THE APPLICATION OF THE 'DUTY TO INQUIRE' TO THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

Dr AJ Orchard*

Since it was first framed in *Prasad v Minister for Immigration and Ethnic Affairs*[1] (*Prasad*), the so-called 'duty to inquire' has 'occupied a tenuous and perhaps unwelcome position in judicial review of decisions of merits review tribunals'.[2]

While the High Court in *Minister for Immigration and Citizenship v SZIAI*[3] (*SZIAI*) accepted the general principle that 'a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review',[4] the Court did not go on to clarify what those circumstances might be.

The High Court had a further opportunity to consider the issue in *Minister for Immigration & Citizenship v SZGUR*,[5] but, while accepting the general principle from *SZIAI*, the Court decided that it was not necessary further to explore the questions of principle.[6]

Subsequent cases (as set out below) have also accepted the general principle but have failed clearly to identify the circumstances in which the duty will arise. However, there now seems little doubt that in appropriate circumstances merits review tribunals are required to make obvious inquiries about critical facts which are readily ascertainable.

The first section of this article considers the general nature of the 'duty to inquire'. The second section explores the legislative and regulatory scheme for the resolution of financial services disputes in Australia and the general nature of the Australian Financial Complaints Authority (AFCA). The third section comes to a conclusion as to whether the principles that apply to merits review tribunals in respect of 'the duty to inquire' apply equally to the financial services external dispute resolution scheme, the AFCA.

The general duty

The starting point for a review of the general nature of the duty to inquire is *Prasad*.[7] In that case, Wilcox J was reviewing a decision to deny the applicant a residence visa. A question arose, in the context of considering the reasonableness of the final decision, as to the relevance of material not before the Minister (the decision-maker). In that regard and particularly in respect of the need to inquire about such material, his Honour commented:

> A power is exercised in an improper manner if, upon the material before the decision maker, it is a decision to which no reasonable person could come. Equally, it is exercised in an improper manner if the decision maker makes his decision — which perhaps in itself, reasonably reflects the material before him — in a manner so devoid of any plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew

* *Dr Orchard LLB (Hons), Grad Dip Leg Prac, LLM, SJD, is the National Director, Legal Services, of the Australian Health Practitioner Regulation Agency (AHPRA). The views expressed throughout this article are the personal views of the author and do not purport in any way to represent the views of AHPRA.*

> to be readily available to him. The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the Court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it. It would follow that the Court, on judicial review, should receive evidence as to the existence and nature of that information.[8]

Thus, to avoid the risk of a decision ultimately being overturned on *Wednesbury*[9] grounds, Wilcox J indicated that the manner in which the decision was made must not be unreasonable. Moreover, failing to obtain information centrally relevant to the decision and which is readily available may be so unreasonable that no reasonable person would have proceeded in that manner.

This approach was considered by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*[10] (*Teoh*). In that case, Mason CJ and Deane J accepted the correctness, in appropriate cases, of the general principle enunciated by Wilcox J in *Prasad*.[11]

Subsequently, in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[12] (*VEAL*), the High Court found that the relevant tribunal was 'bound to make its own inquiries and form its own views upon the claim which the appellant made'.[13]

In *Minister for Immigration and Citizenship v Le*,[14] Kenny J in the Federal Court of Australia considered the relevant authorities and came to the following conclusion:

> Thus, a failure by a decision-maker to obtain important information on a critical issue, which the decision-maker knows or ought reasonably to know is readily available, may be characterized as so unreasonable that no reasonable decision-maker would proceeded [sic] to make the decision without making the enquiry … In this circumstance what vitiates the decision is the manner in which it was made. Since this is a limited proposition, it does not conflict with the larger statement that the Tribunal is under no general duty with respect to making enquiries.[15]

Perhaps the clearest statement of the general principle was provided by the High Court in *SZIAI*. In that case, French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ held that:

> Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a 'duty to inquire', that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case.[16]

The plurality in *SZIAI* also took the opportunity to address the comment from the Court in *VEAL* quoted above. Their Honours noted that the comment related to the context of that case in which the principles of natural justice required the Refugee Review Tribunal to put certain information to an applicant in order to seek a response.[17] In so doing, the plurality appeared to be clarifying that the earlier comment did not indicate the existence of a general duty to inquire.

Subsequent to *SZIAI*, Cowdroy J considered the principle in *Khant v Minister for Immigration and Citizenship*.[18] In that case, Cowdry J said:

> Therefore a failure of a Tribunal to make inquiries in certain circumstances may also constitute jurisdictional error due to '*Wednesbury* unreasonableness' … Despite comments in *SZIAI* at [13]–[15]

> and [22]–[23] noting the difference between judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and judicial review under s 75(v) of the *Constitution*, *SZIAI* would not appear to disturb *Le*. Indeed at [26] of *SZIAI* the majority stated: '*no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review* ***or that it was otherwise so unreasonable*** *as to support a finding that the tribunal's decision was infected by jurisdictional error*.'[19]

The principle was considered further in *Kowalski v Military Rehabilitation and Compensation Commission*.[20] In that case, Dowsett, Cowdroy and Logan JJ held that, in reference to *SZIAI*:

> The High Court accepted that an administrative tribunal, in exercising a power of review, might be obliged to make 'an obvious enquiry about a critical fact, the existence of which is easily ascertained', and that any breach of that duty might amount to a failure to review or other jurisdictional error. However the decision does not establish a general obligation to inquire.[21]

The combined effect of the various decisions is that while merits review tribunals have no general duty to initiate inquiries, in certain limited circumstances there may be an obligation to make an obvious inquiry about a critical fact, the existence of which is easily ascertained (the *Prasad* principle). Failure to do so may amount to jurisdictional error, in failing to undertake the necessary review or in making a decision so unreasonable that no reasonable decision-maker would have made such a decision (*Wednesbury* unreasonableness).

Failure to make the appropriate inquiry does not amount to a breach of the principles of natural justice. Chief Justice Mason and Deane J in *Teoh*[22] stated that they 'do not see how the suggested failure to initiate inquiries can be supported on the footing that there was some departure from the common law standards of natural justice or procedural fairness'.[23]

In *SZIAI*, the plurality also made it clear that any breach of the limited duty to inquire did not amount to a corresponding breach of the principles of natural justice, stating:

> It is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law.[24]

Justice Cowdroy appeared to adopt this position in *Khant v Minister for Immigration and Citizenship*,[25] finding that:

> Such statement would appear to confirm that a failure to make an inquiry could constitute jurisdictional error for at least two different reasons. Those are, a constructive failure to exercise jurisdiction in fulfilling the role of the Tribunal to review, and '*Wednesbury* unreasonableness'.[26]

The fact that these decisions proceed on the basis that a failure to make inquiries in limited circumstances may give rise to jurisdictional error but not a breach of natural justice principles is not surprising. It is clear that the natural justice requirements are procedural in nature in that they relate to the manner in which a decision is made as opposed to the merits of the decision.[27] Indeed, the High Court emphasised in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[28] (*SZBEL*) that, in respect of natural justice, the reviewing court is concerned with the fairness of the procedure rather than the decision itself.[29]

Conversely, the restricted obligation to make an obvious inquiry about a critical fact may take into account the potential outcome. The majority in *SZIAI* specifically referred to the outcome in the following terms:

> It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, *supply a sufficient link to the outcome* to constitute a failure to review.[30]

This certainly suggests that the Court considered the potential impact of the failure to inquire on the outcome. Indeed, Heath and Johnson[31] suggested when commenting on the High Court reasoning in *SZIAI*:

> This serves to highlight that review on the ground of unreasonableness is focused on the making of the decision under review, and not on the procedure followed. Consequently, the question is whether the outcome is unreasonable, not whether the procedure was unreasonable.[32]

Despite this and the clear statement by the High Court in *SZIAI*, some commentators still consider natural justice as providing 'an alternative and perhaps more coherent basis for the duty'.[33] Regardless of the basis of the obligation to inquire, it is clear that such an obligation would only arise in exceptional circumstances.[34]

When considering the basis for the restricted obligation to make certain inquiries, it is also important to consider the nature of the tribunal and, in particular, whether it is inquisitorial or adversarial in nature.

There is little doubt that merits review tribunals (the decisions of which have given rise to the principles in respect of the restricted obligation to inquire) tend to operate in an inquisitorial rather than adversarial manner.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154*,[35] Gummow and Heydon JJ said:

> Accordingly, the rule in *Browne v Dunn* has no application to proceedings in the Tribunal. Those proceedings are not adversarial, but inquisitorial; the Tribunal is not in the position of a contradictor of the case being advanced by the applicant. The Tribunal Member conducting the inquiry is not an adversarial cross-examiner, but an inquisitor obliged to be fair.[36]

Following that clear statement, in *SZBEL*[37] the High Court said:

> More than once it has been said that the proceedings in the Tribunal are not adversarial but inquisitorial in their general character. There is no joinder of issues between parties, and it is for the applicant for a protection visa to establish the claims that are made. As the Tribunal recorded in its reasons in this matter, however, that does not mean that it is useful to speak in terms of onus of proof. And although there is no *joinder* of issues, the Act assumes that issues can be identified as arising in relation to the decision under review. While those issues may extend to any and every aspect of an applicant's claim to a protection visa, they need not. If it had been intended that the Tribunal should consider afresh, in every case, all possible issues presented by an applicant's claim, it would not be apt for the Act to describe the Tribunal's task as conducting a 'review', and it would not be apt to speak, as the Act does, of the issues that arise in relation to the decision under review.[38]

The last point made in this quote is of particular significance. The fact that a tribunal is inquisitorial or is conducting a review in an inquisitorial fashion does not necessarily mean that the tribunal is bound to consider every possible issue arising out of the applicant's claim. This follows from the fact that the tribunal is conducting a review of a particular decision.

In *SZIAI*, in referring to the Refugee Review Tribunal, the plurality cited *SZBEL* and said:

> It has been said in this Court on more than one occasion that proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation. The word 'inquisitorial' has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision-maker, is

> not itself a contradictor to the cause of the applicant for review. Nor does the primary decision-maker appear before the Tribunal as a contradictor. The relevant ordinary meaning of 'inquisitorial' is 'having or exercising the function of an inquisitor', that is to say 'one whose official duty it is to inquire, examine or investigate'. As applied to the Tribunal 'inquisitorial' does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal's functions. They are to be found in the provisions of the Migration Act. The core function, in the words of s 414 of the Act, is to 'review the decision' which is the subject of a valid application made to the Tribunal under s 412 of the Act.[39]

There seems little doubt then that those merits review tribunals that have been considered to operate in an inquisitorial manner. That said, it is clear from the High Court's comment in *SZIAI* that the expression 'inquisitorial' does not carry the full ordinary meaning. Because the tribunals are conducting a review of a decision, this inquisitorial function is limited and does not extend to a general duty to inquire, examine or investigate.

Groves, in considering the High Court's comments in *SZIAI*, suggests that 'if Tribunals may be constituted generally, but not totally, according to the inquisitorial model, the creation of tribunals with many inquisitorial features does not necessarily import the full panoply of inquisitorial features such as a power or duty to inquire'.[40] That is, merely being inquisitorial in nature does not necessarily give rise to a duty to inquire.

While Alderton, Granziera and Smith in considering the Court's comments in *SZIAI* suggest that 'the existence of a broader duty to inquire in *some* circumstances acknowledged by the majority of the court is one incident of this reality',[41] the broader duty to which they refer is clearly that limited obligation from *Prasad*.

The position of merits review tribunals in respect of the so-called duty to inquire can therefore be summarised in the following principles:

(1) The particular merits review tribunals which have been the subject of consideration in the cases exploring a possible duty to inquire are inquisitorial in nature.
(2) The mere fact of being inquisitorial in nature does not give rise to a broad duty to inquire.
(3) Merits review tribunals are not subject to a broad duty to inquire.
(4) Inquisitorial tribunals are subject to an obligation to make an obvious inquiry about a critical fact, the existence of which is easily ascertained (the *Prasad* principle).
(5) A failure to make obvious inquiries about a critical fact may give rise to a jurisdictional error either in failing to undertake the review or in making a decision so unreasonable that no reasonable decision-maker would make the decision.

The next section of this article considers whether these same principles that apply to merits review tribunals apply in the same manner to the circumstance of a scheme designed to resolve disputes between parties in the financial services sector.

The external dispute resolution scheme

Before considering the application of the foregoing principles, it is first necessary to understand the legislative and regulatory system for the resolution of financial services disputes.

The Australian Securities and Investments Commission (ASIC) approved external complaint resolution (EDR) scheme plays a vital role in the financial services and credit regulatory systems in Australia. By virtue of ss 912A(2) and 1017G(2) of the *Corporations Act 2001* (Cth), financial services licensees, unlicensed product issuers and unlicensed secondary sellers must be members of the AFCA scheme. The AFCA scheme is defined to mean the external dispute resolution scheme for which authorisation under Pt 7.10A is in

force.[42] Pursuant to s 1050 of the *Corporations Act 2001* (Cth), the Minister has approved the AFCA as the AFCA scheme.

Under s 47 of the *National Consumer Credit Protection Act 2009* (Cth), a credit licensee must be a member of the AFCA scheme. Further, a credit representative, who is authorised by a registered person or credit licensee, must be a member of the AFCA scheme in accordance with ss 64 and 65 of the *National Consumer Credit Protection Act 2009* (Cth).

Before 1 November 2018, instead of AFCA, there were two ASIC approved EDR schemes: the Financial Ombudsman Service (FOS) and the Credit Ombudsman Service Limited (COSL).[43] Effectively, those two schemes, and the Superannuation Complaints Tribunal, merged to form AFCA.

ASIC has summarised the broad purpose of EDR schemes as follows:

> These schemes provide:
>
> (a) a forum for consumers and investors to resolve complaints or disputes that is quicker and cheaper than the formal legal system; and
>
> (b) an opportunity to improve industry standards of conduct and to improve relations between industry participants and consumers.[44]

In essence, AFCA has financial services and credit licensees as its members and it seeks to resolve disputes between those members and their customers.

The AFCA Rules set out the purpose of the EDR scheme as follows:

> A.1.1 AFCA is an external complaint resolution scheme established to resolve complaints by Complainants about Financial Firms. AFCA is operated by an independent not-for-profit company that has been authorised to do so by the responsible Minister under the Corporations Act.
>
> A.1.2 These rules form part of a contract between AFCA and Financial Firms and Complainants. AFCA may develop Operational Guidelines setting out how AFCA interprets and applies these rules.
>
> A.1.3 AFCA's complaint resolution scheme is free of charge for Complainants. Complainants do not generally need legal or other paid representation to submit or pursue a complaint through AFCA.
>
> A.1.4 A person is not obliged to use the AFCA complaint resolution scheme to pursue a complaint against a Financial Firm and instead may institute court proceedings or use any other available dispute resolution forum. A Complainant who submits a complaint to AFCA may withdraw their complaint at any time.
>
> A.1.5 These rules apply to complaints submitted to AFCA from 1 November 2018, and complaints treated as being submitted to AFCA under rule B.4.5.1.[45]

The Guiding Principles of AFCA are also set out in the AFCA Rules:

> A.2.1 AFCA will:
>
> (a) promote awareness of the scheme, including by undertaking outreach to vulnerable and disadvantaged communities;
>
> (b) make the scheme appropriately accessible to a person dissatisfied with a Financial Firm's response to their complaint including by:
>
> (i) providing a range of ways by which to submit a complaint,

(ii) helping Complainants submit a complaint, and

(iii) using translation services and providing information in alternative formats, as appropriate;

(c) consider complaints submitted to it in a way that is:

(i) independent, impartial, fair,

(ii) in a manner which provides procedural fairness to the parties,

(iii) efficient, effective, timely, and

(iv) cooperative, with the minimum of formality;

(d) support consistency of decision-making, subject to its obligations both under section 1055 of the Corporations Act and to do what is fair in all the circumstances;

(e) have appropriate expertise and resources to consider complaints submitted to it;

(f) be as transparent as possible, whilst also acting in accordance with its confidentiality, privacy and secrecy obligations;

(g) support regulators of Financial Firms by:

(i) reporting matters to them in accordance with the Corporations Act, the Privacy Act and any other relevant legislation, and

(ii) complying with any ASIC regulatory requirements and directions;

(h) account for its operations by publishing Determinations and information about complaints and reporting systemic issues;

(i) consult regularly with AFCA's stakeholders; and

(j) promote continuous improvement of its service, including by commissioning regular independent reviews of its complaint handling operations and meet the benchmarks for Industry-Based Customer Dispute Resolution.[46]

The AFCA Rules form part of the tripartite contractual relationship between the complainant, the financial firm and AFCA and contain the powers of the EDR schemes, including the power to make binding decisions.

The specific provision identifying the existence of the tripartite contract confirms the position established through a number of cases which considered the terms of reference of FOS (or predecessor schemes which merged to form FOS).

In *Masu Financial Services P/L v FICS and Julie Wong (No 2)*[47] (*Masu*), Shaw J considered whether the Financial Industry Complaints Scheme (FICS) (a predecessor scheme to FOS) was bound by the established principles of procedural fairness or natural justice.

Leaving aside the issue of judicial review, Shaw J found that FICS was contractually bound to provide procedural fairness to the plaintiff, who was a member of the dispute resolution scheme. His Honour found that a contract arose from the operation of the Rules and, in so doing, relied upon the fact that one of the objects of FICS was 'to create or modify procedures for resolving complaints concerning members to be known as rules, which shall be a contract between a member and a company'.[48]

His Honour also found, consistent with a submission by counsel for FICS, that:

> the effect of the cases to which I have referred is: that this court may review a decision of FICS on the basis of jurisdictional error, including, in some circumstances, breach of the principles of procedural fairness …[49]

Subsequently, in *Financial Industry Complaints Scheme v Deakin Financial Service Pty Ltd*[50] Finkelstein J held that a contract was formed between the member and the EDR scheme on the basis of the offer by the member (comprising the completion of the application form and payment of the necessary fee) and acceptance by the EDR scheme (comprising the acceptance of the application and the entry into the register of members).[51]

In *Mickovski v Financial Ombudsman Service Ltd and Another*[52] (*Mickovski*), the Victorian Court of Appeal firstly considered whether FOS was subject to judicial review in accordance with what was referred to as the '*Datafin* principle'.[53] After referring to the principle as 'appealing', the Court decided not to make a decision as to whether *Datafin* applies in Australia. Instead, the Court held that the parties to the dispute, in submitting their dispute to FOS, became bound to comply with the rules of the process and entitled, as a matter of contract, to have FOS proceed in accordance with the rules.

Effectively, the Court held that there was a tripartite contract formed involving FOS and the two disputants. It found that the consideration provided by the applicant was his submission to the processes of FOS and the consideration from FOS and the firm was their promise to deal with the matter in accordance with the terms of reference and to be bound by the outcome.

This was a significant decision in that, while members of FOS were, by virtue of the clause in the FOS Constitution, expressly bound by contract, the applicant in the process was not at any stage expressly so bound.[54]

In the more recent case of *Wealthsure v Financial Ombudsman Service Ltd and Box*[55] Gilmour J, referring to *Mickovski*, proceeded on the basis that FOS and the relevant firm in that case were in a contractual relationship and, in so doing, made reference to *Mickovski*.

Clearly from *Mickovski* the parties have the right to have the dispute dealt with in accordance with the rules of the process. In that case the Court found that review would be available if 'it is otherwise apparent that the determination has not been carried out in accordance with the agreement'.[56]

In any event, the issue is put beyond doubt with the AFCA Rules making it clear that the Rules form part of a contract between the parties to the disputes and AFCA[57] and that AFCA is bound to apply the principles of procedural fairness (natural justice).[58]

Another important aspect of EDR schemes is the manner in which the schemes fulfil their contractual obligations. The AFCA Operational Guidelines make it clear that AFCA operates in an inquisitorial manner.[59]

The foregoing gives rise a question in respect of the effect of a breach of the contract between AFCA and its member. In *Chapmans Ltd v Australian Stock Exchange Ltd*[60] the Full Court of the Federal Court considered the consequences of the Australian Stock Exchange (ASX) not complying with the terms of the Listing Rules in the course of removing the name of a company from its list.

The Court found in that case that the specific Listing Rule that was breached constituted a term of the contract between the ASX and the company. As appropriate notice of the potential removal by the ASX was not provided in accordance with the particular rule, the decision to remove the company was void.

Applied to ASIC approved EDR schemes, this suggests that failure to comply with the Rules or terms of reference in reaching a final decision might mean that any final determination is void and therefore not binding on the member firm.

This is broadly consistent with the approach adopted by Shaw J in *Masu*.[61] In that case, his Honour held that the plaintiff (a member of the relevant EDR scheme) had 'a sufficient number of valid criticisms of the tribunal's decision and its reasoning process to warrant a declaration that both decisions are of no force or effect'.[62] In addition, though, Shaw J ordered that the matter be remitted to a differently constituted panel of FICS for redetermination.[63]

This is also consistent with the decision in *Mickovski*, in which the Court suggested that a determination will not be final and so subject to review if the determination is not carried out in accordance with the contract, akin to jurisdictional error.

From the foregoing analysis, it is clear that AFCA:

(a) is inquisitorial in nature (in the same or similar manner as merits review tribunals);
(b) is contractually bound to determine disputes in accordance with the Rules and, in particular, with the principles of procedural fairness; and
(c) may have its determinations declared void in the event that they are not developed in accordance with the Rules.

The application of the principles to AFCA

To determine the ultimate question as to whether AFCA is subject to a duty to inquire, it is necessary to consider the operation of the general principles in the context of the operation of AFCA as a dispute resolution scheme. To revisit, the general principles developed in the first section of this article were as follows:

(1) The particular merits review tribunals which have been the subject of consideration in the cases exploring a possible duty to inquire are inquisitorial in nature.
(2) The mere fact of being inquisitorial in nature does not give rise to a broad duty to inquire.
(3) Merits review tribunals are not subject to a broad duty to inquire.
(4) Inquisitorial tribunals are subject to an obligation to make an obvious inquiry about a critical fact, the existence of which is easily ascertained (the *Prasad* principle).
(5) A failure to make obvious inquiries about a critical fact may give rise to a jurisdictional error either in failing to undertake the review or in making a decision so unreasonable that no reasonable decision-maker would make the decision.

Those general principles can then be applied to the circumstances of AFCA as set out in the previous section to determine whether AFCA is subject to a general 'duty to inquire.'

First, AFCA is inquisitorial in nature,[64] in the same or similar manner as merits review tribunals. However, it is clear from the general principles in the first section of the article that this does not itself give rise to a general duty to inquire.

However, it is equally clear that an inquisitorial body which does not make obvious inquiries about a critical fact may commit a jurisdictional error either in failing to undertake the review or in making a decision so unreasonable that no reasonable decision-maker would make the decision.[65]

AFCA is subject to review for jurisdictional error (either contractually or as a result of *Masu*). It therefore follows that, as an inquisitorial body subject to jurisdictional review, if AFCA fails to make obvious inquiries about a critical fact, it may be the subject of review in the same manner as merit review tribunals.

In short, merits review tribunals are bound to make obvious inquiries about a critical fact, the existence of which is easily ascertained, because, if they do not do so, they may have committed a jurisdictional error either in not exercising their jurisdiction or in making a decision so unreasonable that no reasonable decision-maker would have made it (see above). Given that AFCA is an inquisitorial body that is also subject to review for jurisdictional error, the same requirement applies to those schemes.

Therefore, in the course of determining disputes, while decision-makers within AFCA are not subject to a broad, general duty to inquire, they must make obvious inquiries about a critical fact, the existence of which is easily ascertained.

Endnotes

1 (1985) 6 FCR 155.
2 Mark Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Monash University Law Review* 230, 231.
3 (2009) 259 ALR 429.
4 Ibid 436.
5 (2011) 241 CLR 594.
6 Ibid [23].
7 (1985) 6 FCR 155.
8 Ibid [33].
9 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
10 (1995) 183 CLR 273.
11 (1985) 6 FCR 155.
12 (2005) 225 CLR 88.
13 Ibid [26].
14 [2007] FCA 1318.
15 Ibid [66].
16 (2009) 259 ALR 429, [25].
17 Ibid [19].
18 (2009) FCA 1247.
19 Ibid [67] (emphasis added).
20 [2011] FCAFC 44.
21 Ibid [20].
22 (1995) 183 CLR 273.
23 Ibid [33].
24 (2009) 259 ALR 429, [24].
25 (2009) FCA 1247.
26 Ibid [16].
27 *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J).
28 (2006) 228 CLR 152.
29 This point was also made by the High Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.
30 (2009) 259 ALR 429, [25] (emphasis added).
31 Rebecca Tenille Heath and Anna Johnson, 'Casenote — *Minister for Immigration and Citizenship v SZIAI*' (2010) 17 *Australian Journal of Administrative Law* 66.
32 Ibid 69.
33 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, Australia, 5th ed, 2013), [8.130].
34 Ibid.

[35] (2003) HCA 60.
[36] Ibid [57].
[37] (2006) 228 CLR 152.
[38] Ibid [40].
[39] (2009) 259 ALR 429, [18].
[40] Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings', (2011) 33 *Sydney Law Review* 177.
[41] Matthew Alderton, Michael Granziera and Martin Smith, 'Judicial Review and Jurisdictional Errors: The Recent Migration Jurisprudence of the High Court of Australia' (2011) 18 *Australian Journal of Administrative Law* 138, 149.
[42] *Corporations Act 2001* (Cth) s 761A.
[43] ASIC Class Order 10/249.
[44] ASIC Regulatory Guide 139, 139.35.
[45] Australian Financial Complaints Authority Rule A1.
[46] Australian Financial Complaints Authority Rule A2.
[47] [2004] NSWSC 829.
[48] Ibid [10].
[49] Ibid [8].
[50] [2006] FCA 1805.
[51] Ibid [43].
[52] [2012] VSCA 185.
[53] The Court was referring to the principle from *R v Panel on Take-overs & Mergers; Ex parte Datafin plc* [1987] QB 815.
[54] Prior to *Mickovski*, it had been assumed that there was no contractual relationship between the scheme operator and the consumer so that the consumer had no contractual right of challenge: Ken Adams, 'Judicial Review of Claims Review Panel Decisions' (1997) 8 *Insurance Law Journal* 105; Paul O'Shea, 'Underneath the Radar: The Largely Unnoticed Phenomenon of Industry Based Consumer Dispute Resolution Schemes in Australia' (2004) 15 *Australasian Dispute Resolution Journal* 156.
[55] [2013] FCA 292.
[56] [2012] VSCA 185, [41].
[57] Australian Financial Complaints Authority Rule A1.2.
[58] Australian Financial Complaints Authority Rule A2.1(c)(ii).
[59] Australian Financial Complaints Authority Operational Guidelines 9.1.
[60] (1996) 67 FCR 402.
[61] [2004] NSWSC 829.
[62] Ibid [22].
[63] Ibid [28].
[64] Australian Financial Complaints Authority Operational Guidelines 9.1.
[65] *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429.