OVERCOMING THE ADVERSARIAL BIAS IN TRIBUNAL PROCEDURES

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1 INTRODUCTION

I have had an interest in inquisitorial procedures and a lack of conviction a to the often claimed superiority of adversarial procedures as long as I have ha any interest in the law. Until recently however I found it difficult to engag other Australian lawyers in discussions which questioned whether the adversari system is necessarily the best. It seems that my experience reflected the strengt of the "Anglo-American legal culture".[1]

The decision of the Court of Appeal of New South Wales in *Governmer Insurance Office of New South Wales v Glasscock*[2] demonstrates both th traditional view that a trial should be adversarial and a more open approach t the question. One submission of counsel for the appellant was that the trial ha miscarried because of the extent of judicial intervention, which was summed u by saying that the adversarial basis of the trial had been lost as a result of th judge's intervention. It was submitted that the Judge had

> taken control of the plaintiff's case [and] 'put words in the plaintiff's mouth' an by asking leading questions he caused, or may have caused, evidence to b adduced from the plaintiff which, had the matter been left in the hands c plaintiff's counsel, would not have been before it.[3]

Although dissenting from the Court's decision that the appeal should b allowed because the judge's intervention caused the miscarriage of the tria Mahoney JA acknowledged that one reason why excessive intervention by Judge during the elucidation of evidence is undesirable is that it may change th nature of the trial from adversarial to inquisitorial. His Honour then proceeded t consider why that would be unfair.

> What constitutes unfairness for this purpose will depend upon, or at least b affected by, the context of the proceeding. *There may be a difference between th fairness objectively of an adversarial and an inquisitorial trial: it is n necessary to determine that question. The purpose of each is to determine th truth.* No doubt the adversarial form of trial is adopted or maintained because it believed that it best achieves that result. The reason why there is cogency in M

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1 Damaska writes: "In the Anglo-American legal culture the discussion of the two manners proof taking [adversary and non-adversary] can easily be traced at least as far as Jeren Bentham. It is rather difficult however to find proponents of the continental style of takin evidence among English and American writers": M Damaska, "Presentation of Evidence an Fact Finding Precision" 123 Uni Pennsylvania L Rev 1083, 1083. Three notable exceptio which I have found of great assistance are Sir Richard Eggleston, "What is Wrong with th Adversary System" (1975) 49 ALJ 428; G Osborne, "Inquisitorial Procedure in th Administrative Appeals Tribunal - A Comparative Perspective" (1982) 13 F L Rev 150; and H Langbein "The German Advantage in Civil Procedure" (1985) 52 Uni Chicago L Rev 823.

2 (Court of Appeal of New South Wales, 19 February 1992, unreported).

3 *Ibid* 16.

Neil's complaint in this regard is not that questioning from the bench in a system of law which adopts an inquisitorial form of trial is less apt to produce the truth. *The reason why it is felt unjust to take the matter out of the hands of the advocates is essentially, I think, the expectation of the parties* (emphasis added).[4]

iis paper accepts that adversarial bias creates problems which should be 'ercome in certain circumstances, and makes recommendations to that end.

Damaska has referred to adversary and non-adversary presentations of evidence "tools in the quest for the truth". There are however other views. Justice oynihan, of the Supreme Court of Queensland, has recently expressed "a degree scepticism towards definitions of a trial in terms of a search for truth".

> Such a characterisation of the trial process ... carries with it, or so it seems to me, implications of a resolution of what started off as a dispute between parties or dealing with a specific criminal act in terms of an ideal and objectively ascertainable truth the ascertainment of which, regardless of cost and time, is the only means by which the differences between the parties can be resolved or the act effectively dealt with from the point of view of the accused, victim and society. I have my doubts about the prospects of such an outcome given human limitations and the finite resources available to any legal system.
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> A more realistic approach seems to me to be to regard a trial as a search for the proof of those issues which divide the contenders in the litigation ....
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> It seems to me that a more efficient trial is the culmination of a process designed to bring about the resolution of differences justly and with the minimum necessary commitment of resources on the part of the court system and of the parties.[5]

I have no difference with his Honour in so far as he suggests that differences tween the parties can be resolved without any court or tribunal having to jectively ascertain the truth of the facts in dispute. I agree that a court or bunal can offer processes which assist in the parties in resolving their 'ferences in a practical and pragmatic manner. Where however a matter proceeds a hearing or an arbitration, I consider that the court or tribunal should, in der to do justice between the parties, see the ascertainment of the truth as its n in making findings on contested facts. I endorse Eggleston's summary of his isons for advocating some departure from the traditional adversary system.

> 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.[6]

In so far as I suggest the use of inquisitorial procedures I do so because I lieve they will assist in achieving the aim of getting at the truth. I readily ncede that whether the procedures are inquisitorial or adversarial we will not vays succeed in finding the truth. Sometimes memories have faded so that the th is not ascertainable, and sometimes despite all the best endeavours a party a witness succeeds in distorting or hiding some part of the truth. But that is t to say that the quest for truth should be abandoned. Where a court or ɔunal is conscious that the evidence does not allow it to make findings of fact th any conviction as to their truth I think it should first seek better evidence,

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Ibid 17-18.

Mr Justice Moynihan, "Towards a More Efficient Trial Process", (a paper delivered at Australian Institute of Judicial Administration Tenth Annual Conference, September 1991, forthcoming in Australian Institute of Judicial Administration, *Papers Presented at the Tenth Annual AIJA Conference* (1992)).

Eggleston, *supra* n 1, 431.

using inquisitorial powers if necessary, but where that is not possible or woul impose unreasonable burdens, a finding of fact may have to be made whic depends on the statutory onus. The Federal Court has explained how this shoul be done by an administrative tribunal in *McDonald v Director-General of Soci Security*.[7]

> If the AAT finds itself in a state of uncertainty after considering all the availabl material, unable to decide a question of fact either way on the balance c probabilities, it will be necessary for it to analyse carefully the decision it reviewing. If, for example, it is a decision whether or not to cancel a pension in th light of changed circumstances, then it has failed to achieve the statutor requirement of reaching a state of mind that the pension should be cancelled. If, o the other hand, it is a decision, to be made in the light of fresh evidence, whether c not the pension should ever have been granted in the first place, then it has faile to be satisfied that the person ever was permanently incapacitated for work.[8]

Where this is how a decision has been reached it is suggested that the reasor for decision should make that clear.[9]

2 REASONS TO AVOID ADVERSARIAL BIAS IN ADMINISTRATIVE LAW PROCEEDINGS

Having raised the question whether the adversarial system is necessaril always the best, it is appropriate to consider whether there are some classes c cases in which it is generally less likely to be appropriate than others. There a five factors which suggest that the realm of public or administrative law is on where it is appropriate to overcome adversarial bias and use inquisitorial power

(i) that the "parties" are not necessarily adversaries;
(ii) that there is likely to be inequality of power and legal skills betwee the parties;
(iii) that administrative review on the merits aids good government;
(iv) that the interests of good administration require that the correct c preferable decision be made, not only for the parties but to provid guidance for the future; and
(v) that good administration requires just, efficient and effectiv determination.

These points will now be addressed in more detail.

A The parties are not adversaries

Whitmore has drawn attention to the fact that the parties in administrativ proceedings should not be seen as conflicting.

> I am worried about that party-party conflict that now seems to be insisted upon b the Federal Court because I think that in the sort of situation where one concerned with the disagreement between a private citizen and the government, really is wrong to say that the government is a conflicting party. It is not really conflicting party or it should not be.[10]

This is borne out by reference to the major jurisdictions of the Administrativ Appeals Tribunal (AAT). That Tribunal, of which I have been a Senior Memb since 1984, was established by the Administrative Appeals Tribunal Act 197 ("the AAT Act"). It reviews decisions made under over two hundre

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7 (1984) 1 FCR 354.
8 *Ibid* 358 per Woodward J.
9 *Re Mouratidis and Secretary, Department of Social Security* (AAT, 11 October 199 unreported).
10 H Whitmore, "Comment" (1981) 12 F L Rev 117, 117.

Commonwealth statutes. Review is by way of rehearing. We can receive evidence which was not available to the original decision maker. Our duty is to reach the correct or preferable decision on the material before us, not to review the reasons of the original decision maker. Thus the applicant has another chance to obtain a favourable decision, which is not linked to looking for errors on the part of the original decision maker. In the three jurisdictions from which come the bulk of our matters - Social Security, Veterans' Entitlements and Commonwealth Compensation - it is the duty of the administrators to pay the benefit claimed where the claimant is qualified for that benefit. It is the duty of the administrator to investigate claims to see whether or not qualification is established, not to attempt to defeat them.

The Secretary of the Department of Veterans' Affairs has an express duty to investigate matters to which claims or applications relate.[11] The Repatriation Commission then considers and determines those claims and applications with the assistance of all material obtained by the Secretary. The Commission must however satisfy itself as to all matters relevant to the claim or application.[12] The Commission may inform itself on any matter in such manner as it thinks just and must act according to substantial justice and the substantial merits of the case. The duties imposed on other decision makers are not spelt out quite so clearly. The Social Security Act 1991 (Cth) states in s 1296 that the Secretary is to have regard to the desirability of achieving the delivery of services in a fair manner. An Administering Authority under the Commonwealth Employment Rehabilitation and Compensation Act 1988 (Cth) in making determinations in relation to claims and requests made under the Act, must be guided by equity, good conscience and the substantial merits of the case, without regard to technicalities.

The fact that such decision making involves a responsibility on the decision maker to obtain relevant material has been emphasised by the Federal Court in *Guo v Renevier*.[13] The Court said:

> One may say that the making of a particular decision was unreasonable - and, therefore, an improper exercise of the power - because it lacked a legally defensible foundation in the factual material or in logic. But, equally, one may be able to say that a decision is unreasonably made where, to the knowledge of the decision-maker, there is readily available to him or her other factual material, likely to be of critical importance in relation to central issue for determination, and which has not been obtained.[14]

The Court concluded on the facts that the medical material before the decision-maker was quite inadequate for the purpose of the decision, yet no attempt had been made to obtain a report from a psychiatrist and a specialist endocrinologist known to be attending the person affected by the decision.

The AAT has alluded to the duty of government representatives in a number of matters, pointing out that their responsibility is to ensure that all facts are before the Tribunal, rather than to emphasise the defeat of the application. In *Re Cimino and Director-General of Social Services*[15] it said:

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1 Veterans' Entitlements Act 1986 (Cth) s 17.
2 *Ibid* ss 17, 18.
3 (1989) 91 ALR 39.
4 *Ibid* 50.
5 (1982) 4 ALN N 106. Similar comments were made in *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 366 *per* Norhrop J. See also *Re Lockley and Commonwealth* (1986) 11 ALN N 139, 141; *Re Ermolaeff and Commonwealth* (1989) 17 ALD 686; and *Re*

> I think it is very important that representatives of the department should approac their task in this way, as it were as counsel for the Crown, ensuring only that all th facts are before the Tribunal and not placing emphasis on defeat of the applicatio This appears to me to have been the course adopted, and I commend it.

The role of the respondent was explained by the Tribunal in *Re Mann an Capital Territory Health Commission (No 2)*.[16] The Tribunal was there dealin with a decision made under the Freedom of Information Act 1982 (Cth), but it remarks are equally applicable to all Tribunal jurisdictions. It said:

> In FOI reviews, as in other reviews, the Tribunal must be given assistance b respondents. The Tribunal has no personal knowledge of relevant facts and is not i a position to make its own searches. The Tribunal proceeds by way of a hearing which parties are represented. Justice will not be done to applicants unles respondents, who are aware of the facts, or who readily can ascertain the facts, brin to the notice of the Tribunal all matters which the Tribunal ought to take int account. The review procedure will not function fairly unless respondents freel disclose to the Tribunal all the information which they have concerning th documents to which the applicant seeks access. If there are facts known to th respondent which are not known to either the applicant or the Tribunal, how is th Tribunal to be made aware of those facts unless they are disclosed to it by th respondent? The Administrative Appeals Tribunal Act 1975 provides that in ever case the decision maker is to be a party to a review. See s.30 [of the AAT Act]. Thi provision is not aimed solely at permitting a decision maker to defend his or h decision. Part of its aim is to ensure that the Tribunal is fully informed.

It is of course acknowledged that somewhat different considerations apply wher there is a question of credibility of the applicant. Consistently with what ha been said the government representative in those matters has responsibility fc demonstrating the lack of credibility or the inconsistencies in the presentation c the applicant.

B The parties are unequal

The second factor making adversarial processes inappropriate in administrativ proceedings is the inequality of resources where one party has the full power c the state and the other is often an individual and disadvantaged. The mo frequent justification for the adversary system is fairness. For instanc Mr Hulme QC states:

> Fairness involves each party having the opportunity of fully advancing its cas and challenging that of the other side by way of evidence in chief, cros examination, and address.[17]

Cinkovic and Repatriation Commission (1990) 20 ALD 131, 137-138. In other matters th Tribunal has commented favourably on the approach adopted by department representatives; (*Re White and Secretary, Department of Social Security* (AAT, 1 Octob 1991, unreported). The role of the government representative has been likened to that of a amicus curiae: S Skehill, "The Departmental Advocate's View", in J Goldring (ed), *Th Workings of the Administrative Appeals Tribunal* (1980) 43.

16 (AAT, 14 December 1983, unreported; summary only at (1983) 5 ALN N 368). This passag has been since applied by the Tribunal; see *Re Wertheim and Department of Health* (1984) ALD 121 and *Re Ousley and Comcare* (1990) 19 ALD 770, 770-771. The Tribunal in *R Ousley* also referred to the extensive consideration of s 37(1) of the AAT Act by the Tribuna presided over by Fisher J, in *Re Palmer and Minister for the Capital Territory* (1978) 1 AL 183, 192-194 and *Re Palmer and Minister for the Capital Territory (No 2)* (1979) 2 ALD 20 217.

17 "The Intruding Judge", Bar News, The Journal of the NSW Bar Association, Winter 1991.

But to say that the adversary system leads to fairness presupposes that each side will have the same resources and the same quality of advocate. Unfortunately, those presumptions are rarely accurate and particularly not in cases involving review of administrative decision making. On the one side there is usually a government authority; on the other side there is usually an individual who may or may not be represented. But even where the resources are equal, and the expenditure on counsel's fees may be the same, too frequently the standard of advocacy is unequal or if equal is uniformly poor. In such a case, as Langbein points out, "the active role of the judge [or Court or Tribunal] places major limits on the extent of the injury that bad lawyering can work on a litigant".[18] That reason is a telling one in favour of a departure from the strictly adversarial procedures. There is no justice in an applicant or respondent losing its case because its lawyer does not know how to prepare and present that case or overlooks relevant and appropriate arguments.

Allars pointed out the unsatisfactory nature of administrative review conducted with an adversarial bias, particularly in welfare areas where the inequality is greatest.

> In the absence of a statutory onus, the only onus in AAT review is a common sense one in that parties who fail to ensure that evidence in their favour is before the Tribunal are likely to lose. . . .
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> An unrepresented applicant who bears such a common sense onus may not be much better off before a review tribunal than before the original decision maker if the tribunal does not use inquisitorial powers. Informal justice on its own does not assist such a person in getting before the decision maker the evidence of entitlement to a benefit.[19]

suggest that in such circumstances the AAT can, should and does assist the pplicant in getting the necessary evidence before the decision maker. I have ften done so myself, and I know that other Presiding Members have also done o, but I realise that there is variation in the approach of members of the ribunal.[20]

The role of administrative review on the merits in achieving good government

The importance of the special role of the Tribunal in achieving real justice etween citizens and the state and its requirement of the use of inquisitorial owers was emphasised by Justice Smithers in *Sullivan v Secretary, Department f Transport*.[21] His Honour said:

> The Tribunal is established to exercise a function in the sphere of government. The objective is the achievement of justice in the relations between the citizen and the State compatible with standards only definable as those of good government. This is a function of a very special nature. Its proper performance depends upon the Tribunal having the wide powers and flexible procedures with which it is provided: see in particular s 33 of the Administrative Appeals Tribunal Act. For the performance of its function it would seem appropriate, according to circumstances,

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J H Langbein, *supra* n 1, 843.

M Allars, *Introduction to Australian Administrative Law* (1990), 334.

See P Bayne, "The New Practice Direction of the Commonwealth Administrative Appeals Tribunal (AAT)" (1991) 65 ALJ 546, 549, and more generally, "Tribunals and the Cheshire Cat", (a paper delivered at Australian Institute of Judicial Administration Tenth Annual Conference, September 1991, forthcoming in Australian Institute of Judicial Administration, *Papers Presented at the Tenth Annual AIJA Conference* (1992)).

(1978) 1 ALD 383.

for the Tribunal to take certain initiatives, and to regard itself as unfettered by th strict rules of the adversary system. And s 39 is to be seen as imposing a duty upo the Tribunal consistent with this conception of its function.[22]

In *Kuswardana v Minister for Immigration and Ethnic Affairs*[23] Fox pointed to the difference between a tribunal engaged in administrative enquir and a court, saying:

> The other matter tending to obfuscation was that the argument had not bee presented to the Tribunal.... There is not, however, any requirement that 'the poi be taken' before the Tribunal, and we should be cautious in trying to apply procedures and practices operating in an administrative setting those which app in a judicial setting. This is not to say that an administrative tribunal may nc subject to the regulations governing it, find it convenient or helpful to follow some respects procedures which over the span of many years have been found i courts of law to be most conducive to the interests of justice. They plainly must i able to accept concessions of fact, but so to express the matter is to confuse th functions, which is one of administrative inquiry, without rules of evidence. Where there is material suggesting that the applicant has at, or before, the releva time become a member of the Australian community it is in my opinion incumbe upon the Tribunal to investigate the matter and to form and record its decision. the presidential member constituting the Tribunal affirms the Minister's decisio he must, it seems to me, be satisfied of all the critical ingredients, and, accordance with general principle, he should state his decision thereon, wi reasons. ... [Section 43(2)] ... requires a Tribunal functioning under the Act to gi reasons in writing for its decision, which are to include its findings on materi questions of fact. The operation of the sub-section was considered by a Full Co of this court in *Sullivan v Department of Transport* (1978) 20 ALR 323, where was held that failure to take material facts into account and to examine them relation to a matter the Tribunal had purported to determine amounted, in th case, to an error of law, and the appeal from the Tribunal was allowed.[24]

The public interest aspect of administrative review should not have to rely o the skills and resources of parties engaged in adversarial processes.

D Guidance

Decisions reviewing administrative decisions are primarily decisions affecti the parties, but they do also have a role in providing guidance to decisi makers in how to interpret a statutory provision or how to apply a provision certain facts. Ms O'Neil, Principal Member of the Immigration Review Tribun has said that:

> Those characteristics of review bodies which distinguish them from oth administrative decision makers - independence, resources, expert membership anc range of powers relating to the gathering of evidence - mean that review bodies a in a position to make better decisions for the benefit of individuals and to provi guidance leading to improved decision making at all levels....

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22 *Ibid* 386.

23 (1981) 35 ALR 186.

24 *Ibid* 199-200. Whitmore has observed that: ". . . I believe that the Tribunal should be usi largely inquisitorial procedures and should whenever possible abandon adversarial techniq altogether - bearing in mind that there is a good deal of misunderstanding about wi inquisitorial procedures are all about. In many inquisitorial procedures they do use some of familiar techniques of the common law such as cross-examination, when facts are in iss and so on. It is not simply a question of a judge seeking information on his own . . . One of greatest failures of public law has been reliance on party-party conflict to produce the ri evidence. As a result, in many areas the proper evidence about the wider public interes never produced at all": H Whitmore, *supra* n 10, 117.

> Those of us who work in the field can point to innumerable examples where consideration of a matter by a review body has lead to the correct or preferable decision being made to the benefit of the individual. We can point out how often our decisions result in a change in policy to ensure that primary decisions better reflect the law, or a change in the law to ensure that it better reflects government policy. All of this is valuable.[25]

One erroneous decision by an administrative review body may affect many ›ther people in a similar position. It seems inappropriate that such a result hould follow from an inequality between adversaries in one matter.

Efficiency and effectiveness

As administrative review on the merits is a function of good administration it s important that it be provided in the most efficient and effective way. An Issues 'aper of the Queensland Electoral and Administrative Review Commission[26] uggests that most of the current criticism of the AAT is because it is "too ormal, adversarial, legalistic and prone to delay". It suggests that more use of an nvestigative or inquisitorial approach would reduce this criticism. I often hear hese criticisms[27] but never supported by chapter and verse or even anecdotal vidence.

1) Excess Formality and Legalism

Accepting for argument's sake that there is some merit in the criticism, I agree hat efficiency requires that there be no excessive formality, adversarial bias, egalism or delay. If the Tribunal adopted more of an investigative role it may be een by applicants and respondents as enquiring into the merits of their case ather than as umpiring a contest. That may reduce the impression of excessive ormality. Of course we are bound to be legalistic where we are interpreting and pplying statutes, but perhaps we do not always explain our position clearly nough to the parties and their representatives. In *Re Hennessy and Secretary to)epartment of Social Security*[28] it was said that the Tribunal usually eschews ormality which is excessive for the matters before it, but perhaps a change in eneral procedure rather than a change in approach to assist applicants in ›articular cases is called for.[29] The desire to avoid excessive formality should be emonstrated by the physical surrounds of a hearing room as well as by the ›rocedures adopted during a hearing.

2) Adversarial Bias

Adversarial procedures for dealing with evidence may be unjust and render ›roceedings ineffective because they confuse and intimidate witnesses rather than ssist a court or tribunal in determining the truth of that witnesses evidence. 'his was pointed out by Eggleston:

P O'Neil, "Do Review Bodies Lead to Better Decision Making? - II" (1991) Canberra Bulletin of Pub Admin No 66, 124-125. See too the remarks of Ms Coghlan, National Convenor of the Social Security Appeals Tribunal, in A Coghlan, "Can Review Bodies Lead to Better Decision-Making? - III", (1991) Canberra Bulletin of Pub Admin No 66, 128.

Electoral and Administrative Review Commission, *Appeals From Administrative Decisions Issues Paper No 14* (1991), 50.

Sir Anthony Mason, "Administrative Review - The Experience of the First Twelve Years" (1989) 18 F L Rev 122, 133.

(1985) 7 ALN 113, 116-117.

Re White and Secretary, Department of Social Security (AAT, 1 October 1991, unreported) is an example of another matter where an informal and flexible approach by the Tribunal was required.

> We can, of course, all recall cases in which a fraudulent litigant has been expose by brilliant cross-examination and made to appear an unmitigated liar. But w have to put against these, those cases in which a witness whom we believed to b honest was disbelieved because for one reason or another the cross-examin managed to implant the impression that the witness was not being frank.[30]

There is merit in Eggleston's suggestion that "[w]hen a witness is called h should be required to tell his story to the judge in his own words and as far a possible without interruption".[31] Evidence given in such a manner seems mor convincing than evidence which gives the impression that questions and answe have been carefully rehearsed. Tribunals are usually not bound by the rules c evidence, and as they do not sit with juries, there is no reason to interrupt witness to stop her or him giving hearsay evidence. It is often relevant to th account of events and the Tribunal should be able to consider what weight if an it is appropriate to give to hearsay evidence.[32]

One of the worst habits of the adversarial system in my view is the frequentl repeated demand that the witness just answer the question "yes or no", with n explanation. Whenever Counsel addresses a witness in those terms before me, interrupt to tell the witness that as soon as the question has been answered I wi ask if there is anything he or she would like to add. Usually Counsel drops th habit pretty quickly. I can see no reason why any Court would be assisted b evidence which the witness considers is only part of the story without decidin for itself whether the other information changes the impact of the witnesse evidence.[33]

(3) Delay

I cannot claim at present that the use by the Tribunal of investigative c inquisitorial powers reduces delay. Sometimes there is need of an adjournme because of the use by the Tribunal of an investigative approach. In one matter i which I was involved I suggested that the respondent pay for surgery which th applicant desired to undergo and which was in part exploratory, and suggeste that the surgeon's report would probably be of more assistance to the Tribun than psychiatric evidence as to the applicant's credibility. In another matter I fe that relevant notes from treating doctors had not been put before me. Although had evidence from medico-legal experts I asked for and obtained more evidenc as to the findings of treating doctors before reaching a decision.

The delays in those matters might not have been necessary if I had been awa before the hearing of the evidence that would be called before me and of the fac which gave rise to my request for additional evidence, but those facts did n become apparent until the hearing had progressed almost to a conclusion. It i possible that if at preliminary conferences investigative procedures were used an preliminary assessments of the evidence were made, some, but not all, of thes

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30 Eggleston, *supra* n 1, 431.

31 *Ibid* 437.

32 There is a very valuable discussion of use of hearsay evidence by tribunals in Brennan J reasons for decision in *Re Pochi and Minister for Immigration and Ethnic Affairs* (197 2 ALD 33, 42-43. See also J H Langbein *supra* n 1, 829.

33 I was interested to see that in *Galea v Galea* (1990) 19 NSWLR 263, 275, the passage set o from Powell J's questioning of Dr Galea shows His Honour to have indulged in the same habi The NSW Court of Appeal held that in the particular circumstances of the case, bearing i mind that the judge was sitting alone, that it was a long case and that Dr Galea was a difficu witness, the judge's interventions did not deprive the appellant of a fair trial. It is interestin though that in the passage quoted any criticism of His Honour's conduct of the trial should n be on the basis that it was too inquisitorial but rather that it was too adversarial.

ijournments during a hearing could be avoided. On the other hand, even if there delay caused by the use of inquisitorial procedures, if that delay leads to a tter decision, in that it has taken into account additional relevant material, then is suggested that the delay is worthwhile.

Substantial delays can be caused by the need to obtain additional evidence, in rt because of the processes which must be used to ensure the Tribunal's ıpartiality. Because the parties and their legal representatives are so accustomed an adversarial process they sometimes appear irritated by the delays and by the ibunal itself suggesting lines of enquiry which they have not considered. ıere are no established procedures in force for the Tribunal to use if it wishes obtain another expert's report or to inspect original documents, and the ocesses can be cumbersome, as it seems wise for the Tribunal to ensure that th parties are at all times aware of steps proposed to be taken by the Tribunal give them the opportunity to object if they wish to do so. If expectations of rely adversarial processes were removed then some of this problem would be rrected.[34]

) *Cost Savings*

The other claim sometimes made for the use of investigative rather than versarial procedures is cost efficiency. However it is not necessarily correct ıt the use of inquisitorial or investigative procedures creates a cheaper means resolving disputes. Osborne pointed out that one reason why the Tribunal has t fully lived up to expectations by using its new investigative procedures is ıt it has not had the resources to do so.[35] Similarly, Langbein acknowledged ıt the inquisitorial system in use in civil actions in Germany requires that ere be more civil judges than in Anglo-American systems.[36] However he inted out that as the Judges carry responsibility for the major part of the fact- ıding, there is less work required of the parties' lawyers and therefore there is a ncomitant saving in the cost of justice, although the saving is that of the rties and the increased costs are borne by the court or tribunal.[37]

In applications before the AAT, one party is always the Commonwealth)vernment and the other party is also often indirectly funded by the)mmonwealth Government, through Legal Aid. Thus a cost-saving to the rties is a saving to the Commonwealth Government which of course funds the AT. But looking at the issue practically in these days of budget cuts and)gram budgeting it may be difficult to divert the necessary resources from the versarial system to the Tribunal to provide for more use of investigative or quisitorial procedures. Of course it would not be necessary that judges or ibunal members do all the extra work caused by investigative procedures. me tasks would no doubt be assigned to Tribunal staff. Staff could peruse es and under direction of a Member initiate steps to obtain further evidence her through the parties or by the Tribunal once a matter has been raised with parties. Staff could also supervise the inspection of files by the parties when y are made available to the parties' representatives, as must be done to comply th natural justice and with s 39 of the AAT Act.

As Mahoney JA said in *Glasscock's* case: "The reasons why it was felt unjust to take the matter out of the hands of the advocates is essentially, I think, the expectations of the parties": *supra* n 4.

G Osborne, *supra* n 1.

J H Langbein, *supra* n 1.

Ibid.

As has already been pointed out, sometimes the gaps in the evidence are su that the Tribunal feels that unless further evidence is obtained it will not ha reliable evidence on all the material questions of fact. In those cases it may one of three things: either encourage the parties to call the necessary evidenc call it itself; or decide the case simply by considering which party fails if t particular matter is not established.[38] In those cases a lack of resources may le to the third of these alternatives being adopted, even when justice really requir that further investigations be undertaken.

To illustrate the choices available, in *Re Kiazim and Commonwealth*[39] t Tribunal found the medical evidence and the evidence from the workpla contradictory and incomplete. Pursuant to s 33 of the AAT Act it required t Telecom personnel file and the rehabilitation file to be made available to Pursuant to s 39 it arranged for both files to be made available to the parti representatives for inspection. The Tribunal requested but did not obtain further medical certificate. The files, which were perused by my Associa contained more conflicting and contradictory material, some of which could ha given rise to adverse inferences against Mr Kiazim. The Tribunal did not ha the resources of the continental systems of administrative and civil law to purs further investigations. In interim reasons outlining the deficiencies in t material I concluded:

> The evidence before the Tribunal is in a state where it is unsatisfactory either rely on it or to disregard it altogether. The only approach open to the Tribu seems to be to bring the matters to the attention of the parties. In this way they c either produce further evidence or make submissions on the material which presently before the Tribunal. I propose to make the files available to the part again and to give both parties thirty days within which to apply to have the mat brought on for further hearing or to make written submissions on the matt referred to in this interim decision.[40]

At the end of that period the matter came on for further hearing. Most of t issues to which the Tribunal had drawn the attention of the parties were still r dealt with thoroughly. Nonetheless the Tribunal decided the case on the evider as it then was, as it had no further resources to apply to investigation.

The Tribunal reached a similar impasse in *Re Martin and Commonwealth* In order to resolve the dilemma in which it was placed by the conflict of exp evidence and the failure to call evidence from the applicant as to his pre-19 anxiety symptoms, it considered that it would have to reconvene the hearing. expressed concern about the additional cost to the parties entailed by such course and concluded:

> The alternative course available to me is to disregard Dr Mendelson's evidence the ground that it is not relevant to the narrow question posed by the parties decision by the Tribunal namely whether the incapacitating effects of applicant's work-aggravated war neurosis ceased when he discontinued working a stressful environment. Not without considerable misgivings I have decided tha should adopt that course, partly because the Commonwealth, whose financ interests are at stake, does not urge me to do otherwise, and partly because adoption of that course avoids putting the applicant to any further expen

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38 *Supra* n 8.
39 (1986) 9 ALN N 218.
40 *Ibid* 221.
41 (1983) 5 ALD 277.

Whether the question posed by the parties is the right question, may be another matter.[42]

) *Expert Witnesses*

One area where there are very significant savings to be made by using a less iversarial and more investigative approach is in the use of expert witnesses. If e Tribunal appointed and paid one expert witness instead of the parties using :o or more this would not only save expense but would also improve the ıality of expert evidence available to the Tribunal. Where a review body has to ake a decision as to entitlement, qualification or causation it is not really sisted by partisan expert opinion. It wants the best and most objective expert ıinion available.

Langbein has put it graphically:

> 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.[43]

ıngbein explains how parties can have a role in selecting an agreed expert, but they do not do so the Court takes the initiative. He also explains how the ɔurt formulates the problem for the expert, but the court's formulation and pert's opinion may then be clarified, expanded or challenged by the parties.[44]

The need to discourage the use by the parties of partisan expert evidence is mething about which the Tribunal has been concerned for many years. It arises ost frequently in the medical area, but I think I can say that as a result of ımments made by Tribunal members both at preliminary conferences and :casionally during hearings, at least in Melbourne, and particularly in the area Veterans' Entitlements, we are seeing both parties turning more to balanced d impartial experts and occasionally even to an agreed expert.

As the High Court case of *Vakauta v Kelly*[45] demonstrates, the problem of the ırtisan witnesses is not confined to tribunals. In that case at first instance, when ınt J of the Supreme Court of New South Wales was told that counsel for the ɜneral Insurance Office (GIO) intended to call three named doctors, he referred them as "that unholy trinity". Later, during discussion with counsel, His ɔnour referred to the GIO's "usual panel of doctors who think you can do a full ɜek's work without any arms or legs". While Hunt J's comments appear both discreet and exaggerated they do reflect a problem which is well known. though the High Court allowed a new trial, their Honours acknowledged that Judge who sits regularly to hear claims for damages for personal injury will rm views about the reliability and impartiality of medical experts who are ɜquent witnesses in her or his court. The Court said that that did not mean that ɜ judge was disqualified from hearing the particular action involving that ɜdical expert as a witness. The reason given for this conclusion was that:

Ibid 285.

J H Langbein, *supra* n 1, 837.

I commend Langbein's article to anybody concerned with the unsatisfactory features of the use of expert witnesses in the Australian legal system today. As he says, "[t]he more measured and impartial an expert is, the less likely he is to be used by either side": J H Langbein, *supra* n 1, 835.

(1989) 87 ALR 633.

> If it were so infringed, the administration of justice in personal injuries cases wou be all but impossible. In that regard, both necessity and common sense require th a distinction be drawn between the case where a judge has some preconceived viev about the expertise or reliability of the professional opinions of an expert medic witness and the case where a judge has preconceived views about the credit trustworthiness of a non-expert witness 'whose evidence is of significance on ... question of fact' which 'constitutes a live a significant issue' in the case (see *Lives v New South Wales Bar Association* (1983) 151 CLR 288 at 300; 47 ALR 45).[46]

Mr Justice Toohey in his reasons for judgment found ostensible bias in t comments of Hunt J, because from the latter's remarks

> the observer is likely to conclude that His Honour would approach the assessme of damages with a strongly held opinion that the evidence of the appellan medical witnesses (which he had not heard) would almost certainly be load against the respondent and therefore be worthy of little credence.[47]

With respect, if that establishes bias, I fear that courts and tribunals a frequently biased, as although they are careful not to say so they must for views that certain medical witnesses who frequently give evidence before the give evidence which is "loaded" one way or the other and therefore "worthy little credence", or at least less credence than it would be if given by a witne who gives more objective evidence.

If we were to find a way to change the conduct of cases in regard to the use expert witnesses, not only would there be a saving in the costs of exp witnesses, there would also be an increase in the quality of expert evidence. O factor which would assist in achieving this result is that many medical expe do not enjoy giving evidence, and some refuse to do so, because they do n wish to be "put up" by one side to be "knocked down" by the other. If they we to be called either as agreed experts or as court or tribunal appointed experts th would be much more enthusiastic about sharing their expertise with courts tribunals.[48]

3 WHY DOES THE AAT NOT MAKE MORE EXTENSIVE USE OF ITS INQUISITORIAL POWERS?

How might adversarial bias be overcome? It has been suggested that there a two explanations for the AAT's failure to live up to expectations in the use its wide inquisitorial powers. First, the use in the AAT Act of expressio which indicate that the proceedings before the Tribunal are to be adversarial, ar secondly, the effect of certain views of the Federal Court concerning t appropriate procedure in the AAT. I would add a third and a fourth. The third, was pointed out by Mahoney J in *Glasscock's* case, in the passage quoted earl in this paper, is the prevailing legal culture in this country with the conseque expectations of the parties, their representatives and many members of t

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46 *Ibid* 634.

47 *Ibid* 645.

48 There is insufficient space here to set out Langbein's detailed explanation of the safeguards parties' interests in the German civil procedure in regard to the use of experts. I agree w him that: "[a]ccordingly, the proper question is not whether to have lawyers, but how to them; not whether to have an adversarial component to civil procedure, but how to prev adversarial excesses. If we were to incorporate the essential lesson of the German system our own procedure, we would still have a strongly adversarial civil procedure. We would however, have coached witnesses and litigation-biased experts": J H Langbein, *supra* n 1.

ibunal. The fourth is the lack of structure and resources within the Tribunal to ·ilitate use of inquisitorial powers.

The Language of the Statute

The intention of the committees that led to the establishment of AAT was :t it should not be bound to follow adversary procedures. The AAT Act gives : Tribunal significant powers of an inquisitorial or investigative nature (see ss , 34, 38, 39, 40, 43 of the Act). Under these sections the Tribunal has power determine its own procedure; may inform itself on any matter in such manner it thinks appropriate, without being bound by the rules of evidence, so long the parties have the opportunity to present their cases and to inspect and make)missions in regard to any documents to which the Tribunal proposes to have ;ard; may direct the holding of a conference after consideration of any material iged by the parties; may require the lodging of additional material by a :ision maker; and may summon a person to give evidence or produce :uments. Those powers are very significant. It appears from my reading on the ıtinental system that they are as wide as those of French or German courts, yet : AAT has only moved very tentatively towards an inquisitorial mode of ıcedure.

Perhaps what is required is a clear statement of the objectives of the statute ıng the lines suggested in a recent Issues Paper of the Queensland Electoral l Administrative Review Commission. It said:

> The language of the statute should make it clear that the review body has been vested with the responsibility of determining the proper exercise of the decision making power, and it must therefore take responsibility for managing the appeal through its preparatory stages and for ensuring that all relevant material is disclosed to enable it to determine all relevant facts.[49]

is might both embolden members of any new body who feel tentative about · use of inquisitorial powers, and make clear to any supervisory court that the ıv body is bound to use the powers given to it to initiate enquiries in a way ich is not expected of courts in an adversary system.

The views of the Federal Court

In *Sullivan v Department of Transport*[50] the Federal Court was somewhat ıivocal about how far the Tribunal should go in itself raising matters which parties do not raise. Thus Deane J, with whose reasons Fisher J agreed, said:

> Section 33(1)(b) of the Act requires that the proceedings of the Tribunal shall be :onducted with as little formality and technicality, and with as much expedition as he requirements of the Act and of every other relevant enactment and a proper :onsideration of the matters before the Tribunal permit.... In the ordinary case, a ribunal which is under a duty to act judicially and which has the relevant parties)efore it will be best advised to be guided by the parties in identifying the issues ınd to permit the parties to present their respective cases in the manner which they hink appropriate. Circumstances may, of course, arise in which such a statutory ribunal, in the proper performance of its functions, will be obliged to raise issues vhich the parties do not wish to dispute and to interfere, either by giving guidance)r by adverse ruling, with the manner in which a particular party wishes to present ıis case. Ordinarily, however, in the absence of a request for assistance or guidance)y a party who is appearing in person, a tribunal under a duty to act judicially :hould be conscious of the fact that undue interference in the manner in which a

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Electoral and Administrative Review Commission, *supra* n 26, 53.
(1978) 1 ALD 383.

> party conducts his case may, no matter how well intentioned, be counte productive and, indeed, even overawe and distract a party appearing in person t the extent that it leads to failure to extend to him an adequate opportunity c presenting his case.[51]

His Honour acknowledged that the evidence as to the appellant's fitness to pil a plane was left in an unsatisfactory state but did not suggest that the Tribun should have used its powers under s.33(1)(c) to obtain more satisfactor evidence.[52]

On the other hand, Smithers J took a more expansive view of the Tribunal interventionist role, than did Deane and Fisher JJ.[53] He made the same poi some time later in *Drake v Minister for Immigration and Ethnic Affairs*:[54]

> The duty of the Tribunal is to satisfy itself whether a decision in respect of whic an application for review is duly instituted is a decision which in its view, w objectively, the right one to be made. Merely to examine whether th administrator acted reasonably in relation to the facts, either as accepted by him c as found by the Tribunal may not reveal this. In this connection the observatio of Sheppard J in *Horne v Locke* [1978] 2 NSWLR 88 at 98-100 are in point. *It is permit implementation of the function of the Tribunal, as so understood, th there has been conferred upon the Tribunal extensive powers of investigatio Those powers are conferred so that the Tribunal may equip itself to make c appropriate recommendation or affirm the decision* (emphasis added).

In *Re Nicholls and Department of Primary Industry*[55] I was confronted wi the question whether Tribunal should use its inquisitorial power to raise relevan issues which the parties had not raised themselves. The comments of the Feder Court in *Kuswardana v Minister for Immigration and Ethnic Affairs*[56] and *Minister for Health v Charvid*,[57] and of the High Court in *R v Moodie an Others; ex parte Mithen*[58] suggest that the Tribunal must satisfy itself of a issues relevant to its decision whether or not those issues are adverted to by th parties.[59] Although the Tribunal will usually accept concessions made by th parties it will not necessarily do so, and if it doubts if the concession is proper made and the concession goes to jurisdiction, it cannot accept the concession.

In only one instance of which I am aware has the Federal Court criticised th AAT for not seeking further evidence, when the evidence put before it by th parties was not sufficient to allow it to make a decision on a relevant matter. *Adamou v Director-General of Social Security*[60] Wilcox J held that the Tribun

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51 *Ibid* 402-3.

52 *Ibid* 406-407.

53 *Supra* n 22. In *Commonwealth of Australia v Scott* (1978) 1 CCD 119 Fisher J referred *Sullivan* and said that he preferred the reasons for decision of Deane J to those of Smithers J

54 (1979) 2 ALD 60, 77-78. In *Kuswardana v Minister for Immigration and Ethnic Affairs* (198 35 ALR 186 the Federal Court held that it was an error of law for the Tribunal to fail consider and decide the issue of migrant status even where the parties did not raise the issu see text *supra* n 24.

55 (1988) 22 ALD 596.

56 (1981) 35 ALR 186.

57 (1986) 10 ALD 124.

58 (1977) 17 ALR 219.

59 I consider that the comments in *Ex parte Mithen* apply equally to this Tribunal. Son suggestion that they may not was made by the Tribunal in *Re Lombardo and Commonweal* (1985) 8 ALD 334. However even there the Tribunal repeated that it is not bound to acce concessions made by the parties. It referred in its reasons to *Re Martin and Commonweal* (1983) 5 ALD 277 and *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) ALR 186.

60 (1985) 7 ALN N 203.

iled in its duty because, in a matter concerning a claim for invalid pension, it id not considered the ramifications of the qualification that Mr Adamou was io longer suited for labouring tasks of a very heavy nature". 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: see s 33(1) of the Administrative Appeals Tribunal Act 1975. 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: see s 33(1)(c). However the problem was to be managed it was encumbent upon the Tribunal to make a finding on the question. Its failure to do so constitutes an error of law in respect of the finding of lack of incapacity of work.[61]

There are other instances[62] in which the Federal Court has advocated the use inquisitorial methods. In *Ladic v Capital Territory Health Commission*,[63] ox J emphasised the inquisitorial role of the Tribunal when he said:

> Subject to relevant legislation, it is for the Tribunal to decide upon its own procedure. Although in many ways resembling a court of law, and although it finds it helpful to follow, in general, the course of proceedings in a court of law, it must always be remembered that its role is fundamentally administrative. Its task is to inquire. By way of contrast, the task of a court of law is, in general, to decide which of two opposed cases is to be preferred.

Australian Postal Commission v Burgazoff[64] Davies J quoted the comments Fox J with approval, but indicated that the Tribunal only uses its quisitorial power in a very limited way.

> Because of the nature of its function and the fact that it proceeds by way of a hearing at which parties are entitled to appear and be represented, the Administrative Appeals Tribunal itself rarely calls evidence and never itself makes investigations outside the conduct of the hearing. But an Administrative Appeals Tribunal, as an administrative body, will feel free to suggest to the parties other additional information which ought to be obtained and sometimes appropriate means of obtaining the information and bringing it into evidence.

The Tribunal must therefore tread a careful line in applying its powers under e Act so as not to overstep the boundaries the Federal Court considers ppropriate. My own experience has been that so long as the Tribunal is very reful to explain to the parties why it considers additional evidence to be cessary or why it will look at issues the parties have not raised, and ensures at it complies fully with the rules of natural justice or procedural fairness,[65] the

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Ibid N 207.

In *Doolette v The Repatriation Commission* (1990) 21 ALD 489, O'Loughlin J said: "It is well to start this exercise by reminding oneself that proceedings of this nature are inquisitorial - they do not belong to the adversary system. So much is clear from the provisions of s 120(6). Nevertheless, it remains necessary for the Tribunal to give consideration to the whole of the material before it and, within the parameters laid down by s 120, to come to a conclusion which is governed by the use of the words 'determine' and 'satisfied'." His Honour did not seem to think the inquisitorial nature of the Tribunal proceeding required that the Tribunal itself seek any material beyond that put before it by the widow of the veteran.

(1982) 5 ALN N 60.

(1989) 10 AAR 296, 298.

In *Defence Force Retirement and Death Benefits Authority v O'Fee* (Federal Court, 6 June 1985, unreported) McGregor J criticised the approach the Tribunal had adopted in a case

parties usually do not feel aggrieved by the use by the Tribunal of inquisitorial powers. That therefore has so far as I know never been an iss relied on before the Federal Court.

If the legislation establishing a review body stated unequivocally that it ha duty to manage applications for review so as to ensure that all relevant mater was before it, then a supervisory court would be more likely to make comme similar to those of Wilcox J in *Adamou*.[66] That would make it very clear to t new body that it had a responsibility to use the power given to it by statu Public expectations and those of the Tribunal would then quickly be chang At present, except for *Adamou*, there is no clear statement by the Federal Co that the Tribunal should use its inquisitorial powers more than it does. It rar uses them and thus presiding members see no reason why the use of t somewhat controversial powers should be increased.

C Expectations

It is, in each case, very difficult for the Tribunal to know how far it should to comply with its responsibilities. In other words, how much search appropriate evidence should the Tribunal suggest or even initiate where applicant is not represented or where the applicant's representative has considered all relevant issues or has not called all the evidence which may ass the applicant. If the Tribunal suggests further enquiries to parties or to le representatives who do not regularly appear before the Tribunal, the fi response seems to be that it is causing a lot of bother and interfering in parties' conduct of proceedings. The next is that it is causing unnecessary del This is because in the Anglo-American legal culture parties and th representatives expect a hearing to be one continuous process. Egglest suggested that to counteract this expectation:

> 2. There should be a general enactment to the effect that it is the responsibility the judge to take steps to ensure that cases are correctly decided accordingly that the judge is entitled to intervene if he thinks that the case being conducted in such a way as to lead to an unjust decision; to requir particular witness to be called; or to ask questions of the witnesses beyond present restricted role of clearing up ambiguities in the evidence.
> 3. It should be made clear that trials need not be conducted as a single continu hearing, though it would be natural for judges to require some cause to shown for an adjournment to bring further evidence. In so far as disclosure witnesses' statements is required the number of occasions on which s adjournments might be sought should be reduced.[67]

Once parties and their representatives see the value in the further evidence a the Tribunal's interest in reaching a correct decision rather than just a decisi on the evidence before it, they usually co-operate with the Tribunal.

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where the hearing was in Adelaide, counsel came from New South Wales, a doctor wh evidence was essential had not been available at the original hearing, and legal aid would cover a further hearing in Adelaide. In this difficult position the Tribunal decided to have f addresses in Adelaide and afterwards to hear the doctor's evidence in a three State teleph hook-up. At the telephone hearing the doctor's voice was indistinct and the Tribunal was that further relevant information had come to light since the hearing concluded. In th circumstances McGregor J concluded that the whole proceeding was unsatisfactory and whole matter was remitted to the Tribunal to be heard and decided again.

66 See text *supra* n 60.

67 Eggleston, *supra* n 1, 437.

occasions however the co-operation of one party seems half-hearted. One does not know in those circumstances whether it is because the further evidence would not assist that party or because having geared up for a hearing and run the hearing, the representative has run out of steam and is more interested in closing the file than in drawn out processes which may or may not help that party.

The point about the expectation of the parties made by Mahoney JA in *Glasscock* is a very valid one.[68] I recently had an example of it. I was due to hear a matter in another State about eligibility for a First Homeowner Grant. The applicant was unrepresented. I read the file to prepare myself for the hearing and saw that the original decision had been made on the basis of very little information as to the progress on the building by the relevant date. I considered that evidence from the builder and plumber would be required at the hearing if the Tribunal was to have before it all the information it required to decide whether or not the building had commenced by the relevant date. I caused a letter to be sent to the applicant, with a copy to the respondent, suggesting that she arrange for the builder and plumber to be available to give evidence. As the property was outside the metropolitan area, the letter suggested that if necessary they could give evidence over the telephone. The result of my letter was that the applicant became nervous about proceeding on her own and obtained Legal Aid but sought an adjournment to allow the lawyer time for preparation.

It appears that it was so unusual a concept for a Tribunal to indicate to a party what sort of evidence would be required at a hearing that the applicant and the Legal Aid office both saw my suggestion in quite the opposite way to that I had intended. Instead of facilitating the hearing where the applicant was unrepresented, I ended up causing the applicant to obtain legal representation.

Resources

A factor which weighs with the Tribunal is that if the applicant does not have the means to pay for further expert evidence and the respondent does not agree to pay for that evidence, it throws a burden on the Tribunal. Usually in Victoria I have found respondents do agree to pay for expert witnesses if the Tribunal suggests that it requires their evidence.[69] So far the Tribunal has very rarely called witnesses of its own initiative - and some it has called have not asked for fees and therefore the budget has not been great - but if the Tribunal were to start doing that regularly it would be necessary for there to be a budgetary allotment for witness expenses. Similarly, as I explained earlier, if the Tribunal calls for files, as I did in *Re Kiazim*, one must have staff who are available to peruse those files and if they reveal that further enquiries are called for, to initiate such further enquiries as the Tribunal directs.

THE USE OF THE TRIBUNAL'S POWERS TO OVERCOME ADVERSARIAL BIAS

In the course of this analysis I have made suggestions which would require some considerable change in traditional approaches to hearings. It is the case however that there have been decisions where the Tribunal has intervened or has considered intervening to suggest additional evidence, and several of these cases fall to be considered.

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[8] See text *supra* n 4.

[9] *Re Willey and Repatriation Commission* (1989) 17 ALD 314.

A Defining the issues

The Tribunal in *Re Nicholls and Secretary to Department of Primar Industry*[70] decided that it had no jurisdiction because the vessel in question wa a 'foreign boat'. The point became apparent while the Tribunal was drafting th reasons for decision after a ten day hearing where both sides were represented b conscientious and experienced Counsel. The Tribunal therefore directed th Registrar to write to the parties requesting written submissions on the matters t to which the Tribunal was concerned. A further hearing was held on the issu Counsel jointly submitted that the vessel was an 'Australian boat' but th Tribunal was not convinced and concluded that it lacked jurisdiction. There w no appeal from that decision.[71]

B Calling for additional evidence

In *Re Stephan and Secretary, Department of Social Security*[72] the Tribun adjourned a hearing because it considered that the lack of medical evidence w so significant that it could not dispose of the matter on the material before i Written interim reasons were delivered suggesting material the applicant coul place before the Tribunal and offering to reconvene if cross-examination we required as to any further reports tendered on behalf of the applicant. Th applicant did produce additional evidence including a further medical repor There was no need to reconvene. The Tribunal concluded that he was qualifie for invalid pension.

In contrast, in *Re Roche and Commonwealth*[73] The Tribunal decided not t call a psychiatrist who had examined the applicant on behalf of the respondent. said:

> I readily accept the applicant's genuine belief that she is susceptible in the way th she describes, and likewise her belief that it all flows from her problems at CSIR But I cannot find it so because she thinks it so. There must be evidence, and th preponderance of the evidence is against her case. To a non-doctor, there seem much to be said for the view that the applicant has or has developed some obsessiv or other disorder that had led to her belief that she is subject to a wider incapaci for work than the evidence supports. But again, that view cannot be given effe without evidence, and I just do not have it.[74]

It then continued:

> The applicant's Counsel was critical of the respondent for not calling Dr Saboisk a psychiatrist. That he had made a report or reports was known (see Dr Bromhead report). The respondent did not call Dr Saboisky. The applicant did not call hir The Tribunal did not call for his report. In many areas of the Tribunal's work, would be proper for the Tribunal to adopt a somewhat interventionist role. particular, if an applicant is unrepresented, the Tribunal sometimes has to adopt some degree an inquisitorial role. But in compensation cases in which counsel a involved on both sides, there would be real dangers in the Tribunal so conductin itself. It can be proper for the Tribunal to call for a report, but the matter must l approached in the way referred to in the judgement of Fisher J in *Commonwealth Scott* (1978) 1 CCD 119.[75]

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70 (1988) 22 ALD 596.

71 Another example of this sort of problem arising is *Re Stewart and Department of Employme Education and Training* (AAT, 14 August 1990, unreported).

72 (1985) 9 ALN 49.

73 (1988) 16 ALD 787.

74 *Ibid* para 18 (not reported in (1988) 16 ALD 787).

75 *Ibid* 787.

ıis decision demonstrates how the Tribunal must form a judgement in each atter as to whether or not it should "adopt an inquisitorial role" and if so to hat extent.

In Tribunals where I presided I have twice asked an ear, nose and throat ıecialist to examine an unrepresented applicant suffering hearing loss and to epare a report and give evidence at the Tribunal.[76] The witness' fees were on ch such occasion paid by the Tribunal, although the Tribunal could have dered that they be paid by the Commonwealth under s 67(3) of the AAT Act. *Re Oakley*, I said:

> This matter depended on careful analysis of medical evidence. Mr R. 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 ss 33(1)(c), 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.[77]

ıe evidence called in that case did not help the applicant to establish a ınnection between his sudden deafness in the left ear and his firing practice in e CMF, but at least Mr Oakley and the Tribunal were satisfied that the claim d been thoroughly investigated. In the final analysis, although the connection peared likely to lay people, the Tribunal had to decide the matter on the ɔdical evidence which was that the form of deafness suffered by Mr Oakley was ıt that which resulted from noise exposure.

In *Re Willey and Repatriation Commission*[78] I suggested to the representative the Repatriation Commission, who readily agreed to do so, that because of the satisfactory state of the evidence a report from a neuro-surgeon chosen by the ibunal be obtained by the Repatriation Commission. This was done. Once ain the report was not helpful to the applicant but at least she and the Tribunal ew that her claim had been thoroughly investigated. On numerous other casions the Tribunal has arranged for a medical witness who has already seen unrepresented applicant to give evidence over the telephone.[79]

A witness of a different kind was called in *Re Donath and Secretary, ɜpartment of Social Security*.[80] The matter concerned the question whether Nazi ɜtitution payments paid under Austrian legislation were "income" within the ɜaning of that term in the Social Security Act 1947 (Cth). The witness called ɜs the executive vice-president of the Federation of Australian Jewish Welfare ɔcieties, and he was asked whether he could explain the distinction in the

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Re Trott v Commonwealth (1985) 9 ALN 131 (but not noted on this point), and *Re Oakley and Commonwealth* (AAT, 23 December 1985, unreported).

Re Oakley and Commonwealth (AAT, 23 December 1985, unreported). These cases have apparently not been noticed by M Allars, *Introduction to Australian Administrative Law* (1990) 333, who writes that the Tribunal would not use its powers to call expert witnesses and pointed out (as I did not know) that the Administrative Review Council has recommended against the use by the Tribunal of the powers in ss 33(1)(c) and 40(1)(A) of the AAT Act to call non-party expert witnesses.

(1989) 17 ALD 314.

See *eg Re Stanisavljevic and Secretary, Department of Social Security* (1990) 21 ALD 312.

(1989) 19 ALD 124.

legislation between restitution payments made by the German and the Austri Governments in respect of Nazi persecution. The evidence did not allow t Tribunal to set aside the decision affecting Mr Donath but it did expose anomaly in the legislation.[81]

Another matter where an unusual witness was called by the Tribunal was *Morris and Repatriation Commission*.[82] That matter was a widow's claim have cancer accepted as war-caused. The evidence was that poor penile hygie was a significant risk factor. The veteran had served in Korea but the o evidence available as to conditions of service there was a brief letter from anot veteran now living in New South Wales. The Tribunal was aware that a part-ti Member of the Tribunal in Melbourne had served in Korea. It turned out that had served in the same battalion as the veteran. At the suggestion of t Tribunal, but only because both parties consented, he gave evidence as to t conditions of service and the complete lack of any facilities for personal washi while Mr Morris was in Korea.

Sometimes additional evidence obtained at the request of the Tribunal le one party or the other to concede a point. In *Re Mourtitzikoglou and Secret Department of Social Security*[83] the issue was whether the applicant fo pension was precluded from eligibility due to receipt of lump sum compensati The critical question was whether the living conditions of the applicant's fam in a house with a leaking roof and many broken windows provided spec circumstances under s 156 of the Social Security Act 1947 (Cth) for treati some part of the lump sum as if it had not been paid. The applicant w unrepresented, depressed and required an interpreter. She and her husband w both invalid pensioners. A Department of Social Security social worker h inspected the house and provided a report on it confirming that it was in a v bad state of disrepair. In preparing my reasons for decision I considered tha needed further evidence as to whether the state of the house was "unusu uncommon or exceptional"[84] among clients of the Department; and, if so, h much it would cost to repair it to a reasonable standard. I required t information to know how much of the lump sum, if any, should be treated as having been made. That evidence had not been before any of the earlier decis makers. The real issue was whether the public interest in allowing pensioners obtain a certain level of housing is greater than the public interest in savi some weeks of pension payments. The applicant was not equipped to advan those arguments.

A letter was sent by the District Registrar to the parties explaining w information I required, and suggesting that quotations be obtained by the soc worker in association with the applicant and her husband. The Departm informed the District Registrar by telephone that it was seeking legal advice to whether or not it should provide the information requested by the Tribur After advice it decided to do so. When the information requested by the Tribu

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81 On 4 December 1989, after the witness gave evidence, but before the Tribunal delivered reasons for decision, the Prime Minister announced that as from that day Nazi restitut payments made by the Austrian Government would not affect entitlement to social secu payments.

82 (1990) 21 ALD 293 (not reported on this point).

83 (1991) 23 ALD 249.

84 *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, 3.

as obtained the respondent itself conceded that special circumstances existed uch as to justify him disregarding the whole payment of compensation.[85]

Presentation by the parties of their cases

There are occasions where the Tribunal feels dissatisfied with the evidence it as received, as though the whole picture is still not exposed. Sometimes on ese occasions, particularly where both parties are competently represented, it eems appropriate to accept the evidence as presented and, as Fisher J said in *ommonwealth v Scott*,[86] allow the parties to present their cases in the way they onsider most appropriate. On other occasions the gaps in the evidence are such at the Tribunal will feel it does not have reliable evidence on all the material uestions of fact, unless further evidence is obtained. In those cases it must ither encourage the parties to call the necessary evidence or call it itself.[87]

The examples set out above show how the AAT's obligations, as it steps into ie shoes of the decision maker, can require it to rethink the whole problem and ius to require evidence that the parties had not considered relevant.

CONCLUSION

The procedures of the AAT as provided for in the AAT Act 1975 offer ppropriate powers to allow the Tribunal to obtain whatever evidence it onsiders is necessary to reach the correct or preferable decision. The preliminary onference provides an ideal setting in which a Member of the Tribunal can look t the issues in the matter, together with the parties, to consider what are likely o be the relevant issues and whether any new enquiries should be initiated.

There are a number of reasons why these powers have not on the whole been tilised. First, the vast majority of matters resolve before the hearing. In order to lay a significant role in directing the future conduct of a matter the Member onducting the preliminary conference would need to become very familiar with ie whole file. That would be time consuming and could not be efficiently done nder the present system where we have approximately 24 preliminary onferences listed before one Member over a two day period. Secondly, it is the actice that the Member who conducts the preliminary conferences is not the erson who will be conducting the hearing. Thus, if I look at a matter and iggest a new line of enquiry, it is possible that the Tribunal at the hearing may gard that line as not important and may give prominence to other factors. This actice has developed because it is considered that it is necessary to separate the eliminary procedures from the hearing to avoid the Tribunal "descend[ing] into e arena" where it is "liable to have [its] vision clouded by the dust of the onflict".[88] Another reason is that some members do not regard inquisitorial ocedures as appropriate in our legal culture. Thirdly, there is no specific source allocation for the few matters where the Tribunal will feel obliged to ll evidence additional to that called by the parties.

Another Tribunal took a similar approach to the same provision of the Social Security Act in *Re Kirwan and Secretary to the Department of Social Security* (AAT, 19 December 1990, unreported).

(1978) 1 CCD 119, 126.

Re Kiazim and Commonwealth of Australia (1986) 9 ALN 218; *Re Martin and Commonwealth of Australia* (1983) 5 ALD 277; and *Re Mourtitzikoglou and Secretary Department of Social Security* (1991) 23 ALD 249.

Yuill v Yuill (1945) 1 All ER 193, 198

I consider that there would be merit in a procedure where preliminar conferences were conducted by the Member who would preside at the hearing. Of course a provision such as s 34(4) of the AAT Act is required to protect t rights of parties to object to a Member who presided at a preliminary conferen conducting the hearing. I would however suggest that to facilitate listings t Registrar would have to be notified within fourteen days after a conference if party wishes to make such an objection.

The Issues Paper of the Queensland Electoral and Administrative Revie Commission contains some criticism of s 37 of the AAT Act as a means getting all relevant material in existence at the time the documents are prepar before the Tribunal.[90] I do not share that concern. In general I consider the s statements and attached documents (the "T documents") to be an excellent w of putting both sides of the case before the Tribunal. Of course, a case m change and the new approach be set out in statements of case lodged later but t historical file, which is culled to provide the s 37 documents, is an excelle means of familiarising the Tribunal with the issues as they were seen by t parties at the relevant time. I have never felt that a decision maker intentional excluded relevant material from the departmental file or omitted material prepar by the applicant which should have been before the Tribunal. Sometimes, but n often, it does appear that material has been left out which should have be included but that is always remedied as soon as the discovery is made.[91]

To give a review body responsibility for itself going through t departmental file would, in my opinion, be to place a great burden on the revie body for a very small gain which would only be relevant in a very sm minority of cases. Because most decisions have been made or reviewed short before the application for review is lodged with the Tribunal, the s 37 docume do usually contain up to date material.

What I have been saying may sound radical, but as Langbein pointed out, t introduction of case management techniques, and the requirement of exchange expert reports prior to hearings, have already diminished the contrast betwe continental and Anglo-American civil procedure. That this is so even Australia is demonstrated by a comparison of my comments with those Moynihan J quoted earlier in this article.[92] The use of case management syste is now common in many Australian courts and tribunals. However the balan between management which simply facilitates early hearings, and that whi explores with the parties the evidence to be obtained and the relevant issues be covered in a hearing, seems to vary a great deal, even within the one court tribunal. The result may seem arbitrary if it is the whim or philosophic preference of the Judge or Member which determines which approach is adopte

Finally, it deserves emphasis that is central to the very idea of administrati review that any material on which a decision is to be based must be logica probative and must be disclosed to the parties so that they have the opportun to rebut it if appropriate.[93] Thus, a question which arises concerning the use inquisitorial powers is whether the Tribunal can use them and still be seen

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89 See J H Langbein, *supra* n 1, 860.

90 Electoral and Administrative Review Commission, *supra* n 26, 53-54.

91 Although sometimes the Tribunal has been critical of decision makers in this regard; see *Mann supra* n 16, and *Re Wertheim and Department of Health* (1984) 7 ALD 121, 154. I such cases are now the exception.

92 See text at *supra* n 5.

93 *Mahon v Air New Zealand* [1984] AC 808.

ıaintain the impartiality necessary for the quasi-judicial role it must perform. It s my experience that provided the Tribunal adheres to basic principles of natural ustice, complies with s 39 of the AAT Act, and has adequate staff resources, the se of its inquisitorial powers will not offend any of the requirements of natural ıstice.