Tribunal Practice: Inquisitorial or Adversarial?

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Introduction

1. The New South Wales Civil and Administrative Tribunal (NCAT) combines twenty-three former tribunals, all with distinct functions and procedures, into one tribunal, operating under a single governing statute. The statute allows for provision to be made for different procedures to apply in different divisions of the Tribunal, but nevertheless contains a provision concerning the procedure of the tribunal generally. The Tribunal is to act according to equity, good conscience and the substantial merits of the case and is given wide powers to inquire into and inform itself on any matter as it thinks fit.\(^2\) Whilst this might suggest that the Tribunal is inquisitorial in nature, in some areas of its jurisdiction, it adopts a predominantly adversarial model of litigation.

2. This paper examines the different aspects of the Tribunal’s procedural powers and duties and considers whether any over-arching characterisation of the Tribunal’s functions is useful or meaningful. The breadth of the Tribunal’s powers means that it is able to adapt its procedures to the particular circumstances. The label “inquisitorial” is a useful description of the Tribunal’s functions in merits review proceedings and proceedings in its protective jurisdiction, where it helps to define the relationship of the parties to each other and to the Tribunal, and to indicate that the Tribunal’s function is not merely to determine a dispute between parties. However, proceedings in other areas of the Tribunals’ jurisdiction are more adversarial in nature and the use of the Tribunal’s inquisitorial functions in consumer or commercial proceedings may compromise its role as impartial arbiter of disputes.

Inquisitorial function

3. Under an inquisitorial model of adjudication, the judge performs an active role in determining the issues, witnesses and scope of the evidence, whereas the parties are responsible for doing these things under an adversarial model.\(^3\) Further, under an inquisitorial model, witnesses tell their own story in narrative form and it is mainly the judge who questions the witnesses, whereas with an adversarial model, one party calls and examines a witness and the other party

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\(^1\) Juliet Lucy is a barrister at Thirteenth Floor St James Hall Chambers.
\(^2\) Civil and Administrative Tribunal Act 2013, s 38(2) and (4).
\(^3\) Harradine v District Court of South Australia [2012] SASC 96, Blue J at [47]; PJ v Child Support Registrar (2007) 38 Fam LR 31, Riethmuller FM at [75].
cross-examines the witness. Australian tribunals often combine elements of both models, and are generally given a lot of flexibility in deciding how to conduct proceedings.

4. Like many other tribunals, NCAT may determine its own procedure and is to act with as little formality as the circumstances of the case permit. It must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. In addition, the rules of evidence generally do not apply and the Tribunal may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice. These powers are consistent with the Tribunal having inquisitorial functions.

5. Australian tribunals have generally embraced the “inquisitorial mode of operation” with some hesitancy. An inquisitorial tribunal is entitled to be guided by the issues the parties choose to put before it for its consideration and to have regard to the case put and this is the most common way of proceeding. Many merits review proceedings appear to be conducted much like adversarial proceedings. Forgie DP of the Administrative Appeals Tribunal (“AAT”) has suggested that the AAT’s proceedings may often appear to be indistinguishable from those of a court, even though their functions are significantly different. This encourages an adversarial approach by agencies and applicants alike. There is therefore something of a disjunction between the inquisitorial function of merits review tribunals and the procedures they typically adopt. This may have a lot to do with the training of the lawyers who generally preside in them, the expectations of litigants and their representatives and the limited resources available for tribunals to make their own enquiries.

6. The term “inquisitorial” is often used in contradistinction to “adversarial” but neither term fully encapsulates the ways in which most Australian tribunals operate. It may be helpful to think of these terms as referring to two different ends of a spectrum, with various modes of functioning in the middle. Using this metaphor, a tribunal such as NCAT will function at different places on that spectrum, depending upon the particular Division in which the proceedings occur and the powers being exercised. On the other hand, it is possible that the concept of a spectrum conveys more coherence and order than is warranted in describing the ways in which a tribunal exercises its functions. President Allsop (as his Honour then was) has noted that the label “inquisitorial” “should not be understood to involve some homogenous characterisation of functions, just as the commonly opposed epithets of ‘adversarial’ and ‘inquisitorial’ do not usefully provide a comprehensive description of the field of decision-making.”

7. The distinction between inquisitorial and adversarial proceedings, although not always helpful, has utility in the merits review context, where tribunals stand in the shoes of the decision-maker and make the correct and preferable decision. The High Court has described

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4 Harradine v District Court of South Australia [2012] SASC 96, Blue J at [47].
5 Civil and Administrative Tribunal Act 2013, s 38(1) and (4).
6 Civil and Administrative Tribunal Act 2013, s 38(2) and (3).
7 South Western Sydney Area Health Service v Edmonds [2007] NSWCA 16 at [93]; Residents Against Improper Development Incorporated v Chase Property Investments Pty Ltd [2006] NSWCA 323, McClellan J at CL at [219].
11 Swift v SAS Trustee Corporation [2010] NSWCA 182, Allsop P at [40].
the reviews conducted by the AAT, the Refugee Review Tribunal ("RRT") and the Migration Review Tribunal ("MRT") as being inquisitorial. It follows from the inquisitorial nature of the proceedings that there is no contradictor, no joinder of issue in the proceedings and the notion of onus of proof has no role to play. As the function of a merits review tribunal is generally to arrive at the correct or preferable decision, and the respondent has a duty to assist the tribunal in this task, there is no necessary conflict between the interests of the applicant and of the government agency. This makes an adversarial approach inappropriate.

8. The same principles apply to State tribunals conducting merits review and would apply to NCAT in this context. The Appeal Panel of the former NSW Administrative Decisions Tribunal ("ADT") has noted, in the merits review context, that the Tribunal is required to reach the “correct and preferable decision … by a process of inquiry” and that it “is not engaged in the resolution of an adversarial contest of the kind typical of civil litigation.” The Tribunal was therefore not bound to accept concessions emanating from the bar table and there was no need to file pleadings, such as a statement of claim or a defence. Moreover, because merits review proceedings are “directed to the quality of public administration,” it was appropriate for the ADT to go further in assisting an unrepresented litigant than it would typically do in adversarial proceedings.

9. The term “inquisitorial” is also appropriate to describe proceedings in the Guardianship Division of NCAT. The Guardianship Tribunal adopted a pre-hearing case preparation process whereby Tribunal staff contacted the person with a disability to seek the person’s views, and also obtained other relevant information. Presumably, the same practice will continue in the Guardianship Division of NCAT. The principles which the Guardianship

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13 Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1, McHugh, Gummow, Callinan and Heydon JJ at 6 [22]; SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 at [40]; Minister for Immigration and Citizenship v SZKTI (2009) 258 ALR 434; [2009] HCA 30 at [27], footnote 19; Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618; 297 ALR 225, French CJ at ALR 230 [10]; Gageler J at ALR 253 [93]. In Minister for Immigration and Citizenship v SZIAI (2009) 259 ALR 429, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ acknowledged that the RRT has an inquisitorial function in one sense, but said that it had no duty to make inquiries (at 430 [1] and 432 [10]).
14 Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618; 297 ALR 225, French CJ at ALR 230 [10].
15 SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152, Gleson CJ, Kirby, Hayne, Callinan and Heydon JJ at 164 [40]; Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618; 297 ALR 225, French CJ at ALR 230 [10].
17 Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60, Bowen CJ and Deane J at 68; see also Administrative Decisions Review Act 1997 (NSW), s 63(1), which refers to a “correct and preferable” decision.
20 University of New South Wales v PC [2008] NSWADTAP 26 at [50]. See also WL v Randwick City Council [2009] NSWADTAP 10 at [24] and Director General, Department of Education & Training v Mullett [2002] NSWADTAP 13 at [75].
21 University of New South Wales v PC [2008] NSWADTAP 26 at [49]-[51].
22 WL v Randwick City Council [2009] NSWADTAP 10 at [24].
23 GR v Director-General, Department of Housing [2004] NSWADTAP 26 at [34].
Division is required to apply when exercising functions under the *Guardianship Act 1987* include that the welfare and interests of persons with a disability should be given paramount consideration. These principles, and the Tribunal’s protective functions in this context, are inconsistent with an adversarial approach to the proceedings.\(^{25}\)

10. There has been little judicial commentary on how tribunals are to exercise inquisitorial or non-adversarial functions when deciding disputes between citizens, companies or other private entities. Disputes in the Consumer and Commercial Division of NCAT include home building, dividing fence, retail leases and tenancy disputes. These are all matters which could be resolved by a court in an adversarial manner. Should NCAT decide to conduct its own inquiries in such proceedings, this may cause the parties some consternation or at least surprise. It may also be inconsistent with the role the tribunal generally adopts in such matters as an impartial arbiter determining the dispute as framed by the parties. Unlike in merits review matters, in commercial matters, tenancy disputes and consumer claims, an onus of proof applies.\(^{26}\) The proceedings therefore have adversarial characteristics, and the use of the Tribunal’s powers of inquiry is potentially problematic.

11. The proper characterisation of commercial or consumer proceedings in a tribunal was touched upon in a decision of the New South Wales Court of Appeal concerning the conduct of the former Consumer, Trader and Tenancy Tribunal. By way of comparison of CTTT’s functions with those of a merits review tribunal, Basten JA referred to a comment by Hayne J that the provisions in the *Migration Act 1958* (Cth) regulating the Refugee Review Tribunal “are not made to regulate an adversarial contest that will culminate in a trial of issues joined between parties.”\(^{27}\) His Honour continued:

> By contrast, the proceedings in the present case are closer to a judicial model than an inquisitorial model and do, in one sense, involve the trial of issues between parties. On the other hand, representation before the Tribunal is subject to leave and the Tribunal has a broad power to inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of procedural fairness: s 28(2). Accordingly, the present case falls somewhere between the two kinds of procedure identified by Hayne J in *SAAP*.\(^ {28}\)

12. Proceedings in the Consumer and Commercial Division of NCAT also involve an amalgam of different kinds of procedure, but there is little guidance as to how the Tribunal is to exercise its broad powers and what procedures it may legitimately adopt. According to the *Civil and Administrative Tribunal Act 2013*, it has an almost unfettered discretion, providing that it complies with the legislation and the rules of natural justice. The difficulty is that, unlike in merits review or protective proceedings, the tribunal lacks a clear jurisprudential justification for adopting an inquisitorial approach. When dealing with unrepresented litigants, there may be reason to be more interventionist, but the tribunal still needs to comply with the rules of procedural fairness and maintain its impartiality.

\(^{25}\) *Guardianship Act 1987*, s 4.


\(^{27}\) *Italiano v Carbone* [2005] NSWCA 177, Basten JA at [114], citing *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24, Hayne J at [197].

\(^{28}\) *Italiano v Carbone* [2005] NSWCA 177, Basten JA at [114].
13. Another factor which NCAT needs to consider when deciding how to exercise its procedural powers is the “guiding principle” being “to facilitate the just, quick and cheap resolution of the real issues in the proceedings”. This of course involves a balancing exercise, since achieving what is “just” may require different action from that necessary to achieve an outcome which is “quick and cheap”. In practical terms, however, the guiding principle will provide a disincentive for the Tribunal to make its own inquiries, unless this can be justified in terms of facilitating the just resolution of the real issues in the proceedings. This is particularly so when the Tribunal only identifies at the hearing, rather than in the pre-trial stage, that it would be desirable to have additional information.

**Duty to inquire**

14. The inquisitorial functions exercised by many tribunals do not make them inquisitorial in the European sense. The High Court has explained that, although proceedings of the RRT are inquisitorial, “[a]s applied to the tribunal ‘inquisitorial’ does not carry [the] full ordinary meaning” of “having or exercising the function of an inquisitor”, that is to say “one whose official duty it is to inquire, examine or investigate”. Rather, the term “merely delimits the nature of the tribunal’s functions” and these are set out in its enabling statute.

15. The suggestion that a decision-maker may have a duty to inquire was first raised in 1985 in *Prasad v Minister for Immigration and Ethnic Affairs*. In that case, the Minister refused an application for a permanent entry permit on the grounds that the applicant’s marriage was not genuine. The applicant argued that the decision was unreasonable in the *Wednesbury* sense. Wilcox J expressed the view that a power would be “exercised in an improper manner if the decision-maker makes his decision … in a manner so devoid of any plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew to be readily available to him.” His Honour added that a duty to inquire would only arise in “strictly limited” circumstances.

16. The issue of whether tribunals may have a duty to make enquiries arose for the consideration of the High Court in *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429. In that case, six members of the Court rejected the existence of such a duty in general terms, but said:

> 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 vitiating by jurisdictional error. The duty imposed upon the tribunal by the Migration Act is a duty to review. 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

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29 Civil and Administrative Tribunal Act 2013, s 36(1).
30 See South Western Sydney Area Health Service v Edmonds [2007] NSWCA 16 at [94].
31 Minister for Immigration and Citizenship v SZIAI (2009) 259 ALR 429 at 434 [18], per French CJ, Gummow, Hayne, Crenn, Kiefel and Bell JJ.
32 (1985) 6 FCR 155.
33 (1985) 6 FCR 155 at 169.
review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.  

17. The High Court also left open the possibility that a failure to enquire may be legally unreasonable even where there is no duty to review, finding that there was no factual basis, in that case, 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.” 

18. The duty to review is to be understood in light of the High Court’s earlier comments in Szbel v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 that the Tribunal’s task would not be described as conducting a “review” if “it had been intended that the Tribunal should consider afresh, in every case, all possible issues presented by an applicant’s claim” (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ at 164 [40]). Thus, a review is focused upon reconsidering an original decision and a duty to make an obvious inquiry is presumably less likely to arise in relation to an issue which was not considered in that decision.

19. As a consequence of the decision in SzIAI, a tribunal may, generally speaking, choose whether to enquire or refrain from inquiring into a matter. Since SzIAI, there has been a flood of applications for judicial review in which applicants have alleged that a tribunal or other decision maker failed to make an obvious inquiry about a critical fact. Most of these applications have been unsuccessful, the courts emphasizing that the circumstances in which a duty will arise and jurisdictional error arise as a result of a failure to comply with it are likely to be “rare and exceptional”. The fact that it may have been reasonable for the Tribunal to make an inquiry is not sufficient to elevate the absence of such an inquiry to the status of jurisdictional error.

20. The Federal Court has noted that the question of whether a particular fact is “critical” to the decision is not always easy to determine. Katzmann J has suggested that “for a fact to be critical it must at least be decisive of, or crucially important to an anterior issue which provides ‘a sufficient link’ to the outcome of the review.” Another formulation of the test is that the information must be “centrally relevant” to the decision. A majority of the Full Court of the Federal Court has observed that information cannot be “centrally relevant” (as required to found a case of an unreasonable failure to inquire) when the only indications

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38. SZNFv Minister for Immigration and Citizenship (2010) FCA 1041, Nicholas J at [35].
available at the time were that the information, even if obtained, would not have yielded a different outcome.  

21. The High Court rejected the argument that a particular statutory provision gave rise to a duty to inquire, or to consider making an inquiry, in Minister for Immigration and Citizenship v SZGUR (2011) 273 ALR 223. Section 427(1)(d) of the Migration Act provides that the Refugee Review Tribunal may require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination. The Court held that, although circumstances may arise requiring the tribunal to make enquiries, this provision did not impose a legal duty on the tribunal to consider whether to exercise its inquisitorial powers.  

22. NCAT, on the other hand, may be under a duty to inquire where it clearly does not have relevant documents, as it has a statutory obligation “to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings”. There is no equivalent obligation imposed upon the AAT, the RRT or the MRT. It remains to be seen whether this obligation extends beyond the duty to make an obvious enquiry about a critical fact but, on its face, it is a broader obligation. 

**Power to enquire**

23. A tribunal’s power to make its own inquiries may derive from a statutory power to inform itself on any matter in such manner as it thinks fit. In Commissioner of Police v Sleiman (2011) 78 NSWLR 340, the ADT appointed counsel to assist it in evaluating a criminal intelligence report relied on by the Commissioner of Police, which could not be disclosed to the applicant. The New South Wales Court of Appeal held that the ADT was empowered to do this by a provision which enabled the ADT to inform itself on any matter as it saw fit. In another case, referred to in the Sleiman case, the Victorian Court of Appeal held that a similar provision enabled a tribunal to conduct a Google search, providing that it complied with the rules of procedural fairness by disclosing the results of the search to the parties and giving them an opportunity to comment.  

24. Where a tribunal determines to take steps to inform itself of certain matters, this may sometimes be done by requiring the parties to provide information. The respondent to a merits review application in the AAT and in NCAT has a duty to assist the tribunal (in the AAT) or to provide the tribunal with relevant documents (for NCAT when conducting merits review). The AAT may require a party to provide further information in relation to the proceeding and NCAT may require an administrator to produce further relevant documents if it considers that those documents are relevant to the determination of the application. 

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45 Civil and Administrative Tribunal Act 2013, s 38(6)(a).
46 See, for example, Harris v Secretary, Department of Employment and Workplace Relations (2007) 158 FCR 252 at [19].
48 Weinstein v Medical Practitioners Board Of Victoria (2008) 21 VR 29 at [27]-[33].
49 Administrative Appeals Tribunal Act 1975 (Cth), s 33(1A); Administrative Decisions Review Act 1997 (NSW), s 58(1)(b).
50 Administrative Appeals Tribunal Act 1975 (Cth), s 33(2A)(a); Administrative Decisions Review Act 1997 (NSW), s 58(4).
provides an efficient and cost-effective way for these tribunals to ensure that they have the material needed to arrive at the correct and preferable decision.

25. Where NCAT is not exercising merits review functions, however, its options are more limited in terms of the inquiries it may make. It has power to direct the Registrar to issue a summons, but it would be very unusual for the Tribunal to do this of its own motion. It is unclear, however, how else it could ensure that it had all relevant material to determine all of the relevant facts in issue, as it is required to do, if the parties were uncooperative. It would also be open to the Tribunal to exercise its inquisitorial powers in other ways, such as through a tribunal member’s questioning of witnesses.

Duty to Act According to Substantial Justice

26. Courts are generally not permitted to review the merits of administrative decisions and have “no jurisdiction simply to cure administrative injustice or error.” Their purview, at least when conducting judicial review proceedings, is procedural justice. Tribunals, on the other hand, are often charged with acting according to “substantial” justice. NCAT is required to act according to the “substantial merits of the case”.

27. The High Court recently considered the meaning of a similarly-worded injunction to the MRT in s 353 of the Migration Act 1958 (Cth) in Minister for Immigration and Citizenship v Li (2013) 297 ALR 225. The MRT is required to provide a mechanism of review that is fair, just, economical, informal and quick and to “act according to substantial justice and the merits of the case”. It was argued that this required the tribunal to act fairly and that failure to do so would result in the invalidity of the relevant decision.

28. Two members of the Full Federal Court had held that this provision imposed an obligation on the MRT akin to the requirements of procedural fairness. In their view, provisions including that requiring the tribunal to act according to substantial justice were not “to be consigned to the status of aspirational statements, as opposed to requirements”.

29. The High Court disagreed. In accordance with earlier authority, the High Court held that s 353 was a facultative, rather than a restrictive provision. It did not impose any requirements. However, in the course of his judgment, French CJ suggested that the tribunal was nevertheless required to dispense “administrative justice”:

The MRT is not excused from compliance with the criteria of lawfulness, fairness and rationality that lie at the heart of administrative justice albeit their content is found in

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51 Civil and Administrative Tribunal Act 2013 s 48(1).
52 Civil and Administrative Tribunal Act 2013 s 38(6)(a).
53 Attorney General (NSW) v Quinn (1990) 170 CLR 1, Brennan J at 35-36.
54 Civil and Administrative Tribunal Act 2013 s 38(4).
55 Migration Act 1958 (Cth), s 353.
58 Minister for Immigration and Multicultural Affairs v Eshu (1999) 197 CLR 611.
59 Minister for Immigration and Citizenship v Li (2013) 297 ALR 225, French CJ at 233 [15], Hayne, Kiefel and Bell JJ at 243-244 [52]-[53], Gageler J at 254 [96].
the provisions of the Act and the corresponding regulations and, subject to the Act and those regulations, the common law.\textsuperscript{60}

30. Although rejecting the argument that s 353(2) imported substantive common law requirements of procedural fairness, French CJ’s comments nevertheless suggest that something resembling a duty to act fairly and rationally may be inferred from the provisions of the \textit{Migration Act 1958 (Cth)} and from the common law.

31. In light of \textit{Li’s} case, it is unlikely that NCAT’s obligation to act according to the substantial merits of the case could give rise to an error of law, should it adopt a procedure which was perceived to be unfair. This is of course of less relevance to NCAT, however, since it is required to comply with the rules of procedural fairness.

\textbf{Rules of Evidence}

32. With some limited exceptions, NCAT, like many other tribunals, is not bound by the rules of evidence.\textsuperscript{61} Freedom from the rules of evidence is, in some ways, liberating, and is particularly important when dealing with unrepresented litigants, but it may also lead to confusion on the part of parties as to what rules, if any, apply and what evidence or other material the tribunal is likely to admit.

33. The courts have considered other provisions which free tribunals from evidentiary rules, and have made comments which are applicable to NCAT. First, the non-application of the rules of evidence means that hearsay evidence and opinion evidence may be considered.\textsuperscript{62} However, the tribunal must “draw its conclusions from material that is satisfactory, in the probative sense, in order that it act lawfully and in order that conclusions reached by it are not seen to be capricious, arbitrary or without foundational material”.\textsuperscript{63} Freedom from the rules of evidence does not mean a tribunal may admit material which is irrelevant or which is not logically probative of a matter upon which the tribunal must make a finding of fact.\textsuperscript{64}

34. Justice Evatt’s comment in 1933 about the value of the rules of evidence, even in a tribunal not bound by them, has been frequently quoted.\textsuperscript{65} His Honour said that those rules “represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth,” and that a tribunal cannot, “without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party”.\textsuperscript{66} However, as French CJ has observed, “that caution is not a mandate for allowing the rules of evidence, excluded by statute, to ‘creep back through a domestic procedural rule.’”\textsuperscript{67}

35. It is likely that the rules of evidence will be relied upon, or relaxed, to varying degrees in different divisions of NCAT, depending upon the type of matter involved. In the Guardianship Division, for example, it would rarely be appropriate to apply evidentiary rules.

\textsuperscript{60} Minister for Immigration and Citizenship \textit{v} Li (2013) 297 ALR 225, French CJ at 233 [14].
\textsuperscript{61} Civil and Administrative Tribunal Act 2013 s 38(2). For the exceptions, see s 38(3).
\textsuperscript{63} Re General Merchandise & Apparel Group Pty Ltd \textit{v} CEO of Customs (2009) 114 ALD 289, Forgie DP at 332-333 [135].
\textsuperscript{64} See, for example, Heyward \textit{v} Minister for Immigration and Citizenship (2009) 112 ALD 226, Emmett J at [63].
\textsuperscript{65} R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228, Evatt J at 256.
\textsuperscript{66} Koetz \textit{v} HIA Insurance Services Pty Ltd (2010) 241 CLR 390 at 396 [17].
strictly, whereas such rules apply with statutory force when NCAT is exercising its “enforcement jurisdiction”. Although NCAT is generally “not bound by the rules of evidence,” there is no statutory prohibition against the tribunal applying those rules, and its ability to inform itself as it thinks fit indicates that it may choose to apply them if it wishes to do so.

Conclusion

36. NCAT has a very broad discretion in any particular case as to how it will exercise its powers, whether and to what extent it will apply the rules of evidence and whether it will make its own inquiries. In the merits review jurisdiction, the proceedings are inquisitorial rather than adversarial, because the tribunal stands in the shoes of the decision-maker and determines the correct or preferable decision. There is a clear jurisprudential framework in which the Tribunal operates. Similarly, in the Guardianship Division, the protective nature of the proceedings creates a coherent, principled framework for decision-making.

37. In other areas of NCAT’s jurisdiction, the conceptual framework in which it makes decisions is more opaque. The Tribunal may, in all areas of its decision-making, determine its own procedure and inform itself as it thinks fit, provided that it complies with the rules of natural justice. However, its inquisitorial powers are limited, in practice, by its resources and by expectations that it will adopt predominantly adversarial procedures. In commercial proceedings, an adversarial approach is likely to be the norm, notwithstanding that the tribunal has inquisitorial functions and may choose to exercise them in certain contexts. The guiding principle, to facilitate the just, quick and cheap resolution of the real issues in the proceedings, may also mitigate against an interventionist approach, except in circumstances where the Tribunal perceives that the “real issues” are not being adequately addressed by the parties.

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68 Civil and Administrative Tribunal Act 2013, s 38(3)(a)(i). For the meaning of “enforcement jurisdiction,” see s 33.
69 Civil and Administrative Tribunal Act 2013, s 38(2).
70 Civil and Administrative Tribunal Act 2013, s36(1).