INQUISITORIAL ADJUDICATION: THE DUTY TO INQUIRE IN MERITS REVIEW TRIBUNALS

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[This article examines the duty to inquire in Australian merits review tribunals. Following the High Court's recent decision in Minister for Immigration and Citizenship v SZIAI*, there has been some uncertainty surrounding the duty's status in a number of Federal Court and Federal Magistrates Court decisions. This article essays a conflicted conceptual basis for the duty to inquire derived from five (competing) aspects of merits review: the institutional, the procedural, the orientational, the substantive and the managerial. These five aspects of merits review underlie the development of the duty to inquire case law. Through an analysis of 25 years of this case law, a set of core principles to guide the confined circumstances in which a duty to inquire should arise is identified. These core principles consist of two threshold requirements and a number of further relevant circumstances concerning statutory structure, the circumstances of the particular hearing and the applicant's situation. The implications of this limited duty to inquire for the system of administrative review are then considered.]*

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I INTRODUCTION

Twenty-five years ago, the duty to inquire was conceived in the case of *Prasad v Minister for Immigration and Ethnic Affairs* ('*Prasad*').[1] Wilcox J framed the duty as a failure to make inquiries which no reasonable administrative decision-maker would have failed to make; it would arise only in 'strictly limited' circumstances.[2] Since then, the duty has occupied a tenuous and perhaps unwelcome position in judicial review of decisions of merits review tribunals. In light of this, it may have been anticipated that the High Court, in its first full consideration of the duty,[3] would have seized the opportunity to close down the duty, or clarify the circumstances in which it would arise. Despite indicating that the term 'duty to inquire' was apt to mislead by attracting attention away from the central question of jurisdictional error,[4] the majority in *Minister for Immigration and Citizenship v SZIAI* ('*SZIAI*') held that such an obligation might arise in

1 (1985) 6 FCR 155.

2 Ibid 169–70.

3 *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 ('*SZIAI*'). The duty was only tangentially considered in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 391 (Mason CJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 289–90 (Mason CJ and Deane J); *Abebe v Commonwealth* (1999) 197 CLR 510, 578–9 (Gummow and Hayne JJ); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 99 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

4 It is argued below in Part III(B) that the High Court's concern with jurisdictional error derives from the ousting of *Wednesbury* unreasonableness in the *Migration Act 1958* (Cth). Other juridical bases for the duty outside of the migration jurisdiction have been preserved: *SZNMJ v Minister for Immigration and Citizenship* (2009) 112 ALD 284, 291 (Cowdroy J) ('*SZNMJ*').

certain undefined circumstances.[5] Since then, a flood of recent Federal Court[6] and Federal Magistrates Court[7] decisions have grappled with identifying those circumstances, and have largely reverted to the pre-*SZIAI* line of authority, which

[5] (2009) 259 ALR 429, 436 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*SZIAI*').

[6] *Brown v Minister for Immigration and Citizenship* (2009) 112 ALD 67 ('*Brown*'); *Lohse v Arthur [No 3]* (2009) 180 FCR 334; *Minister for Immigration and Citizenship v Dhanoa* (2009) 180 FCR 510; *SZNHU v Minister for Immigration and Citizenship* [2009] FCA 1243 (4 November 2009); *Khant v Minister for Immigration and Citizenship* (2009) 112 ALD 241 ('*Khant*'); *SZNLQ v Minister for Immigration and Citizenship* [2009] FCA 1312 (13 November 2009); *SZNMJ* (2009) 112 ALD 284; *SZNBX v Minister for Immigration and Citizenship* (2009) 112 ALD 475 ('*SZNBX*'); *SZLGP v Minister for Immigration and Citizenship* (2009) 112 ALD 501 ('*SZLGP*'); *SZMXS v Minister for Immigration and Citizenship* [2009] FCA 1542 (22 December 2009); *SZNOA v Minister for Immigration and Citizenship* [2010] FCA 60 (12 February 2010); *SZNPS v Minister for Immigration and Citizenship* [2010] FCA 101 (15 February 2010); *SZNSJ v Minister for Immigration and Citizenship* [2010] FCA 100 (16 February 2010); *SZNNU v Minister for Immigration and Citizenship* [2010] FCA 175 (17 February 2010); *SZGUR v Minister for Immigration and Citizenship* [2010] FCA 171 (4 March 2010).

[7] *SZNOA v Minister for Immigration and Citizenship* [2009] FMCA 1012 (1 October 2009); *SZNSX v Minister for Immigration and Citizenship* [2009] FMCA 1055 (1 October 2009); *SZMKN v Minister for Immigration and Citizenship* [2009] FMCA 954 (8 October 2009); *SZNPM v Minister for Immigration and Citizenship* [2009] FMCA 1014 (9 October 2009); *SZNGI v Minister for Immigration and Citizenship* [2009] FMCA 1032 (14 October 2009); *SZNRZ v Minister for Immigration and Citizenship* [2009] FMCA 1018 (20 October 2009); *SZNRX v Minister for Immigration and Citizenship* [2009] FMCA 1021 (20 October 2009); *SZNTU v Minister for Immigration and Citizenship* [2009] FMCA 1045 (26 October 2009); *SZLUQ v Minister for Immigration and Citizenship* [2009] FMCA 1047 (26 October 2009); *SZNWN v Minister for Immigration and Citizenship* [2009] FMCA 1054 (29 October 2009); *SZNKV v Minister for Immigration and Citizenship [No 2]* [2009] FMCA 1053 (29 October 2009); *SZNTM v Minister for Immigration and Citizenship* [2009] FMCA 1080 (3 November 2009); *SZNRH v Minister for Immigration and Citizenship* [2009] FMCA 849 (4 November 2009); *SZLDY v Minister for Immigration and Citizenship* [2009] FMCA 1140 (11 November 2009); *Puwar v Minister for Immigration and Citizenship* [2009] FMCA 1062 (12 November 2009); *Lai v Minister for Immigration and Citizenship* [2009] FMCA 1064 (12 November 2009); *SZNSJ v Minister for Immigration and Citizenship* [2009] FMCA 1115 (17 November 2009); *SZNPS v Minister for Immigration and Citizenship* [2009] FMCA 1102 (18 November 2009); *SZNTT v Minister for Immigration and Citizenship* [2009] FMCA 1163 (24 November 2009); *SZNPG v Minister for Immigration and Citizenship* [2009] FMCA 1033 (25 November 2009); *SZNYI v Minister for Immigration and Citizenship* [2009] FMCA 1170 (25 November 2009); *SZMJM v Minister for Immigration and Citizenship* [2009] FMCA 1175 (26 November 2009); *SZHFG v Minister for Immigration and Citizenship* [2009] FMCA 1186 (2 December 2009); *SZNSK v Minister for Immigration and Citizenship* [2009] FMCA 1196 (4 December 2009); *MZYEL v Minister for Immigration and Citizenship* [2009] FMCA 1179 (7 December 2009); *SZJOU v Minister for Immigration and Citizenship* [2009] FMCA 1211 (7 December 2009); *SZNLE v Minister for Immigration and Citizenship* [2009] FMCA 1247 (8 December 2009); *MZYFO v Minister for Immigration and Citizenship* [2009] FMCA 1148 (10 December 2009); *SZMSS v Minister for Immigration and Citizenship* [2009] FMCA 1232 (11 December 2009); *Singh v Minister for Immigration and Citizenship* [2009] FMCA 1261 (14 December 2009); *SZNZD v Minister for Immigration and Citizenship* [2009] FMCA 1300 (17 December 2009); *SZNVW v Minister for Immigration and Citizenship* [2009] FMCA 1299 (22 December 2009); *SZNWA v Minister for Immigration and Citizenship* [2010] FMCA 21 (25 January 2010); *SZNXJ v Minister for Immigration and Citizenship* [2010] FMCA 89 (8 February 2010); *SZNWF v Minister for Immigration and Citizenship* [2010] FMCA 91 (16 February 2010); *SZNDJ v Minister for Immigration and Citizenship* [2010] FMCA 139 (22 February 2010); *SZNZY v Minister for Immigration and Citizenship* [2010] FMCA 82 (4 March 2010); *SZNXA v Minister for Immigration and Citizenship* [2010] FMCA 148 (11 March 2010).

derives from *Prasad*, to do so.[8] As a consequence of this uncertainty, the time is ripe for a consideration of the duty's place within administrative law.

While practically the duty to inquire has operated at the fringes of judicial review case law, conceptually it lies at the heart of administrative law. The duty raises key questions concerning the procedural differentiation of tribunals from courts and other administrative decision-makers, the tension between the provision of efficient but fair and just resolution of individual grievances in administrative tribunals,[9] issues surrounding the institutional and functional differentiation of tribunals from courts, and the consequent dilemma of judicial intrusion into administrative decision-making.

Previous considerations of the duty have focused on either the case law as it has periodically emerged,[10] or its role in a broader analysis of the expanding scope of *Wednesbury* unreasonableness[11] or procedural fairness.[12] No article or research has previously focused exclusively on the duty.[13] In addressing that lacuna, the purpose of this article is to identify core principles governing the existence of the duty which emerge from the judicial review case law, and to rationalise these principles with the merits review function of tribunals. In doing so, the analysis of the duty to inquire is used to demonstrate broader aspects of the role of merits review tribunals in the system of administrative justice.

Part II identifies a conceptual basis for the duty to inquire within the Australian concept of merits review. The importance of the connection between the duty

8 In respect of the Federal Court decisions, see especially *Brown* (2009) 112 ALD 67, 85–7 (Edmonds J); *Lohse v Arthur [No 3]* (2009) 180 FCR 334, 360, 364 (Graham J); *Khant* (2009) 112 ALD 241, 254–8 (Cowdroy J); *SZNMJ* (2009) 112 ALD 284, 290–2 (Cowdroy J). The decision of Bennett J in *SZNBX* (2009) 112 ALD 475, 479–81, whilst grounded in the core principles of the pre-*SZIAI* case law, is more directly focused on the decision in *SZIAI*.

9 Robin Creyke, 'Administrative Justice — Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705, 708–9.

10 See Robin Creyke, 'The Impact of Judicial Review on Tribunals — Recent Developments' (Paper presented at the Fifth Annual AIJA Tribunals Conference, Melbourne, 6–7 June 2002); Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2nd ed, 2009) 986–9; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 296–305; Roger Douglas, *Douglas and Jones's Administrative Law* (Federation Press, 5th ed, 2006) 466–71; Vincenzo Salvatore Paparo, 'Review of Collegiate Decisions: Judicial Protection for "Pissants"' (2005) 47 *AIAL Forum* 65, 70–1.

11 See Elizabeth Carroll, 'Scope of *Wednesbury* Unreasonableness: In Need of Reform?' (2007) 14 *Australian Journal of Administrative Law* 86, 87–9; Timothy J F McEvoy, 'New Flesh on Old Bones: Recent Developments in Jurisprudence Relating to *Wednesbury* Unreasonableness' (1995) 3 *Australian Journal of Administrative Law* 36, 39–45; Rossana Panetta, '*Wednesbury* Unreasonableness: Judicial or Merits Review?' (2002) 9 *Australian Journal of Administrative Law* 191, 198–9.

12 See Michael Izzo, 'High Court on Procedural Fairness: *SAAP* and *VEAL*' (2006) 13 *Australian Journal of Administrative Law* 186, 189; Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 144–5; John McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24 *Federal Law Review* 347, 359–61.

13 The most comprehensive analyses are Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006) 49–52; Robin Creyke, '"Inquisitorial" Practice in Australian Tribunals' (2006) 57 *Admin Review* 17, 20–2.

and the merits review function of tribunals was highlighted in *SZIAI*.[14] Five aspects of merits review bearing upon the existence and scope of a duty to inquire are identified and analysed: the institutional, the procedural, the orientational, the substantive and the managerial. This analysis raises two important issues. The first is the tension between the provision of probing, inquisitorial adjudication of individual circumstances, which is a core function of merits review tribunals, and the managerial demands of providing speedy and cost-effective access to justice. The second is the dilemma of ensuring tribunals perform their distinctive merits review function via judicial review, while recognising that this differentiated function militates against judicial intrusion into merits review.

Part III shifts from the conceptual to the analytical, with an examination of 25 years of case law considering the duty. Tribunals are under 'no general obligation to initiate enquiries';[15] however, in certain 'strictly limited' circumstances,[16] a duty to inquire arises. The High Court's reasoning in *SZIAI* was confined to the facts, and the Court did not enunciate an objective standard against which those facts could be measured. As noted recently by the Federal Court, the juristic basis of the duty and the strictly limited circumstances in which it arises remain unclear.[17] The lack of a principled approach to the duty is consistent with the conflicted conceptual basis identified in Part II. To suggest when the strictly limited circumstances giving rise to the duty may exist, Part III develops a set of core principles, including two threshold requirements and further relevant circumstances, which emerge from the case law. Because the courts have not enunciated general principles guiding the existence of the duty, the five aspects of merits review provide a useful framework with which to understand the operation of the duty and the core principles identified.

In light of the limited duty to inquire illustrated by the core principles in Part III, Part IV considers the extent to which the duty is consistent with the merits review function of tribunals, explored through the five aspects of merits review. Part IV concludes that a limited duty to inquire is consistent with providing access to justice and is important in order to encourage tribunals to use their inquisitorial powers. Nevertheless, a narrow application of the core principles is critical to retaining flexibility and simplicity in tribunal procedure, upholding the legality–merits distinction, and balancing the competing need for tribunals to be efficient and inexpensive while providing justice to the individual.

[14] (2009) 259 ALR 429, 436 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[15] *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151, 172 (Kenny J) ('*Le*').
[16] *Prasad* (1985) 6 FCR 155, 169–70 (Wilcox J).
[17] *Brown* (2009) 112 ALD 67, 86 (Edmonds J).

II A Conceptual Basis for the Duty to Inquire

A *Introduction*

Previous overviews of the duty to inquire[18] have not provided a conceptual basis for the duty. This Part essays a conceptual rationale for the duty within the Australian concept of merits review. It identifies and analyses five aspects of merits review: the institutional, the procedural, the orientational, the substantive and the managerial.

The five aspects of merits review are ways of conceptualising the function and operation of tribunals particularly insofar as these concern a duty to inquire. These aspects are not the only way of conceptualising merits review and are necessarily abstract. This level of abstraction may oversimplify differences amongst tribunals. However, their generality is necessary to locate the duty within the administrative law system.[19]

Through an analysis of each of the five aspects of merits review, implications for the existence and scope of a duty to inquire are considered. The orientational and substantive aspects of merits review are concerned with providing probing, individualised review of facts through *modified* inquisitorial procedures, consistent with a duty to inquire. However, these implicit foundations are constrained by an institutional reluctance of courts to review administrative findings of fact, adversarial procedural tendencies, and the dictates of efficiency derived from the managerial aspect of merits review.

B *Institutional Aspect of Merits Review*

The institutional aspect of merits review derives from the formal location of administrative tribunals within the executive branch of government. At least at the federal level, merits review is steeped in institutional considerations of the separation of powers. The Kerr and Bland Committees 'were established largely because of dissatisfaction with the means available to review Australian governmental actions.'[20] Except through certain independent tribunals, the existing system provided no *general* capacity for disaffected citizens to seek external review of broader aspects of administrative decisions beyond legality: the

[18] Creyke and McMillan, above n 10, 986–9; Creyke, 'The Impact of Judicial Review on Tribunals', above n 10; Creyke, '"Inquisitorial" Practice in Australian Tribunals', above n 13, 20–2; Aronson, Dyer and Groves, above n 10, 296–305; Douglas, above n 10, 466–71; Paparo, above n 10, 70–1.

[19] Similar approaches underlie Peter Bailey's 'administrative review paradigm' and Peter Cane's 'elements of administrative adjudication': Peter Bailey, 'Is Administrative Review Possible without Legalism?' (2001) 8 *Australian Journal of Administrative Law* 163; Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) ch 5.

[20] D C Pearce, 'The Australian Government Administrative Appeals Tribunal' (1976) 1 *University of New South Wales Law Journal* 193, 194. See Commonwealth, *Commonwealth Administrative Review Committee: Report*, Parl Paper No 144 (1971) ('*Kerr Committee Report*'); Commonwealth, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973) ('*Bland Committee Report*').

merits.[21] According to the *Kerr Committee Report*, the High Court's ch III jurisprudence meant that

> courts cannot be entrusted with the unrestricted review of discretions which are not judicial; nor can courts be called upon to review administrative decisions on any basis which requires the ultimate decision to be given by reference to policy or non-legal considerations.[22]

To provide for general external merits review, a unique general jurisdiction review tribunal, the Administrative Appeals Tribunal ('AAT'), was established.[23] The AAT and subsequent tribunals are endowed with 'all the powers and discretions' of the original decision-maker.[24] They can affirm or vary the decision under review, or set it aside and substitute their own decision which is deemed to be that of the original decision-maker,[25] so that their review is considered an exercise of non-judicial power.[26] This statutory formula means tribunals determine 'the correct or preferable' decision[27] while 'standing in the shoes' of the original decision-maker.[28] From an *institutional* perspective, these features of merits review firmly cast the major Australian tribunals within the executive branch of government,[29] although this has been challenged from a *functional* perspective.[30]

Because of this different institutional location of tribunals and courts, there are, formally, marked differences between merits review and judicial review. Creyke and McMillan note that:

> The doctrine of judicial review is itself a doctrine of judicial restraint. At heart is the legality/merits distinction, which recognises the limited role played by courts in reviewing executive decision-making. Their role, stated broadly, is to look only at the legality of decisions, leaving all other aspects of the decision-making process — development of administrative procedures, consultation with

[21] Commonwealth, *Commonwealth Administrative Review Committee: Report*, Parl Paper No 144 (1971) 1–2 [5]; see also ibid 194–5.

[22] *Kerr Committee Report*, above n 20, 24 [67]. For a more detailed discussion, see Cane, *Administrative Tribunals and Adjudication*, above n 19, 59–61.

[23] Cane, *Administrative Tribunals and Adjudication*, above n 19, 62.

[24] *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1); *Social Security (Administration) Act 1999* (Cth) s 151(1); *Migration Act 1958* (Cth) ss 349(1), 415(1); *Veterans' Entitlements Act 1986* (Cth) s 139(3).

[25] *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).

[26] Cane, *Administrative Tribunals and Adjudication*, above n 19, 62.

[27] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68 (Bowen CJ and Deane J).

[28] *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143 (Smithers J); Cane, *Administrative Tribunals and Adjudication*, above n 19, 62.

[29] Creyke notes that 'tribunals do not exist in some undefined hinterland between the executive and the judiciary. They are at the apex of the administrative review system, within the executive arm of government': Robin Creyke, 'Tribunal Reform: A Commentary' in Susan Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (Australian Institute of Administrative Law, 1999) 359, 361.

[30] Peter Cane, 'Merits Review and Judicial Review — The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213.

> clients, fact-finding, policy formulation, and evaluation of individual circumstances — to be resolved by the executive branch.[31]

This differentiation exists generally, but not universally, in state tribunals.[32]

The institutional location of merits review within the executive branch provides the first implicit basis for the duty to inquire for several reasons.

First, separation of powers considerations restrict judicial intrusion into reappraisal of fact-finding by administrative decision-makers, except perhaps in appeals.[33] Creyke and McMillan note that 'the classification of an error as one of law will usually permit judicial invalidation or reversal of a decision, but not so if the error is classified as one of fact.'[34] As explored further below, merits review's *distinctive additional* contribution is fact-finding and fact adjudication.

Secondly, as an executive body, merits review generally involves the tribunal varying or substituting its *own* decision, as opposed to judicial review where, generally, 'a court stops short of substituting a new decision for the decision under review.'[35] Thus, merits review has a focus on truth-finding (rather than error identification as in judicial review).[36] Conceptually, a duty to inquire arises as part of the tribunal substituting the correct or preferable decision, rather than remitting it to another body.

Thirdly, from a procedural perspective, considering merits review as an executive rather than judicial function may have implications for the use of inquisitorial powers. The culture of adversarialism in tribunal procedure is outlined below. In part, the adversarial culture has been engendered by the influence of legal and judicial factors: the historical importance of adversarial procedures in protecting the parties in the common law system,[37] concerns over ostensible bias,[38] the leadership of tribunals by judges or senior lawyers,[39] and the location of tribunals in a system in which ultimate review is in an adversarial court proceeding.[40] The more tribunals are conceptualised as quasi-judicial bodies, the more judicial procedures may permeate tribunals. Conversely, their recognition as being institutionally within the executive may legitimise a more active inquisitorial role for tribunal members.

While these institutional considerations are conceptually important for providing a basis for the duty to inquire, they also militate against the finding of a breach of the duty on judicial review, as this may implicitly involve the courts revisiting the decision's merits. As McMillan notes, 'judicial review principles

31 Creyke and McMillan, above n 10, 460.
32 Ibid 315.
33 Cane, *Administrative Tribunals and Adjudication*, above n 19, 178.
34 Creyke and McMillan, above n 10, 460–1.
35 Ibid 420. See also Peter Cane, 'Judicial Review in the Age of Tribunals' [2009] *Public Law* 479, 494, 499.
36 Cane, 'Judicial Review in the Age of Tribunals', above n 35, 499.
37 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256 (Evatt J).
38 Aronson, Dyer and Groves, above n 10, 301.
39 Margaret Allars, 'Neutrality, the Judicial Paradigm and Tribunal Procedure' (1991) 13 *Sydney Law Review* 377, 393, 404.
40 Bedford and Creyke, above n 13, 6, 25.

which focus the court's attention on the facts that support a decision are apt to tilt the balance towards disguised merits review.'[41] The need to characterise a failure to inquire as an error of law under the legality–merits distinction outlined above, together with judicial deference to administrative fact-finding, are institutional factors which have constrained the development of a duty to inquire. Part IV will explore the implications of a limited duty to inquire for the legality–merits distinction.

C *Procedural Aspect of Merits Review*

The operation of tribunals in a modified inquisitorial manner provides the procedural aspect of merits review.[42] The exceptional nature of the duty to inquire partly reflects the hesitancy with which the inquisitorial mode of operation has been embraced by tribunals. This section defines the meaning of and rationales for inquisitorial procedures, contrasts their operation in merits review tribunals, and considers conceptual implications for the duty to inquire.

Inquisitorial powers are those which 'enable the adjudicator to take the initiative in eliciting evidence and formulating legal arguments, and to control the way in which a case is presented.'[43] They give the power over the hearing's conduct to the decision-maker through broad discretion, rather than to the parties through prescribed rules.[44] A corollary is the relative informality of proceedings.

A key finding of the *Bland Committee Report* was that 'the code of procedure for the Tribunals should clearly spell out that they are not bound to follow adversary procedures. … [I]n most cases, the investigative or inquisitorial process would be most apposite.'[45] The Bland Committee's rationale was that inquisitorial procedures would 'have the … consequences of shorter hearings, less need of legal representation and hopefully of better decisions'.[46] In respect of the AAT, Pearce commented that '[t]he whole idea of the Tribunal is to avoid court-like procedures and, more importantly, a court-like way of thinking.'[47]

Many commentators attribute further rationales for the recommendation of inquisitorial procedures.[48] First, access to justice: informal procedures are less

41 McMillan, 'Recent Themes in Judicial Review', above n 12, 380.

42 Although there is no necessary connection between merits review and inquisitorial procedures, such procedures exist in all the major Australian merits review tribunals: Bedford and Creyke, above n 13, 14–15. Indeed, Creyke notes that the 'distinguishing feature of administrative tribunals is the procedure they adopt to reach a decision. The definition or description of a tribunal will often focus on its procedure, on how it collects evidence, hears the parties, and its degree of informality': Robin Creyke, *The Procedure of the Federal Specialist Tribunals* (Australian Government Publishing Service, 1994) 1.

43 Gillian Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal — A Comparative Perspective' (1982) 13 *Federal Law Review* 150, 150.

44 Allars, 'Neutrality', above n 39, 383–4.

45 *Bland Committee Report*, above n 20, 33 [172(j)].

46 Ibid.

47 Pearce, 'The Australian Government Administrative Appeals Tribunal', above n 20, 196.

48 See, eg, William De Maria, 'Exposing the AAT's Private Parts' (1991) 16 *Legal Service Bulletin* 10; David Gill, 'Formality and Informality in the Administrative Appeals Tribunal' (1989) 58 *Canberra Bulletin of Public Administration* 133, 134; Joan Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20 *Federal Law Review* 252, 257–8; Scott Henchliffe, 'The-

intimidating for and require less expertise of unrepresented litigants,[49] and inquisitorial powers enable tribunals to assist unrepresented applicants.[50] Secondly, administrative decision-making, theoretically, does not involve the parties as adversaries: 'the disagreements are between private citizens and the government, and the government, in making its decisions, has a duty to consider the individual citizen's interest'.[51] Often, there is a power imbalance between individuals and large bureaucracies which undermines the competitive adversarial model's operation.[52] Thirdly, because the tribunal itself must be satisfied that the decision was the correct or preferable one and, theoretically, the parties bear no onus of proof.[53] This suggests a truth-finding element to merits review consistent with inquisitorial procedures.[54] Fourthly, an inquisitorial process may facilitate balancing 'collective as well as individual interests,'[55] which is critical to public law disputes, particularly those decisions involving polycentric considerations.[56] Finally, flexible, inquisitorial procedures can promote efficiency;[57] in part this may be because '[a]dversariness almost necessarily has a strong association with formal procedure and with a punctilious regard for procedural rights.'[58] The preference for *inquisitorial* merits review has been

ory, Practice and Procedural Fairness at Administrative Appeals Tribunal Hearings' (1995) 13 *Australian Bar Review* 243, 246–7; Osborne, above n 43, 150–2.

49 Pearce, 'The Australian Government Administrative Appeals Tribunal', above n 20, 196.

50 Osborne, above n 43, 150–1; Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures', above n 48, 257.

51 Henchliffe, above n 48, 246.

52 Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures', above n 48, 257.

53 *Bushell v Repatriation Commission* (1992) 175 CLR 408, 425 (Brennan J). However, a practical onus may arise: *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 357 (Woodward J).

54 Cane, *Administrative Tribunals and Adjudication*, above n 19, 234.

55 Leroy Certoma, 'The Non-Adversarial Administrative Process and the Immigration Review Tribunal' (1993) 4 *Public Law Review* 4, 4. Brennan J also stated in *A-G (NSW) v Quin* (1990) 170 CLR 1, 37 (emphasis added):

> The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, *nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented as well as interests which are represented must often be considered*.

56 Creyke and McMillan, above n 10, 449.

57 See Tom Thawley, 'Adversarial and Inquisitorial Procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61, 77; Osborne, above n 43, 169–70; A N Hall, 'Administrative Review before the Administrative Appeals Tribunal — A Fresh Approach to Dispute Resolution? Part I' (1981) 12 *Federal Law Review* 71, 90–1; Frank Esparraga, 'Procedure in the Administrative Appeals Tribunal' in John McMillan (ed), *Administrative Law: Does the Public Benefit?* (Australian Institute of Administrative Law, 1992) 386, 394; Sir Anthony Mason, 'Administrative Review — The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 133. However, note the discussion in Thawley, above n 57, 65; Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures', above n 48, 259–61; Bedford and Creyke, above n 13, 62–5.

58 Jerry L Mashaw, 'The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims' (1974) 59 *Cornell Law Review* 772, 790.

confirmed in the reports concerning the operation of federal specialist tribunals[59] and state and territory general jurisdiction tribunals.[60]

1 *Adversarial–Inquisitorial Spectrum*

Australian tribunals, which share many basic procedural features, do not operate *inquisitorially* in the civil law sense. Rather, they fall on 'a spectrum ranging from the heavily investigative to the adversarial'.[61] At the adversarial end of this spectrum, the general jurisdiction tribunals possess the minimum inquisitorial features which characterise all the major Australian tribunals. They are required to be satisfied of their decision,[62] have discretion over procedure,[63] are not bound by the rules of evidence,[64] are required to proceed with minimal formality,[65] and may inform themselves on any matter.[66] Traditional features of litigation, such as discovery and cross-examination, are replaced by reliance on the decision-maker's original information, the departmental file and the parties' submissions. Tribunals may engage in active questioning of witnesses and provide guidance on evidence and arguments.[67] However, these general jurisdiction tribunals also possess adversarial features, including the right to representation[68] and a reasonable opportunity to present a case.[69] Consequently, general jurisdiction tribunal hearings may often resemble adversarial court procedures.[70]

By contrast, a number of the specialist tribunals operate in a more inquisitorial manner. For example, the Migration Review Tribunal and Refugee Review

[59] Administrative Review Council, *The Structure and Form of Social Security Appeals*, Report No 21 (1984) 42 [141]–[142]; Committee for the Review of the System for Review of Migration Decisions, *Non-Adversarial Review of Migration Decisions: The Way Forward* (1992) 55–8 [7.1]–[7.3] ('*Non-Adversarial Review of Migration Decisions Report*').

[60] Robin Creyke, 'Tribunals: Divergence and Loss' (2001) 29 *Federal Law Review* 403, 414. See, eg, Explanatory Memorandum, Civil and Administrative Tribunal Bill 2009 (Qld) 4, 34–6; Explanatory Memorandum, Civil and Administrative Tribunal Bill 2008 (ACT) 4, 7–8.

[61] Bedford and Creyke, above n 13, 18.

[62] See, eg, *Repatriation Commission v Deledio* (1998) 83 FCR 82, 94 (Beaumont, Hill and O'Connor JJ); *Paramananthan v Minister for Immigration & Multicultural Affairs* (1998) 94 FCR 28, 62–3 (Merkel J).

[63] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 23; *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(a); *Administrative Decisions Tribunal Act 1997* (NSW) s 73(1).

[64] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 8; *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c); *Migration Act 1958* (Cth) s 353(2)(a); *Administrative Decisions Tribunal Act 1997* (NSW) s 73(2).

[65] *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(b); *Migration Act 1958* (Cth) s 353(1); *Administrative Decisions Tribunal Act 1997* (NSW) s 73(3).

[66] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 26; *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1)(c), 37(2), 38(1); *Migration Act 1958* (Cth) s 359(1); *Administrative Decisions Tribunal Act 1997* (NSW) s 73(2).

[67] See Administrative Review Council, *Social Security Appeals*, Report No 8 (1981) 35 [5.035]; Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures', above n 48, 257.

[68] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 30; *Administrative Appeals Tribunal Act 1975* (Cth) s 32; *Administrative Decisions Tribunal Act 1997* (NSW) s 71(1).

[69] *Administrative Appeals Tribunal Act 1975* (Cth) s 39(1); *Administrative Decisions Tribunal Act 1997* (NSW) s 70.

[70] Mark Aronson and Nicola Franklin, *Review of Administrative Action* (Law Book, 1987) 237–8.

Tribunal ('RRT') were 'overtly designed as "inquisitorial"'.[71] The applicant usually attends alone, and

> Tribunal members themselves are responsible for actively assisting the applicant to present his or her case, identifying all the relevant issues, thoroughly testing the evidence and protecting the interests of both the applicant and the Department.[72]

The absence of legal representation necessitates a more proactive approach by decision-makers and was designed to minimise legal formalities.[73]

2 *Adversarial Pressures*

Despite these statutory features, systemic pressures curtail the operation of inquisitorialism in all the major Australian tribunals.[74] The culture of adversarialism has arisen through: the general application of the rules of evidence out of pragmatic convenience[75] and historical significance;[76] concerns over ostensible bias;[77] the organisational leadership of tribunals by judges or senior lawyers;[78] the use of legal counsel and a pervasive adversarial legal culture;[79] the location of tribunals in a system in which ultimate review is in an adversarial court proceeding;[80] resource limitations;[81] and the objective that tribunals be 'fair, just, economical, informal and quick'.[82] These pressures mean that the major Australian tribunals do not operate inquisitorially in the civil law sense.[83] They operate in a *modified* inquisitorial way varying along the adversarial–inquisitorial spectrum.

Nevertheless, this modified inquisitorial procedural aspect of merits review is a necessary component of the duty to inquire. Theoretically, the operation of merits review within a procedural context that empowers an active role for decision-makers *suggests* a truth-finding element similar to the civil law system.[84] This is confirmed by the requirement that tribunals be satisfied of the 'correct or preferable' decision, the lack of a legal onus of proof, and the access

71 Bedford and Creyke, above n 13, 5. See also Rachel Bacon, *Amalgamating Tribunals: A Recipe for Optimal Reform* (PhD Thesis, The University of Sydney, 2004) 23–5.

72 *Non-Adversarial Review of Migration Decisions Report*, above n 59, 55 [7.1.2]; Robin Creyke, 'Administrative Tribunals' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 77, 92.

73 Bedford and Creyke, above n 13, 8.

74 See H Whitmore, 'Commentaries' (1981) 12 *Federal Law Review* 117; ibid 57–9.

75 *Re Golem and Transport Accident Commission [No 1]* (2002) 19 VAR 265, 269 (Judge Bowman).

76 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256 (Evatt J).

77 Aronson, Dyer and Groves, above n 10, 301.

78 A risk alluded to in *Bland Committee Report*, above n 20, 26 [136]; Allars, 'Neutrality', above n 39, 404.

79 Bedford and Creyke, above n 13, 57–9.

80 Ibid 6.

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

82 Creyke, 'Administrative Tribunals', above n 72, 94.

83 Bedford and Creyke, above n 13, 9–11.

84 Cane, *Administrative Tribunals and Adjudication*, above n 19, 234, 234 n 91.

to justice and public law rationales for inquisitorial procedures identified above. In a social security system with some similar features, Mashaw notes that 'the theoretical model of the passive adjudicator ruling on the basis of facts and arguments presented by opposing parties is wholly inappropriate.'[85] Taking an instrumental approach to tribunal procedure, inquisitorial processes which prefer truth over fairness may be better tailored to these ends.[86] Moreover, where decision-makers are given wide discretion over the control of proceedings, it may seem a natural corollary that they should be obliged to utilise their inquisitorial powers reasonably to determine the correct or preferable decision,[87] especially where legal representation is removed. Similar reasoning underlies the obligation on American administrative law judges to develop the record.[88] However, the reluctance of Australian courts to find a duty to inquire may reflect, in practice, the adversarial operation of many tribunals.

D *Orientational Aspect of Merits Review*

A further aspect of merits review derives from the orientation of tribunals vis-a-vis other decision-makers. Generally, administrative decision-making follows a tripartite model: 'finding facts, ascertaining law and applying the law as ascertained to the facts'.[89] What distinguishes merits review from other forms of decision-making, including primary decision-making and reconsideration, is the orientation of this inquiry.[90] Merits review involves a modified adversarial–inquisitorial form of Fullerian adjudication,[91] being *a hearing before a neutral third party*.[92] Adjudication is fundamentally different from other forms of administrative decision-making which, lacking a hearing before a neutral third party and often taking place internally within a department, should be considered to be *implementation*.[93] Both administrative adjudication and implementation involve the application of general rules to individual circumstances.[94] However, in the event of conflict between societal interests and individual interests when applying these general rules, different priorities emerge. Based on Mashaw's three models of administrative justice,[95] Cane argues that as a matter of orientation

> 'adjudication' is a significantly different mode of applying general norms to individual cases than 'implementation' in that it favours resolving conflicts be-

[85] Mashaw, 'The Management Side of Due Process', above n 58, 782.
[86] Dwyer, 'Fair Play the Inquisitorial Way', above n 81, 10.
[87] A similar suggestion is made in Bedford and Creyke, above n 13, 39.
[88] Mashaw, 'The Management Side of Due Process', above n 58, 787.
[89] Cane, *Administrative Tribunals and Adjudication*, above n 19, 8.
[90] Ibid 10–16.
[91] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.
[92] Cane, *Administrative Tribunals and Adjudication*, above n 19, 9–11.
[93] Ibid 11–12.
[94] Ibid 11–12, 73.
[95] The three models are 'bureaucratic rationality', 'professional treatment' and 'moral judgment': Jerry L Mashaw, 'Conflict and Compromise among Models of Administrative Justice' [1981] *Duke Law Journal* 181.

> tween individual and social interests in favour of the former whereas implementation favours resolving such conflicts in favour of the latter.[96]

Cane also notes that '[i]mplementation focuses on the characteristics that individuals share with members of some relevant group'.[97] Accordingly, 'a certain proportion of primary decisions will be unfair because they take insufficient account of the personal situation of an affected individual.'[98] This is analogous to Mashaw's bureaucratic rationality model, the goal of which 'is to develop, at the lowest possible cost, a system for distinguishing between true and false claims.'[99] Its 'legitimating force' is its claim to correctly implement legislative programs focused on the collective, while efficiently preserving social resources.[100]

By contrast, adjudication is oriented towards the individual's circumstances.[101] This is similar to Mashaw's moral judgment model, which focuses on 'the deservedness of the parties in the context of the events, transactions, or relationships that give rise to a claim.'[102] Its rationale is correcting injustice which arises from the prioritising of the *collective* at the implementation stage.[103] To summarise, although tribunals 'stand in the shoes' of the original decision-maker, they face a different direction and are charged with probative review based on *individual deservedness*, as distinct from *collective interests* and efficiency.

The adjudicative outlook of tribunals 'inject[s] a greater element of individualisation into the decision-making process.'[104] The focus shifts from collective efficiency and accuracy to deservedness. Mashaw notes that '[t]he focus on deservedness implies certain things about a just process of proof and decision.'[105] Mashaw observes that this has traditionally been achieved through an adversarial process with a passive decision-maker; however, adversariness is not essential and the key concern is probing consideration of the individual's circumstances against the bureaucratic agenda.[106] A duty to inquire arises implicitly from a failure to properly conduct this review of an individual applicant's deservedness through utilisation of the inquisitorial powers that tribunals possess. Although an added burden on tribunals, the duty to inquire is consistent with the moral judgment model's emphasis on deservedness over efficiency and a collective outlook.

96 Cane, *Administrative Tribunals and Adjudication*, above n 19, 107.
97 Ibid 228.
98 Ibid.
99 Mashaw, 'Conflict and Compromise', above n 95, 185.
100 Ibid.
101 Cane, *Administrative Tribunals and Adjudication*, above n 19, 228.
102 Mashaw, 'Conflict and Compromise', above n 95, 188.
103 Cane, *Administrative Tribunals and Adjudication*, above n 19, 228.
104 Ibid.
105 Mashaw, 'Conflict and Compromise', above n 95, 188.
106 Ibid 189, 194, 197.

E *Substantive Aspect of Merits Review*

The substantive aspect of merits review is derived from the institutional location of tribunals, their inquisitorial procedures and their adjudicative orientation. Whereas judicial review is concerned with negatively identifying errors in the original decision, only certain of which are considered errors of law and judicially reviewable,[107] merits review is a free-ranging positive inquiry into what constitutes the correct or preferable decision.[108] Merits review is, of course, concerned with the legality of decisions, ascertaining the law and applying it to the facts. It may also involve inconclusively determining points of law.[109] However, what *distinguishes* merits review from judicial review is the additional, comprehensive de novo inquiry into errors of fact when applying the law. Tribunals, unlike courts,[110] may reach their own conclusions of the facts, reassess the weight given to a particular piece of evidence by the original decision-maker, and use their broad inquisitorial powers to assemble their own evidence.[111] The *Kerr Committee Report* envisaged an administrative tribunal that 'would be mainly concerned with review as to fact-finding'.[112] For these reasons, Cane considers that 'fact-finding is at the very core of merits review.'[113]

As 'the characteristic function of tribunals is intense review of fact-finding',[114] a duty to inquire arises to ensure the performance of that function. Tribunals often have the resources, specialist expertise, subject-specific jurisdiction and inquisitorial powers, coupled with an individualistic adjudicative orientation, to carry out extensive factual review, which *primary* decision-makers may lack.[115] A failure to utilise these powers through making inquiries to ascertain facts central to the decision may constitute the non-fulfilment of this characteristic 'intense review of fact-finding' function. For the institutional reasons noted, courts are ill-placed and incapable of fulfilling this function themselves. The duty to inquire exists so that courts can identify as an error of law clear examples of a failure by a tribunal to execute its role, and enables the decision to be remitted to the tribunal for this to occur.

107 Creyke and McMillan, above n 10, 416–20.

108 Cane, *Administrative Tribunals and Adjudication*, above n 19, 150–1. Pearce notes the AAT 'does not have to find something wrong with the decision in the way in which the Federal Court acting under the *AD(JR) Act* … must so find': Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis Butterworths, 2nd ed, 2007) 178.

109 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 247. See also *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1.

110 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 340–1 (Mason CJ).

111 *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137, 141 (Senior Member Hall, Members Skermer and Woodley).

112 *Kerr Committee Report*, above n 20, 89 [299].

113 Cane, 'Judicial Review in the Age of Tribunals', above n 35, 490.

114 Peter Cane, 'Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals' (Paper presented at the Yale Law School Workshop on Comparative Administrative Law, New Haven, 9 May 2009) 37–8 <http://www.law.yale.edu/academics/conference.htm>.

115 Cane, *Administrative Tribunals and Adjudication*, above n 19, 172–3.

F *Managerial Aspect of Merits Review*

Despite foundational support for the duty to inquire in the institutional, procedural, orientational and substantive aspects of merits review, its managerial aspect undermines those foundations. The managerial aspect derives from the time and cost-efficiency demands on tribunals. Tribunals are expected to be 'quicker, simpler, cheaper, more accessible, more expert and more flexible than an ordinary court.'[116] Costs and efficiency benefits derive from the simpler, less technical procedures and the capacity of tribunal members to 'inquisitorially' manage hearings in a more active way than their curial counterparts.[117] The tribunal apparatus and members are also cheaper. The specialisation of tribunal members, particularly in the specialist tribunals, is a means of promoting efficiency through expertise.[118]

The funding of tribunals, relative to the courts, reflects this cost-efficiency rationale, and has led to the suggestion that funding constraints have impacted tribunal procedure.[119] One example is the failure to implement the Kerr Committee's recommendation for tribunal research units,[120] which Aronson and Franklin suggest has increased the need for adversarial procedure and reliance on the parties.[121] The cost-efficiency rationale has also been translated into the typical statutory objectives that tribunals be 'fair, just, economical, informal and quick.'[122] These objectives can be classified as either *legal* (the first two) or heavily *managerial* (the latter three).[123] Creyke describes this statutory formula as creating a 'conundrum' for tribunals in balancing these internally inconsistent objectives.[124]

The balance tribunals must strike in resolving this conundrum between legal and managerial values has implications for the duty to inquire. In part, it reflects a tension between Mashaw's bureaucratic justice and moral judgment models. In analysing Mashaw's three models, Adler notes that while the models are not mutually exclusive 'the more there is of one, the less there will be of the other two.'[125] A system mirroring the bureaucratic justice model is legitimated by

116 Esparraga, above n 57, 386. See also *Kerr Committee Report*, above n 20, 3–4 [12].

117 See Thawley, above n 57; Bedford and Creyke, above n 13, 8–9. However, some argue that inquisitorial procedures require greater resources: Henchliffe, above n 48, 246.

118 Stephen H Legomsky, *Specialized Justice — Courts, Administrative Tribunals and a Cross-National Theory of Specialization* (Clarendon Press, 1990) 26–7, 31. For a recent discussion of how such accumulated experience may influence a decision-maker's psychological process of deciding, see Jane Herlihy and Stuart W Turner, 'The Psychology of Seeking Protection' (2009) 21 *International Journal of Refugee Law* 171, 188–91.

119 Bedford and Creyke, above n 13, 67.

120 *Kerr Committee Report*, above n 20, 87 [292].

121 Aronson and Franklin, above n 70, 237.

122 See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 2A; *Migration Act 1958* (Cth) s 420(1).

123 Cane, *Administrative Tribunals and Adjudication*, above n 19, 218.

124 Creyke, 'Administrative Tribunals', above n 72, 94. See also *Sun v Minister for Immigration and Ethnic Affairs* (Unreported, Federal Court of Australia, Lindgren J, 6 May 1997); Creyke, 'Administrative Justice — Towards Integrity in Government', above n 9, 708–9.

125 Michael Adler, 'Fairness in Context' (2006) 33 *Journal of Law and Society* 615, 621.

efficiency and accuracy, as distinct from fairness and deservedness. While the extent to which these managerial values are prioritised in Australian tribunals varies,[126] a significant legitimating function of all administrative tribunals is their capacity to provide efficient and cost-effective justice.[127] Bedford and Creyke note that:

> The emphasis on speed, informality, and economy suggests that the principal motivation for giving the tribunal inquisitorial powers was not because of a belief in the truth-elicitation advantage of the civil law model, but rather to ensure an efficient and relatively speedy resolution of complaints.[128]

Because efficiency legitimises the existence of tribunals, managerial considerations have had significant implications for the depth of merits review and the willingness of courts to impose positive obligations via a duty to inquire. Regarding the procedural aspect of merits review, the truth-finding rationale for the inquisitorial model is impinged upon by the dictates of efficiency. Concerning the orientational aspect, the focus on individual circumstances, entitlement and fairness in Mashaw's moral judgment model must be balanced against the interests of the collective in both efficiency and effective, utilitarian policy delivery. Unlike judicial review, merits review adjudication may prioritise the interests of the individual, but only when this is not at the expense of the collective interest in an efficient and cost-effective tribunal system.

G *Conclusion*

This Part has essayed a conceptual basis for the duty to inquire as implicit within merits review. Institutionally, the location of tribunals within the executive — 'standing in the shoes' of the original decision-maker and substituting the correct or preferable decision — establishes a truth-finding element of merits review. Substantively, the *distinguishing* feature of merits review tribunals is the making of factual determinations. Because of the adjudicative orientation of tribunals, attention should be given to the individual applicant's deservedness. Procedurally, inquisitorial powers exist in all the major Australian tribunals to enable, theoretically, the fulfilment of this function. These aspects of merits review form the basis of an implied duty to inquire in administrative tribunals; an inherent part of their review is ascertaining particular evidence or asking key questions.

However, certain aspects of merits review also curtail claims for a free-ranging duty to inquire. Managerially, the legitimating force behind tribunals is providing time-efficient, cost-effective access to justice. Institutionally, courts have been reluctant to interfere with findings of fact, which must be characterised as errors of law, and, procedurally, tribunals often exhibit adversarial tendencies.

126 Cane, *Administrative Tribunals and Adjudication*, above n 19, 235.
127 Paul Dawson, 'Tenure and Tribunal Membership' (1997) 4 *Australian Journal of Administrative Law* 140, 141.
128 Bedford and Creyke, above n 13, 9.

Nonetheless, judicial review cases since *Prasad* indicate there are circumstances where merits review tribunals have a duty to inquire. Part III provides an analysis of these circumstances, and the degree to which they reflect considerations consistent with the conceptual basis for the duty developed in this Part. It is argued that there is a strong relationship between the predictions of the foregoing analysis, and the matters which Australian courts have treated as relevant to the existence and scope of the duty to inquire.

III CORE PRINCIPLES OF THE DUTY TO INQUIRE

A *Introduction*

The competing aspects of merits review identified in Part II provide a basis for understanding the development of the duty to inquire in the judicial review case law since 1985. Due to the limitations identified, it is unsurprising that tribunals are under 'no general obligation to initiate enquiries or to make out an applicant's case for him or her.'[129] Tribunal members are generally entitled to be guided by the submissions of the parties and the materials before them.[130] However, since the decision in *Prasad*, courts have recognised in certain exceptional circumstances that tribunals may be under an obligation to inquire to discharge their review duty.

The aim of this Part is twofold. First, to consider the juristic basis of the duty to inquire through an analysis of the grounds of review on which the duty has rested. Secondly, to provide a thematic analysis of over 100 cases which have considered the duty.[131] Although its application has been reactive, a set of core principles can be identified, being two *threshold requirements* essential to the duty's existence, followed by a number of *relevant circumstances*. The threshold requirements are that the information is centrally relevant and is readily available. Once these are satisfied, a number of relevant circumstances concerning the tribunal's statutory structure, the circumstances of the hearing, and the applicant's situation, have been consistently identified by the courts. Although unstated by the courts, these core principles are largely consistent with the competing aspects of merits review, which facilitate an understanding of the judicial review case law. As the aim of the core principles is to provide overarching clarity to the sometimes opaque reasoning and inconsistent application of the duty to inquire, their logical structure is not intended to oversimplify the often idiosyncratic reasoning in duty to inquire cases.

129 *Le* (2007) 164 FCR 151, 172 (Kenny J).

130 *Emiantor v Minister for Immigration and Multicultural Affairs* (1997) 48 ALD 635, 653 (Merkel J) ('*Emiantor*'); *Chen v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 157, 180 (Merkel J).

131 Primarily, the cases which follow concern applications for judicial review. A number of tribunal decisions in which tribunals considered whether they were under an obligation to make inquiries are also used.

B *Juristic Basis*

For institutional reasons noted above, a failure to inquire must, on judicial review, be characterised as an error of law. The juristic basis for the duty to inquire has been elusive. Some commentators suggest that the duty derives from *Wednesbury* unreasonableness, a failure to take account of relevant considerations or a denial of procedural fairness.[132] Others focus exclusively on *Wednesbury* unreasonableness[133] or procedural fairness.[134] The High Court's recent decision in *SZIAI* provides only limited clarity. The High Court's approach, and the previous uncertainty amongst commentators, suggests that the exceptional circumstances of the case, rather than the principles of a ground of review, are more relevant to determining whether a tribunal is under an obligation to inquire.

In *SZIAI*, the majority held that '[i]t is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law.'[135] Unless there is a positive statutory obligation to make inquiries, such as in the New South Wales Administrative Decisions Tribunal,[136] or perhaps a legitimate expectation,[137] it is unlikely that procedural fairness would oblige the tribunal to go beyond providing the applicant with an opportunity to comment on adverse conclusions.[138]

The majority directed its analysis neither to a general concept of a duty to inquire, nor to a breach of the grounds of review suggested above, but to jurisdictional error, holding that:

> Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a 'duty to inquire', that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error … It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.[139]

The majority concluded that

> there is no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review or that it was otherwise so *unreasonable* as to support a finding that the tribunal's decision was infected by jurisdictional error.[140]

132 Aronson, Dyer and Groves, above n 10, 297; Creyke and McMillan, above n 10, 986–9.
133 Douglas, above n 10, 466–71.
134 Izzo, above n 12, 189.
135 (2009) 259 ALR 429, 436 [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
136 *Administrative Decisions Tribunal Act 1997* (NSW) s 73(5)(b).
137 See *Al Shamry v Minister for Immigration and Multicultural Affairs* [2000] FCA 1679 (21 November 2000) [42]–[43] (Madgwick J).
138 *SZIAI* (2009) 259 ALR 429, 436–7 [24]–[27] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
139 Ibid 436 [25].
140 Ibid 436 [26] (emphasis added).

It is likely that the majority's concern with jurisdictional error resulted from the decision pertaining to the *Migration Act 1958* (Cth) ('*Migration Act*'), thus requiring jurisdictional error to enliven the Court's inherent jurisdiction under s 75(v) of the *Commonwealth Constitution*.[141] The use of 'unreasonable' suggests a continuing connection with *Wednesbury* unreasonableness and the *Prasad* line of authority.[142] This is supported by the majority's citation, without disapproval, of *Prasad*[143] and subsequent decisions including *Le*[144] and *Boya Association Inc v State Planning Commission; Ex parte Helena Valley*.[145] It may be that jurisdictional error is merely an extra threshold requirement for a failure to inquire under the *Migration Act*, which is not required for review on the ground of *Wednesbury* unreasonableness under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Recent decisions of the Federal Court following *SZIAI* confirm the continuing relevance of unreasonableness, and the application of the *Prasad* line of authority.[146]

As will be explored below, both *SZIAI* and the previous *Prasad* line of authority note that a duty may arise in strictly limited circumstances. This is indicative of the circumstantial approach courts have taken in duty to inquire cases, where the concern is not with enunciating principles relating to a particular ground of review, but with providing a 'black box' form of review in exceptional cases consistent with the role of *Wednesbury* unreasonableness or jurisdictional error.[147] The focus is therefore on the circumstances in which the merits review function of tribunals is not fulfilled.

The High Court did not seize the opportunity to enumerate core principles to determine when those strictly limited circumstances exist. This has already been noted, perhaps with disappointment, by the Federal Court,[148] and could lead to

141 *Migration Act* s 474; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

142 This is despite members of the majority casting doubt during argument on whether the scope of *Wednesbury* unreasonableness could extend to the process of the decision as opposed to the outcome. For example, Gummow J stated that '[s]ection 5(1)(b) of the *AD(JR) Act* is all about procedures. Section 5(1)(e) is all about making decisions. Section 5(2)(g) is linked to 5(1)(e). So it is all about outcomes, not about procedures': Transcript of Proceedings, *Minister for Immigration and Citizenship v SZIAI* [2009] HCATrans 165 (28 July 2009) 438–40. It had previously been argued by commentators that unreasonable errors of procedure were consistent with an expanded concept of *Wednesbury* unreasonableness: McEvoy, above n 11, 39–45; Panetta, above n 11, 198.

143 *SZIAI* (2009) 259 ALR 429, 434–5 [21]–[23] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing (1985) 6 FCR 155, 167–70 (Wilcox J).

144 *SZIAI* (2009) 259 ALR 429, 435 [22] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing (2007) 164 FCR 151, 174–6 [65]–[67] (Kenny J).

145 *SZIAI* (2009) 259 ALR 429, 435 [22] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing (1989) 2 WAR 422, 445 (Ipp J).

146 *Brown* (2009) 112 ALD 67, 85–7 (Edmonds J); *Lohse v Arthur [No 3]* (2009) 180 FCR 334, 360, 364 (Graham J); *Khant* (2009) 112 ALD 241, 254–8 (Cowdroy J); *SZNMJ* (2009) 112 ALD 284, 290–2 (Cowdroy J). Cowdroy J, for example, stated that '[t]he High Court's decision in *SZIAI* at [26] appears to leave *Le* intact, meaning that a failure to inquire can constitute a jurisdictional error on two separate bases: unreasonableness and constructive failure to exercise jurisdiction': at 291.

147 See Margaret Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 188.

148 *Brown* (2009) 112 ALD 67, 86 (Edmonds J).

continued confusion. The remainder of this Part develops a set of core principles which may give rise to those strictly limited circumstances, beginning with two threshold requirements.

C *Threshold Requirements*

The genesis of the duty to inquire is the oft-cited statement of Wilcox J in *Prasad*:

> Where it is obvious that material is readily available which is centrally relevant to the decision to be made … to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it.[149]

Subsequent cases have applied Wilcox J's statement and noted the key elements of 'central relevance' and 'ready availability'. Recently in *SZIAI*,[150] *Brown*,[151] and *Khant*,[152] these elements were essentially treated as threshold requirements.

The need for threshold requirements reflects the institutional restrictions noted above. They facilitate judicial deference to administrative fact-finding, while providing a means for the characterisation of egregious failures to inquire as an error of law amounting to jurisdictional error or *Wednesbury* unreasonableness.

1 *Central Relevance*

Wilcox J's statement that the further inquiries must be 'centrally relevant to the decision to be made'[153] has been cited with approval in many subsequent cases.[154] In *Prasad*, despite affidavits and a departmental report to the contrary, the decision-maker concluded that the applicant's marriage was a sham based on conflicting statements in separate interviews of Bineshri and Agnes Prasad regarding their living arrangements. This conclusion was central to Mr Prasad's application for permanent residency as a spouse. Consequently, the conflicting evidence necessitated further inquiries rather than the automatic drawing of an adverse inference.[155] The failure to make such inquiries amounted to *Wednesbury* unreasonableness.[156]

Central relevance has been important in subsequent duty to inquire cases. Illustrations include requiring the Immigration Review Panel to inquire into the

149 (1985) 6 FCR 155, 170.

150 (2009) 259 ALR 429, 1129 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

151 (2009) 112 ALD 67, 86 (Edmonds J).

152 (2009) 112 ALD 241, 255–8 (Cowdroy J). Cowdroy J framed the relevant requirements as (1) a critical fact; (2) an obvious inquiry; and (3) the existence of information about the critical fact which is easily ascertained.

153 *Prasad* (1985) 6 FCR 155, 170.

154 See, eg, *Luu v Renevier* (1989) 91 ALR 39, 49–50 (Davies, Wilcox and Pincus JJ); *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 119 (Wilcox J); *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220, 251 (Sackville J).

155 *Prasad* (1985) 6 FCR 155, 174 (Wilcox J).

156 Ibid 176.

welfare and care available to an applicant were she to be deported to the United States;[157] suggesting the RRT may have been required to consider making positive inquiries regarding the Lao Gai Foundation to determine whether the refugee visa applicant's membership of the foundation would subject him to persecution in China;[158] and requiring the decision-maker to inquire into the nature of the applicant's relationship with his son, where this was a ground for the granting of a temporary entry permit on humanitarian grounds.[159]

Conversely, courts have consistently refused to find a duty to inquire where the information was not centrally relevant. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*,[160] the RRT overlooked two folios of information which included reference to the applicant's spouse being granted a temporary protection visa, one of two disjunctive grounds under reg 785.211 of the *Migration Regulations 1994* (Cth). Although this information was important to one of those grounds, and the applicant was unaware of it herself, it was extraneous to the *particular* ground claimed by the applicant under reg 785.211, being the *Convention* reason, and was therefore not centrally relevant. There was no obligation on the Tribunal to act on that information or inform the applicant of it so that she might, as a matter of procedural fairness, amend her case.[161]

Similarly, where the inquiries would not add to existing evidence, they are not centrally relevant. For example, the tribunal need not call on the authors of key affidavits if the credibility of those affidavits is already 'a given'.[162] This principle also applies in the inverse. In *Mazhar v Minister for Immigration and Multicultural Affairs*, where a translated document indicated that several key words were illegible, no duty to inquire as to the original meaning arose as the document was discredited on other bases.[163] In *Gomez v Minister for Immigration and Multicultural Affairs*, no duty to inquire of the Sri Lankan police as to the cause of an allegedly politically motivated attack against the applicant arose because 'the wholesale rejection by the tribunal of the appellant's evidence

157 *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363, 372–3 (Lee J).

158 *Li v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275, 287–9 (Foster J). Although setting aside the Tribunal's decision only on the basis that it had failed to consider the 'major issue posed for determination', Foster J also considered in obiter the issue of further inquiries pertaining to that determination, at 289:

> in a case such as the present, where information of obvious significance is provided for the first time to the Tribunal then, in my view, the statutory obligation arises. The Tribunal must consider whether it wishes to obtain further relevant material. The decision either to seek or not to seek such further material is probably not a reviewable decision for the reasons I have already given. However, a failure to consider the question, at least where consideration was obviously called for, would, in my opinion, be an error capable of vitiating the review process and would be reviewable by this Court under s 476(1)(a) of the Act.

159 *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167, 179 (Toohey J) ('*Videto*').

160 (2003) 211 CLR 441.

161 Ibid 457–9 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ); Izzo, above n 12, 189.

162 *MZXRS v Minister for Immigration and Citizenship* (2009) 106 ALD 305, 315–16 (Jessup J).

163 (2000) 183 ALR 188, 200 (Goldberg J).

meant that it was unnecessary for the tribunal to make any further inquiries.'[164] In *SZMKN v Minister for Immigration and Citizenship*, inquiries to 'lay witnesses', when only inquiries of Falun Gong practitioners could have confirmed the applicant's practitioner status, were not centrally relevant.[165] Similarly, in *SZIAI*, a primary reason for finding that no duty to inquire as to the authenticity of Bangladeshi religious conversion certificates existed was that the authors 'would have added nothing to the statements effectively conveyed by the certificates themselves.'[166]

Finally, the central relevance criterion obviates the need to inquire if such inquiries would likely prove futile for an intervening reason. For example, in *Minister for Immigration and Multicultural Affairs v Rajalingam*, the need to withhold the applicant's names in making inquiries of the Turkish criminal court meant that the authenticity of certain documents and claims could not be established, which precluded the applicant's claim for the duty, though these inquiries would otherwise have been centrally relevant.[167] In *SZNBX*, the RRT did not need to inquire into and obtain otherwise important information from the appellants' former Latvian lawyers, as those lawyers had previously been uncooperative and were unlikely to yield the centrally relevant information (if it existed).[168]

The importance of the 'central relevance' requirement in the duty to inquire case law is consistent with courts *generally* deferring to administrative fact-finding for institutional reasons, while at the same time maintaining a degree of supervision by characterising *certain* failures to inquire as errors of law. Moreover, it is one mechanism for ensuring tribunals discharge their orientational and adjudicative function of conducting probing merits review of the facts, without undermining managerial concerns by requiring tribunals to ascertain non-critical facts.

2 *Ready Availability*

The second threshold requirement is that the information be 'readily available'. This requirement is an implicit judicial recognition of the managerial imperatives which constrain merits review tribunals. Examples of sufficiently simple inquiries have included: seeking a readily accessible medical opinion regarding the likelihood of recidivism;[169] seeking a comparison of the educational standards in Chinese and Australian high schools;[170] conducting internet research regarding the sport of futsal;[171] ordering a search of the Australian

164 (2002) 190 ALR 543, 553 (Hill, O'Loughlin and Tamberlin JJ).
165 [2009] FMCA 954 (8 October 2009) [65] (Scarlett FM).
166 (2009) 259 ALR 429, 1129 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *SZNMJ* (2009) 112 ALD 284, 292 (Cowdroy J).
167 (1999) 93 FCR 220, 252 (Sackville J).
168 (2009) 112 ALD 475, 481 (Bennett J).
169 *Luu v Renevier* (1989) 91 ALR 39, 50 (Davies, Wilcox and Pincus JJ).
170 *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571, 578–9 (Ryan and Finkelstein JJ).
171 *Milton Sakkos* [2004] MRTA 7649 (9 December 2004) [22]–[23] (Member Buljan).

Government Retirement Benefits Office's database to find the numbers of tenosynovitis claimants in a given year;[172] confirming the authenticity of Red Cross prison certificates with that organisation;[173] requiring an unrepresented applicant's general practitioner to give further medical evidence;[174] phoning an applicant to follow up the RRT's letter requesting reasons for his non-compliance with condition 8202 of his visa, to which the applicant had not responded;[175] and making a telephone inquiry of a fish farm in China to verify a refugee visa applicant's claim of dismissal from employment on political grounds.[176]

By contrast, inquiries which were too burdensome have included: inquiring into a sponsor company's workplace relations and wages standards;[177] requiring a Centrelink caseworker to appear before the Tribunal and be cross-examined;[178] contacting two individuals unknown to the RRT in Sri Lanka;[179] requiring a witness to appear before the New South Wales Administrative Decisions Tribunal, where this would take an additional hearing day;[180] requiring the commission of a building expert to give evidence in a development application;[181] and inquiring as to the economic conditions in the Italian sodium cyanide market.[182]

It has been held recently that the question of 'how "readily available" the information need[s] to be before the principle operates … can be determined only against the circumstances of a particular case.'[183] The managerial considerations of efficiency will vary across tribunals. A certain inquiry may be relatively simple for an expert specialist tribunal to make based on past experience or members' expertise, but may be comparatively onerous for a general jurisdiction tribunal, depending on members' experience. Clearly, though, where a given inquiry falls on this spectrum of simplicity will be a crucial factor in the foundation of a requirement that it be undertaken.

172 *Re Rowlands and Commissioner for Superannuation* (1988) 16 ALD 589, 600 (Deputy President Todd, Dr Travers and Member Attwood).

173 *Al Shamry v Minister for Immigration and Multicultural Affairs* [2000] FCA 1679 (21 November 2000) [42], [49] (Madgwick J).

174 *Mustafay v Secretary, Department of Family and Community Services* [2004] AATA 819 (6 August 2004) [5] (Dr Christie).

175 *Khant* (2009) 112 ALD 241, 257 (Cowdroy J).

176 *SZLGP* (2009) 112 ALD 501, 515–16 (Logan J).

177 *Tide Sequence Industries Pty Ltd v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 155, 164 (Conti J).

178 *Wecker v Secretary, Department of Education, Science and Training* (2008) 168 FCR 272, 298–9 (Greenwood J).

179 *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 175 ALR 209, 212–13 (McHugh J) ('*Cassim*').

180 *Battenberg v The Union Club* [2004] NSWADT 285 (9 December 2004) [16]–[24] (Judicial Member Britton, Non-Judicial Members de Bikal and Bolt).

181 *Campbell v Port Phillip City Council* [1999] VCAT 128 (30 June 1999) [31]–[32] (Deputy President McNamara and Dr Atkinson).

182 *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458, 469 (Hill J).

183 *MZXRS v Minister for Immigration and Citizenship* (2009) 106 ALD 305, 315 (Jessup J).

D *Statutory Structure*

Once the threshold requirements of central relevance and ready availability have been established, a number of further *relevant circumstances* have been relied on by courts to determine whether a duty exists. The first set of circumstances relates to the statutory structure. These include economic efficiency and the 'need for speed',[184] where the tribunal falls on the adversarial–inquisitorial spectrum, and the nature of the decision.

1 *Economy and Speed*

The statutory managerial objectives that tribunals operate in a manner which is 'fair, just, economical, informal and quick',[185] and the corresponding caseloads and funding constraints of tribunals, have had an impact on the willingness of tribunals to find they are under a duty to inquire. Economy and speed concerns have been particularly acute in the general jurisdiction merits review tribunals. Their limited investigative resources were cited in *Erdstein v Comcare*,[186] *Talma v Repatriation Commission*,[187] *Re Hargreaves and Australian Community Pharmacy [No 2]*,[188] *Campbell v Port Phillip City Council*[189] and *Battenberg v The Union Club*[190] to refuse the extension of a hearing, even by a few hours. These concerns will have an even greater impact on the decision to undertake further inquiries if the parties dispute the prolongation of proceedings or refuse to bear the costs of those additional inquiries.[191] In conjunction with the threshold requirement that the information be 'readily available', the efficiency factors exemplify an underlying concern with upholding the managerial aspect of merits review.

2 *Procedural Operation and Statutory Powers*

A common argument in cases alleging a breach of a duty to inquire is that the more extensive a decision-maker's statutory inquisitorial powers, the greater the obligation they are under to exercise them.[192] Conversely, it might be expected that those tribunals which operate almost as adversarial courts, and possess adversarial statutory features, ought not be obliged to meet expectations consis-

184 Creyke, '"Inquisitorial" Practice in Australian Tribunals', above n 13, 30.

185 Creyke, 'Administrative Tribunals', above n 72, 94.

186 (2004) 39 AAR 283, 286 (Senior Member Dwyer and Member Maynard).

187 [2003] AATA 866 (4 September 2003) [5] (Senior Member Dwyer and Dr Weerasooriya).

188 (1995) 41 ALD 147, 167 (Deputy President Forgie).

189 [1999] VCAT 128 (30 June 1999) [32] (Deputy President McNamara and Dr Atkinson).

190 [2004] NSWADT 285 (9 December 2004) [23] (Judicial Member Britton, Non-Judicial Members de Bikal and Bolt).

191 *Re Achurch and Comcare* (2003) 77 ALD 531, 533–4 (Senior Member Dwyer and Dr Weerasooriya). Similarly, although not necessarily related to the operation of the tribunal itself, no duty to inquire arises where a 'quick' decision is important, either to prevent ongoing breaches or for the purposes of a subsequent administrative determination: *J Wattie Canneries Ltd v Hayes* (1987) 74 ALR 202, 217 (Keely, Wilcox and Gummow JJ).

192 See, eg, *Cassim* (2000) 175 ALR 209, 212 (McHugh J); *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 413 (McHugh J); *SZJBA v Minister for Immigration and Citizenship* (2007) 164 FCR 14, 28–9 (Allsop J).

tent with an inquisitorial mindset. This accords with the implications deriving from the procedural aspect of merits review.

It may be that such reasoning underlay the development of the duty by Wilcox J in *Prasad*, which followed a two-stage process involving a bureaucratic investigation and then a Ministerial decision.[193] The investigative process in *Prasad* would seem to provide greater implicit support for a duty to inquire than typical merits review processes, since the latter often affords the applicant an opportunity to examine the departmental information and make submissions.

Initially, some cases suggested a judicial inclination towards finding a duty to inquire where the tribunal operates in a more inquisitorial manner and possesses a range of inquisitorial statutory powers, including under the *Migration Act*.[194] However, there is now extensive authority indicating that the powers conferred, for example, by ss 415, 420, 424 and 427 of the *Migration Act* are discretionary.[195] This interpretation of the provisions of the *Migration Act*, and the general reluctance to embrace a free-ranging duty to inquire even in tribunals at the inquisitorial end of the spectrum, is what one would expect if courts were attaching considerable weight to institutional and managerial considerations.

Notwithstanding this, a vast number of duty to inquire claims are made in tribunals at the inquisitorial end of the adversarial–inquisitorial spectrum, particularly the migration tribunals. The success of these claims is not because of the construction of these tribunals' statutory powers per se. Rather, the courts have focused on other aspects of the hearing and the applicant's circumstances that bear upon a tribunal's merits review function, which may be more common in the cases before specialist inquisitorial tribunals.[196]

3 *Nature of the Decision to Be Made*

Another factor relevant to the existence of a duty to inquire is the type of decision to be made. This affects decision-makers' obligations because a heightened level of scrutiny is expected to attach to certain decisions. In *Goldie v Commonwealth*, it was stated that '[g]iven that deprivation of liberty is at stake, [relevant] material will include that which is discoverable by efforts of search and inquiry that are reasonable'.[197] According to Creyke, this is because '[d]ifferent stances are taken if the matter relates to something of limited monetary value as compared with cases in which personal liberty is involved.'[198] Inversely, in *Campbell v Port Phillip City Council* it was held to be

> generally fair that a development proponent who seeks approval for a development, no doubt with a view ultimately to obtaining a profit from the transaction,

193 (1985) 6 FCR 155, 158–61.

194 See, eg, *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28, 62–3 (Merkel J); *Al Shamry v Minister for Immigration and Multicultural Affairs* [2000] FCA 1679 (21 November 2000) [36]–[42] (Madgwick J).

195 See, eg, *Cassim* (2000) 175 ALR 209, 213 (McHugh J); *W41/01A v Minister for Immigration and Multicultural Affairs* [2001] FCA 742 (20 June 2001) [21]–[22] (Nicholson J).

196 See Parts III(E)–(F) below.

197 (2002) 117 FCR 566, 569 (Gray and Lee JJ).

198 Creyke, '"Inquisitorial" Practice in Australian Tribunals', above n 13, 27.

> should bear the responsibility of placing before the decision-maker any expert opinion upon which he relies.[199]

The importance attached to the interests at stake in the case is consistent with Mashaw's moral judgment model, a corollary of the adjudicative orientation of tribunals, because considerations of collective efficiency should arguably not take precedence over deservedness and considered judgment where, for example, individual liberty is concerned.

4 *Conclusion: Structural Factors*

The limited impact of structural factors may be due to a reluctance by the courts to embrace a free-ranging duty to inquire for reasons of institutional separation, and is accentuated by resource and efficiency concerns consistent with the managerial aspect of merits review. However, the nature of the decision under the statute may necessitate greater intervention. Ultimately though, because of the limited nature of the duty to inquire, idiosyncratic factors relating to the circumstances of the hearing and the applicant have been given greater attention in the case law.

E *Circumstances of the Hearing*

Courts have been especially concerned with the circumstances of the *particular* hearing. Hearing factors identified include defective procedures, the decision-maker's awareness of the existence of further information, and requests by the applicant that inquiries be undertaken.

1 *Hearing Defects*

Courts have been reluctant to impose upon a tribunal a burden to make further inquiries when a lengthy hearing was conducted in which the applicant had ample opportunity to present their case.[200]

Consistent with the error identification focus of judicial review, courts have been more willing to impose a duty to inquire if the propriety of the hearing was undermined by a defect. In *Videto*, the Minister's failure to consider information that the applicant did not submit to him was held to be a reviewable error, because the applicant was dissuaded by departmental officers from submitting that information.[201] Similarly, in *Le*, the lengthy five-hour original interview by the Department, despite the applicant's advanced age, and the mistranslations of the interview transcripts, cast doubt on much of the evidence before the Migration Review Tribunal.[202] Because of these defects, this was 'one of those rare or exceptional cases where a decision-maker acting reasonably would have made some further enquiry'.[203] And in *SZJBA v Minister for Immigration and Citizen-*

[199] [1999] VCAT 128 (30 June 1999) [32] (Deputy President McNamara and Member Atkinson).
[200] *Emiantor* (1997) 48 ALD 635, 653 (Merkel J); *J Wattie Canneries Ltd v Hayes* (1987) 74 ALR 202, 217 (Keely, Wilcox and Gummow JJ).
[201] (1985) 8 FCR 167, 178–9 (Toohey J).
[202] (2007) 164 FCR 151, 176–8 (Kenny J).
[203] Ibid 178.

ship, the RRT was required to inquire as to the contents of pages missing from the applicant's faxed submissions.[204]

2 *Awareness of Further Information*

Related to defective processes, a duty to inquire will arise if it can be established that the decision-maker either knew, or ought to have been aware, that further centrally relevant information existed. This occurs in a number of common scenarios, including where:

- the decision-maker is actually aware or it is *obvious* that centrally relevant material is available;[205]
- conflicts in the evidence emerge which may be resolved by further inquiries; or
- the evidence relied on by the tribunal obviously lacks some probative basis.

Common examples of evidence lacking a probative basis include where it is provided by an untrustworthy or inexpert source,[206] is obviously outdated[207] or is obtained from a source other than the applicant without proper verification.[208]

However, evidential conflicts or inaccuracies will not necessitate further inquiries where the threshold requirements are absent. In Flick J's decision in *SZIAI v Minister for Immigration and Citizenship*, conflict between the applicant and the Ahmadiyya Muslim Association over the authenticity of certificates supporting his claim to be an Ahmadi Muslim convert required the RRT to inquire of the documents' Bangladeshi authors.[209] A significant factor in the High Court's overturning of the decision on appeal was that such further inquiries would not have resolved the evidential conflict,[210] and therefore could not be considered *centrally relevant*. Reflecting the threshold criterion of *ready availability*, no duty to resolve conflicts in evidence will arise where the evidence is complicated (such as the contradictory evidence of expert economists).[211]

204 (2007) 164 FCR 14, 28–30 (Allsop J).

205 *Prasad* (1985) 6 FCR 155, 170 (Wilcox J); *Ertan v Hurford* (1986) 11 FCR 382, 387–8 (Wilcox J); *Detsongjarus v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 21 ALD 139, 143 (Pincus J) ('*Detsongjarus*'); *Foxtel Management Pty Ltd v Australian Competition and Consumer Commission* (2000) 173 ALR 362, 417 (Wilcox J).

206 *C A Ford Pty Ltd v Comptroller-General of Customs* (1993) 46 FCR 443, 449 (Davies J). See also *Rowe and Repatriation Commission* [2000] AATA 329 (28 April 2000) [58] (Senior Member Handley, Dr Re and Member Campbell) in which the original medical evidence before the Tribunal was prepared by consultants who had examined the applicant on one occasion only. Further evidence was sought by the Tribunal.

207 *Tickner v Bropho* (1993) 40 FCR 183, 197–9 (Black CJ).

208 *Detsongjarus* (1990) 21 ALD 139, 143 (Pincus J).

209 *SZIAI v Minister for Immigration and Citizenship* (2008) 104 ALD 22, 27.

210 *SZIAI* (2009) 259 ALR 429, 436 [26]–[27] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

211 *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, 431 (Tamberlin J).

3 *Request for Inquiries*

Another circumstance where the duty may arise is where the applicant requests that the decision-maker conduct further inquiries. Courts have expressed mixed views as to whether this creates a duty to inquire. In *Minister for Immigration and Ethnic Affairs v Singh*,[212] *Kabir v Minister for Immigration and Multicultural Affairs*[213] and *Hourn v Farm Plan Pty Ltd*,[214] obiter comments suggest that, had the applicants asked the Tribunal to make further inquiries regarding the authenticity of certain documents, the Court may have imposed the duty. In *Sun v Minister for Immigration and Ethnic Affairs*, the applicant's migration agent had made requests that the presiding Member make inquiries of the applicant's parents in China, and to authorities in Papua New Guinea, to confirm the applicant's status as a former politically active Chinese student with a well-founded fear of persecution.[215] On review, the refusal to meet these requests was found to be so unreasonable that 'substantial justice' had not been done.[216]

In other cases, a request alone was insufficient. For example, in both *Raheem v Minister for Immigration and Multicultural Affairs*[217] and *Cassim*,[218] the refugee visa applicant's request for further inquiries was validly rejected by the RRT because those inquiries in Sri Lanka would have been onerous and the Tribunal had other bases on which to discredit the applicant. Even where the request is for the tribunal to undertake relatively straightforward inquiries, as in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* in which a second psychologist's report was requested, a request of itself may be insufficient where the decision-maker has other adequate evidence before them.[219] As noted recently by Logan J in the Federal Court:

> the mere extending by a visa applicant of an invitation to the tribunal to conduct inquiries itself does not thereby convert a course of action that it would be permissible but not obligatory for the tribunal to undertake into one which it is bound to undertake.[220]

It can be concluded that while a request may be a relevant factor, a request alone will not create an obligation on the decision-maker. If a request is made, the applicant will often bear the onus of furnishing the tribunal with sufficient information to carry out that request.[221]

212 (1997) 74 FCR 553, 561 (Black CJ, von Doussa, Sundberg and Mansfield JJ).
213 (2001) 184 ALR 295, 307 (Katz J).
214 [2003] FCA 1122 (16 October 2003) [50] (Nicholson J).
215 (1997) 81 FCR 71, 91 (Wilcox J).
216 Ibid 119.
217 [2001] FCA 940 (20 July 2001) [21]–[26] (Stone J).
218 (2000) 175 ALR 209, 212–13 (McHugh J).
219 (2004) 207 ALR 12, 21–2 (Gummow and Hayne JJ), 48–9 (Callinan J).
220 *SZLGP* (2009) 112 ALD 501, 515. Logan J went on to note that '[r]ather, the singular circumstances of a particular case may, exceptionally, give rise to an obligation on the part of the tribunal in that case to make its own inquiry with respect to a critical fact.'
221 *SZNBX* (2009) 112 ALD 475, 480–1 (Bennett J).

4 *Conclusion: Hearing Factors*

The manner in which a hearing is conducted, and the information and inconsistencies which emerge during it, have given rise to the most extensive judicial discussion of the duty to inquire. Courts, reluctant to impose a general duty to inquire on decision-makers, have been more inclined to do so when some form of *fault* can be attributed to the decision-maker through defective processes or knowledge of further information. This is consistent with tying the duty to *Wednesbury* unreasonableness and institutional deference, but could also reflect an unstated aim of ensuring proper adjudicative review consistent with the moral judgment model.

F *Applicant Factors*

The final relevant circumstances concern the applicant, including whether they have legal representation, suffer a disadvantage, or possess certain abilities.

1 *Legal Representation*

Whether or not an applicant is legally represented or has received other assistance has had a significant impact on the willingness of courts to find a duty to inquire. In *Emiantor*, the applicant's legal representation and the extensive documents and evidence provided as a result meant no assistance was required.[222] A similar result emerged in *Turner v Minister for Immigration and Ethnic Affairs* because of both legal advice and extensive family support when the applicant made submissions.[223] As noted in *Re Golem and Transport Accident Commission [No 1]*, this is because

> the closer one gets to something resembling an adversarial contest with experienced counsel representing the parties, the closer one gets to the system applied in the courts and the greater the reluctance on the part of the Tribunal to interfere and impose its own inquisitorial directions …[224]

By contrast, in *Mustafay v Secretary, Department of Family and Community Services*, because the applicant was unrepresented, the Tribunal was more willing to take a proactive role in seeking out and inviting additional witnesses.[225]

2 *Applicant's Attributes*

Certain disabilities faced by the applicant may require the tribunal to undertake proactive assistance. As Pearce notes, 'the degree of assistance to be afforded by the Tribunal will depend upon the applicant's ability and the nature of the issues that arise'.[226] For example, where the applicant is of advanced age,[227] has

[222] (1997) 48 ALD 635, 653 (Merkel J).
[223] (1981) 35 ALR 388, 392–3 (Toohey J).
[224] (2002) 19 VAR 265, 267 (Judge Bowman).
[225] [2004] AATA 819 (6 August 2004) [5] (Dr Christie).
[226] Pearce, *Administrative Appeals Tribunal*, above n 108, 134.
[227] *Le* (2007) 164 FCR 151, 176 (Kenny J).

language difficulties,[228] is severely stressed by the proceedings,[229] has just suffered debilitating personal tragedy, such as the loss of a child,[230] or is in detention without access to legal advice,[231] inquiries to provide assistance may be required. The inverse is also true; where an applicant possesses certain skills or advantages, such as a high level of education as a doctor[232] or a developer who stands to profit from the transaction in question,[233] a tribunal may provide less assistance.

3 *Conclusion: Applicant Factors*

Ultimately, it is the capacity of the applicant to adequately make their case which enhances or undermines their claim for a duty to inquire, with disadvantaged and unrepresented litigants at one end of the spectrum, and educated and articulate represented applicants with significant financial resources at the other. One explanation for this is the access to justice and truth-seeking rationales for introducing the inquisitorial procedural aspect of merits review. Another is that the adjudicative orientation of tribunals, compared with primary decision-makers, ought necessitate tribunals to undertake a probing assessment of an applicant's deservedness.

G *Conclusion*

The restricted development of the duty to inquire is unsurprising given the competing values underlying merits review outlined in Part II. The duty has an uncertain juristic basis which reflects its employment in exceptional situations based on a circumstantial approach by the courts. This Part has developed core principles to identify when the courts are likely to find a duty to inquire. Two *threshold requirements* and further relevant circumstances concerning the statutory structure, the hearing and the applicant, were identified.

The attention to efficiency and resourcing objectives, and the treatment of the extensive inquisitorial powers in the *Migration Act*, demonstrate a reluctance to create generally applicable investigative duties. Instead, the courts have emphasised the idiosyncrasies of each case, so that more confined propositions emerge. Particular attention is paid to the conduct of the hearing, especially where defects are evident or centrally relevant information is obviously available. This reflects

228 Ibid.

229 *Patricia Hudson and Child Support Registrar* [1998] AATA 863 (28 October 1998) [5] (Deputy President McDonald, Members Rodopoulos and Woodard).

230 *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363, 373 (Lee J).

231 *Videto* (1985) 8 FCR 167. Note the comments of Marshall J in respect of represented applicants in detention in *Luu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 161, 181–2.

232 *Joseph v Health Insurance Commission* [2005] FCA 1042 (29 July 2005) [78] (Branson J).

233 See *Campbell v Port Phillip City Council* [1999] VCAT 128 (30 June 1999) [32] (Deputy President McNamara and Dr Atkinson):

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

the traditional juristic basis of *Wednesbury* unreasonableness and institutional deference. Finally, consistent with the rationales for inquisitorial procedures, the willingness to impose the duty will also depend on the applicant's circumstances, including whether they are legally represented or suffer a disability. Having identified both a conceptual basis for the duty to inquire and a set of core principles which have governed its existence, Part IV considers implications of and future directions for the duty to inquire in Australian administrative law.

IV IMPLICATIONS OF A DUTY TO INQUIRE

A *Introduction*

Based on the limited duty to inquire which emerges from the core principles set out in Part III, this Part will outline some potential implications of that limited duty. The framework identified in Part II is retained to consider procedural, substantive, orientational, institutional and managerial implications.

B *Procedural Implications*

The duty to inquire has important procedural implications. The adversarial operation of tribunals was condemned early in the life of the modern administrative tribunals,[234] and remains an ongoing source of criticism.[235] This derives, in part, from cultural and systemic entrenchment. A duty to inquire may encourage greater utilisation of the extensive inquisitorial powers given to tribunals, consistent with the truth-finding function of merits review and the Administrative Review Council's procedural recommendations in its Best Practice Guide, *Decision Making: Evidence, Facts and Findings*.[236]

The core principles are also consistent with the access to justice impetus underlying the *Kerr Committee Report*'s recommendation of inquisitorial powers by emphasising the applicant's circumstances. This aspect of the duty is consistent with the federal government's current access to justice reforms and recent comments by the Attorney-General regarding the obligation to assist.[237]

However, a related reason which should caution against a free-ranging duty to inquire is that, as noted in *Minister for Immigration and Multicultural Affairs v Eshetu*, tribunals' informal, inquisitorial features 'are intended to be facultative, not restrictive.'[238] The development of an obligation to exercise these powers

234 Whitmore, above n 74.

235 Robin Creyke, 'Where Do Tribunals Fit into the Australian System of Administration and Adjudication?' in Grant Huscroft and Michael Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, 2006) 81, 89–90.

236 Administrative Review Council, *Decision Making: Evidence, Facts and Findings*, Best Practice Guide No 3 (2007) 5–6.

237 Robert McLelland, 'The Obligation to Assist: Model Litigants in Administrative Appeals Tribunal Seminar' (Speech delivered at The Obligation to Assist: Model Litigants in Administrative Appeals Tribunal Proceedings Seminar, Canberra, 26 August 2009) <http://www.aat.gov.au/SpeechesPapersAndResearch/ObligationToAssistSeminar.htm>.

238 (1999) 197 CLR 611, 628 (Gleeson CJ and McHugh J).

could undermine flexibility in tribunal practice and may needlessly oblige tribunal members to undertake inquiries out of fear of otherwise falling into error. By impinging on flexibility and minimalism, a duty straying beyond the strictly limited circumstances identified in Part III could undermine the access to justice endeavours.

A further reason noted for the reluctance to embrace the inquisitorial system is concern over the impact on a fair hearing. However, the content of procedural fairness should take its colour from the structure of the statute and circumstances of the case, including a tribunal's inquisitorial powers.[239] Moreover, Allars has questioned whether passivity actually achieves procedural fairness. Where one party is weaker and incapable of putting their case, fairness may require intervention.[240] Undoubtedly, ostensible bias might be a concern the more actively decision-makers involve themselves in the hearing. However, the circumstances in which the duty to inquire has been imposed by the courts, particularly the threshold requirements and circumstances of the applicant, suggest that the duty is unlikely to infringe the fair hearing rule.[241]

C *Substantive and Orientational Implications*

A limited duty to inquire is beneficial from the perspective of fulfilling the substantive and orientational aspects of merits review. If, for institutional reasons, merits review ought to provide a form of decision-making functionally distinct from both judicial review and primary decision-making or reconsideration, the procedures and tasks of tribunals should reflect those aims. From an orientational and substantive perspective, that functional purpose is a form of decision-making which is deliberative, probing and adjudicative in outlook and substantively enables intense review of fact-finding and fact-adjudication. A limited duty to inquire which requires tribunals to seek information that is centrally relevant to the decision is consistent with these aims. It reflects the notion that merits review obliges the tribunal member to reach the correct decision, and it also reflects the greater focus on deservedness of Mashaw's moral judgment model.

D *Institutional Implications*

However, from an institutional perspective, even the limited duty to inquire illustrated in Part III may have controversial implications. There is an inherent tension between ensuring tribunals perform their merits review function via judicial review, while recognising this differentiated function militates against

239 See *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 98 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

240 Allars, 'Neutrality', above n 39, 412. Dwyer also states that '[t]o achieve a fair outcome it may be necessary for the Tribunal to direct the inquiry, to adopt an inquisitorial mode': Dwyer, 'Fair Play the Inquisitorial Way', above n 81, 34.

241 For a discussion of the due process validity of more inquisitorial administrative proceedings in the United States, see *Secretary of Health, Education, and Welfare v Perales*, 402 US 389 (1971); Mashaw, 'The Management Side of Due Process', above n 58, 787–9.

judicial intrusion into merits review through, for example, a duty to inquire. The institutional implications can be considered in both a purposive and a substantive way.

1 *Purpose: Institutional Separation*

McMillan posits that the legality–merits distinction serves a dual purpose: 'defining the role of the judiciary while safeguarding the separate role of the executive from unwarranted judicial intrusion.'[242] It recognises the expertise of the executive.[243] The existence of tribunals to perform comprehensive adjudicative review on the merits, including fact-finding determinations, in addition to the institutional incapacity of the courts to fulfil this function for separation of powers reasons, may militate against an additional layer of fact-related appeal via a duty to inquire. As Creyke notes, tribunals stand 'at the apex of the administrative review system',[244] and appeals from them to courts on purely evidentiary issues would undermine this role and the interests of finality. This reflects the conclusion that 'there are indicators that the courts' role, while critical for the determination of meta-standards on legal issues, is diminishing in importance.'[245]

Moreover, McMillan has suggested that selecting the level of investigative procedure involves balancing 'variables like resources, program objectives, time, and patterns of behaviour of all relevant parties.'[246] Tribunal members possess expertise in administrative adjudication, the types of matters before the tribunal and the demands of its caseload. A deferential approach favours entrusting tribunal members with determining the level of investigation to be undertaken in a given matter based on that expertise, rather than the courts.

Conversely, courts may have comparative advantages over tribunals in identifying whether further inquiries should be undertaken. Courts do not face the same managerial pressures as tribunals. Applying the moral judgment model, courts have a more individualised orientation, together with greater time and resources, to determine whether inquiries should be taken in the interests of *individual* cases. Secondly, the lack of legal representation in some specialist tribunals might result in centrally relevant inquiries being overlooked.

Because the core principles ensure the duty exists to correct particularly egregious examples of a failure to make centrally relevant inquiries, it is consistent with *Wednesbury* unreasonableness as a 'black-box'[247] form of addressing maladministration. One view is that such intervention actually 'protects judicial review's credibility by allowing intervention in extreme cases of unreasonableness which would otherwise detract from public confidence in the courts'

242 McMillan, 'Recent Themes in Judicial Review', above n 12, 377.
243 McEvoy, above n 11, 40.
244 Creyke, 'Tribunal Reform', above n 29, 361.
245 Robin Creyke, 'Administrative Justice: Beyond the Courtroom Door' [2006] *Acta Juridica* 257, 287.
246 McMillan, 'Recent Themes in Judicial Review', above n 12, 361.
247 Allars, *Introduction to Australian Administrative Law*, above n 147, 188.

supervisory function.'[248] However, whether such additional review is considered beneficial will depend on the relative value attributed to individual rights or deservedness as against finality, efficiency and the advantages which flow from institutional separation.[249]

2 *Legality–Merits*

Whether the duty to inquire substantively involves revisiting the merits of the decision is contested. McMillan has argued that it does, by inviting courts to reassess the merits of a decision through questioning its evidential basis and whether the information relied on alone was sufficient to justify the decision reached.[250] This may be unsurprising given that *Wednesbury* unreasonableness has been denounced for the same reasons.[251] The threshold requirement of 'central relevance' to the decision might involve consideration of the merits, because courts are assessing whether inquiries ought to have been made by reference to how important these would have been to a desired outcome.

By contrast, McEvoy argues that

> any requirement imposed on decision-makers to be in full knowledge of relevant facts in no way takes the decision out of their hands and places it in the hands of the court. Indeed, what it actually does is allow the decision-maker full autonomy in the making of the decision, but demands that the power being exercised be exercised properly, with all the relevant material to hand.[252]

The duty to inquire, conceptualised in this way, is an anterior consideration to the merits, focused on whether the decision was based on all centrally relevant material, and does not involve the courts remaking the actual decision.[253] The allegedly centrally relevant material would need to pertain to the statutory decision in question, rather than the decision-maker's reasoning. However, given that the courts have considered the adequacy of other evidence relied on by a tribunal,[254] this position may be difficult to sustain. Moreover, McEvoy's position may not fully address McMillan's rationale for institutional deference which centres on tribunal expertise in determining the appropriate level of investigation in a given matter, under which 'the merits' might include process rather than just outcome.

Whether a failure to inquire in accordance with the core principles should provide a basis for judicial review may ultimately turn on whether an additional layer of review is considered consistent with the supervisory role of judicial review or whether, for reasons of institutional deference, considerations of the

248 Carroll, above n 11, 86.

249 See John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335.

250 McMillan, 'Recent Themes in Judicial Review', above n 12, 379–82.

251 Carroll, above n 11, 86.

252 McEvoy, above n 11, 41.

253 Panetta, above n 11, 199.

254 See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, 21–2 (Gummow and Hayne JJ), 48–9 (Callinan J); *Cassim* (2000) 175 ALR 209, 213 (McHugh J).

level of inquiry should be left to administrative tribunals. Ultimately, if a narrow construction of the core principles continues, it is unlikely that the duty will tangibly impact on the institutional separation between courts and tribunals.

E *Managerial Implications*

Finally, the limited duty to inquire has implications for the managerial aspect of merits review. Concerns over resourcing and efficiency implications were evident in the *SZIAI* hearing before the High Court. Gummow J pondered '[w]here would this process stop?'[255] and Crennan J asked 'how far would you be expected to go?'[256] A strictly limited duty to inquire based on the core principles would not necessarily create inefficiencies. The existence of threshold requirements means that decision-makers need only inquire where information is centrally relevant, including consideration of the utility of the inquiry to the outcome of the decision, and where the information is readily available. Moreover, courts have considered it relevant that some form of fault or awareness can be attributed to the decision-maker. This appears to strike an appropriate balance between managerial efficiency and the moral judgment model's emphasis on individual justice. Indeed, a duty to inquire may provide some guidance to tribunals in resolving the 'conundrum'[257] between their inconsistent legal and managerial objectives.

Courts may need to continue to adhere to the core principles in order to maintain an appropriate balance between the competing aspects of merits review. Managerial concerns may underlie item 9A(4) of sch 1 of the current Education Services for Overseas Students Amendment (Re-Registration of Providers and Other Measures) Bill 2009 (Cth). The Bill expressly states that the Secretary must re-register a provider of overseas education and training if it meets certain specified criteria, so long as the Secretary has no reason to believe that the provider:

- is not complying with the Act;
- does not have the principal purpose of providing education; or
- does not have the clearly demonstrated capacity to provide education of a satisfactory standard.[258]

In an attempt to ensure the administrative decision-maker is under no obligation to ascertain material relevant to the item 9A(2) criteria, item 9A(4) of sch 1 purports to oust any duty to inquire by stating that '[n]othing in subsection (2) creates a duty for the Secretary to seek any information about the matters mentioned.'

255 Transcript of Proceedings, *Minister for Immigration and Citizenship v SZIAI* [2009] HCATrans 165 (28 July 2009) 328.
256 Ibid 1134.
257 Creyke, 'Administrative Tribunals', above n 72, 94.
258 Education Services for Overseas Students Amendment (Re-Registration of Providers and Other Measures) Bill 2009 (Cth) sch 1 item 9A(2).

Although in the context of the primary decision-maker, any increasing incidence of such duty to inquire 'no-invalidity clauses' would represent the legislature's intervention to emphasise the managerial aspect of administrative decision-making in certain jurisdictions, such as migration. Like the ousting of *Wednesbury* unreasonableness in the *Migration Act*,[259] the existence of such clauses for merits review bodies would probably necessitate a failure to inquire being framed as a jurisdictional error, or would perhaps even expand the scope of jurisdiction such that a failure to inquire would not constitute jurisdictional error.[260]

F *Conclusion*

Despite the conceptual basis for the duty to inquire within merits review, the duty may have implications which expose it to criticism. The core principles indicate the duty to inquire has developed with a keen, although perhaps unstated, awareness of these implications. The core principles, which confine the duty to strictly limited circumstances, may balance the continued need for procedural fairness, economic efficiency, speed, flexibility and the importance of the legality–merits distinction in reviewing administrative decisions, with the need to foster an inquisitorial tribunal culture, probing merits review and access to justice.

V Concluding Remarks

For the last 25 years, the duty to inquire has persisted as a limited mechanism by which individual citizens and non-citizens can seek redress for a failure by merits review tribunals to conduct key, straightforward inquiries into centrally relevant issues. However, the duty's existence has been marked by conceptual uncertainty and pragmatic apprehension about its role within the system of administrative adjudication by tribunals.

In light of its recent limited consideration by the High Court in *SZIAI*, and subsequent tentative application in Federal Court and Federal Magistrates Court decisions, this article has sought to develop a conceptual basis and set of core principles that underlie the duty to inquire.

259 *Migration Act* ss 474, 476, 476A. A decision which is otherwise within jurisdiction is valid even if it were made as a result of *Wednesbury* unreasonableness: *Abebe v Commonwealth* (1999) 197 CLR 510, 522 (Gleeson CJ and McHugh J); Justice Kevin Lindgren, 'Commentary' (2001) 29 *Federal Law Review* 391, 394; Mary Crock, '*Abebe v Commonwealth; Minister for Immigration and Multicultural Affairs v Eshetu* — Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions' (2000) 24 *Melbourne University Law Review* 190, 196–7.

260 For a recent discussion of the effect of no-invalidity clauses generally, see Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14, 15–16, where McDonald considers that:

> To the extent that, in general, judicial review remedies are only issued on the basis of jurisdictional errors, no-invalidity clauses may be read as converting errors that would otherwise be jurisdictional in nature and result in invalidity into errors which are made within the decision-maker's powers and will not justify a remedy. In this way, no-invalidity clauses expand the decision-maker's powers to make legally valid decisions.

This duty to inquire has emerged because it is characteristic of the core function of tribunals: providing merits review via a form of inquisitorial adjudication. However, institutional limitations and managerial pressures have curtailed the willingness of courts to hold that a failure to inquire is judicially reviewable. Consequently, the courts have found a duty in only strictly limited circumstances, where the inquiries are centrally relevant and straightforward, and where the statutory structure, circumstances of the hearing and/or position of the applicant necessitate a proactive role for decision-makers. This limited duty to inquire is consistent with ensuring that tribunals carry out their core function of inquisitorial adjudication on the merits, while not unduly infringing flexibility, efficiency, procedural fairness and the legality–merits distinction.

The core principles and conceptual basis of the duty to inquire identified in this article provide a timely analysis of the important niche role of a limited duty to inquire in merits review tribunals. More generally, the duty's strained development but persistent operation is illustrative of the competing aspects of merits review, and the institutional tensions and differentiated functions of courts and tribunals in Australia's system of administrative justice.