

# **8TH ANNUAL AIJA TRIBUNALS CONFERENCE**

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## **THE USE OF EXPERTISE BY NON-LEGAL MEMBERS OF TRIBUNALS-AN UPDATE**

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### **1.1 INTRODUCTION**

It seemed appropriate in a session concerned principally with the receipt of expert evidence, to revisit the paper which I gave at the 3<sup>rd</sup> AIJA Tribunals Conference in 2000 entitled "The Role of the Non-Legal Member in the Work of Tribunals" In that paper I looked at issues relevant to the use of specialist knowledge by tribunals members appointed because of that knowledge. In essence I reproduce that paper but with some updates on cases.

A member of a tribunal will necessarily bring to the task of decision-making a range of knowledge and experience, social, personal and professional, which may guide them, directly and indirectly, in that task. Indeed, it can be expected that a person appointed to a specialist tribunal will acquire information and knowledge which will be used on an incremental basis. Further, a tribunal member may be specifically appointed to a tribunal because of their experience and can be expected to use the knowledge which they have as the result of their experience in the decision-making process.

The paper is designed to be of particular interest to non-legal members of tribunals in view of the fact that they will normally have been appointed to tribunals because of their particular expertise. It will examine the use which they can make of that expertise. The paper does, however, deal with the use by tribunal members of information generally, acquired outside the tribunal hearing, or during the hearing, where the parties do not know of the existence of this information. To what extent can a tribunal rely upon this information, which may include observation? Should the existence of the information be disclosed to the parties?<sup>1</sup> These are matters of interest to both legal and non-legal members of tribunals.

### **1.2 KNOWLEDGE MAY BE USED PROVIDED PROCEDURAL FAIRNESS ACCORDED**

Lowe J of the Supreme Court of Victoria, in a case decided in 1944, spoke of the information and accumulated knowledge of specialist bodies and which they brought to bear in relation to their determinations:

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<sup>1</sup> Reference can be made to the interesting article by Mr Justice Young entitled "Observation by Trial Judges Outside Court" (1989) 5 *Australian Bar Review* 199, where his Honour identifies many of the situations which may arise.

If the [body] can not make use of such information and documents, so far from its being the best qualified body, it is really handicapped by having such information, because it is difficult, if not impossible, for it to act as if it were ignorant of such matters. Where an arbitrator is chosen for his special knowledge, *e.g.*, where a medical question comes before a medical man, or an engineering question before an engineer, such an arbitrator is not bound to accept evidence, even if uncontradicted, which his experience makes him think incredible. In all such cases the special knowledge of the tribunal can not be separated from it and is part of the knowledge of the tribunal."<sup>2</sup>

His Honour referred to the fact that in such cases the legislature must have known that in discharging their duties the members of the decision-making body would acquire knowledge and information relevant to the decision-making process.<sup>3</sup> Implicit in the passage quoted above is the recognition that persons chosen for their specialist knowledge should be entitled to use that knowledge, at least where the use of that knowledge does not transgress notions of procedural fairness.<sup>4</sup>

In a recent decision of Ashley J of the Victorian Supreme Court, the case of *Turner v Horsfall*<sup>5</sup>, his Honour, whilst acknowledging that "a specialist tribunal should not be prevented from using its acquired technical expertise in the resolution of a dispute before it" and having referred to the passage from the judgment of Lowe J (above) said that:<sup>6</sup>

"Concerning the issue of specialist knowledge this should be said: if the Tribunal had particular specialist knowledge upon which it proposed to rely, it was knowledge of which the parties should have been apprised before a decision was made in reliance upon it.

Concerning the issues of judicial notice and specialist knowledge I should add this: if by either route the Tribunal was able to rely upon the notorious fact which it identified, it would not solve the problem of extrapolating the general to the particular, a problem to which I earlier adverted".<sup>7</sup>

In *Turner* a member of a tribunal experienced in planning matters said in reasons for decision that:

"I believe it is so notorious that the mode of proceeding adopted by councils is for the councillors to be provided with a set of papers for each meeting including reports from the relevant departments which are affected by the various items of business for consideration at the meeting. These papers in themselves provide a very large bundle of 'homework' for councillors who in Victoria are still largely honorary rather than professional. In these circumstances it is, in the absence of evidence of anything more, simply fanciful to consider that one or more of the councillors might, without any suggestion in the officer's report that it was necessary or appropriate, have gone to the zoning maps to establish the zoning of the subject land (which does not appear in the Officer's report) and then considered the text of the Scheme to see whether under the then current planning arrangements it would be possible to

<sup>2</sup> *R v Milk Board; ex parte Tomkins* [1944] VLR 187, 196-7.

<sup>3</sup> *Ibid.*, at page 196.

<sup>4</sup> *Cf Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1, 10, Stephen J, to be discussed more fully later.

<sup>5</sup> [2002] VSC 195.

<sup>6</sup> At [44].

<sup>7</sup> At [46]-[47]

grant a permit for the proposed use and development. The obvious inference is that this matter ... was ignored completely."

**The case illustrates the fact that one must be able to conclude that the specialist knowledge relied upon was in fact specialist knowledge which the tribunal had acquired and that the tribunal was acting upon that knowledge.**

### **1.3 IS THE TRIBUNAL BOUND BY THE RULES OF EVIDENCE?- THE RELEVANCE OF EVIDENCE AND MATERIAL LED BEFORE THE TRIBUNAL TO ITS DECISION**

Whether a tribunal is bound by the rules of evidence is a question to be determined by reference to the statute pursuant to which the tribunal is established. For the most part tribunals in this country are not bound by the rules of evidence and may inform themselves in such manner as they think appropriate.

The tribunal which is not bound by the rules of evidence must ensure, however, that in departing from the traditional means by which facts are established, it does not transgress principles of procedural fairness. It may allow a party to introduce matters which would not be admitted in evidence under the rules of evidence. However, in doing so it may have to allow the other party to contradict that material or to admit material otherwise inadmissible under ordinary evidentiary rules tendered by that party. The wisest course may be to allow the parties to introduce any material that may be of relevance to the question to be determined and then to give that material such weight as the tribunal believes it should be given having regard to its probative value. This is likely to ensure that any decision is not impugned for want of procedural fairness.<sup>8</sup>

The tribunal is ultimately required to establish facts upon which it can base its decision. The conclusions stated in the tribunal's reasons for decision must be supported by evidence or other material properly placed before it.<sup>9</sup> Where a court is asked to overturn the decision of a tribunal on the basis that it has acted on its own experience, or otherwise on the basis of material which was not placed before it by the parties, there will always be an initial question whether the tribunal's decision can be sustained on the basis of the evidence led or other material properly before it. For example, in *Spurling v Development Underwriting (Vic) Pty Ltd*<sup>10</sup> a Town Planning Appeal Tribunal in its reasons for upholding a planning permit, stated:

"Experience has shown that following the introduction of a regional shopping centre into an area the business of shopping centres in the area has declined at first, has increased to the former level and has then improved. This recovery and improvement stems from population growth in the area and steps taken by the shopping centre to improve facilities, particularly car parking facilities..... We can see no reason why the pattern established elsewhere should not be followed at Footscray."<sup>11</sup>

<sup>8</sup> See *Santamaria v Secretary to Department of Human Services* [1998] VSC 107, Balmford J on the extent to which a tribunal may be required to allow a party time to present their case to ensure procedural fairness.

<sup>9</sup> *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1, 10.

<sup>10</sup> [1973] VR 1.

<sup>11</sup> *Ibid.*, at page 9.

On proper analysis of the reasons for decision and the evidence adduced before the Tribunal, Stephen J was satisfied that it had not acted on the basis of its own experience, but on evidence of experience in relation to regional shopping centres.<sup>12</sup>

**It follows that a tribunal should ensure, where possible, that there is evidence or other material before it upon which it may base its decision without recourse to its own experience or to material which is not put before it by the parties.**

#### **1.4 TO WHAT EXTENT IS A TRIBUNAL ABLE TO DRAW UPON MATERIAL WHICH IS NOT PUT BEFORE IT BY THE PARTIES IN REACHING ITS DECISION?**

I am not concerned here with the use to which a specialist tribunal can use its own specialist knowledge. The concern is a broader one. In *R v Metropolitan Fair Rents Board; ex parte Canestra*<sup>13</sup>, the Full Court of the Supreme Court said that:

"there is no room to doubt that a tribunal which is bound to act in a judicial manner and therefore to observe the principles of natural justice is bound to disclose to the parties any specific information or evidence received in the course of an inquiry relevant thereto, unless the legislation governing its duties negatives it."<sup>14</sup>

The Court then considered the Privy Council's decision in *University of Ceylon v Fernando*<sup>15</sup> in which the Vice-Chancellor of the University in conducting an inquiry in respect of the plaintiff had obtained information in relation to the plaintiff in his absence. It was there held that the plaintiff ought to have been afforded the opportunity to correct or contradict any relevant statement to his prejudice.

The Full Court went on to say that "in our opinion... the fact that the tribunal may obtain from any source information it thinks fit does not carry with it the result that such information need not be disclosed to the parties."<sup>16</sup> The Fair Rents Board in that case purported to deny the lessor of premises the subject of an inquiry for the determination of a fair rent access to reports and valuations submitted to the Fair Rents Board without his knowledge. The Full Court directed prohibition.<sup>17</sup>

It is fairness in these cases which requires the tribunal to provide all parties before it with such material and to afford them an opportunity to answer the material. Even though a tribunal may be authorised to gather extraneous evidence, for example by way of inspection, it will normally be required to give the parties the opportunity to make submissions and in appropriate cases to adduce evidence in relation to matters observed in the course of the

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<sup>12</sup> *Ibid.*, at page 10.

<sup>13</sup> [1961] VR 89.

<sup>14</sup> *Ibid.*, at page 91.

<sup>15</sup> [1960] 1 All ER 631.

<sup>16</sup> [1961] VR at page 92.

<sup>17</sup> The case is entirely consistent with the decision of Lowe J in *R v Milk Board; ex parte Tomkins* [1944] VR 187 where particular facts and documents were relied upon by the Board which should have been disclosed to the claimant so that he might have an opportunity of answering them.

inspection.<sup>18</sup> This principle would appear to extend to cases where the tribunal seeks to rely on experience based upon evidence in previous cases.<sup>19</sup>

Several other instances are given in De Smith, Woolf and Jowell, "Judicial Review of Administrative Action", 5<sup>th</sup> ed., pp 446-447. The learned authors express the view that the case law gives "no clear indication of the extent to which [a tribunal] will be permitted to abstain from disclosing during the hearing their own expert opinions, or information relevant to the exercise of their discretion in so far as they can take public policy considerations into account."<sup>20</sup> They express the view, however, that if a party is misled as to the basis upon which the tribunal is likely to decide, then a failure to disclose may result in a denial of procedural fairness. The learned authors would appear to be concerned here with **special knowledge** rather than general knowledge of a specialist tribunal or specialist member of a tribunal.

**A tribunal should always disclose the existence of material which is not put before the tribunal by the parties and provide an opportunity to answer the material. This extends to observations made by the tribunal which are not shared by the parties. When in doubt disclose, at least where the material or observation is relevant to the decision or to the decision-making process.**

## 1.5 THE USE OF GENERAL EXPERTISE

In *Spurling v Development Underwriting (Vic) Pty Ltd*, Stephen J noted that "where only general expert knowledge of an expert tribunal is in question there need not be disclosure of that expert knowledge to parties in order for the hearing to be fair in the sense of complying with the requirements of natural justice (and the relevant legislation)..."<sup>21</sup> His Honour referred with approval to the words of du Parcq LJ: "the experience of an expert tribunal, such as this, is part of its equipment for determining the case".<sup>22</sup>

It is to be noted that a distinction is drawn between general expertise which enables the tribunal to better understand the evidence or other material led before the tribunal and specialist knowledge which enables the tribunal to assert the existence of a fact.<sup>23</sup> The better view would appear to be that if the tribunal proposes to establish the existence of facts upon which it proposes to base its decision through its own expertise, whether gained professionally, or as the result of evidence and experience in other proceedings, this ought to be disclosed to the parties. The use to which a non-legal member of a tribunal may put their experience was explained by the Full Court of the Supreme Court of Victoria as follows:

<sup>18</sup> *Torrington Investments Pty Ltd v Shire of Bulla* (1985) 57 LGRA 181, Brooking J.

<sup>19</sup> *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456, 466-468, 489-490. See also *City of Altona v Protean (Holdings) Ltd* (1981) 63 LGRA 284, 289 where Murphy J held that the use by the tribunal of its expertise acquired in other cases was permissible.

<sup>20</sup> *Ibid.*

<sup>21</sup> [1973] VR 1, 10. As stated earlier, the statements were *obiter* because Stephen J, in fact, formed the view that the Tribunal was relying on the evidence and not its own expert knowledge and experience. This was the conclusion reached by Tamberlin J in *Tisdall v Health Insurance Commission* [2002] FCA 97 at [98].

<sup>22</sup> *R v City of Westminster Assessment Committee; ex parte Grosvenor House (Park Lane) Ltd* [1941] 1 KB 53, 69.

<sup>23</sup> The distinction is explained in these terms in *Cross on Evidence*, loose leaf ed., para [3135].

The industrial experience of a lay member may assist him in understanding conditions of employment, the nature of the industrial problem then before the Court, and so on. It may assist in understanding problems of industrial powers and jurisdiction as between State and Federal tribunals. As part of his general stock of knowledge, it may assist him to understand the history and principles of wage fixation, and so on. But we think that the distinction drawn by Lowe J [in *R v Milk Board; ex parte Tomkins* [1944] VLR 187], between special knowledge - in this instance industrial experience - and particular facts is a significant distinction in the present case. It may be that a lay member is entitled to draw on his industrial experience to reject an argument or an assertion of fact which he knows, as a matter of his general industrial experience - or perhaps even of some special industrial experience to be unfounded. But it is quite another thing to say that he can draw on his own experience to assert the existence of some particular fact without disclosing to the parties his own particular knowledge bearing on that particular fact, and giving either party an opportunity, if he desires it, of rebutting qualifying by argument or by the adduction of evidence the existence of that particular fact or assigning a different significance thereto...<sup>24</sup>

This passage supports the view that a specialist member of a tribunal may use their experience to evaluate the evidence produced before the tribunal.

In *Tisdall v Health Insurance Commission*<sup>25</sup> Tamberlin J said, having referred to the passage from the judgment of Stephen J, that:

“In these passages his Honour draws a distinction between the **general** experience and expertise used to evaluate material before the expert Tribunal, in contrast to the obtaining of **specific material** or facts which are then relied on by the expert Tribunal to reach a decision. In the former case, the better view seems to be that disclosure is not required but in the latter case where there are specific sources of information or particular, specific, experience called into play, disclosure may be necessary. The generalised nature of the experience of the members of the Tribunal in that case is set out in the judgment. By **particular information** or **exposure** I am referring to some matter, thing, observation or knowledge which would not be apparent to a party as part of the general expertise or experience of a member. For example, in a town planning case, independent personal knowledge of the activities carried out at a particular site where a question of "existing use" is in contest could amount to **particular** specific relevant knowledge of which the parties may normally be unaware. If such knowledge were reflected in the decision without first alerting the parties there could be a breach of procedural fairness requirements.”

His Honour continued:

“The observations of Stephen J were applied by Batt J in *Roads Corporation v Dacakis* [1995] 2 VR 508 at 529-530. In that case it was not necessary for His Honour to consider the question as to the use of general expert knowledge because in his view the Tribunal had not used its expertise to supplant or contradict the evidence. However, he said that if he had concluded that such knowledge had been used then it must have been specifically referable to the land in question and therefore was not within the realm of general expert knowledge so that disclosure should have been made. That is in sharp contrast to the circumstances in the

<sup>24</sup> *R v Industrial Appeals Court; ex parte Maher* [1978] VR 126, 143.

<sup>25</sup> [2002] FCA 97 at [99]

present case, where there is no indication whatsoever that the Committee had used its expertise to **contradict** evidence apart from speculation.

There is a useful statement of principle by Street CJ in *Kalil v Bray* [1977] 1 NSWLR 256 where his Honour, with whose reasoning Moffit P and Glass JA agreed, said in relation to an expert disciplinary tribunal under the *Veterinary Surgeons Act 1923* (NSW), at 261:

*"The tribunal is in truth an expert panel, and as such it needs no expert evidence on matters within its particular field of expertise, that is to say, the field of veterinary science. Its function is to determine in the light of factual evidence, with or without supplementation by expert evidence, the proper veterinary conclusion to be drawn from such objective facts as may be established by the evidence, bearing in mind at all times that its function is essentially, as its name imports, disciplinary. It provides a veterinary surgeon facing a charge with a forum constituted in the majority by his professional peers and supplemented, in the interests of natural justice, with judicial chairmanship."*

At 262 his Honour continued:

*"The purpose of setting up the tribunal, with its membership drawn from the ranks of veterinary surgeons, is to enable it to do the very thing that either a Bench of justices or a jury may not do, that is to say, to draw upon its own expert resources to resolve such questions of expert science as might emerge from the objective, or lay facts proved in evidence before it. In doing so it will, no doubt, give due weight to such expert evidence, if any, as may be placed before it. But the ultimate responsibility for forming an expert view upon which the disciplinary powers will be exercised or withheld is with the tribunal itself. This is a responsibility to be discharged by drawing upon its own internal resources of knowledge of veterinary science."<sup>26</sup>*

**Where a tribunal proposes to make a finding as to the existence of a fact based upon their expertise, including their experience in similar cases, this should be brought to the attention of the parties so that they may have an opportunity to lead evidence or additional evidence or to make submissions or additional submissions to the tribunal. They may, however, use their general knowledge to understand or better understand the evidence or other material led by the parties and, where appropriate, to evaluate the evidence.**

## 1.6 DECISIONS OF SPECIALIST TRIBUNALS

In a passage relied upon in several cases, Stephen J in *Spurling v Development Underwriting (Vic) Pty Ltd*<sup>27</sup> said of the decisions of specialist tribunals:

In approaching the decision of an expert tribunal I must, I think, not only refrain from making up my own mind on the evidence before it, must not only confine myself to inquiring whether on any reasonable view of the evidence the Tribunal's decision on a question of fact can be supported, but must also bear in mind that I am concerned with areas in which members of the tribunal have special expertise and experience which the legislation plainly intends them to employ. I must, therefore, be slow to conclude

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<sup>26</sup> At [100]-[102].

<sup>27</sup> [1973] VR 1.

that on no reasonable view could this Tribunal decide a particular matter of fact as it has."<sup>28</sup>

Courts will no doubt accord great respect to the findings of specialist tribunals having regard to their expertise. They will do so, of course, only if satisfied that they the tribunal has acted fairly in relation to the use of the specialist knowledge which they possess.<sup>29</sup> The passage taken from the judgment of Stephen J must be so understood.

In a decision of Balmford J given on 9 September 2003, her Honour distinguished what was said by Stephen J saying:

“However, while the Tribunal, in its Planning List, is by definition expert in planning matters, I have no reason to suppose that, as constituted in the present case, it was necessarily expert in the chemical content of the material to be discharged from the works which are the subject of the works approval”.<sup>30</sup>

The passage cited from that decision and the decision itself illustrate the fact that only there must be a close analysis of the facts to be decided to ascertain whether the tribunal has the requisite specialist knowledge in relation to such facts as are to be determined in using that expertise. Moreover, the deference to specialist tribunals cannot excuse the failure of a tribunal to take into account matters which it ought to have taken into account where this constitutes an error of law.<sup>31</sup>

## 1.7 DOES THE INQUISITORIAL NATURE OF A TRIBUNAL AFFECT MATTERS?

Judges in recent cases have emphasised the "inquisitorial" nature of many modern tribunals. For example, Eames J of the Victorian Supreme Court, on an appeal from a decision of the Victorian Administrative Appeals Tribunal, spoke of the task of a tribunal of review as follows:

The task of the Tribunal is to determine, for itself, whether the decision under review was the correct one. The Tribunal must make an independent assessment and an independent determination of the question which was before the decision-maker: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, at 422, per

<sup>28</sup> *Ibid.*, at page 11. The passage was applied in *Teston Investments Pty Ltd v Melbourne and Metropolitan Board of Works* (1985) 62 LGRA 346, 350, Vincent J, *Fransceshini v Melbourne and Metropolitan Board of Works* (1980) 57 LGRA 284, 295, Tadgell J, *Warren v Living Water Home Healing Committee* [1981] VR 551, 557, Starke J, *Mynard v Shire of Cranbourne* (1983) 57 LGRA 243, 250, Fullagar J and *McIntosh v Minister for Health* (1987) 57 FCR 463, 467, Davies J.

<sup>29</sup> See [1.4] and [1.5] above.

<sup>30</sup> *Clean Ocean Foundation Inc v Environment Protection Authority* [2003] VSC 335 at [30].

<sup>31</sup> *Hunnam v Evans* [2003] VSC 284 [11] referring to Barwick CJ in *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675 at 679-680:

“Of course, if it is shown that a Tribunal such as the present, in making an order within its competence, has failed to take into account relevant matters, its determination can be reviewed, as in this case, upon an order to review. So much is a settled facet of the relevant jurisprudence. But that course cannot be taken unless it clearly appears that there has been a material error of that kind. Whether or not it has occurred is a matter of fact and not of surmise. Failure in expressing reasons for decision is a very unsure guide to the resolution of such a fact, though in some cases it may be indicative. But in any case, such a failure to advert to some material circumstance, if it exists, must be weighed in the light of all the circumstances of the proceedings including the nature and extent of the charter of the Tribunal”.

Bowen CJ and Deane J. The task is not to determine whether the decision-maker was itself acting reasonably and regularly when it made the decision. As their Honours observed in *Drake, supra*, at 419: "The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for determination is whether the decision was the correct or preferable one on the material before the Tribunal."...

...If the task of the Tribunal was an inquisitorial one, so as to ensure that the correct decision was made on the matter at issue, it can not be the case, in my opinion, that the omission of highly relevant information, which should have been disclosed [by reason of a statutory provision], could constitute the review a proper one...

"The very fact that the [Administrative Appeals Tribunal Act 1984 (Vic)] gives power to the Tribunal to both subpoena witnesses and to call for the production of additional documents, and that the Act provides that the Tribunal is not bound by the rules of evidence but may inform itself on any question in a manner which it deems appropriate, serves to emphasise the inquisitorial nature of its inquiry."<sup>32</sup>

The passage from the judgment of Eames J must be understood in the context of the need for a tribunal of review to satisfy itself as to the correctness of the decision of the original decision-maker, in circumstances where the primary administrative decision-making body fails in its obligation to assist the tribunal in its review.<sup>33</sup> There is a need to make an independent assessment and an independent determination of the question which was before the decision-maker.<sup>34</sup> There are many tribunals which are not tribunals of review. These tribunals act as primary decision-makers. Significantly, Woodward J in the Full Court of the Federal Court in *McDonald v Director-General of Social Security* appeared to draw no distinction between tribunals of review and other tribunals in comparing proceedings before them with proceedings before a court. His Honour emphasised that curial proceedings are necessarily adversarial, whereas in proceedings conducted by administrative decision-makers the decision-maker "will commonly inform himself of the facts by his own inquiries..."<sup>35</sup>

To what extent, if at all, does this approach allow a tribunal to act on the basis of its own experience and knowledge and to make its own inquiry without reference to the parties? To what extent does it allow a tribunal to act without reference to the principles discussed in this article? I am unable to proffer an answer to these questions. It may be that those statements which support an inquisitorial approach to administrative review are relevant only to the case where there has been a failure by the primary decision-making body to make available all relevant information to the tribunal of review. They may not authorise a tribunal to act on the

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<sup>32</sup> *Bausch v Transport Accident Commission* (1996) 24 MVR 392, 408-9. The decision was upheld on appeal (see *Transport Accident Commission v Bausch* [1998] 4 VR 249). There are passages in the judgment of Tadgell JA (with whom Batt and Buchanan JJA agreed) which support the view that the inquiry by the Tribunal was inquisitorial in nature: see [1998] 4 VR at 259 and 263. The case was concerned with the failure by the Commission to provide all relevant material to the Tribunal as required by s 36(1)(b) of the *Administrative Appeals Tribunal Act 1984* (Vic).

<sup>33</sup> In *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 366, Northrop J spoke of the obligation of the primary administrative decision-making body to assist the Tribunal in making the review.

<sup>34</sup> *Transport Accident Commission v Bausch* [1998] 4 VR at 263, Tadgell JA. And see also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 422, Bowen CJ and Deane J.

<sup>35</sup> (1984) 1 FCR 354, 369. See and compare *Re Refugee Review Tribunal; ex parte H* [2001] HCA 28 at [127]-[128] on the limits of the inquisitorial nature of tribunals where questions of apprehended bias may arise.

basis of its own knowledge and expertise in determining facts upon which its decision is based so as to give rise to questions of whether procedural fairness has been denied.

It is suggested that it is unlikely that courts will permit inquisitorial procedures to undermine notions of fairness developed by the courts to ensure that parties have access to all material upon which the tribunal may arrive at findings of fact upon which its decision is based. This will extend to allow a party to deal with such material. Ultimately a party cannot be disadvantaged as the result of the process adopted in the absence of express legislative prescription to the contrary. Members of tribunals, whether legal or non-legal must continue to ensure that the decision-making process is fair to all parties.

Greg Reinhardt  
June, 2005