

# THE UNIVERSITY OF WESTERN AUSTRALIA LAW REVIEW

---

Volume 37

March 2014

Issue 2

## CONTENTS

---

### ARTICLES

The Rules for Contractual Renegotiation: A Call for Change  
*Mark Giancaspro* ..... 1

Third Parties and the Australian Remedial Constructive Trust  
*David Wright* ..... 31

Dead DOGS? Towards a Less Restrictive Interpretation of the Establishment  
Clause: Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)  
*Luke Beck* ..... 59

A critical evaluation of the professional practice Defence in the Civil Liability  
Acts  
*Catherine Mah* ..... 74

The Pacific Solution: Australia and Negotiation of the Trans-Pacific Partnership  
Agreement (TPPA).  
*Michael Blakeney* ..... 123

### CASE NOTES

Whoops...’ Inadvertent Disclosure and the Test for Implied Waiver in the  
Discovery Context. Australian Competition and Consumer Commission v  
Cathay Pacific Australia Limited [2012] FCA 1101  
*Michael Douglas* ..... 142

## H

Forrest in the High Court: What Lessons Does FMG v ASIC & Anor [2012] HCA 39 hold for the Future?  
*Daniella Spencer-Laitt* ..... 146

Google Inc v Australian Competition and Consumer Commission [2013] HCA 1: Misleading and Deceptive Representations  
*Graham Hansen* ..... 153

---

# WESTERN AUSTRALIAN DEVELOPMENTS

---

Limitation and Personal Injury Claims: Retrospective Application of the Limitation Act 2005 (WA)  
*Peter Handford* ..... 160

The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum?  
*Bertus de Villiers* ..... 182

A Regulatory Framework for Monitoring and Enforcement of Water Access Rights in Western Australia  
*S. Robertson* ..... 215

# The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum

BERTUS DE VILLIERS\*

*The State Administrative Tribunal of Western Australia (SAT) is one of Australia's 'super-tribunals'. The super-tribunals are tribunals that have a wide jurisdiction that involves review of administrative decisions by government agencies and local governments, as well as determination of certain civil and commercial disputes. SAT, similar to other super-tribunals, have statutory objectives and powers that have caused it to be described as 'inquisitorial'. However this article contends that SAT should not be characterised as 'inquisitorial' in the civil law sense of the word, considering that:*

- (a) SAT is a creature of statute and its powers should be interpreted on the basis of the statute;*
- (b) SAT operates against the background and tradition of the common law and accusatorial/adversarial approach of Australia; and*

*the use of the term 'inquisitorial' to describe the powers and functions of SAT is erroneous.*

## INTRODUCTION

The State Administrative Tribunal of Western Australia (SAT) – along with some of the so-called other 'super-tribunals'<sup>1</sup> that have been established in Australia, such as the Victorian Civil and Administrative Tribunal ('VCAT')<sup>2</sup> and Queensland Commercial and Administrative Tribunal ('QCAT')<sup>3</sup> – is often

\* Legal practitioner (Australia and South Africa); BA (Law), LLB, LLD; Ordinary Member, State Administrative Tribunal of Western Australia; Visiting Fellow, The University of Western Australia; Inaugural Fellow, Western Australian Institute of Dispute Management, Murdoch University. The author acknowledges with great appreciation the grant made available by the Alexander von Humboldt Stiftung to facilitate the research on which this article is based.

1 The term 'super-tribunal' refers to state-based tribunals with jurisdiction that goes beyond traditional administrative review as is generally the case with merit review tribunals. The super-tribunals have included in their jurisdiction traditional review functions as well as a wide range of civil, commercial, vocational and guardianship and administrative jurisdictions. Super-tribunals are to be distinguished from administrative review tribunals in that administrative review tribunals *only* deal with the review of governmental decisions, while super-tribunals deal with review of governmental decisions *and* a wide range of civil and commercial disputes.

2 For more information see <http://www.vcat.vic.gov.au/>

3 For more information see <http://www.qcat.qld.gov.au/>

referred to as a tribunal that is ‘inquisitorial’ in nature.<sup>4</sup> The super-tribunals are not courts, although in some instances they may exercise the powers of a court if so enabled by the relevant statute.<sup>5</sup>

The reasons for the ‘inquisitorial’ label are varied. SAT has attracted this label because:

- (a) SAT has the ability to inform itself and make use of the knowledge of its members;<sup>6</sup>
- (b) SAT has an obligation to come to the ‘correct and preferable decision’;<sup>7</sup>
- (c) SAT is not bound by the rules of evidence;<sup>8</sup>
- (d) SAT has unique and informal case management processes; and
- (e) SAT ‘members’<sup>9</sup> often play an active role during hearings.<sup>10</sup>

This article investigates whether the term ‘inquisitorial’ is appropriate to describe proceedings in SAT, especially after taking into account:

- (a) The nature of SAT’s jurisdiction which includes administrative review as well the determination of many civil and commercial disputes;
- (b) SAT’s powers and functions which have been interpreted consistently with the common law principles of statutory construction; and
- (c) That the legal history, theory and practice of European civil law systems from which the term ‘inquisitorial’ originates differs in

---

4 See David Parry and Bertus De Villiers, *Guide to Proceedings in the WA State Administrative Tribunal* (Thomson Reuters, 2012) where the authors stated at 161:

The style of hearings [of SAT] is respectful, in some respects akin to court practices, but with a higher degree of flexibility and informality. The Tribunal also adopts a more active role than occurs in other parts of the justice system, whereby the Tribunal often assists parties in explaining their case and questions witnesses and representatives. *This style of the Tribunal is generally referred to as an “inquisitorial” approach* (emphasis in original).

See, eg, *RC and LP and AC* [2007] WASAT 171, [13] where it was stated that ‘the Tribunal has an inquisitorial role’ and *EA and KD, TA, LA, BA & VT* [2007] WASAT 175, [42] where it was said that SAT has an ‘inquisitorial character common to tribunals’.

5 Refer for example to QCAT, which is referred to as a ‘court of record’ in its enabling statute, *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164(1) and has been found to be a ‘court’ in *Owen v Menzies & Ors*; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170 (22 June 2012). In *BGC Construction and Vagg & Anor* [2006] WASAT 367, it was also found that the Building Disputes Tribunal of Western Australia was a ‘court’ for purposes of *Supreme Court Act 1935* (WA) s 32 so as to award interest.

6 SAT Act ss 9(c) and 32(4).

7 SAT Act s 27(2). However, note that the obligation to come to the ‘best and preferable’ decision applies only to review matters.

8 SAT Act s 32(2)(a).

9 Note that the officers that preside at a hearing of SAT are referred to as “members”, not as judges or magistrates.

10 Parry and De Villiers, above n 6, 162.

material respects from the common law tradition.

Since SAT is a creature of statute – the *State Administrative Tribunal Act 2004* (WA) ('SAT Act') – SAT's powers, functions and case management practices should be assessed by reference to the SAT Act. This requires a proper interpretation of the SAT Act<sup>11</sup> against the background of the Australian common law, adversarial context. This article contends that reference to SAT as 'inquisitorial', as if it is rooted in the European civil law tradition, is therefore misplaced.

This article will also demonstrate that the Australian adversarial system has, as is evidenced by the provisions of the SAT Act and developments in common law, developed to allow more flexibility, informality and active involvement by a member during a hearing than would normally be the case in the traditional court system.

The SAT Act and the case management practices by SAT demonstrate that, although the divide between the Napoleonic inquisitorial system and the Australian common law accusatorial system is 'perceived to be much narrower than previously supposed',<sup>12</sup> the roots of the accusatorial and inquisitorial systems are quite different. Caution should therefore be taken not to conflate the two philosophies that underpin these systems into one by merely focusing on case management styles.

## **DOES THE CLASSIFICATION OF SAT AS INQUISITORIAL OR ACCUSATORIAL MATTER?**

Putting aside theoretical discourse, is there any practical relevance in appropriately classifying SAT as either 'inquisitorial' or 'accusatorial'?

The proper classification of SAT does matter since the respective systems differ fundamentally in certain respects. The application of the term 'inquisitorial' to SAT implies that the legal traditions on which civil law inquisitorial systems are established may apply to SAT. The correct classification of SAT will reflect the legal traditions, philosophy and culture of how SAT operates and set the framework for:

- (a) The role of its members prior to and during hearings;
- (b) The application of the rules of natural justice and procedural fairness;
- (c) The treatment parties can expect; and
- (d) The way in which the SAT Act is interpreted.

11 As a general point of departure for categorising SAT the focus must be on the SAT Act since by doing so 'one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require': *Kioa v West* (1985) 159 CLR 550, 614.

12 *Sharp v Rangott* [2008] FCAFC 45 [3] (Gray and North JJ).

This is not to suggest, however, that the accusatorial and inquisitorial systems cannot learn from one another and adjust from time to time.

In adversarial systems, two or more opposing parties gather and present evidence along with their arguments to a judge who knows nothing of the litigation until the parties present their cases. In inquisitorial systems, however, the presiding judge is not a passive recipient of information. Rather, the presiding judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. The judge actively steers the search for evidence and questions the witnesses, including the respondent or defendant. Legal representatives play a more passive role, suggesting routes of inquiry for the presiding judge and following the judge's questioning with questioning of their own. The questioning by legal representatives is often brief because the judge tries to ask all of the relevant questions.<sup>13</sup>

In Australia, reference has been made to the 'inquisitorial' capacities of purely administrative review tribunals, for example those tribunals that have autonomous investigative powers such as the Migration Review Tribunal, the Refugee Review Tribunal<sup>14</sup> and the Administrative Appeals Tribunal.<sup>15</sup> The statutes setting out the powers of these administrative review tribunals grant powers to the tribunals that may show some resemblance with civil law experiences,<sup>16</sup> but even so, the way in which those statutes are interpreted are determined by the Australian common law and not the European civil law.

SAT, however, is not a tribunal limited to administrative review – hence the reference to it as a tribunal that is rather 'schizophrenic' in nature.<sup>17</sup> SAT has extensive and constantly expanding jurisdiction over civil and commercial disputes which in many instances overlap with the jurisdiction of courts and follow the procedure of courts. The name State *Administrative* Tribunal therefore does not accurately describe SAT's wide jurisdiction or how SAT functions.

SAT, like the other super-tribunals, is a unique species of tribunal that is grounded in the accusatorial (common law) tradition, although the statutes that give effect to them have elements that are novel to traditional accusatorial customs. While the term 'inquisitorial' therefore has a certain pragmatic descriptive utility when

13 See E E Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1989) *Indiana Law Journal* 64.

14 *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71; *Minister of Immigration and Multicultural Affairs and Eshetu* (1999) 197 CLR 611.

15 'The [Administrative Appeals] Tribunal, although constituted in the judicial model, also has extensive inquisitorial powers, *consistent with its functions of administrative review*' (emphasis in original): H Katzen, 'Procedural fairness and specialist members of the Administrative Appeals Tribunal' (1995) 2 *Australian Journal of Administrative Law* 170.

16 J Segal, R Creyke, M Sloss et al, 'Inquisitorial practice in Australian tribunals' (2006) 57 *Administrative Review* 17, 17.

17 P Johnston, 'State Administrative Tribunal: Model Non-Adversarial Tribunal or Split Personalities' (Paper presented at AIJA Tribunals Conference, Sydney, 10 June 2005).

referring to the style, powers and procedures of SAT (and other super-tribunals), it is open to question whether such a description is appropriate, especially if account is taken of the origin and true meaning of the term ‘inquisitorial’ in civil law jurisdictions.

With reference to Biblical creationist and evolutionist debates, it is the contention of this article that SAT’s so-called ‘inquisitorial’ nature is not a result of a new species of tribunal having been *created* to the mould of the civil law systems, but rather that the SAT Act and practice reflect a *natural evolution* of the Australian law and practice of dispute resolution, mediation and adjudication within the context of the traditional accusatory foundations of the common law. SAT is therefore a result of Darwinian evolutionary adaptation to new societal challenges.

The term ‘inquisitorial’ carries with it a mass of theoretical, historic, legal and cultural values, principles and prejudices. Those values, which are closely associated especially with European civil law jurisdictions, are not easily transportable to common law jurisdictions such as Australia.<sup>18</sup> Caution should therefore be taken when an essentially common law system of adjudication is classified as ‘inquisitorial’ in nature.<sup>19</sup> There are without doubt unique characteristics of a super-tribunal such as SAT, but those derive from the statute that created SAT and not by the imposition of a new philosophical basis on a tribunal that is placed in an adversarial, common law legal system.

When assessing the nature of SAT by reference to provisions of the SAT Act, SAT decisions, appeals of those decisions and other developments in the Australian common law, the following points can be deduced concerning the proper characterisation of SAT:

- (a) In the events leading to the establishment of SAT, frequent references were made to a tribunal being ‘inquisitorial’ in nature, but there was no suggestion by the proponents of SAT or the Parliament of Western Australia (‘WA’) to create a tribunal on the basis of the European civil law, inquisitorial traditions.
- (b) The powers and functions of SAT derive from the SAT Act. SAT does not have inherent powers. This means that the only sources of its powers, functions and jurisdiction are the SAT Act, and interpretations given

18 Even in some inquisitorial systems, such as Italy where aspects of the adversarial system were introduced, such developments ‘confused the judiciary’ and ‘undermined the integrity of the Italian tradition in criminal procedure’: M Marmo, ‘Cross-fertilisation between civil law countries and common law countries: The importance of judicial dialogue in criminal proceedings’ (2006) 16 *Journal of Judicial Administration* 106, 108.

19 As is observed by Cumes, the term ‘inquisitorial’ ‘as a descriptor of tribunal practice has significant problems’: G Cumes, ‘Separation of powers, courts, tribunal and the state’ (2008) 19 *Australasian Dispute Resolution Journal* 10, 15. See also C Mantziaris, ‘Client privilege in administrative proceedings: killing off the adversarial/inquisitorial distinction’ (2008) 82 *Australian Law Journal* 397 where Mantziaris states that the ‘troubled distinction between adversarial and investigate proceedings no longer serves any purpose.’

by courts as to the exercise of those powers. The SAT Act makes no reference to the Tribunal being inquisitorial in nature.

- (c) The proper characterisation of SAT must be done by way of interpretation of the SAT Act, taking account of the case management procedures of SAT; and assessing SAT's decisions; appeals of those decisions; and general developments in the common law.
- (d) The general conduct of SAT hearings and the active or passive role of the member/s during hearings vary depending on a variety of factors, including whether parties are legally represented; the subject matter and complexity of a dispute; whether a dispute arises from the review or original jurisdiction; and whether witnesses are called to give evidence.
- (e) The user-friendly style of SAT and the often active role played by a member during a hearing, does not equate to or justify SAT being labelled as 'inquisitorial' in a European civil law sense. The different style of SAT is rather demonstrative of SAT breaking new ground, within the accusatorial tradition of the Australian law and of developing user friendly, self-representative and user-friendly procedures.
- (f) The proper classification of SAT as being inquisitorial or accusatorial can only be done if account is taken of the provisions of the SAT; powers granted to SAT pursuant to an enabling Act; the case management practices of SAT and the application in SAT of the rules of natural justices; the rules of evidence and the principles of procedural fairness.

Therefore, the proper characterisation of SAT as inquisitorial or accusatorial does matter since it related to the very principles upon which SAT is established.

## INQUISITORIAL - WHAT IS IT ALL ABOUT?

The word 'inquisitorial' is often used rather loosely when it comes to characterising the operation of tribunals in Australia and particularly that of super-tribunals. The risk of using a term that is deeply-rooted in the European civil law legal tradition to describe processes in the Australian common law tradition is that such description rests on an assumption that the essential building blocks of one legal tradition are necessarily present in the other legal tradition.

Comparative research inherently faces the challenge that the same term may be used in different legal traditions to reflect a different meaning. This is particularly true in the context of this article. The origins of common law and civil law systems extend as far back as the thirteenth century. Since then, the traditions that flowed from them have continued in various countries with constant adaptation.<sup>20</sup> The

<sup>20</sup> Refer in general to A S Goldstein, 'Reflections on two models: inquisitorial themes in American criminal procedure' (1974) 26 *Stanford Law Review* 1009-17; M R Damaska,

accusatorial and inquisitorial systems are not separated in watertight silos. There is some cross-pollination between the systems and neither system is ‘pure’ anymore. The systems may have gained insight from one another, but their roots and DNA nevertheless continue to be different.<sup>21</sup>

The key characteristics of accusatorial and inquisitorial systems can be summarised as follows:<sup>22</sup>

- (a) *Responsibility for marshalling evidence for trial:* In an adversarial model, responsibility for gathering evidence rests with the parties, and an independent evaluation of that evidence by a neutral judge is left to the trial. In an inquisitorial model, investigation is typically overseen by either an ‘independent’ prosecutor or an examining magistrate/judge.
- (b) *Relative faith in the integrity of pre-trial processes:* An adversarial model allows parties to test and counter evidence at the trial. An inquisitorial model relies on the integrity of pre-trial processes (overseen by the prosecutor or examining magistrate) to distinguish between reliable and unreliable evidence, to detect flaws in the prosecution case and to identify evidence that is favourable to the defence. By the time a case reaches trial, there is a greater presumption of guilt in an inquisitorial system than in an adversarial model.
- (c) *The extent of discretion:* In the adversarial model, the preparation of a case and presentation of evidence are left largely in the hands of the parties – including a prosecutorial discretion not to proceed with the case, even when there is evidence to support a criminal charge. There is also the ability, recognised in statute, for the defendant to plead guilty and avoid a trial. In an inquisitorial model, ‘the legality principle’ dictates in theory (if not in practice) that the prosecuting-magistrate has carriage of a matter, including the collection and presentation of evidence.
- (d) *The nature of the trial process:* In an adversarial model, all parties determine the witnesses they call and the nature of the evidence they give; and the opposing party has the right to cross-examine. There are strict rules to prevent the admission of evidence that may prejudice or mislead the judge. In an inquisitorial model, the conduct of the hearing

---

*The faces of justice and state authority* (Yale University Press, 1986); D A Mundis, ‘From “common law” towards “civil law”: the evolution of the ICTY Rules of Procedure and Evidence’ (1999) 46 *Netherlands International Law Review* 343.

21 See L Certoma, ‘The non-adversarial administrative process and the Immigration Review Tribunal’ (1993) 4 *Public Law Review* 7 for a description of inquisitorial systems in the civil law legal-philosophical sense.

22 New Zealand Law Commission, *Alternative Pre-trial and Trial Processes: Possible Reforms* (2012) <[http://www.lawcom.govt.nz/sites/default/files/publications/2012/02/alternative\\_trial\\_processes\\_nzlc\\_ip30\\_-1.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/2012/02/alternative_trial_processes_nzlc_ip30_-1.pdf)>.

is largely in the hands of the court. Cross-examination as known in the accusatorial tradition does not exist, although the parties and their counsel are generally permitted to ask questions. There are, however, far fewer rules of evidence and rules of natural justice, and much more information is available to the court at the outset.

- (e) *The role of the victim (in criminal proceedings)*: In an adversarial model, the victim is largely relegated to the role of a witness. They have no recognised status either in the pre-trial investigation or the trial itself. In an inquisitorial model, victims have a more recognised role in the entire process. In some jurisdictions victims have a formal role in the pre-trial investigative stage, including a recognised right to request particular lines of inquiry or to participate in interviews by the examining magistrate.

The term ‘inquisitorial’ is therefore, within the context of the legal tradition and historical context of Europe, more than a mere word of description of behaviour by the magistrate-inquisitor during a hearing. The term represents a philosophical approach and a legal history with century old roots and customs that are largely foreign to Australia. Applying the term ‘inquisitorial’ to SAT, without qualification so as to acknowledge the difference between the legal systems, may muddy the water and confuse rather than clarify the proper characterisation of SAT. Kirby J cautions:

I do not consider it necessary or helpful ... to decide whether the [Refugee Review] Tribunal can be classified as ‘inquisitorial’ ... or ‘adjudicative’. Such labels may have a tendency to mislead.<sup>23</sup>

Descriptions labelling SAT and other super-tribunals in Australia as ‘inquisitorial’ often focus on the more humane, user-friendly and interactive conduct by the member during hearings, while in inquisitorial systems, use of the word ‘inquisitorial’ refers to a magistrate *leading the process of investigation* ‘by virtue of an office’.<sup>24</sup> The respective roles of SAT members vis-à-vis inquisitorial magistrates are fundamentally different.

The members in super-tribunals such as SAT tend to move away, by virtue of their powers under the SAT Act, from the general passive role of a judge in judicial proceedings, to a role where the member may inform him/herself, make enquiries, ask questions, explain the law and implications of assertions made by parties, facilitate the hearing process and use his/her expertise to assess the evidence. These statutory powers and functions of the members of SAT do not mean that the civil law role of the judge-‘inquisitor’ has been imported into the Australian accusatorial system or an abdication of the common law principles concerning the

23 Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka (2001) 206 CLR 128, 149 [63].

24 Macquarie Concise Dictionary (Macquarie Library, 3<sup>rd</sup> ed, 2004).

right to a fair trial, rules of natural justice, rules of evidence, procedural fairness and burden of proof.<sup>25</sup>

The powers and functions of the magistrate-inquisitor in civil jurisdictions entail much broader functions than those of the SAT members under the SAT Act. Those emphasising the ‘inquisitorial’ nature of super-tribunals often do not take into consideration that the objectives of an accessible, facilitative and questioning/investigative tribunal can be achieved *within* the adversarial system, albeit with statutory, cultural and management adaptation.

The term ‘inquisitorial’ understood in its proper legal-historical and philosophical context, describes much more than a tribunal ‘informing itself’<sup>26</sup> or a tribunal adopting a more informal, less expensive and more flexible case management approach than courts. By using the word ‘inquisitorial’ to describe SAT and thereby suggesting that the entire legal tradition on which inquisitorial systems are based has been integrated into SAT, is inappropriate.<sup>27</sup> The selective ‘legal transplant’ of a term from one legal philosophy into another legal philosophy tends to skew reality and brings about results that are not a true reflection of the theory or practice.<sup>28</sup> Such a ‘cut and paste’ exercise between legal systems often ‘fails to account for the transformation that legal ideas and institutions may undergo when they are transferred between legal systems.’<sup>29</sup>

The term ‘inquisitorial’ viewed from an historical perspective often carries with it many negative connotations (especially if viewed from an accusatorial system), for example, in the case of the magistrate-inquisitor undertaking the investigation, obtaining confessions by way of inappropriate means, restricted cross-examination of witnesses, a less rigorous approach to the rules of natural justice as known by accusatorial systems, and apprehended bias of presiding

25 Although in administrative review matters there is no burden of proof, in civil and commercial disputes the burden of proof as is understood at common law, applies since there is a ‘contest’ of evidence. Even in the case of review matters where there is no burden of proof, ‘the civil standard of proof, as informed by the principle in *Briginshaw*, applies’: *Nom and Director of Public Prosecutions* [2012] VSCA 198, par. 75, 89.

26 SAT Act s 32(4).

27 There is a ‘danger’ that in comparing the inquisitorial and accusatorial systems, focus takes place on a ‘particular procedure without appreciating its relationship with other aspects of the system, or in seeing parts only of the system rather than the system as an integrated whole’: B McKillip, ‘What can we learn from the French criminal justice system?’ (2002) 76 *Australian Law Journal* 49, 50.

28 See A Watson, *The evolution of law* (1985) where Watson explains that cross-fertilisation between legal systems has taken place since the earliest time.

29 See M Langer, ‘From legal transplants to legal translations: the globalization of plea bargaining and the Americanization theses in criminal procedure’ (2004) 45 *Harvard International Law Journal* 1, 4 where Langer observes,

The adversarial and the inquisitorial systems can be understood not only as two different ways to distribute powers and responsibilities between legal actors – the decision-maker (judge and/or jury), the prosecutor, and the defence – but also as two different procedural cultures and thus, two different sets of basic understandings of how criminal cases should be tried and prosecuted.

officers.<sup>30</sup> As a result, even classical European and South American inquisitorial systems have in recent times made attempts to move away from their traditional inquisitorial approach by introducing reforms that are of an ‘adversarial’ nature.<sup>31</sup>

In many instances, however, the introduction of elements of accusatorial systems into the civil law system has not been smooth and one could not say that those systems have undergone a ‘legal transplant’ by becoming adversarial.<sup>32</sup> Those civil law systems remain essentially inquisitorial, although lessons have been drawn from adversarial systems.

The criticism against inquisitorial systems does not mean that accusatorial systems are without blemish. The Australian Law Reform Commission has recognised that the word ‘adversarial’ is also associated with negative connotations and that it is even used in a ‘pejorative’ sense.<sup>33</sup>

The ‘investigative’ or ‘inquisitorial’ powers that generally characterise the powers and functions of civil law (inquisitorial) judges, are not found in SAT. The SAT member does not lead or coordinate an investigation; it does not collect evidence and it conducts a hearing in accordance with principles of common law such as compliance with the rules of natural justice, procedural fairness and consideration of the rules of evidence. Even in those instances, as discussed below, where a member may request a government agency to undertake an investigation, for example under the Guardianship and Administration Act where the Public Trustee or Public Advocate may be requested to undertake an investigation, it is not the presiding member that leads the investigation as happens in inquisitorial systems. SAT may, for example, request the Office of the Public Advocate to investigate whether a guardian should be appointed for a person, but such investigation is conducted by the Office of the Public Advocate with no involvement or interference by the member in a manner comparable with civil law inquisitorial systems.<sup>34</sup>

The role of the judge as ‘protagonist’ in civil law proceedings and his/her role to seek out and test evidence ‘often in advance of the formal hearing’, does not apply to SAT.<sup>35</sup> Although SAT members ‘may inform’ themselves, this power does not

30 A J Bullier, ‘How the French understand the inquisitorial system’ (2001) 29 *Australian Institute of Administrative Law Forum* 47.

31 See generally H Stacy and M Lavarch (eds) *Beyond the adversarial system* (Federation Press, 1999).

32 See Langer, above n 32, 27–62 where the author discusses some of the challenges that efforts to conduct a ‘legal transplant’ has brought about in countries such as Germany, Italy, France and Argentina.

33 Australian Law Reform Commission, *Managing Justice*, Report 89 (2000) 3.

34 See, eg, *Dueschen and City of Stirling* [2008] WASAT 181 (S) where the Office of the Public Advocate decided after an investigation at the request of SAT that a person was not in need of a guardian. The member accepted the report of the Public Advocate and had no power to conduct its own investigation.

35 N Bedford and R Creyke *Inquisitorial process in Australian tribunals* (Australian Institute of Judicial Administration, 2006) 4.

enable SAT members to conduct themselves in a manner consistent with judge-inquisitors in civil systems.<sup>36</sup>

Informality, speed and greater activism by SAT members during hearings may in some respects be akin to judges in civil law jurisdictions, but those attributes are not unique to civil law systems. As has been observed by Bedford and Creyke in regard to the Immigration Review Tribunal, the same can also be said about SAT:

The emphasis on speed, informality, and economy suggests that the principal motivation for giving the [Immigration Review] [T]ribunal inquisitorial powers was not because of a belief in the truth-elicitation of the civil law model, but rather to ensure an efficient and relatively speedy resolution of complaints. *The choice was pragmatic rather than principled.*<sup>37</sup>

Inquisitorial processes in the Australian context are usually associated with line-function tribunals where decisions of a specific department, for example in regard to refugees, are reviewed.<sup>38</sup> In those instances, the tribunal may have to conduct its own investigations into the merit of a decision<sup>39</sup> since the tribunal is, in effect, part of the executive branch of government.<sup>40</sup> Those review tribunals are responsible for an administrative rather than a judicial function.<sup>41</sup> The powers of purely administrative review tribunals are therefore the same as those of the original administrative decision-maker. In the case of SAT, however, the review of administrative decisions is only a part of its jurisdiction, and even in review matters, SAT does not conduct an investigation but considers submissions made and documents filed by a representative of the relevant government agency.<sup>42</sup> SAT

36 For example, a SAT member ‘informing’ him/herself would still be bound by the rules of natural justice, and procedural fairness as understood in the common law – a standard that does not apply to civil law judges.

37 Bedford and Creyke, above n 38, 8–9 (emphasis added)

38 The classical adversarial approach as it originated in common law as a contest between parties, pre-dates modern day administrative review where decisions are reviewed *within* the executive by a tribunal and where the objective is the best and preferable decision: Mantziaris, above n 22, 413. The courts are therefore not as ‘equipped [in the same way as tribunals] to evaluate the policy considerations’ that underlie many administrative decisions: *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 35–7.

39 See, eg, the Migration Review Tribunal. The immigration tribunals ‘have close links to the Immigration Department and Minister in terms of the legislative and administrative framework... Thus the immigration jurisdiction is closely controlled by the Executive for both the immigration tribunals and the AAT in its migration jurisdiction.’ Y Ng, ‘Tribunal independence in an age of migration control’ (2012) 19 *Australian Journal of Administrative Law* 203, 204.

40 Bedford and Creyke, above n 38, 5–6. Refer also to D G Jarvis, ‘Procedural fairness as it applies in the Administrative Appeals Tribunal’ (2007) 81 *Australian Law Journal* 465.

41 D Farquhar, ‘Beginner’s guide to tribunals in the Northern Territory’ (2008) 1 *Northern Territory Law Journal* 79.

42 The SAT Standard Orders require from the decision-making department to file in proceedings the reasons for the decision as well as all documents of relevance to the decision under review. The process of review in SAT therefore has strong adversarial

also hears various other matters that fall within its jurisdiction which are of a purely civil, commercial or personal nature, for example building, commercial tenancy, and guardianship and administration disputes. Even if the term ‘inquisitorial’ may apply to some of the other purely administrative review tribunals of Australia (and even such a characterisation is open to challenge), its application to SAT is not appropriate.<sup>43</sup>

## ESTABLISHMENT OF SAT

The Australia-wide process to rationalise the large number of tribunals and to expand the powers and functions of the new super-tribunals began in the early 1970s.<sup>44</sup> Since then several proposals had been made for the establishment of a single tribunal with expanded civil and commercial functions in WA. Reviews were completed and reports were published about ways to reform what was a very fragmented system of administrative review. The discussions took place in parallel with developments across the rest of Australia where the integration of tribunals, the harmonisation of administrative review, and the inclusion of aspects of civil and commercial disputes within the new super-tribunals were considered.<sup>45</sup>

In March 2001, a taskforce was appointed to investigate the consolidation of administrative review and matters related thereto. The taskforce produced its report entitled *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal* (‘Taskforce Report’). The Taskforce Report noted the many shortcomings of the then system of administrative review and concluded that, in effect, there was no

---

undertones whereby:

- (a) SAT does not conduct the investigation;
- (b) the decision-maker is represented during the hearing by an official or a legal practitioner;
- (c) a department often calls witnesses to give evidence;
- (d) SAT takes into account all the information before it in order to reach a decision; and
- (e) the process of the hearing is in essence adversarial with contested positions taken by the parties. See the SAT Standard Orders at Parry and De Villiers, above n 6, 270–88.

43 It has also been suggested by Bedford and Creyke, above n 38, 9 (and the author concurs) that the use of the label ‘inquisitorial’ to describe the pure administrative tribunals of Australia may be ‘misconceived.’

44 See Commonwealth of Australia Parliament, *Commonwealth Administrative Review Committee* (Parliamentary Paper No 144, August 1971).

45 See, eg, Western Australian Law Reform Commission, *Report on Review of Administrative Decisions: Appeals*, Project No 26 (I) (1982); Parliament of Western Australia, *Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II* (1992); *Commission on Government*, Report No 4 (July 1996); Commissioner J Gotjamanos and Mr G Merton, *Report of Tribunal’s Review to the Attorney General* (August 1996); Western Australian Law Reform Commission, *Review of the Criminal and Civil Justice System*, Project No 92 (1999); *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal* (‘Taskforce Report’) (May 2002).

comprehensive, transparent and consistent ‘system’ of review in the State.<sup>46</sup> SAT was therefore established following a period of gestation and debates that lasted more than 20 years.<sup>47</sup> SAT came into operation on 1 January 2005.

Most notable finding for purpose of this article is that the Taskforce Report did not present a general challenge to the accusatorial common law tradition of Australia. Although the Taskforce Report proposed the harmonisation of administrative review and the simplification of certain aspects of commercial and civil proceedings, it did not suggest a general departure from the historic roots and philosophy of the accusatorial Australian legal system and the substitution thereof with the European civil law inquisitorial system.

The Taskforce Report noted that there was ‘remarkable unanimity among commentators’ as to the benefits which were likely to flow from the establishment of a super-tribunal such as SAT. The Taskforce Report identified a number of benefits including the following:

- (a) Citizens would gain access to a single, one stop tribunal, in place of a variety of existing tribunals;
- (b) As a result of access to a single tribunal, there would be an identifiable point of contact for all citizens in respect of most civil and administrative review decisions;
- (c) More information would be provided to citizens about the making of applications, hearings and the reasons for decisions;
- (d) A more flexible and user-friendly system of decision-making would be developed;
- (e) SAT would have the capacity to keep abreast of innovation and developments in comparable tribunals elsewhere; and

<sup>46</sup> SAT in effect replaced a previous disparate arrangement that comprised of six formal tribunals, a State government authority, a review board, the Supreme Court (in relation to decisions under 33 Acts), the District Court (in relation to decisions under 22 Acts), the Local Court (in relation to decisions under 31 Acts), the Courts of Petty Sessions (in relation to decisions under 15 Acts), various ministers (in relation to decisions under 63 Acts) and other public officials (in relation to five types of decisions under three Acts). In relation to vocational regulation, SAT became responsible for disciplinary matters of regulated vocations of 22 separate boards established under relevant statutes. Since its inception the jurisdiction of SAT has been ever expanding with the most comprehensive new jurisdiction being that of building disputes pursuant to the *Building Services (Complaint Resolution and Administration) Act 2011* (WA). It has been recommended by a recent parliamentary overview of the functioning of SAT that its jurisdiction should be further expanded. See Parliament of Western Australia, *Inquiry into the jurisdiction and operation of the State Administrative Tribunal*, Report 14 (May 2009) 491 (Appendix 10).

<sup>47</sup> For an overview see L Dempsey, ‘Western Australia State Administrative Tribunal: a long time coming – worth the wait’ (2005) 13 *Australian Journal of Administrative Law* 47.

- (f) SAT would have the appropriate leadership, expertise, experience and independence from the Government of the day to ensure that citizens could have the fullest confidence in the administrative review system and its results.

These purported benefits of the proposed tribunal were reflective of *pragmatic* considerations aimed to improve delivery of justice in WA and not to substitute the essential values of the accusatorial common law system with those of the inquisitorial civil law systems.

In regard to the appropriate name for the new Tribunal of WA, the Taskforce recommended that the approach of the Victorian Civil and Administrative Tribunal *not* be followed, namely not to refer in the name of the new tribunal to its ‘civil’ jurisdiction. The Taskforce said the following in this regard:

The Taskforce recommends the establishment of a civil and administrative review tribunal to be called the State Administrative Tribunal (SAT). This title is sufficiently short and descriptive to enable citizens easily and readily to refer to and identify the tribunal. While lawyers may appreciate the finer distinctions between ‘civil’ and ‘administrative review’ functions, we doubt others generally will find such distinctions helpful. In the final analysis the body is an administrative tribunal exercising administrative, not judicial, power and is best so described.<sup>48</sup>

In his second reading speech commending the SAT legislation to the Legislative Assembly of WA, the then Attorney General Jim McGinty described SAT as ‘a cohesive new jurisdiction’ and the fulfilment of an important commitment to the people of WA ‘to establish a modern, efficient and accessible system of administrative law decision-making across a wide range of areas.’<sup>49</sup> No suggestion was made by Mr McGinty that SAT represented a departure from the Australian accusatorial legal tradition. What government and parliament had in mind was a modern, streamlined and user-friendly tribunal that would operate *within* the context of the existing legal tradition and customs of Australia.

The Taskforce Report did, however, make several references to ‘inquisitorial’ elements that SAT should have. These included:

- (a) ‘[T]he establishment of a body that, by adopting a less adversarial and a more inquisitorial approach, would develop procedures of a *less formal, less expensive* and more flexible kind than used in traditional courts’;<sup>50</sup>
- (b) ‘The 1996 Review also emphasised the importance of the use of inquisitorial techniques that is, more *direct questioning* by the tribunal

48 Taskforce Report, 59–60.

49 Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 June 2003, 9104 (Jim McGinty).

50 Taskforce Report, (iv) (emphasis in original).

and less reliance on the questions of the parties in relation to matters in issue’;<sup>51</sup>

- (c) SAT ‘should assist the person by *asking relevant questions or seeking relevant documents* and information on its own initiative. This is essentially what is meant when it is said that the SAT should adopt an inquisitorial approach’;<sup>52</sup> and
- (d) ‘The Taskforce, however, sees pursuit of the correct or preferable decision as the main consideration that should inform the SAT’s proceedings. This will entail in some cases a more inquisitorial approach where the SAT of its own initiative decides to be more flexible and interventionist in its conduct of the inquiry. However, it should always be within the discretion of the SAT as to *how far it relaxes the traditional court-like processes*.’<sup>53</sup>

It would seem from these references to the ‘inquisitorial’ attributes and code of conduct of the new Tribunal, that the Taskforce did not aim at an entirely new legal-philosophical basis upon which SAT should rest but rather that a more user-friendly, accessible and active tribunal should be established within the framework of the common law tradition. There is no suggestion that the members of the new Tribunal would have powers and function akin to magistrate-inquisitors in civil law jurisdictions or that the basic common law principles of rules of natural justice, procedural fairness, construction of statutes and rules of evidence would be discarded in favour of civil law procedures.

The use of the ‘inquisitorial’ to describe aspects of the to-be-established tribunal was pragmatic rather than dogmatic. The Taskforce did not go into any depth about the background, functioning or merit of civil law inquisitorial legal theory in comparison to the common law traditions. The repeated emphasis on the term ‘inquisitorial’ as quoted above in the Taskforce Report was on the *style* and *conduct* of the proposed tribunal, the *flexibility* of its processes and procedures, and the *active role* that could be fulfilled by its members during a hearing when such activism was justified. No mention was made of the typical and far-reaching investigative or inquisitorial functions that are associated with the civil law jurisdictions such as France, Germany and Italy.<sup>54</sup>

The author suggests that the Taskforce was acutely aware that the ‘cultural differences between the adversarial and the inquisitorial systems are too deep to be overcome’<sup>55</sup> by the mere modernisation of the proposed SAT along the lines of

51 Taskforce Report, 31 (emphasis in original).

52 Taskforce Report, 130 (emphasis in original).

53 Taskforce Report, 130 (emphasis in original).

54 See generally Australian Law Reform Commission, *Managing Justice*, Report 89 (2000) for an overview of modern elements.

55 Langer, above n 32, 6.

other tribunal-reform which at the time had been taking place throughout Australia. The following observation by Bedford and Creyke is therefore endorsed:

We are accustomed to describing hearing process as either adversarial or inquisitorial. Despite frequent references to this dichotomy, the meaning of ‘inquisitorial’ is less well understood than ‘adversarial’. A consequence is that the description of ‘inquisitorial’ may have been *allocated inappropriately* to the procedures of Australian tribunals, at least if the term is taken to imply that non-adversarial bodies in Australia operate in accordance with the traditional concept of civil law process.<sup>56</sup>

The jurisdiction of SAT can be summarised into three main categories which are:

- (a) The review of the vast majority of administrative decisions made by State and local government authorities, in respect of which administrative review rights are conferred, such as firearms, State revenue, town planning, land valuation, and mental health matters;
- (b) Vocational regulation, involving registration and disciplinary proceedings concerning allegations of misconduct or incompetence, and licensing disputes, in relation to most professions, occupations and trades which are licensed under State law for example lawyers, medical professionals, builders, finance brokers, architects, nurses and midwives and dentists; and
- (c) Original jurisdiction in relation to disputes in civil and commercial matters, such as commercial tenancies, building, strata titles, retirement villages, land compensation, guardianship and administration, and equal opportunity. In its original jurisdiction SAT inherited matters that previously formed part of the court system.

SAT, in essence, is the result of efforts to establish within the context of the existing Australian (accusatorial) legal tradition, an integrated and harmonised forum for adjudication of disputes, but with simplified processes and procedures so as to facilitate accessibility, affordability and speedy resolution of matters.

## UNIQUE CHARACTERISTICS OF THE SAT

Any assessment of the characteristics of SAT must use as point of departure the SAT Act. SAT is a creature of statute and its powers and functions derive from the SAT Act and not from an inherent jurisdiction.<sup>57</sup> Therefore, if a dispute does not

<sup>56</sup> Bedford and Creyke, above n 38, X (emphasis in original).

<sup>57</sup> In *Medical Board of Western Australia v A Medical Practitioner* [2011] WASCA 151, [78] the following was said about the statute-based powers of SAT: ‘While it may be appropriate to construe the relevant statutory provisions [of the SAT Act] by reference to analogous common law principles, ultimately, the scope of the powers and obligations created by

arise under the SAT Act or an enabling Act that gives SAT jurisdiction to deal with it, SAT cannot hear the matter.

The SAT Act does not refer to the terms ‘inquisitorial’ or ‘accusatorial’. The SAT Act does, however, clothe SAT with powers that were historically principally associated with administrative review tribunals, and to also apply those powers to the original, civil and commercial jurisdiction of SAT. These expanded powers are reflected in ss 9 and 32 of the SAT Act. It has been said that ss 9 and 32 of the SAT Act, when read together, reflect the unique ‘soul’ of SAT.<sup>58</sup> This is because ss 9 and 32 contain key elements that form the recipe for the uniqueness of SAT. For example:

- (a) SAT is to act speedily and with little formality;<sup>59</sup>
- (b) SAT is to make appropriate use of the knowledge of its members;<sup>60</sup>
- (c) SAT is not bound by the rules of evidence;<sup>61</sup>
- (d) SAT must act according to the substantial merits of the case ‘without regard to technicalities and legal form’;<sup>62</sup>
- (e) SAT may admit documents despite non-compliance with any time limit or requirement specified in the rules about it;<sup>63</sup>
- (f) SAT may inform itself on any matter as it sees fit;<sup>64</sup>
- (g) SAT is obliged to take measures that are reasonably practicable to ensure that parties understand the nature of the assertions they make and the legal implications thereof;<sup>65</sup> and
- (h) SAT must explain to parties any aspect of the procedures.<sup>66</sup>

These provisions as contained in ss 9 and 32 of the SAT Act are ‘commonly described as representing the inquisitorial character common of tribunals.’<sup>67</sup>

### Where Does SAT Belong – Executive or Judicial Branch?

Generally speaking, administrative review tribunals in common law jurisdictions are characterised as being part of the executive branch rather than the judicial branch of government. This is because administrative review tribunals, or merits review tribunals as they are also referred to, deal exclusively with the review of

---

the [SAT] Act is to be found in the language used by the legislature, not in common law principle.’

58 B De Villiers, ‘S32 – the soul of the State Administrative Tribunal’ (September 2012) *Brief* 14.

59 SAT Act s 9(b).

60 SAT Act s 9(c).

61 SAT Act s 32(2)(a).

62 SAT Act s 32(2)(b).

63 SAT Act s 32(3).

64 SAT Act s 32(4).

65 SAT Act s 32(6)(a).

66 SAT Act s 32(6)(b).

67 Bedford and Creyke, above n 38, 15.

the merits of a government department decision. The purpose of a review of an administrative decision is to produce the 'correct and preferable' administrative decision.<sup>68</sup> The review tribunal is in effect placed in the shoes of the original decision-maker and the tribunal conducts the hearing *de novo* which means it is not confined to the information that was before the departmental or local government decision-maker at the time when the decision was made.<sup>69</sup> The tribunal therefore becomes the final (administrative) decision-maker.<sup>70</sup>

SAT is, however, not merely an extension of a government department and its jurisdiction is not limited to review the merits of administrative decisions. The jurisdiction of SAT is, as pointed out above, wide ranging and includes extensive civil and commercial areas. Although SAT is not a 'court',<sup>71</sup> it is also not a traditional tribunal of restricted administrative review.

At a practical level, SAT is more closely associated with the judicial branch rather than with the executive branch of government<sup>72</sup> because:

- (a) The president of SAT is a judge of the Supreme Court of WA<sup>73</sup> and the two deputy presidents are judges of the District Court of WA;<sup>74</sup>
- (b) The senior members are required to have legal experience of at least 8 years or otherwise extensive knowledge or experience of any class of matter before the Tribunal;<sup>75</sup>
- (c) All members of the civil and commercial stream are legally trained;
- (d) Certain appeals against a decision by SAT may be heard internally but only before a member who is a judicial member (judge) or a legally qualified senior member;<sup>76</sup>
- (e) In regard to disciplinary proceedings under a vocational act, a SAT

68 SAT Act s 27(2). This power applies only to administrative review proceedings. It means SAT does not only rely on the contest of evidence between the parties, but the member may play an active role to put questions, require additional materials to be produced and even, in rare cases, provide information in its disposal for parties to respond to.

69 SAT Act s 27(1).

70 Some of the single-topic review tribunals that remain in WA are the racing and gambling tribunal, workers compensation tribunal and industrial relations tribunal.

71 SAT Act s 7 states that 'A tribunal called the State Administrative Tribunal is established.'

72 SAT is not referred to in the SAT Act as a 'court of record'. In contrast, QCAT is referred to as a 'court of record': *Queensland Civil and Administrative Tribunal 2009* (Qld) s 164(1) and has consequently been found to be a 'court': *Owen v Menzies & Ors*; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170 (22 June 2012).

73 SAT Act s 108(3).

74 SAT Act s 112(3).

75 SAT Act s 117(4).

76 *Building Services (Complaint Resolution and Administration) Act 2011* (WA) s 58(5)(a)(i).

member who is legally qualified must preside at the hearing;<sup>77</sup>

- (f) In the case of an internal appeal of a matter under the Guardianship and Administration Act<sup>78</sup> or the Planning and Development Act,<sup>79</sup> a judicial member – the president or deputy president – must preside at the hearing;
- (g) All magistrates are *ex officio* members of SAT;<sup>80</sup>
- (h) Appeals of SAT decisions take place within the framework of the SAT Act and the principles associated with the common law, for example compliance with the rules of natural justice, procedural fairness and the rules of evidence (to the extent that they apply to the weighting of evidence);
- (i) The Attorney-General is responsible for the administration of the SAT Act;<sup>81</sup>
- (j) Decisions of SAT are appealed to the Supreme Court of WA. Only questions of law may be appealed;<sup>82</sup>
- (k) SAT forms part of the Heads of Jurisdiction Board where matters of relevance to the judicial system in WA are discussed. The Board comprises the Chief Justice of WA; the Chief Judge of the Family Court of WA; the Chief Judge of the District Court; the President of SAT; the Chief Magistrate; and the President of the Children’s Court. The Board does not include smaller, line-function tribunals such as the Workers Compensation Tribunal; the Industrial Relations Tribunal; or the Racing and Gambling Tribunal; and
- (l) SAT is, as was envisioned by Attorney-General Jim McGinty, ‘clearly independent’ from the executive.<sup>83</sup>

The ethos and culture of SAT resembles that of the judiciary – albeit that SAT is more user-friendly than one would traditionally associate with a court. It is arguable that in the eye of those that use the tribunal facilities (legal practitioners and the public alike) SAT would be perceived as intimately part of the judicial services of WA. The Supreme Court of WA has however cautioned that SAT

77 SAT Act s11(4).

78 *Guardianship and Administration Act 1990* (WA) s 17A(1).

79 *Planning and Development Act 2005* (WA) s 244(1).

80 SAT Act s 116.

81 SAT Act s 146.

82 SAT Act s 105(2).

83 Jim McGinty MLA as quoted in J Eckert, ‘Detailed overview of the State Administrative Tribunal (SAT) legislation’ (February 2005) *Brief* 6.

is a tribunal not a court even when constituted by a judicial member<sup>84</sup> and care must therefore be exercised in the application, even by analogy, of principles and authorities relating to courts.

The training and on-going professional development of members of SAT is embedded in the common law, accusatorial philosophy and tradition of Australia. The active involvement that members often fulfil during hearings in regard to the putting of questions or explanation about aspects of law arise from the provisions of the SAT Act, is pursuant to ss 9 and 32 SAT Act. The approach taken by SAT is consistent with the emphasis in accusatorial systems on the impartiality of the judge; in contrast to inquisitorial systems where the emphasis is on the judge as conductor of the proceeding, the investigator and the prosecutor.<sup>85</sup>

The culture and tradition of SAT is principally towards the maintenance of the existing common law traditions of Australia<sup>86</sup> with no reference to European systems, albeit with adjustments and evolutionary changes so as to make SAT more accessible and user-friendly. The ‘socialisation processes’<sup>87</sup> of SAT, its members and its conduct are therefore imbued in the common law not in the civil law even if constitutionally SAT is not regarded as a ‘court’.

### Little Formality and Technicality

SAT is mandated by its objectives to ‘act as speedily and with as little formality and technicality as is practicable’ to resolve disputes.<sup>88</sup> This objective has given rise to case management practices within SAT to bring disputes to an end as quickly as possible. Tribunal members generally resist unnecessary delays and adjournments, put benchmarks in place for the finalisation of applications, report yearly to Parliament in the SAT Annual Report<sup>89</sup> and mediation and hearing processes are often programmed in parallel so as to ensure that time is not wasted. By far, the majority of proceedings of SAT are conducted in an informal atmosphere where the traditional customs and rules applicable to courts do not apply strictly. This ranges from the way in which the hearing rooms of SAT are designed to the manner in which the members of SAT are addressed, the attire

84 *Erujin Pty Ltd v Western Australian Planning Commission* [2010] WASC 326, [55].

85 Often when inquisitorial and accusatorial systems are compared the same words are used but with completely different meaning. For example, in the adversarial system, ‘prosecutor’ means a party in a dispute with an interest at stake in the outcome of the procedure while in an inquisitorial system the word signifies an impartial judicial officer whose role it is to investigate the truth: T Weigend, ‘Prosecution: Comparative aspects’ (2002) 3 *Encyclopaedia of Crime and Justice* 1233–4.

86 See, eg, SAT’s duty to give ‘legally adequate reasons’ for its decisions as explained by Chaney J in *Thio and Western Australian Planning Commission* [2009] WASAT 88, 31.

87 Langer, above n 32, 12.

88 SAT Act s 9(b).

89 For example, in the case of the civil and commercial matters the benchmark is to resolve 80% matters within 28 weeks from lodgement: SAT, SAT Annual Report 10/11 (23 September 2011), [9].

of members and representatives, seating arrangements, administering the oath or affirmation of witnesses, taking of evidence, hearing expert evidence, preparation for hearings, alternative dispute resolution and the conduct of a hearing. The relative informality must however not give rise to practices that give rise to breaches of rules of procedural fairness. In *S v State Administrative Tribunal of Western Australia [No 2]*,<sup>90</sup> the Court criticised procedures adopted in that matter:

The decisions of the SAT must be set aside for several independent reasons. The wrong composition of the board in relation to a claimed review on the merits of the original decision; the presence of the original decision-maker as a member of the three-member panel which was called upon to review, among other things, the propriety of his earlier decisions; the failure to exercise powers necessary to obtain evidence from a suitably qualified medical expert; the failure to observe a procedure which allowed witnesses to be called and made available for cross-examination; the failure to adopt any process by which the 'evidence' of those who had provided information could be formally verified or assured by way of oath, affirmation or affidavit all provide reasons sufficient to justify the review of the determination (*G & A Act* s 21(b)) and also reveal errors of law and actions both without and in excess of the jurisdiction.<sup>91</sup>

Generally speaking in civil and commercial hearings, the SAT follows the same procedure as a court. The applicant commences the proceeding with the respondent replying, while in administrative review proceedings the decision-maker generally commences proceedings so as to assist the applicant to understand the reasons for a decision that is now under review. In applications for guardianship or administration proceedings, the procedure is even more flexible and informal but, as is pointed out in *S v State Administrative Tribunal of Western Australia [No 2]*, the flexibility and informality should nevertheless comply with the fundamental principles of procedural fairness of the common law.<sup>92</sup>

The relative informality of SAT should therefore not be confused with a licence for persons to act uninhibited or uncontrolled, or that any information can be presented to and relied on by SAT. In matters that are complex, or where expert evidence is heard, or where parties are legally represented, the proceedings are less informal and often resemble a hearing in a court. SAT therefore encourages a certain level of informality but at the same time ensures that its procedures are structured, formal and respectful.

90 [2012] WASC 306.

91 Ibid at par.218

92 *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306, par. 217 the Court observed the following:

What did occur reveals many serious shortcomings in the procedure adopted by SAT both in preparation for and in the conduct of the several hearings. ... the combined effect of this was to lead to the making of decisions which must be set aside.

These management practices of SAT may be unique to WA but they are not indicative of a new, civil law-philosophy in the administration of justice. It is rather reflective of a new style of dispute resolution management that may, in the long term, also impact on court-processes.

The Supreme Court of WA has been accommodating of this unique SAT-style and SAT's case management procedures. Martin CJ has observed that:

It is, in that context, important for a court to exercise restraint, when presented with an application for leave to appeal from what I might call an interim or case management decision of a specialist tribunal such as SAT. That is because SAT is an administrative tribunal that has specialist expertise in the areas of jurisdiction which it administers and which by s 9 of the SAT Act is required to discharge that jurisdiction by reference to the objectives that are specified. It would be hazardous to the achievement of those objectives if the Supreme Court were to be too ready to impose its view on SAT as to the procedures of SAT and as to case management decisions that are made by SAT within its specialist areas of jurisdiction and which are taken for the achievement of the objectives set out in s 9 of the SAT Act.<sup>93</sup>

The organisational and behavioural creativity of SAT should however not be interpreted as a departure from basic common law and adversarial principles. Neither the requirement to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms, nor SAT's objectives under ss 9 and 32 of the SAT Act diminish SAT's obligation to observe the rules of natural justice or procedural fairness as associated with the Australian common law heritage.<sup>94</sup>

### **Make Use of Knowledge of Members**

The SAT Act provides that one of the main objectives of SAT is to 'make appropriate use of the knowledge and experience of the Tribunal members.'<sup>95</sup>

This wide-ranging power inevitably raises questions about how the knowledge and experience of the members are put to use, how the rules of natural justice and procedural fairness are complied with and how perceptions of bias can be averted.<sup>96</sup> These questions are resolved on the basis of common law principles as

93 *Dalton v Commissioner of Police* [2009] WASC 9, [28]. Also refer to *Commissioner of State Revenue v Artistic Pty Ltd* (2008) 70 ATR 818, [16] (Martin CJ with whom Buss JA (at [37]) and Newnes AJA (at [38]) agreed).

94 See *Mijatovic v Legal Practitioners Complaints Committee* (2008) 37 WAR 149, [54] (Buss JA). The common law recognises that the requirements for a 'fair trial' have always 'varied with changing social standards and circumstances': J J Spigelman, 'The truth can cost too much: the principle of a fair trial' (2004) 78 *Australian Law Journal* 29, 43.

95 SAT Act s 9(c).

96 Refer to the test for 'reasonable apprehension' from *Laws v Australian Broadcasting*

developed by the courts and not with reference to the inquisitorial and civil law legal philosophy.

Although it is recognised that the power to make use of a member's knowledge is unique to SAT in comparison to the courts of WA, the way in which the power is exercised is determined in the framework of the SAT Act and common law principles. While in purely administrative review tribunals greater scope may exist for a decision-maker to 'act on its own view, and to do so without disclosing those views to a person appearing before it',<sup>97</sup> in a super-tribunal such as SAT, the rules of natural justice and procedural fairness require that tribunal members use their knowledge and expertise to *assess* evidence, not to *substitute* it.<sup>98</sup>

Due to the specialist nature of aspects of SAT's jurisdiction, notably so in disputes related to building, planning and vocational matters, the Tribunal is often constituted in a manner that makes available a person with expert knowledge in the field of the dispute to form part of the panel that hears the dispute.<sup>99</sup> In some instances, for example when SAT determines an application under a vocational regulatory act, a person with special experience in the same vocation must form part of the panel.<sup>100</sup> The involvement of an expert in a panel not only adds to the confidence of parties in the tribunal-process, but also enables SAT to fulfil its objectives effectively when conducting a hearing, putting questions to the parties and considering the contentions made and the evidence given.

These powers of SAT do not mean that members conduct investigations on their own<sup>101</sup> or that members come to conclusions based on their own knowledge without giving the parties an opportunity to respond to a proposition. It is accepted, however, that specialist members bring to SAT the benefit of their

---

*Tribunal* (1990) 170 CLR 70, [100]. Also note the following observation of the High Court in the matter *Re Minister for Immigration and Multicultural Affairs; Ex Parte Epeabaka* (2001) 206 CLR 128, 138:

The kind of conduct on the part of the Tribunal that might give rise to a reasonable apprehension of bias needs to be considered in the light of the Tribunal's statutory functions and procedures. Conduct which, on the part of a judge in adversarial litigation, might result in such an apprehension, might not have the same result when engaged in by the Tribunal.

97 *Minister of Health v Thompson* (1985) 8 FCR 213, 217.

98 In *J v Lieschke* (1986) 162 CLR 447, 456–7, it was emphasised that the principles of natural justice take into account the nature of the jurisdiction, the nature of the proceedings, the powers to be exercised and the rules of procedure.

99 SAT Act s 11(6).

100 SAT Act s 11(4).

101 Even in guardianship and administration proceedings which are very informal and flexible, SAT staff may make inquiries and obtain medical reports or SAT may request the Office of the Public Advocate or the Public Trustee to undertake an investigation, but:

- (a) The SAT member does not conduct or lead the investigation in a manner as understood in the inquisitorial systems;
- (b) The rules of natural justice and procedural fairness apply at the hearing; and
- (c) In contested applications or appeals of decisions, the SAT processes are akin to the general accusatorial approach.

specialist background to resolve disputes as envisaged by parliament.<sup>102</sup>

In *Twinbrook*, the SAT allowed a review of a decision of the Building Disputes Tribunal ('BDT') since the BDT had come to a finding about what it would cost to do certain rectifications to building works. The BDT failed, however, to give the parties an opportunity to make submissions in regard to the information on which the finding was based. In allowing the review, SAT said:

In this instance, the BDT has provided its own evidence. Its special knowledge has not been used in the process of evaluation but to substitute for evidence which should have been provided on behalf of one or other of the parties. The BDT was entitled to rely on special knowledge provided that it was disclosed and the parties were provided with an opportunity to deal with it.<sup>103</sup>

In another matter before SAT a question arose as to whether an applicant for a high-power firearms licence had demonstrated sufficient justification to be licensed for a type of firearm that according to the Commissioner of Police could be used for 'sniper' purposes. The member informed the parties during the hearing that he had extensive practical experience in ballistics, hunting and firearms matters. The member recorded in his decision as follows:

The presiding member explained to the parties that he is an experienced hunter and shooter and that pursuant to s 9(c) of the SAT Act, his knowledge may be of value in the proceedings.<sup>104</sup>

The objective of the Tribunal to make use of the knowledge of its members is a creation of the SAT Act. The power is traditionally associated with pure administrative review tribunals where members could investigate the merits of a decision by a government department or administrative decision-maker,<sup>105</sup> but in the case of SAT the power to use knowledge has been expanded to be applied to all disputes including those of a commercial and civil nature. All SAT members, especially those with specialist knowledge, 'must be careful not to use their specialist knowledge in a way that would infringe the rules of procedural fairness.'<sup>106</sup>

102 Refer for example to the decision in *Ego Pharmaceuticals Pty Ltd and Minister of Health and Aging* 2012 [AATA] 113 at para 34-37 in which the role of sessional members and their expertise play in tribunal proceedings.

103 *Twinbrook Pty Ltd and WMP Pty Ltd* [2008] WASAT 279, [48] referring to *Monaco & Anor v Arnedo Pty Ltd & Anor* WASC (Full Court) Lib No 940481 (6 September 1994).

104 *Bent and Commissioner of Police* [2011] WASAT 143, [39].

105 'Proceedings before the [AAT] sometimes give the appearance of being adversarial but, in substance, a review by the tribunal is inquisitorial. Each of the commission, the board and the tribunal is an *administrative decision-maker*': *Benjamin v Repatriation Commission* (2001) 70 ALD 622, 41 (emphasis added).

106 D G Jarvis, 'The practice of the Administrative Appeals Tribunal in relation to medical evidence' (2012) 86 *Australian Law Journal* 34, 41.

The scope of the objective to use knowledge must, however, be assessed within the context of the SAT Act, including the obligation of SAT to conform to the rules of natural justice.<sup>107</sup> Any specialist view or opinion that is held by a member must therefore, to the extent that it bears on the evidence before the Tribunal in a specific proceeding, be put to the parties to enable them to reply to it. This is consistent with the right of a person to present their case and to know and to be given an opportunity to respond to the arguments presented against them.

### **SAT is Bound by the Rules of Natural Justice**

Regardless of its objective of resolving disputes with as little formality and technicality as practicable,<sup>108</sup> SAT is bound by the rules of natural justice.<sup>109</sup> The nature and scope of the rules of natural justice are found in the provisions of the SAT Act construed according to the common law. In essence SAT must ensure that:

- (a) Parties understand the nature of assertions made and the implications thereof;
- (b) All evidence of relevance is made available and considered;
- (c) Parties have sufficient time to consider the evidence and to make submissions;
- (d) Parties can address SAT on any matter of relevance; and
- (e) Parties may give evidence and examine evidence and witnesses.

Compliance with the rules of natural justice, whether those rules are implicit in the SAT Act or implied by common law, goes to the heart of the Australian legal system. Kirby J noted that:

It is a principle of justice that a decision-maker, at least one exercising public power must ordinarily afford a person whose interest may be adversely affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made. The principle lies deep in the common law. It has long been expressed as one of the maxims which the common law observes as ‘an indispensable requirement of justice’. It is a rule of natural justice or ‘procedural fairness’. *It will usually be imputed into statutes creating courts and adjudicative tribunals.* Indeed, it long preceded the common and statute law.<sup>110</sup>

107 SAT Act s 32(1).

108 SAT Act s 9(b).

109 SAT Act s 32(1).

110 *Allesch v Mauenz* (2000) 203 CLR 172, [35] (emphasis in original).

The requirements of natural justice or procedural fairness are flexible and evolutionary. Proceedings before the Tribunal may therefore be organised to ensure fairness having regard to the nature and circumstances of the case, including the statutory context, relevant facts, the matters in dispute, the circumstances of the parties, whether parties are legally represented, and whether the proceeding is in the Tribunal's original or review jurisdiction.<sup>111</sup>

In *Antony and S Omar Perdana Pty Ltd*,<sup>112</sup> SAT made orders against a party who had failed to comply with programming orders of SAT. The decision was set aside on the grounds that an error of law had been made since a party was not given sufficient opportunity to be heard and to explain the reasons why it had failed to comply with the orders.<sup>113</sup>

Compliance with the rules of natural justice lies at the heart of the accusatorial system. The rules of natural justice:

[R]equire that a person is entitled to be given a proper hearing before a determination is made affecting his or her rights. The fairness of the proceeding will also depend on the conduct of the judicial officer – the more arbitrary or subjective it appears to be, the less acceptable to all concerned. It is also important that there be the appearance and, if possible, the reality of control by law rather than judicial whim. Detailed rules of evidence lend to the trial the appearance of proceedings controlled by the law, not by the individual trial judge's discretion, and reduce the scope for subjective decisions.<sup>114</sup>

In summary, the duty of SAT to comply with and adhere to the rules of natural justice is mandated by the SAT Act and those principles are interpreted in accordance with the common law.

### **SAT is Not Bound by the Rules of Evidence**

The *Evidence Act 1906* (WA) does not apply to SAT.<sup>115</sup> SAT is also not bound by the rules of evidence or any practices or procedures applicable to the courts, except if SAT adopts those rules, practices or procedures. SAT must, however, act according to 'equity, good conscience and the substantial merits of the case.'<sup>116</sup> This reflects the common law as expressed by Lord Denning when he observed:

111 Parry and De Villiers, above n 6, 15.

112 [2009] WASAT 96.

113 Ibid [8]–[9].

114 S Odgers, *Uniform Evidence Law* (Thompson Reuters, 2012) 21.

115 SAT Act s 32.

116 SAT Act s 32(2). The practical meaning, application and scope of acting in accordance to 'equity and good conscience' requires further clarification and development.

Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law.<sup>117</sup>

Although SAT is not bound by the rules of evidence, it does not mean that those rules, which have developed over centuries in common law jurisdictions and have been codified by way of statute, can be discarded when it comes to considering and weighting evidence before the Tribunal. The proverbial net with which evidence is caught up in SAT is potentially wide, but the rules of evidence often assist SAT to determine the admissibility of, and weight that is ultimately attached to, evidence for the purposes of a determination. The rules of evidence therefore continue to provide essential guidance as to what type of evidence should be admitted to determine the outcome of a proceeding or what weight should be given to evidence.<sup>118</sup> This is consistent with the Federal Court's view:

The tribunal is not bound by the rules of evidence ... This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.<sup>119</sup>

The provisions of s 32 therefore establish a basis upon which SAT may permit information that would otherwise be regarded as inadmissible under the rules of evidence into a hearing.<sup>120</sup> However, this seemingly broad power does not discard SAT's obligation to adhere to the rules of natural justice,<sup>121</sup> the obligation to ground its decisions on evidence which is relevant and the duty to ensure that the evidence that is relied upon is logically probative of a fact in issue.<sup>122</sup> If SAT

117 *TA Miller Ltd v Minister of Housing and Local Government* [1968] 1 WLR 992 at [995]. See, also *Collector of Customs (Tasmania) v Flinders Island Community Association* (1985) 7 FCR 205, [210]–[211] in which it was found that the AAT had erred in law by drawing conclusions on its own understanding of aspects of Aboriginal people's culture and not on the evidence before it. Such a conclusion was therefore not based on evidence that was logically probative.

118 *Gardiner v Land Agents Board* (1976) 12 SASR 458, 474–5; *Re Pochi and Minister of Immigration and Ethnic Affairs* (1979) 36 FLR 482.

119 *Rodriguez v Telstra Corporation* [2002] FCA 30, [25].

120 See, eg, *Commissioner for Equal Opportunity and Alcoa of Australia Ltd* [2007] WASAT 317, [33] where the Tribunal allowed hearsay evidence.

121 See, eg, although a tribunal such as SAT may not, when it puts questions to a witness, be subject to the rule in *Brown v Dunn* (1893) 6 R 67 (HL) as per *Re Minister for Immigration and Multicultural Affairs* [2003] HCA 60 (8 October 2003), 57, the Tribunal may nevertheless have to comply with the essential elements of the rule so as to ensure procedural fairness to the parties.

122 See, eg, the way in which SAT dealt with a case of unlawfully obtained evidence, by applying the factors stated by the High Court of Australia in *Bunning v Cross* (1978) 141 CLR 54 to guide the exercise of judicial discretion as to whether to exclude the evidence, before having regard to the statutory framework in the SAT Act that: 'mitigates ... against the exclusion of ... illegally obtained material, by reason of the obligation imposed on the Tribunal by s 32(2)(b) to act according to equity, good conscience and the substantial merits of the case': *Department for Consumer and Employment Protection and Chequecash Pty Ltd* [2008] WASAT 168 (S), [8], [39]; see also [42].

exercised its wide powers under s 32 in a manner that fails to comply with those common law principles, a decision amounts to an error of law and may be set aside.<sup>123</sup> Finkelstein J observed that certain privileges that are understood to be part of the rules of evidence are so important to the common law, that tribunals are bound by such common law principles regardless of tribunals not being bound by the rules of evidence.<sup>124</sup>

In practice, proceedings in SAT are therefore usually not interrupted with objections to the admissibility of evidence, but when it comes to the making of submissions by parties, the Tribunal is often requested to attach less weight to certain evidence with reference to the rules of evidence.<sup>125</sup> The Tribunal would also in its reasons for its decisions refer to and rely on the rules of evidence and other relevant principles of common law to explain why particular evidence is accorded more weight than other evidence.<sup>126</sup>

In summary, when SAT considers the principles that guide the admissibility and weight of evidence, it relies on the SAT Act and common law principles acknowledging that it is ‘not bound to consider only evidence or information that

---

123 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492. See also *Sammut v AVM Holdings Pty Ltd [No 2]* [2012] WASC 27, [40]–[56].

124 See *Epeabaka v Minister for Immigration & Multicultural Affairs* (1997) 150 ALR 397, [408]–[409], where the Court stated:

‘The privileges are legal professional privilege, the privilege against self incrimination and what was once referred to as Crown privilege but is now known as public interest immunity. While each of these privileges is commonly regarded as part of the rules of evidence, they have application to a proceeding before the Tribunal not because they are rules of evidence but because they are *fundamental principles of the common law* that are capable of being exercised not only in curial proceedings but in administrative and investigative proceedings as well’ (emphasis in original).

Client privilege as a fundamental and substantial common law right was affirmed in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

125 See, eg, *A and Commissioner of Police* [2005] WASAT 121 where the Tribunal relied on the evidentiary rule of ‘relevance’ to determine if information about outstanding criminal charges could be taken into account in the licensing of a person for vocational purposes. In this regard the Tribunal adopted an approach consistent with the ss 55, 56 of the *Evidence Act 1995* (Cth) which provides that in order for evidence to be admissible, it must be ‘relevant’ to the proceeding. On appeal, Johnson J affirmed the decision of the Tribunal and said the following about the use of the test of ‘relevancy’:

In the absence of any binding or compelling authority that evidence of unresolved criminal charges is irrelevant to satisfaction as to good character on a licence application and such evidence is therefore inadmissible, I consider that the pending charges, evidenced by tendering the Statement of Material Facts, are relevant and admissible and cast sufficient doubt to make a conclusion of good character something that cannot be reached:

See *Grover v Commissioner of Police* [2005] WASC 263, [49].

126 See, eg, the matter of Legal Practitioners Complaint Committee and Trowell [2009] WASAT 42 where SAT considered the application of the common law rule of *Jones v Dunkel* (1959) 101 CLR 298 (failure to call a witness) to the proceedings to give evidence before the tribunal.

conforms with the rules of evidence.<sup>127</sup>

### **SAT May Inform Itself on Any Matter as it Sees Fit**

Section 32(4) of the SAT Act allows SAT to ‘inform itself on matter it sees fit’. This power often gives rise to questions since the SAT Act does not give guidance or impose limitations on the way in which it is exercised. It is, arguably, the power that is most often construed as being ‘inquisitorial’ in nature.<sup>128</sup> This raises the question about what is the scope of this power and what restrictions apply when the Tribunal ‘informs itself as it sees fit’?

In the context of traditional review of administrative decisions, a tribunal’s power to ‘inform itself’ would usually be assessed within the context of the specific department of which the decision is under review. A tribunal may therefore conduct an investigation into the files of the department and undertake other investigations so as to determine the best and preferable decision to be made. In relation to the Refugee Review Tribunal, the High Court did not find that the Tribunal was under a general obligation to conduct enquiries and emphasised that the obligation is on the applicant to put forward evidence it wishes the Tribunal to consider.<sup>129</sup>

In the case of SAT, however, where:

- (a) There is no direct nexus between SAT and a specific department of which the decision is being reviewed;
- (b) Decisions of many different administrative agencies are reviewed; and
- (c) Civil and commercial disputes that do not require a review of an administrative decision are determined,

127 Wignall and Commissioner of Police [2006] WASAT 206, [280].

128 It has been held that a tribunal panel may, for example, ‘inform itself’ by using Google to check on the background and expertise of an expert called to give evidence. In *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 (30 September 2008), 25, the Court observed the following about the potential scope of the right of a tribunal to inform itself:

The words ‘may inform itself ...’ were plainly intended to have work to do. They have a meaning and a purpose quite distinct from the meaning and purpose of the words ‘not bound by rules of evidence’. Far from the phrase ‘may inform itself’ being negated or neutralised by other provisions, these words play a necessary part in defining the character of the formal hearing which the panel conducts. For the purposes of ‘determining the matter before it’, the panel is authorised to ‘inform itself in any way it thinks fit’ subject always to the overriding obligation to accord procedural fairness.

129 *Minister for Immigration & Citizenship v SZGUR* [2011] HCA 1 (2 February 2011), [84]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, 17 [40], where Gummow ACJ, Callinan, Heydon and Crennan JJ observed that: ‘This Court has repeatedly said that the proceedings of the Tribunal are administrative in nature, or inquisitorial, and that there is an onus upon neither an applicant nor the Minister.’

the power of SAT to ‘inform itself on any matter it sees fit’ becomes even more uncertain. A tribunal that acts on its own volition to ‘inform itself’ could easily attract criticism from a party of bias and/or of a breach of the rules of natural justice. At the same time, if SAT fails to make an ‘obvious inquiry’ into a matter which is under review, it may constitute an error in law.<sup>130</sup> In order to establish what is meant by SAT to ‘inform itself on any matter it sees fit’, SAT has placed reliance on the proper construction of the SAT Act and principles of relevance in the Australian common law.

In essence, SAT is not under a duty to inquire; it *may* inform itself, including through the use of the expertise available to it;<sup>131</sup> it is not SAT’s role to run a party’s case; and it does not act as the ‘protagonist’ in a manner as associated with civil law inquisitor-judges.<sup>132</sup> This is consistent with the view expressed in *Battenberg v The Union Club*,<sup>133</sup> namely, that the tribunal’s powers do not ‘impose on it an obligation to inquire into every matter a party asserts might be relevant to the facts in issue.’ The authority to seek information therefore does not translate into a duty to seek information. SAT is, however, under a duty 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 a proceeding.’<sup>134</sup> SAT is therefore under an obligation to ensure that information that is readily available and of relevance to the proceeding is procured, or at least, that efforts are made to procure it. The extent to which SAT may pursue the disclosure of material depends on the factual situation of a case. SAT hearings are, regardless of a varying degree of informality, contested proceedings. Even when guardianship and administration matters are considered and the Public Advocate or Public Trustee may be invited to conduct an investigation or make submissions,<sup>135</sup> or in matters where SAT appoints an

130 A constructive failure to review may occur if SAT fails to ‘make an obvious inquiry about a critical fact, the existence of which is easily ascertained...’: *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, at para 25. Although the High Court viewed the Refugee Review Tribunal as ‘ultimately an inquisitorial body’: H Alderton, M Granziera and M Smith ‘Judicial review and jurisdictional errors: The recent migration jurisprudence of the High Court of Australia’ (2011) 18 *Australian Journal of Administrative Review* 138, 149, care should be employed when the same categorisation is sought to be applied to a tribunal such as SAT which has a much broader jurisdiction. See also J Stellios, ‘Reconceiving the separation of judicial power’ (2011) 22 *Public Law Review* 113–38.

131 See *Ego Pharmaceuticals Pty Ltd and Minister of Health and Aging* 2012 [AATA] 113 at para 34–37 where the important role of specialist members and the expertise they bring to a tribunal was considered and it was held that the expertise of an expert sessional member did not constitute apprehended bias for the reason that the tribunal relied on such knowledge for purposes of its decision-making.

132 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 169.

133 [2004] NSWADT 285, para 23–4.

134 SAT Act s 32(7)(a).

135 *Guardianship and Administration Act 1990* s 97(1)(b). Although these proceedings are aimed at establishing what is in the best interest of the represented person: *EBF and DMW* [2008] WASAT 236, [45], SAT will nevertheless allow persons with an interest in the proceeding to attend, make submissions, and give evidence. In its ‘informal’ approach, SAT remains obliged to comply with the rules of natural justice and procedural fairness as per the common law. Although the jurisdiction in guardianship proceedings is of a ‘protective nature’ and although there are not contesting parties as is understood in civil litigation,

expert,<sup>136</sup> the essential nature of the hearing is within the adversarial context. This is highlighted in those matters where family members take opposing positions or other interested parties, when legal representation is present or when a decision is appealed.

The Supreme Court of WA has emphasised that the ‘evidence’ upon which SAT may act is unique and must be assessed in accordance with the SAT Act. In *Medical Board of Western Australia v A Medical Practitioner*, the Court observed that:

[T]he word ‘evidence’ must be construed in the context of the Act as a whole, which does not oblige the Tribunal to apply the laws of evidence, [it] permits the Tribunal to inform itself as it thinks fit, and expressly authorises the receipt of evidence from witnesses in writing, and allows the Tribunal to decide cases without a hearing.<sup>137</sup>

In another dispute that concerned a ‘site inspection’ where the SAT informed itself as to whether a commercial tenancy was operating as a ‘delicatessen’ or a ‘sandwich bar’, the Tribunal concluded after the inspection that:

The Tribunal benefitted greatly from the site inspection it conducted with the parties. The overwhelming impression of the Tribunal visiting, entering the premises and walking around in it, was that it is what one could call a neighbourhood delicatessen. A substantial area of floor space is dedicated to the typical products one would expect in a delicatessen and these are set out in the Inventory of Products...<sup>138</sup>

The decision was appealed to the Supreme Court of WA. On appeal, the question arose as to whether SAT could have come to such a conclusion about the predominant use of the premises on the basis of the inspection it conducted. The Supreme Court upheld the decision of the Tribunal observing that:

[T]he member reached the same conclusion as the City as a result of his inspection of the premises and other evidence, his decision was *an independent conclusion* that the premises were being used [as a delicatessen].<sup>139</sup>

---

SAT must comply with the rules of natural justice and procedural fairness when making a determination. Note that even in administrative review tribunals in Tasmania research showed that the tribunals (at the time of that research) were ‘largely adversarial in nature’: T Henning and J Blackwood ‘The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian quasi-judicial tribunals’ (2003) 10 *Australian Journal of Administrative Law* 84, 99.

136

SAT Act s 64.

137

[2011] WASCA 151, [98].

138

*Sammut and AVM Holdings Pty Ltd* [2011] WASAT 32, [9].

139

*Sammut v AVM Holdings Pty Ltd [No 2]* [2012] WASC 27, [56] (emphasis in original).

When ‘informing itself,’ SAT must guard against being perceived as biased against a party or that it comes to a conclusion independent from the evidence submitted to it. This again highlights the fundamental difference between the SAT-common law approach and inquisitorial systems, where the magistrate-inquisitor conducts the investigation. The common law ‘bias rule’ recognises the right of a person to have their case determined by a tribunal which is not actually biased,<sup>140</sup> or appears to be biased.<sup>141</sup>

The precise requirements of natural justice or procedural fairness are flexible and proceedings before SAT may be organised to ensure fairness having regard to the nature and circumstances of the case, including relevant facts, the statutory context, the matters in dispute, the circumstances of the parties, and whether the proceeding is in the Tribunal’s original or review jurisdiction.<sup>142</sup>

The nature and character of hearings of SAT, albeit from very informal to very formal, are therefore contested in a manner that is consistent with adversarial proceedings. Even in those instances where SAT relies on investigations to be conducted by other government agencies, for example when the Public Trustee, Public Advocate<sup>143</sup> or Building Commission<sup>144</sup> investigates a matter at the request of SAT, the member is not responsible to conduct an investigation or to collect information as is the case with inquisitorial systems. The member remains at arms length with an investigation done by another government agency and SAT considers the evidence presented to it in accordance with its statutory powers and principles of common law.<sup>145</sup> At no stage does SAT become so active in the process of investigation that it can be equated to a typical inquisitorial-magistrate.<sup>146</sup> The same applies to proceedings where self-represented parties appear before SAT. SAT explains the processes to the parties, allows them to state their case and to put questions to each other while SAT often also takes an active role in putting questions to the parties or witnesses. This involvement of SAT and the relative

140 *Chin v Legal Practice Board of Western Australia* [2011] WASCA 110, [5] (Newnes JA) referring to *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

141 *Chin v Legal Practice Board of Western Australia* [2011] WASCA 110, [3] (Newnes JA) referring to *Johnson v Johnson* (2000) 201 CLR 488.

142 *Mijatovic v Legal Practitioners Complaints Committee* (2008) 37 WAR 149, [55]–[56] (Buss JA).

143 *BS and KM* [2009] WASAT 198, [25].

144 *Building Services (Complaints Resolution and Administration) Act 2011* (WA) s 9.

145 See, eg, *Steve’s Nedlands Park Nominees Pty Ltd and City of Nedlands* [2006] WASAT 16, [42] in which SAT emphasised the important role played by legal representatives in hearings and the obligation on SAT to heard all the evidence before a decision is made:

Counsel for the parties of course perform an important role in asking questions after that process is complete. However, it is simply inconceivable in this Tribunal that an expert, such as Mr Bordbar, or objectors, such as the applicants for intervention, would not be able to express their evidence as they wish, and for the Tribunal to somehow not take it into account.

146 See *Lai & Anor and Costa* [2006] WASAT 117, [19] for an illustration of the risk of a chairperson of a tribunal becoming too ‘involved’ and thereby erring in law.

informality of the proceedings should not be construed as SAT taking on the role as the ‘investigator’ as is typically associated with the magistrate in inquisitorial proceedings.

## **CONCLUSION**

In this overview of the accusatorial/inquisitorial conundrum that often face super-tribunals such as SAT, it has been shown that SAT, as a creature of statute, exercises its powers and functions in accordance with the common law tradition of Australia.<sup>147</sup> SAT has a wide review and civil and commercial jurisdiction that makes it distinct from the traditional administrative review tribunals of Australia. Although the SAT Act does not refer to SAT as ‘inquisitorial’ or ‘accusatorial’, the way in which SAT operates; its case management practices; its wide jurisdiction; its placing in the judicial framework of Western Australia; and the interpretation that has been given to the SAT Act, show that SAT is not a new creature that is founded in the European civil law and traditions. The use of civil law terms and characteristics to describe SAT processes as “inquisitorial” are therefore not helpful. References to SAT as an ‘inquisitorial tribunal’, as understood in the civil law, is therefore misplaced and should be avoided.

---

<sup>147</sup> See also Bedford and Creyke, above n 38, 32 where Bedford and Creyke reached a similar conclusion in regard to other tribunals in Australia.