2002)

132. *Id.* at para. 20.

133. *Id.* at para. 6.

134. *Id.* at para. 20.

135. *Id.*

136. *Id.* at para. 21.

137. *Id.* at para. 22.

the Prime Minister announced that the anomaly would be corrected.¹³⁸

Another matter where the Tribunal called an unusual witness was *Morris v. Repatriation Commission*.¹³⁹ In this case, a widow claimed that war caused her husband's cancer.¹⁴⁰ The widow advanced the hypothesis that the impossibility of maintaining proper penile hygiene while serving in Korea was a significant risk factor.¹⁴¹ The only evidence available as to conditions of service in Korea was a brief letter from another veteran living in New South Wales.¹⁴² The Tribunal was aware that a Member of the Tribunal in Melbourne had served in Korea.¹⁴³ It turned out that he had served in the same battalion as the veteran. At the suggestion of the Tribunal, but only because both parties consented, he gave evidence as to the conditions of service and the complete lack of any facilities for personal washing while Mr. Morris was in Korea.¹⁴⁴

(iii) *Intervention by the Tribunal*

(a) Investigations Conducted by the Tribunal

There are a few matters where the Tribunal has itself made investigations outside the hearing and has then referred the result of those investigations to the parties and invited them to make submissions concerning the investigation. *Commonwealth of Australia v. Chomsky*¹⁴⁵ was a matter where the applicant was receiving compensation for a condition described as Regional Pain Syndrome ("RSI").¹⁴⁶ Conflicting medical opinions were before the Tribunal as to whether or not the condition existed.¹⁴⁷ The Tribunal, through reading the newspapers, had become aware of a doctor in Western Australia who had stated in a letter to the papers that there was "recently published

138. *Id.* at para. 27.

139. (1990) 21 A.L.D. 293.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. (1990) No. A87/180 A.A.T. No. 5959, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep3993.html> (last visited Sept. 5, 2002).

146. *Id.* at para. 1.

147. *Id.* at paras. 13-16.

research” which pointed strongly towards a physical cause for the symptoms of many RSI patients.¹⁴⁸ In those circumstances Deputy President Todd said at paragraphs 43 and 44:

As I did not believe that such research had been put before me by either party, I caused a letter to be sent to Dr. Quintner in which he was asked to advise what published research he had in mind. The letter stated *inter alia*:

“It would not be proper for me to enter into any kind of discussion with a person not called as a witness in the proceedings before me, and I am therefore specifically not asking you for your personal opinion in any respect. I am however not confident that the recently published research to which you refer has been placed before me by any medical witnesses on either side in the proceedings. I would therefore be grateful if you could simply let me have a reference or references to the research in question. The law would then require me to submit that research to both parties in each case before me for their comment if desired.”

My action in contacting Dr. Quintner was no doubt unusual, but so also was the problem before me. 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 section 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. The material produced to me is contained in Ex. X. Unfortunately, while much of the material contained in Ex. X is of considerable interest, it has not resolved the vexed question of the elucidation of the cause of regional pain syndrome.¹⁴⁹

The Tribunal affirmed the decision that compensation payable to Mrs. Chomsky should cease, but at least it did so being satisfied that it had

148. *Id.* at para. 43.

149. *Id.* at paras. 43-44.

not overlooked material which might have been of assistance to Mrs. Chomsky.¹⁵⁰ The Tribunal also referred to that material in the matter of *Beer v. Australian Telecommunications Commission*.¹⁵¹ However, in that matter, the failure to achieve a clear diagnosis was not fatal to the applicant's claim that she remained entitled to compensation.¹⁵² The Tribunal accepted her evidence and the evidence of the medical witnesses called on her behalf and found that she suffered real pain.¹⁵³

In *Lukins v. Repatriation Commission*,¹⁵⁴ the Tribunal considered the nexus between alcohol consumption and colon cancer.¹⁵⁵ The Repatriation Committee Tribunal viewed an opinion on this issue in another matter but, this opinion was not offered into evidence in *Lukins*.¹⁵⁶ The Tribunal stated that it was desirable that the Tribunal endeavour to be fully informed as to matters relevant to the issue it had to determine and produced a copy of the opinion which it put before the parties in *Lukins*.¹⁵⁷

In *O'Maley v. Comcare*,¹⁵⁸ a psychiatrist had given evidence in which he said, in very strong terms, that the applicant was not depressed, but that if he had been, he should have been on a much higher dose of antidepressant medication than he was.¹⁵⁹ He described the current dose of 450 milligrams a day as "minute" and "only homoeopathic" and said that Mr. O'Maley should have been taking ten or twelve 150 milligram tablets a day; a daily dose of 1500 milligrams or 1800 milligrams.¹⁶⁰ He added, "Because the makers say that they are of no use unless one takes three in a small person and four in a medium size person, that is the sort of background that the makers in their - the manufacturers have in their guide, under that they have no use."¹⁶¹

150. *Id.* at paras. 40-42.

151. (1990) No. D88/3 A.A.T. No. 5974, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep4177.html> (last visited Sept. 5, 2002).

152. *Id.* at para. 59.

153. *Id.*

154. (1991) No. P88/573 A.A.T. No. 6757, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep4261.html> (last visited Sept. 1, 2002).

155. *Id.* at para. 2.

156. *Id.* at para. 3.

157. *Id.* at para. 4.

158. (1997) No. V96/7 A.A.T. No. 11593, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep6562.html> (last visited Sep. 5, 2002).

159. *Id.* at para. 79.

160. *Id.* at paras. 82, 83.

161. *Id.* at para. 83.

Of the other three psychiatrists who gave evidence, two considered 450 milligrams per day an appropriate dose and one said he might consider increasing it but only up to 900 milligrams a day.¹⁶² As I was drafting the reasons for decision, it appeared to me that the discrepancy was so great as to cast doubt on the credibility of the psychiatrist who recommended the greatly increased dose. I therefore checked the recommended prescribed dose in the American Mims Manual and found that it did not say what he had represented it as saying.¹⁶³ It recommended a starting dose of 300 milligrams a day which could be increased “to 450 milligrams a day and up to 600 milligrams a day if necessary.”¹⁶⁴ I arranged for a copy of that extract to be sent to the parties and invited them to make submissions on the issue.¹⁶⁵ The party calling that psychiatrist did not argue that his evidence on that issue should be accepted.¹⁶⁶ That decision is further considered in the section of this paper which deals with the role of expert witnesses and recommendations for changes in procedures used by tribunals and courts.

Usually the Tribunal will not procure material put before the parties, but rather suggest to the parties evidence which would assist it in reaching the correct and preferable decision.¹⁶⁷ In *Stephan v. Secretary to the Department of Social Security*,¹⁶⁸ I pointed out that I did not have sufficient medical evidence to decide the matter.¹⁶⁹ I asked the applicant to provide further medical reports. He did so and based upon that material, the respondent, having declined the option of reconvening the Tribunal, a decision was made that Mr. Stephan was entitled to invalid pension.¹⁷⁰ In *Mourtizikoglou v. Secretary to the Department of Social Security*,¹⁷¹ I asked the Secretary to obtain a social work report as to the circumstances in which the applicant and her family were living, so that I could take that into account in deciding whether there were special circumstances such that some part of a lump sum payment of

162. *Id.* at para. 84.

163. *Id.* at para. 85.

164. *Id.*

165. *Id.*

166. *Id.* at para. 87.

167. See *Stephen v. Sec’y of the Dep’t of Soc. Sec.* (1985) 9 A.L.N. at para. 37, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep2129.html> (last visited Sept. 5, 2002).

168. *Id.*

169. *Id.* at para. 37.

170. *Id.* at paras. 34-35.

171. (1991) 22 A.L.D. 667, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep4199.html> (last visited Sept. 5, 2002).

compensation should be treated as if it had not been paid.¹⁷² That would then allow the applicant to receive invalid pension, notwithstanding her receipt of that compensation.¹⁷³ After the report was obtained, the Secretary conceded that special circumstances existed so as to justify him disregarding the whole payment of compensation which had been made.¹⁷⁴

An interventionist approach proved unsuccessful in *LNC (Wholesale) Pty. Ltd. v. Collector of Customs*.¹⁷⁵ The matter was remitted by the Federal Court on the ground that the statements of agreed facts and the written and oral evidence presented to the Administrative Appeals Tribunal were inadequate to enable the Tribunal to form a concluded view on the issues.¹⁷⁶ Before the remittal hearing, Deputy President Bannon directed the respondent to provide further and better particulars as to the issue of homologation.¹⁷⁷ However, in spite of that direction Counsel for both parties informed the Tribunal that they did not propose to adduce further evidence.¹⁷⁸ Deputy President Bannon pointing out that he could take the matter no further said:

While [section] 33(1)(c) of the A.A.T Act provides that the Tribunal is not bound by the rules of evidence, but may inform itself on any matter in such manner as it thinks appropriate, the Tribunal is also obliged to act judicially. 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. It appears to me that I have exhausted the possibilities of obtaining further evidence in these proceedings.¹⁷⁹

The Deputy President then proceeded to decide the matter on the basis explained by the Federal Court in *McDonald v. Director-General of Social Security*,¹⁸⁰ but added:

172. *Id.* at paras. 15-17.

173. *Id.* at paras. 6, 8-9.

174. *Id.* at paras. 11-13, 18-20.

175. (1988) Nos. N86/416, 422, 721, 912 A.A.T. No. 4814, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep3560.html> (last visited Sept. 5, 2002).

176. *Id.* at para. 2.

177. *Id.*

178. *Id.*

179. *Id.* at para. 5.

180. (1984) 6 A.L.J. 6, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep1530.html> (last visited Sept. 5, 2002).

It is perhaps proper that I add that consideration may have to be given to expanding the Tribunal's powers to enable it to conduct inquisitorial proceedings and take evidence from foreign exporters, if necessary abroad, in order to arrive at the truth in customs matters. It is not satisfactory that important fiscal matters be determined on the basis of insufficient evidence. I share, with respect, the concern of the Court as to the evidence available to me. It is a matter for Parliament to determine if this Tribunal should be granted the financial resources and the legal powers to conduct a more adequate review process.¹⁸¹

Of course there has been no subsequent amendment to widen our powers, and no budget increase to allow us to conduct inquisitorial proceedings if necessary abroad. In my opinion we already have the power but we lack the means, unless the inquisitorial steps can be undertaken without significant expense.

I struck difficulties with our limited resources in *Kiazim v. Commonwealth*.¹⁸² I was reviewing a compensation "cease effects" determination.¹⁸³ The evidence was very unsatisfactory as to what, if anything, was wrong with Mr. Kiazim, as to whether he had reported the condition at work, and as to the progress of his rehabilitation at Coonac.¹⁸⁴ I arranged for the Telecom and Coonac files to be put before the Tribunal.¹⁸⁵ My associate then looked through the files and drew to my attention any relevant medical records.¹⁸⁶ The files contained material suggesting that the true reason for Mr. Kiazim's absences from work may have been because of a conflict with his supervisors over his unsatisfactory work record.¹⁸⁷ In addition, one file contained two records of information which suggested that Mr. Kiazim was not incapacitated for work at all but was working in a fish and chip shop.¹⁸⁸ Although the files had been made available to the parties and they had been asked to

181. LNC (Wholesale) Pty. Ltd. v. Collector of Customs, (1988) Nos. N86/416, 422, 721, 912 A.A.T. No. 4814, at para. 12, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep3560.html> (last visited Sept. 5, 2002).

182. (1986) 9 A.L.N., available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/aat/unrep2356.html> (last visited Sept. 5, 2002).

183. *Id.*

184. *Id.*

185. *Id.* at para. 22.

186. *Id.*

187. *Id.* at para. 26.

188. *Id.*

make submissions concerning the material in them, they did not address the issue of incapacity in their submissions.¹⁸⁹ What was I to do? I delivered an interim decision in which I said:

Some of these matters give rise to possible inferences against Mr. Kiazim. On the other hand, the matters set out in the files have not been tested in a hearing. They may be statements made in error or there may be further information which casts a different light on these matters. I do not know whether they have been noticed by those who have inspected the files on behalf of the parties. I have received no submissions in respect of these matters.

....

The evidence before the Tribunal is in a state where it is unsatisfactory either to rely on it or to disregard it altogether. The only approach open to the Tribunal seems to be to bring the matters to the attention of the parties. In this way they can either produce further evidence or make submissions on the material which is presently before the Tribunal. I propose to make the files available to the parties again and to give both parties thirty days within which to apply to have the matter brought on for further hearing or to make written submissions on the matters referred to in this interim decision.¹⁹⁰

The matter was revisited in a later hearing. There was evidence as to Mr. Kiazim's poor work performance, but he was not cross-examined as to whether he had been working in the fish and chip shop on other than an occasional basis. The person who was shown in the files as having reported that he worked in the fish and chip shop was not called. I found that if Mr. Kiazim was incapacitated for work, it was not due to a compensable condition, but it seemed unsatisfactory that the parties did not treat as significant the issue whether or not he was incapacitated for work. I certainly could not call and cross-examine witnesses on that issue myself.

There are sometimes situations where the Tribunal refers to inadequacies in the evidence, but decides not to seek to remedy those

189. *Id.* at para. 27.

190. *Id.* at paras. 27-30.

inadequacies. In AAT Case 5756,¹⁹¹ the Tribunal had to determine the significance of amendments to a trust deed. There were problems with the evidence. Deputy President Bannon said:

The family trust became the subject of a number of manoeuvres. The grey eminence behind those manoeuvres was the local accountant, a gentleman well known to those dealing with taxation matters. He was present at the hearing of this matter on the first two days. Neither the taxpayer nor the respondent called him as a witness. However, criticism was made of his non-appearance in the witness box. When the tribunal suggested at the close of their evidence that it might exercise its inquisitorial powers and call him as a witness, neither party desired this to be done. The grey eminence shortly thereafter left the hearing room and did not appear against that day nor the next. No inference will be drawn because of his arrival or departure. Having regard to the statutory onus of proof in taxation matters, and the competent and skilled representation of both parties in these proceedings, I consider it inexpedient to summons the accountant to give evidence when not called by either party.¹⁹²

In *Riley v. Comcare Australia*,¹⁹³ the Tribunal considered that the evidence was inadequate as to what was “suitable employment” for the applicant.¹⁹⁴ The Tribunal considered whether it should rely on its own experience as to what types of employment would be suitable for her.¹⁹⁵ It decided against that course, partly because of the difficulty of formulating that experience in a way in which it could be put before the parties as required by § 33 of the Administrative Appeals Tribunal Act of 1975.¹⁹⁶ Secondly, it appreciated that it would be better served by an assessment prepared by those with appropriate skills. The Tribunal then looked at § 33 of the Administrative Appeals Tribunal Act to consider whether it gave the Tribunal power to order Mrs. Riley to undergo the appropriate assessment.¹⁹⁷ It concluded:

191. (1990) 21 A.T.R. 3281.

192. *Id.* at 3882.

193. (1994) A.A.T. 8078B, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/aat/unrep6627.html> (last visited Sept. 5, 2002).

194. *Id.* at para. 14.

195. *Id.* at para. 20.

196. *Id.*

197. *Id.*

In this regard, we have considered section 33 of the AAT Act and, in particular, paragraph 33(1)(c) which provides:

“(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 in such manner as it thinks appropriate.”

Paragraph 33(1)(c) sets out a very broad power but we do not regard it as justifying our making an order requiring Mrs. Riley to be assessed. While the provision that the Tribunal “may inform itself on any matter in such manner as it thinks appropriate” could perhaps be interpreted as justifying such an order, we consider that these words must be construed in light of the preceding provision that the Tribunal “is not bound by the rules of evidence”. When that is done, *we consider that paragraph 33(1)(c) means that the Tribunal may have regard to such evidence as it thinks fit without being bound by the rules of evidence in doing so but no more. It does not justify its use of investigative powers. To explain what we mean, we should explain what we mean by rules of evidence and investigative powers.*¹⁹⁸

The Tribunal then considered whether under § 43 of the Administrative Appeals Tribunal Act the matter should be remitted to Comcare with the direction that it make arrangements that the necessary assessment be performed to determine what work would be “suitable employment” for Mrs. Riley.¹⁹⁹ The Tribunal decided not to do so, although it acknowledged that the conclusion did not accord “with either commonsense or with the function given to Comcare.”²⁰⁰

I regard the Tribunal’s interpretation of § 33(1)(c) of the Administrative Appeals Tribunal Act as unduly restrictive. That is not to say that I would necessarily have directed Mrs. Riley to undergo the appropriate assessment. I might have tried to persuade the parties to arrange for it to be performed.

Perhaps the most unusual investigation suggested by the Tribunal in my experience took place in *Hanns v. Australian Postal Corporation*.²⁰¹ The question was whether Mr. Hanns continued to be incapacitated for

198. *Id.* at paras. 22-23 (emphasis added).

199. *Id.* at para. 34.

200. *Id.* at para. 33.

201. (1992) A.A.T. 7869.

work as a result of a compensable shoulder injury and resulting depression.²⁰² The respondent contended that Mr. Hanns no longer had any problem with his shoulder and was malingering.²⁰³ Four psychiatrists were to be called on that issue. The evidence included a report from an orthopaedic surgeon who had examined Mr. Hanns and reported that he had found signs of impingement and tenderness of the shoulder.²⁰⁴ The orthopaedic surgeon had suggested in his report that he perform an arthroscopy to determine the state of the shoulder. He said that during that procedure he would correct any internal derangements or pathology which was found. When the hearing commenced the arthroscopy had not been performed.²⁰⁵ We said in our reasons for decision:

As at the date of the commencement of the hearing on 12 December 1990 that arthroscopy had not taken place. Mr. Hanns in evidence said this was because he could not arrange to have the surgical procedure unless it was paid for by Australia Post. He had apparently not investigated the possibility of having the surgery performed under Medicare.

At the conclusion of the three day hearing in December 1990 the Tribunal had heard evidence from three psychiatrists and a number of Australia Post employees as well as Mr. Hanns, Dr. Roantree and Dr. Bokor. There seemed to be considerable conflict amongst the psychiatrists. The Tribunal therefore raised with Counsel the possibility of having the arthroscopy and any appropriate surgery performed, so that the Tribunal would be in a position where it knew whether or not there was an organic explanation of the shoulder pain of which Mr. Hanns complained. This suggestion was accepted by both parties and the arthroscopy took place on 6 February 1991.²⁰⁶

The hearing resumed six months after the arthroscopy. At that time the Tribunal had before it a report from the surgeon who had performed the arthroscopy, stating:

I reviewed Michael today and it is about 4.5 months

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

since his arthroscopic shoulder debridement and coracoacromial ligament resection. Overall he is delighted with his outcome and states that his pain has decreased about 90% compared to his pre-operative status. He still gets occasional twinges of discomfort with particular movements but he has been gradually doing more and more activities without any great discomfort. He has, however, not tested his shoulder to extremes with regard to heavy work.

Clinical examination today shows only minimal local tendinitis and equivocal impingement signs. His strength is reasonable. There is a full, good range of motion.

While currently he is substantially improved I feel he should be cautious in returning to any heavy work and would rather that he gradually resume activities in a light duties capacity for the next 2-4 months and then re-introduce more significant activities.²⁰⁷

The Tribunal found that report very helpful and concluded that Mr. Hanns remained incapacitated for work until after he recovered from the surgery.²⁰⁸

(b) Assistance to and Questioning of Unrepresented Applicants

Both courts and tribunals these days recognize their duty to assist unrepresented applicants by explaining to them the issues as to which they will need to call evidence and the procedures at the hearing. In *Titan v. Babic*,²⁰⁹ the question was whether the Master of Supreme Court of the Australian Capital Territory should have allowed Mr. Titan an adjournment so that he could call witnesses in support of his claim for loss of earnings.²¹⁰ The Full Court of the Federal Court said:

The question remains whether the master should have allowed Mr. Titan an adjournment to call witnesses. Where it is apparent that a party who does not have legal representation has misunderstood procedural requirements so that he or she is not in a position to complete the presentation of evidence, an

207. *Id.*

208. *Id.*

209. (1994) 126 A.L.R.455, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/unrep6811.html> (last visited Sept. 5, 2002).

210. *Id.* at para. 21.

adjournment might be considered in the interests of justice provided that no irreparable substantive or procedural injustice is done to the other party involved. In any such case the granting of an adjournment will be a matter of discretion. In this case there was no application for an adjournment nor does there seem to have been any intelligible explanation to the Master of Mr. Titan's failure to arrange his witnesses. It may be that in some cases a tribunal should, to avoid possible injustice, inquire of an unrepresented person the reason for the failure properly to prepare his or her case. Again, that is a matter of discretion limited by the necessity that the tribunal be, and appear to be, impartial as between the parties.²¹¹

There was no guidance given as to the precise circumstances when those discretions should be exercised to assist an unrepresented applicant.

In *Ball v. Federal Commissioner of Taxation*,²¹² Justice Lindgren held that there was no obligation on the Tribunal to offer Mr. Ball an adjournment because his solicitor was not present at the hearing.²¹³ He additionally held that the Tribunal had taken adequate steps to assist Mr. Ball by explaining to him the relevant issues and the importance of tendering any documentary evidence on which he relied.²¹⁴

On a number of occasions it has been claimed by an individual party on appeal that the Tribunal's questioning of the party or of his or her witnesses has been so searching as to deny procedural fairness. On the whole such appeals have not been successful. In *Perring v. Australian Postal Corp*,²¹⁵ Justice Einfeld expressed the view that the Tribunal's questioning should not have occurred, but found that it was not such as to give rise to a reasonable suspicion of bias.²¹⁶ He said in words similar to those he used in *Repatriation Commission v. Levi*:²¹⁷

Although s.33(1)(c) of the AAT Act permits the tribunal to ignore the rules of evidence and procedure and inform itself of any matters in any way it thinks appropriate, the

211. *Id.*

212. (1966) 33 A.T.R. 226.

213. *Id.*

214. *Id.*

215. (1993) 31 A.L.D. 693, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/unrep6247.html> (last visited Sept. 5, 2002).

216. *Id.* at para. 3.

217. (1994) 33 A.L.D. 79.

section does not envisage the tribunal calling the evidence itself or taking over the conduct of cases. It must always respect the rights of the parties and the perceptions of others about the system. It ought also to pause long before substituting itself as the actual or possible adversary especially where both parties are represented by apparently competent legal practitioners. Here there were two professional barristers. The questioning under criticism in this case exceeded those simple time-tested rules and should not have occurred.²¹⁸

He concluded:

On this basis, although the interrogation of Mr. Perring by the tribunal should not be countenanced or supported in any way, I have concluded on balance that what reasonably flows from the tribunal's questioning concerned [sic] was an unwisely executed but understandable effort to discover the motivations of the applicant and a truthful explanation of the complex web of events it was being asked to decide. The evidence was to all intents and purposes complete when the questioning took place. It is not unlikely that the tribunal held some tentative views about the case but I doubt that anyone could reasonably have apprehended bias against the applicant's claim.²¹⁹

More recently in *Murphy v. Australian Postal Corporation*,²²⁰ Justice Finn was prepared to give more emphasis than Justice Einfeld had done to the Tribunal's responsibility for finding the relevant facts. He said:

It is the case that the Tribunal is bound to observe the rules of procedural fairness and to that end it should be guided where relevant by the rule in *Browne v. Dunn*. It equally is the case that the Tribunal is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit. One method of informing itself can entail undertaking examination of a witness. Where this occurs issues of procedural fairness can arise.

218. *Perring v. Australian Postal Corp.* (1993) 31 A.L.D 693, at para. 43, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/unrep6247.html> (last visited Sept. 5, 2002).

219. *Id.* at para. 45.

220. (1994) 503 F.C.R. 95, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/unrep7633.html> (last visited Sept. 5, 2002).

....

There clearly can be circumstances in which procedural fairness would require the Tribunal to put a witness on notice as to the inferences it could draw from questions asked, especially where the burden of the questions is not self evident The present case, however, is not one in which the Tribunal members can be faulted on the manner of their questioning of the applicant and of the medical witnesses and of their use of the answers given. With the medical history, the applicant's capabilities and more broadly his credibility being all clearly in question, there could be no issue of prejudice or surprise in the use made by the Tribunal members of the answers given to their questions.²²¹

In the recent criminal deportation matter of *Hordila v. Minister for Immigration & Multicultural Affairs*,²²² the Tribunal not only arranged for the applicant's psychiatrist to prepare a report and give evidence, it also took great care to ensure that the applicant understood what was happening in the proceedings:

The Tribunal had earlier arranged for the presiding member's associate to attend with an interpreter at the Loden Prison for the purpose of explaining the contents of "T" documents to the applicant. Other documents referred to (including statements from the two detectives and the respondent's outline of argument) were interpreted during the adjournments, given for that purpose, in the course of the hearing.²²³

Frequently in conferences, directions hearings or even regrettably at the final hearing of a matter, unrepresented applicants have no idea what material he or she needs to present to the Tribunal, or how to address the issues raised by the respondent. Reductions in legal aid have made this problem more common. In such circumstances, I have arranged for the District Registrar to send detailed letters to an applicant (with a copy to the respondent). These letters explain what steps the applicant must take either to prepare for the hearing, or if the hearing has already commenced, to introduce appropriate evidence before the Tribunal.

In *Bartlett v. Comcare*,²²⁴ an applicant attempted to show that her

221. *Id.* at paras. 18, 22 (citations omitted).

222. No. V96/1192, A.A.T. LEXIS No. 11695 slip op. (May 13, 1997).

223. *Id.* at para. 2.

224. (1996) 40 A.L.D. 709, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/>

psychiatric condition was related to her employment.²²⁵ She did not appear to fully understand the importance of producing medical evidence regarding her state of health during the relevant period.²²⁶ I arranged for the Registrar to send a detailed letter to both parties advising precisely what medical evidence Miss Bartlett should agree to place before the Tribunal.²²⁷ The respondent assisted the Tribunal by writing to the relevant doctors once Miss Bartlett had provided authority for the respondent to do so.²²⁸ Even with these reports, there was insufficient evidence for Miss Bartlett to succeed.²²⁹ The Tribunal therefore affirmed the decision under review, but at least, Miss Bartlett knew her case had been fully investigated.²³⁰ Neither the respondent nor the Tribunal had allowed her inadequate understanding of the hearing requirements to disadvantage her.²³¹ The letter sent to the parties in *Bartlett* is set out in full in the Reasons for Decision in order to give some indication as to the steps the Tribunal may consider appropriate when an applicant is unrepresented.²³²

I adopted a similar procedure in *Galea v. Secretary, Department of Social Security*.²³³ That matter concerned the deposit of money by Mrs. Galea on trust for her adult children.²³⁴ The issue before the Tribunal was whether she had disposed of assets in the relevant period.²³⁵ In order to answer that question, I needed to determine whether the money in the bank accounts was her money or her children's money.²³⁶ Once again, the Tribunal sent a letter to Mrs. Galea laying out the reasons for decision.²³⁷ Mrs. Galea did not reply, so the Tribunal decided the matter on the evidence given at the hearing.

My intention in setting out the full text of the letters in decisions such as *Bartlett* and *Galea* was to clarify to parties, practitioners,

cases/cth/aat/unrep6078.html (last visited Sept. 5, 2002).

225. *Id.* at para. 1.

226. *Id.* at para. 30.

227. *Id.* at para. 31.

228. *Id.*

229. *Id.* at para. 33.

230. *Id.* at para. 53.

231. *Id.* at para. 54.

232. *Id.* at para. 30.

233. (1994) 34 A.L.J. 673, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/aat/unrep5461.html> (last visited Sept. 6, 2002).

234. *Id.* at para. 1.

235. *Id.* at para. 5.

236. *Id.* at para. 9.

237. *Id.* at para. 47.

academics and the Federal Court the steps the Tribunal has taken in the matter, so that it will be apparent that we have moved towards an inquisitorial approach.

(iv) The Role of Expert Witnesses in Providing Assistance to the Tribunal in Reaching a Correct and Preferable Decision

The way in which expert witnesses are used in the adversarial system is very different from the approach adopted by the inquisitorial system. As stated earlier, in an adversarial system, a party may go from expert to expert seeking a favourable witness and is usually under no obligation to disclose the report of an unfavourable expert.

In an inquisitorial system, the court chooses the expert, who gives the court the benefit of his or her expert opinion. Professor Langbein described the distinction:

German courts obtain expert help in lawsuits the way Americans obtain expert help in business or personal affairs. If you need an architect, a dermatologist, or a plumber, you do not commission a pair of them to take pre-ordained and opposing positions on your problem, although you do sometimes take a second opinion. Rather, you take care to find an expert who is qualified to advise you in an objective manner; you probe his advice as best you can; and if you find his advice persuasive, you follow it.²³⁸

My experience suggests that the use of expert witnesses in the adversarial system has three significant drawbacks:

- (a) the “experts” who are called are often not the best qualified to help;
- (b) they are frequently confused as to whether their primary role is to assist the AAT, or to assist the party who is paying them; and
- (c) sometimes efforts are made to inhibit the AAT from becoming aware of relevant evidence obtained by one party, which would assist the other party.

I will briefly touch on my experience with each of these problems.

238. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 837 (1985).

(a) Do We Get the Most Qualified Expert Witnesses?

This problem arises in two ways. Sometimes a medical expert in the relevant discipline refuses to give an opinion in a medical/legal matter because he or she does not want to be subjected to adversarial cross-examination, designed to confuse rather than to clarify the issues. Sometimes, even a treating specialist is unwilling to attend a hearing. The applicant or his/her solicitor may be unwilling to risk issuing a summons for fear of upsetting the doctor and disturbing the doctor/patient relationship. Quite often, in the pressure of litigation, the treating general practitioner is overlooked in favor of “impressive” specialists, when in fact the treating doctor’s history is an important fact to take into account in conjunction with the specialist’s opinion. My opinion, expressed a number of times, is that treating general practitioners and specialists are important medical witnesses, and frequently assist the Tribunal more than “medical/legal experts.”

The point was first made in 1982 in *Leone v. Director-General of Social Services*,²³⁹ where Mr. Hall, then Senior Member, expressed the view that often the evidence of the general practitioner who has treated the patient over a period of time, and not simply for the purposes of legal proceedings, can be considerably valuable. In *Stephan v. Secretary, Department of Social Security*,²⁴⁰ we endorsed that view and added our belief that the evidence of treating orthopaedic surgeons is often of more assistance than the evidence of doctors who only see the applicants for the purpose of giving evidence at a hearing.

In *Callanan v. Australian Postal Corporation*,²⁴¹ I had to decide whether an angioplasty had been reasonable medical treatment for an ulcer that had been present for some months without healing. Although both sides offered evidence presented by medical specialists, including evidence from the treating vascular surgeon, neither side called the treating general practitioner nor tendered his notes in evidence, even though I was told he or she was present at the hearing. Because one issue was the size and pattern of healing of the ulcer, I believed that the notes might have been relevant. After the hearing, I arranged for the District Registrar to write to the parties telling them I considered those notes helpful in making my decision. Neither party objected, although the respondent sought to reconvene the hearing so that respondent could

239. (1982) 4 A.L.N. N104.

240. (1985) 9 A.L.N., available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep2129.html> (last visited Sept. 6, 2002).

241. (1999) A.A.T. 978.

cross-examine the doctor. We reconvened the meeting, and I found the notes helpful in informing me of the state of the applicant's ulcer before and after the angioplasty was performed. I called for the treating doctor's notes in an earlier decision and found them to be relevant.²⁴²

(b) Partisan Expert Witnesses

In my 1991 article *Overcoming the Adversarial Bias in Tribunal Procedures*,²⁴³ I stated that the need to discourage the parties' use of partisan expert witnesses had been a concern of the AAT for many years, but that we were seeing parties turn to more balanced and impartial experts, or even in rare cases, to a mutually acceptable expert. Unfortunately, today, a significant problem remains.

The trouble with adversarial expert witnesses is that their evidence is not as helpful as their expertise would lead one to expect, because they do not give their best expert opinion. They "argue cases," and one has the impression that they sometimes advance views that are more governed by "partisan" considerations than by an expert appraisal of the facts.

These problems are certainly not confined to the AAT. The High Court raised these issues in *Vakauta v. Kelly*,²⁴⁴ where the trial judge (with more frankness than commonsense) had referred to the respondent's medical witnesses as "that unholy trinity," and the "usual panel of doctors who think you can do a full week's work without any arms or legs."²⁴⁵

The difficulties with partisan expert witnesses have been a factor in the recent changes in the Supreme Court of Western Australia's pre-trial case management practice. The considerations leading to those changes have been discussed by Justice Ipp in his articles *Reforms to the Adversarial Process in Civil Litigation*.²⁴⁶ Perhaps the most interesting change in this regard is the requirement that expert witnesses meet before giving evidence to see if they can reach a common ground. It is my view that there would be a place for a similar requirement before the

242. See *Porter v. Comcare* (1995) A.A.T. 10071.

243. See Dwyer, *supra* note 6.

244. (1989) 167 C.L.R. 568, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/167clr568.html> (last visited Sept. 6, 2002).

245. *Id.* at para. 6.

246. Ipp D.A., *Reforms to the Adversarial Process in Civil Litigation – Part I*, 69 AUSTL. L.J. 705 (1996); Ipp D.A., *Reforms to the Adversarial Process in Civil Litigation – Part II*, 69 AUSTL. L.J. 790 (1995).

AAT, but on the only occasion where I made the suggestion, I was told that the medical experts in question would not agree to the proposal.

An area where the use of expert witnesses has been identified as causing difficulty for the AAT is in determining whether or not a disease or injury is attributable to military service under the *Veterans' Entitlements Act* of 1986.²⁴⁷

The problems are exacerbated in matters where the test laid down by the legislation is that of a "reasonable hypothesis." Expert witnesses advance hypotheses more readily than opinion. It can be difficult for the Tribunal to determine whether such a hypothesis is "reasonable" as advanced by a "respectable medical practitioner," "eminent in the relevant field of knowledge," or is some speculative proposition that the expert would not advance in front of a group of colleagues.

In *Gillman v. Repatriation Commission*,²⁴⁸ I explained the problem, and even quoted principles for the guidance of expert witnesses laid down by the court in *National Justice Companies Naviera SA v. Prudential Assurance Co. (the "Ikarian Reefer")*.²⁴⁹

The problems are also significant in compensation matters. In *Beer v. Australian Telecommunications Commission*,²⁵⁰ Deputy President Todd stated with respect to a diagnosis of repetitive strain injury:

As to this there is not only no unanimity amongst the medical profession, there is instead quite bitter division, with polarised attitudes and sometimes express or implied condemnation of those who hold other views. Some of the evidence can be disquieting and bordering on the demeaning. I have to say that the least toleration of opposing or alternative views tends to come from some of those at the pole which represents the view that unless a well-recognised disease entity, such as one of those referred to above, can be diagnosed, or a specific lesion in the medical sense identified, the claimant's allegations of pain must be rejected and the claimant inferentially dismissed as a "malingerer."²⁵¹

In *Flynn v. Australian and Overseas Telecommunications Corp.*,²⁵²

247. Veterans' Entitlements Act, 1986 (Austl.), available at http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/consol_act/vea1986261/ (last visited Sept. 6, 2002).

248. (1993) 30 A.L.J. 545, 555-56.

249. Nat'l Justice Company Navier S.A. v. Prudential Assurance Co. Ltd., 2 Lloyd's Rep. 68 (Q.B. 1993) ("Ikarian Reefer") *aff'd*, 1 Lloyd's Rep. 455 (Eng. C.A. 1995).

250. (1990) A.A.T. 5974, para. 56.

251. *Id.*

252. (1990) 92 A.A.T. 8656, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/>

the Tribunal expressed its opinion of all the evidence except evidence by one of the psychiatrists who testified:

The difficulty which we have encountered arises not only from the fact that the views of the expert witnesses are so different from one another but also from the fact that, apart from Dr. Cole, we did not find any of the experts to be a satisfactory witness. Dr. Kingston, Dr. Freed and Dr. Wahr all gave evidence strictly in conformity with their written reports and displayed a total reluctance to consider the possible merits of any opinion other than that which each had himself expressed originally.

....

Dr. Wahr referred to his examination of “thousands of plaintiffs”. It was clear that he had examined them on behalf of defendants; the dismissive manner in which he described what they had told him created an impression of prejudice and that he regarded the applicant as one more plaintiff to be disbelieved. Alone of all the psychiatrists he considered that the applicant had no incapacity for work. He appeared to us to have closed his mind totally to any possible view of the applicant’s condition and its cause other than the one he had formed as a result of his single examination of the applicant.

Dr. Freed went to great lengths to explain the reasons why he held his own views about the applicant and her condition but, although he acknowledged that Dr. Cole was a psychiatrist of good repute, he refused completely to consider the opinions which he had expressed. He refused to say why he disagreed with them, saying instead that he was never willing to criticize the opinions of another well qualified medical practitioner. In taking that attitude, he clearly indicated a failure to understand the role of an expert witness, that is to say that he is required not only to state his own opinions and the reasons for them but also, where they conflict with the opinions of other experts, to explain why his opinions should be preferred to them.²⁵³

The Tribunal again referred to problems with the expert evidence in

cases/cth/aat/unrep4996.html (last visited Sept. 6, 2002).

253. *Id.* at paras. 31, 33-34.

Falzon v. Comcare.²⁵⁴ We said:

We have recently read Chapter 13 of the “Access to Justice: Final Report” by the Right Honourable the Lord Woolf, Master of the Rolls. Chapter 13 of that report deals with “Expert Evidence”. Lord Woolf has addressed the question of impartiality of experts and has written:

The present system has the effect of exaggerating the adversarial role of experts, and this helps neither the court nor the parties. As the Court of Appeal has recently remarked:

“For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend . . . to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.”

The clear implication of this is that a new approach is required which emphasises experts’ impartiality. In cases where the option of a single expert is not pursued, it is particularly important that each opposing expert’s overriding duty to the court is clearly understood. This is partly a matter of good practice on the part of instructing solicitors, who may themselves need guidance as to the appropriate form of instructions to experts. In my view, clarification in the rules of court is also needed.

Contributions to the Inquiry from experts themselves suggest that there is a degree of uncertainty among them as to their duties, and a perceived conflict between their professional responsibilities and the demands of the client who is paying their fee. Experts would welcome some formal recognition of their role as advisers to the court rather than advocates of

254. (1997) A.A.T. 11628, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/aat/unrep6588.html> (last visited Sept. 6, 2002).

the parties.

Although we accept that all the medical witnesses who gave evidence intended to be fair and impartial, we pointed out to Mr. Weaver and Ms. Schellenberger that their reports and evidence did demonstrate some confusion as to their role. They are called as expert medical witnesses and their assistance to the Tribunal depends on their maintaining a medical focus unaffected by their perception of the exigencies of the litigation in which they are called. The language used by both Mr. Weaver and Ms. Schellenberger in their lengthy reports at times, in our view, demonstrated concern with legal issues rather than with purely medical matters. Mr. Weaver set out the history obtained from Mr. Falzon in terms of allegations and concessions. Ms. Schellenberger's report used the terminology of claims and denials

Ms. Schellenberger, within eight lines in a passage in her report, mentioned three times that Mr. Falzon and his wife had been supported by compensation payments from Comcare for the last six years. That seems to have been giving undue emphasis to a matter which was not relevant to medical issues.²⁵⁵

As is apparent from the reference to Lord Woolf's report in the U.K., the problem is recognized by lawyers and doctors both in Australia and the United Kingdom, and no doubt wherever there is an adversarial system of justice. A tremendous amount of time and money is wasted if we obtain polarised reports from medical experts at both ends of the spectrum.²⁵⁶

It is a great challenge to tribunals and courts to devise procedures which will result in them obtaining expert witnesses who recognize their duty to give impartial expert opinions. The Supreme Court of Western Australia has been extremely innovative in this respect. It remains to be seen how far Lord Woolf's recommendations will be followed by the new Blair government in England. At least the problem has been identified and the means of remedying it have been suggested.

255. *Id.* at paras. 60-62 (citations omitted).

256. *See e.g.*, *Vernon v. Bosley*, 1 All E.R. 577 (Q.B. 1997); *Vernon v. Bosley* (No. 2), 1 All E.R. 614 (Eng. C.A. 1997). *See also* Joan L. Dwyer, *The Vernon Saga*, TORTS LAW REVIEW (forthcoming).

(d) The Failure to Disclose Relevant Expert Evidence

In *Roche v. Commonwealth of Australia*,²⁵⁷ the Tribunal decided not to call a psychiatrist who had examined the applicant on behalf of the respondent.²⁵⁸ The Tribunal explained:

The applicant's counsel was critical of the respondent for not calling Dr. Saboisky, a psychiatrist. That he had made a report or reports was known. The respondent did not call Dr. Saboisky. The applicant did not call him. The Tribunal did not call for his report. In many areas of the Tribunal's work, it would be proper for the Tribunal to adopt a somewhat interventionist role. In particular, if an applicant is unrepresented, the Tribunal sometimes has to adopt to some degree an inquisitorial role. But in compensation cases in which counsel are involved on both sides, there would be real dangers in the Tribunal so conducting itself.²⁵⁹

The Tribunal did not consider whether perhaps it was only a matter of expense which was stopping the applicant from calling Dr. Saboisky. Nobody ever discovered whether or not his or her evidence would have been helpful to the applicant. A better course for the Tribunal to have adopted might have been that outlined in *McMaugh v. Australian Telecommunications Commission*,²⁶⁰ where the Tribunal suggested that it would use section 37(2) of the Administrative Appeals Tribunal Act 1975 in similar circumstances.²⁶¹

I had a similar experience recently. At the commencement of a hearing, counsel for the applicant raised with the Tribunal his client's concern that the respondent refused to make available to him a copy of the report of the medico-legal orthopaedic surgeon to whom he had presented himself at the respondent's request.

I expressed surprise at the respondent's attitude particularly in view of the responsibility of a compensation authority to pay compensation to those who have the necessary entitlement, but the respondent's counsel was not influenced by my views. I then suggested that perhaps I might

257. (1988) 16 A.L.D. 787, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep3567.html> (last visited Sept. 6, 2002).

258. *Id.* at para. 19.

259. *Id.*

260. (1991) 22 A.L.D. 393, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep4212.html> (last visited Sept. 6, 2002).

261. *Id.* at para. 1.

require production of the report bearing in mind the comments of Justice Brennan in *Bushell v. Repatriation Commission* as to the inquisitorial nature of proceedings before the Tribunal.²⁶² Counsel for the respondent expressed outrage at this suggestion and relied on legal professional privilege as his justification.

I referred the parties to *McMaugh v. Australian Telecommunications Commission*.²⁶³ As *McMaugh* explains, the answer lies in the powers under sections 37(2) and 37(3) of the Administrative Appeals Tribunal Act which provide:

[37](2) Where the Tribunal is of the opinion that particular documents or that other documents included in a particular class of 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 writing stating that the Tribunal is of the opinion and requiring the person to lodge with the Tribunal, within a time specified in the notice, the prescribed number of copies of each of those other documents that is in the possession or under his control, and a person on whom such a notice is served shall comply with this notice.

[37](3) This section has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production or documents.²⁶⁴

When I drew the attention of counsel to sections 37(2) and 37(3), the matter settled before I had the opportunity to make a formal direction in writing under section 37 of the Administrative Appeals Tribunal Act.

The reverse situation arises where the Tribunal is prepared under sections 40(1A) and (1B) of the Administrative Appeals Tribunal Act of 1975 to summons treating doctors to produce their files at a directions hearing prior to a full hearing, so that the respondent may obtain a full medical history. Of course that procedure is only appropriate in respect of treating notes relevant to the condition at issue in the proceedings. The applicant, or his or her solicitor, is always advised of the directions hearing and is at liberty to object to a copy being given if the material is not relevant to the issues in dispute. The use of this procedure is constantly being monitored because of concerns that respondents may be using the summons procedure in a manner oppressive to applicants,

262. (1992) 175 C.L.R. 408, available at http://www.austlii.edu.au/au/cases/cth/high_ct/175clr408.html (last visited Sept. 6, 2002).

263. *McMaugh*, 22 A.L.J. 393.

264. *Id.* at para. 19.

rather than simply to obtain relevant medical information.

4. HOW CAN TRIBUNAL MEMBERS BE HELPED TO ADAPT TO THEIR CHANGING ROLES?

(i) *Education and Training*

When I published my paper in 1991, the AAT seemed well respected. I was intending to gently persuade AAT members, as well as applicants and respondents before the Tribunal, that it was appropriate for the Tribunal to use its inquisitorial powers to a much greater extent than it had been doing. I was not intending to criticize the AAT for being unduly adversarial, as the accepted culture in legal circles seemed to be that the adversarial method was the preferred method in Australia and Britain. In the words of Justice Mahoney in *Government Insurance Office of New South Wales v. Glascock*,²⁶⁵ that was “the expectation of the parties.”²⁶⁶

In the 1990’s, the climate seems to have changed to one of criticism of the AAT for “excessive formality” and “excessive legalism,” neither of which criticisms I consider to be justified. The criticism of “excessive adversarialism” is quite often also levelled at the AAT. I often suspect those making that criticism have very little appreciation of what would be involved in reducing the degree of adversarialism. Obviously, one cannot simply remove the adversarial procedures without substituting some other means of fact finding and determination, or else reducing the likelihood of the AAT, making the correct and preferable decision on the true facts. Unless tribunal members are trained and ready to use inquisitorial powers, and have sufficient resources to do so, and unless their use will be accepted by the community they serve, there is little point in criticising a tribunal for adopting an adversarial system.

The Administrative Review Council (“ARC”), in its report No. 39, “*Better Decisions - Review of Commonwealth Merits Review Tribunals*,” at paragraph 3.36, pointed out that European judges using an inquisitorial approach are generally given extensive training over a long period.²⁶⁷ This is to ensure that they are able effectively to extract

265. *Gov’t Ins. Office of New South Wales v. Glascock* (Unreported, Court of Appeals of New South Wales, Mahoney JA).

266. *Id.*

267. Administrative Review Council, *Better Decisions - Review of Commonwealth*

all information relevant to the decision in question, using an active investigative approach, without risking their appearance of impartiality and fairness. The ARC in Chapter 5 made recommendations as to the training to be given to tribunal members to enable them to perform that task.²⁶⁸

Not only tribunal members require training. It is also appropriate to train those lawyers who will be involved in representing parties before tribunals as to the validity of inquisitorial procedures. Law courses should include a proper appreciation of inquisitorial models of systems of justice. Young lawyers brought up in the Anglo-American culture should no longer be educated to believe that there is greater virtue in an adversarial hearing than in an inquisitorial hearing. The Bond University Mediation Course I attended used a very effective video. It showed mediation in progress and every now and again the script posed a predicament for the mediator. The video stopped and students from the course were asked what they would do at that point if they were the mediator. It was an excellent teaching tool and it made the students appreciate the advantages and disadvantages of each possible course of action and the validity of different viewpoints. A case which demonstrates the conflict between finding out the truth and maintaining a mere umpire's role is *Business Guides Inc. v. Chromatic Communications Enterprises Inc.*²⁶⁹ It poses a predicament suitable for such a course. Business Guides took action against Chromatic Communications claiming copyright infringement and seeking a temporary restraining order.²⁷⁰ Business Guides published directories for eighteen specialized areas of retail trade.²⁷¹ In an effort to protect its directories against copying, it deliberately planted bits of false information known as "seeds." The reasons for decision were: "Some seeds consist of minor alterations in otherwise accurate listings - transposed numbers in an address or zip code, or a misspelled name - while others take the form of wholly fictitious listings describing non-existent businesses."²⁷²

Business Guides regarded the presence of seeds in a competitor's directory as evidence of copyright infringement.²⁷³ At the hearing, there was an affidavit charging Chromatic with copying as evidenced

Merits Review Tribunal, para. 3.36, available at http://www.law.gov.au/publications/better_decisions/chapters/chap3.pdf (last visited Sept. 6, 2002).

268. *Id.* at paras. 5.2 - 5.95.

269. 498 U.S. 533 (1991).

270. *Id.* at 535-36.

271. *Id.* at 535.

272. *Id.*

273. *Id.*

by the presence of ten seeds in Chromatic's directory.²⁷⁴ The affidavit identified the ten listings in the Business Guide's directory, but did not pinpoint the seed in each listing.²⁷⁵ Three days before the hearing, the Judge's law clerk phoned the solicitors for Business Guides asking the firm to specify what was incorrect about each listing.²⁷⁶ He was advised that Business Guides was retracting its claims of copying three of the seeds.²⁷⁷ "The District Court considered this suspicious and so conducted its own investigation into the allegations of copying. The District Judge's law clerk spent one hour telephoning the businesses named in the seeded listings only to discover that nine of the ten listings contained no incorrect information."²⁷⁸ However, before the Court advised the parties of those inquiries made by the law clerk, Business Guides' solicitor prepared an affidavit identifying seven listings and explained precisely what part of each listing supposedly contained seeded information.²⁷⁹ It seems that the solicitor found that one listing did not in fact reflect any incorrect material so at that stage there were actually only six false listings.²⁸⁰

At the hearing, the District Court, on the basis of its discovery that nine of the original ten listings contained no incorrect information, denied the application for a temporary restraining order.²⁸¹ The matter was referred to a Magistrate to determine whether Rule Eleven sanctions under the Federal Rules of Civil Procedure should be imposed against the solicitor who swore the affidavit claiming there were ten seeds in the defendant's directory.²⁸²

There is no suggestion in the report that the Court did not act reasonably in having the judge's clerk spend an hour checking the accuracy of the purported seeds. I doubt very much whether a Court here would do so. Yet it would not be surprising if a small business, such as Chromatic Communications, which was a company operating out of a garage, did not have the time to arrange for a detailed check of the accuracy of the entries alleged to be seeds and simply relied on denying that they had used the plaintiff's directions.

Another matter where normally inadmissible critical evidence was

274. *Id.* at 536.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 537.

282. *Id.*; *see also* FED. R. CIV. P. 11.

taken into account by an administrative decision-maker was *Shulver v. Sherry*.²⁸³ The Supreme Court of Victoria heard an application to set aside a decision to cancel the licence of the applicants to run a child care center.²⁸⁴ The ground relied on was that hearsay evidence of parents as to what their children had told them ought not to have been admitted into evidence at the inquiry. The children were not competent to testify on account of their very young age of between two and five years.²⁸⁵ Judge Hayne wrote:

I consider that it is clear that the question presented is not to be answered by considering only whether the evidence upon which the decision-maker acted was evidence of a kind that could have been admitted in a court applying the rules of evidence. Rather, the inquiry is one about whether the material upon which the decision-maker has acted was material that, as a matter of logic or reason, supported the finding made. . . . *Accordingly, the mere fact that the parents gave evidence of what their children had told them and that the statements of the children thus reported were treated as evidence of the truth of the contents of those statements does not of itself mean that a decision founded upon the substantial accuracy of what the children had said is manifestly unreasonable. What the children said was material which as a matter of logic tended to support the conclusion reached by the respondent.*²⁸⁶

His Honour pointed out that in addition to the parents' evidence, there was medical evidence that three of the girls aged three to four years had signs of damage to the hymen.²⁸⁷ The prospect of that damage being caused by any other trauma or explained by congenital abnormality or being self-inflicted was so remote as to be well beyond the bounds of probability.²⁸⁸ Accordingly, it was probable that the three girls had been sexually abused.²⁸⁹ His Honour concluded, "While it is

283. *Shulver v. Sherry* (1992) 28 A.L.D. 570.

284. *Id.*

285. *Id.*

286. *Id.* (emphasis added).

287. *Id.*

288. *Id.*

289. *Id.*

true that the children were not and could not be cross-examined the applicants were given every opportunity that could be given to them to challenge the veracity of the statements that were reported.”²⁹⁰

Would it have been preferable to have excluded the childrens’ hearsay evidence, even though the result may have been that the center would have continued operating?

I am sure there are many cases in the criminal area where relevant evidence has been excluded on the grounds that it does not comply with the rules of evidence. I do not have the expertise to address that area. I consider that there needs to be a focus in legal education on achieving justice. This requires an explanation of how that aim is assisted by a court or a tribunal adopting an inquisitorial approach, and how the truth may remain hidden if the matter is left to adversarial procedures. Others may comment that the fact that we are all seeking truth and justice is so obvious it is not worth mentioning. In my experience, when it is not mentioned, it may be overlooked when people start evaluating different procedures or methods of case management.

(ii) *Budget Implications*

Of course, we do not only need further training in law schools. While we wait for our new graduates to become decision-makers, current judges and tribunal members should be offered similar intensive training focusing on situations which arise in daily practice. Unfortunately, the high cost of taking judges and tribunal members away from their normal daily duties makes it unlikely that such training will occur at anything other than a superficial level. The cost problems are of increasing importance as our governments adopt an economic rationalism model, particularly in respect of a federal tribunal where travel and accommodation costs would be significant.

Because of the effect of budget cuts in reducing the availability of legal aid, it is becoming more important for courts and tribunals to be ready and to have the means to take steps to advise unrepresented parties how to prepare their case for a hearing.

The fact that assisting unrepresented applicants imposes an increasing burden on courts and tribunals was recognised by the High Court in *Cachia v. Hanes*,²⁹¹ where the High Court said:

290. *Id.*

291. (1994) 179 C.L.R. 403, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/179clr403.html> (last visited Sept. 6, 2002).

Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts. It would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives. All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself. Even so, litigation involving a litigant in person is usually less efficiently conducted and tends to be prolonged. The costs of legal representation for the opposing litigant are increased and the drain upon court resources is considerable.²⁹²

Although an inquisitorial approach is not going to save courts and tribunals money, it should reduce the amount of expenditure on litigation by the community as a whole. Unfortunately, this is hard to establish and so does not impress those responsible for budget allocations. The fact that an inquisitorial approach may add to the budget expenditure of a court or tribunal means that, in the current culture of budget cuts and competition, those who have criticized the AAT as too adversarial, may find that they appreciate an effective inquisitorial approach by tribunals even less. Unless a tribunal is properly resourced, both financially and in terms of the appropriate staff, it will not be effective if it uses inquisitorial procedures. If review of decisions is important, the reviewing body must have the resources to investigate matters which it considers relevant to deciding whether or not the decision being reviewed was the correct and preferable decision.

(iii) Improvement in Use of Expert Witnesses

The single most important move would be to start using tribunal expert medical witnesses in many cases rather than allowing each party to choose their own medical witnesses to express polarised views. For the Tribunal to call its own experts would cost significant amounts of money. However, if that saved respondents calling such witnesses, other Commonwealth bodies would save money in calling their own witnesses, and where an applicant is successful in a compensation matter, in paying for the applicant's expert witnesses. To implement

292. *Id.* at para. 22 (citations omitted).

such a program would take a lot of work and would require co-operation from the medical and legal professions, but I think it would be worthwhile. I would place great reliance on treating doctors, but where necessary, I would like to have expert witnesses called by the Tribunal to give further expert opinions.

(iv) *Concern About Increasing Adversarialism*

As all government departments and authorities are looking for ways they can cut costs, one way seems to be to reduce the amount paid out by way of compensation. If this is done by genuinely reviewing entitlement, no problem arises. However, occasionally it seems to be done on the basis that a decision is made ceasing a person's entitlement to compensation simply because he or she has been paid compensation for a long time. Alternatively, a claim may be rejected without a thorough consideration of the possible grounds of entitlement. An example of that problem arose recently in a matter where compensation was claimed for a stroke suffered at work. The solicitor for the applicant was seeking medical evidence to establish a link between stress at work and the stroke. In a telephone directions hearing, I referred the solicitor to *Williams v. Australian and Overseas Telecommunications Corp.*,²⁹³ and suggested that she may wish to consider an argument, based on that decision, that the stroke was an "injury simpliciter," sustained at work, so that the applicant may be entitled to compensation under section 6(1)(b)(1) of the Safety Rehabilitation and Compensation Act 1988.²⁹⁴

The solicitor, acting for the respondent, objected to me making that suggestion. I pointed out that if we had made it to the hearing, I might have felt obliged to raise the matter at that stage. No doubt that would have required an adjournment. It was in the hope of saving such delay that I made the suggestion I did at the time.

In view of the objection by respondent's solicitor, I refused to hear the matter, but the discussion caused me concern. It would not be the correct or preferable outcome that an applicant should fail to obtain compensation to which he or she may be entitled because a previous decision in point was overlooked or because an applicant's case was inadequately presented. The correct and preferable decision would be

293. (1993) 17 A.A.R. 308, available at <http://www.austlii.edu.au/au/cases/cth/aat/unrep5053.html> (last visited Sept. 6, 2002).

294. *Id.*

less likely to be made if the applicant's solicitor did not know of all the ways in which the applicant's case could properly be stated. The solicitor for the respondent may have overlooked these considerations. By the time the matter came on for hearing before one of my colleagues, the High Court in *Zickar v. MGH Plastic Industries Pty Ltd.*²⁹⁵ had delivered a decision which added considerable authority to the tentative suggestion I had made.²⁹⁶ The applicant succeeded in the matter on the ground suggested.

The second example concerned a claim that an employee's death was related to asbestos exposure at his workplace. It so happened that the deceased employee's son worked for the same administering authority. I was told at a directions hearing that he had advised the solicitor acting for the estate of his father that a unit had been set up to research asbestos exposure in that work place. Counsel for the respondent authority undertook at the directions hearing that his client would make the relevant information available to the applicant's solicitor.

At a further directions hearing eight weeks later, I was informed that not all the relevant information had yet been located by the administering authority and that it could take a further few weeks. I asked if the son might not be able to help identify the relevant material. The solicitor for the respondent authority told me that his client might take action against the son if he did so. He said that he did not want to put the son under that pressure. I suggested that I did not see how a compensation administering authority could properly try to prevent an employee identifying material that might assist an applicant in establishing an entitlement to compensation. The solicitor for the respondent authority explained that there were "financial considerations involved" and that was the reason for his client's attitude.

The suggestion that an administering authority, by reason of financial considerations, may punish a fellow employee for assisting an applicant in the preparation of a compensation matter is extremely troubling. It seems to show a totally inappropriate reliance on adversarialism on the part of a government authority.

CONCLUSION

If we are going to leave the bad days of excessive adversarialism

295. (1996) 140 A.L.R. 156, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/1995/S51/1.html> (last visited Sept. 6, 2002).

296. *Id.*

behind us, it is important that government departments and authorities also adopt a non-adversarial approach. If the desire to save money leads departments and administering authorities to try to stop relevant material from coming before the Tribunal, then the AAT or any other decision-maker will be unable to reach the correct and preferable decision. If relevant material exists, a decision made without it will be made on inadequate material, at whatever level it is made. As Justice Brennan stated, "*the notion of onus of proof . . . has no part to play in these administrative proceedings.*"²⁹⁷ In an adversary system, the party bearing an onus of proof must establish the necessary facts, using if need be the compulsory process of discovery of documents and interrogatories to compel disclosure of facts within his opponent's knowledge. We are not in such a system. The AAT is entitled to expect that the decision-maker will make all relevant material available to the Tribunal and the other party. When the AAT stands in the shoes of the primary decision-maker, it should have available to it all information bearing on the decision which is available to the respondent. Good administration requires no less.

The AAT has shown in many cases that it can use its procedures to seek the truth as the basis for the correct and preferable decision. It has shown that fair play between the parties does not require and may not be compatible with the adversarial way. To achieve a fair outcome, it may be necessary for the AAT to direct the inquiry to adopt an inquisitorial mode.

There is a concern when radical changes are mooted that they may destroy rather than enhance the benefits of the existing system. It is important that the AAT, or if it is to be replaced, the ART, retain the flexible procedures currently available. Those procedures have been used in innovative ways to be fair to the parties by seeking out the truth. Hopefully the current climate of cultural change will not preclude the recognition of that aim as an important feature of any system of administrative review.

297. *Bushell v. Repatriation Comm'n* (1992) 175 C.L.R. 408, 424-25 (emphasis added).

