'It's not Fair!': The Duty of Fairness and the Corporate Regulator

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Abstract

The duty of fairness imposed on the Australian Securities and Investments Commission (ASIC) was scrutinised in the decisions of the New South Wales Court of Appeal and the High Court in the long-running litigation arising from the James Hardie corporate scandal. The different ways the duty was interpreted by these courts raises serious issues about its nature and extent. This article will explore the origins and purpose of the duty of fairness in order to better understand its impact on ASIC and other government litigants. It draws on both theoretical and judicial understandings of fairness in order to propose criteria that can be used to guide analysis of the demands of fairness in particular cases.

I Introduction

The James Hardie Industries Ltd ('James Hardie') corporate restructure, subsequent inquiries and litigation shook the ground under the feet of many directors, beyond those directly involved. But interest was not limited to those whose personal obligations took on a somewhat different hue in the wake of the court cases. It became a topic of broader interest, as the wider public engaged with the idea that a parent company may not have legal liability for the harmful acts of its subsidiaries. This interest was echoed in the voluminous academic writings that analysed the events from many angles[1] and in the multiple government inquiries that it spawned.[2] In the more recent throes of the litigation, another issue emerged

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[1] See, eg, Suzanne Le Mire, 'The Case Study: James Hardie and Its Implications for the Teaching of Ethics' in Bronwyn Naylor and Ross Hyams (eds), *Innovation in Clinical Legal Education: Educating Lawyers for the Future* (Legal Service Bulletin Cooperative Ltd, 2007); Edwina Dunn, 'Cases and Comments, James Hardie: No Soul to be Damned and No Body to Be Kicked' (2005) 27(2) *Sydney Law Review* 399; Brendan T O'Connell and Laurie Webb, 'Asbestos Victims versus Corporate Power: The Case of James Hardie Industries' (2007) (Paper presented at the AFAANZ Conference, Wellington, New Zealand, 2–4 July 2006); Peta Spender, 'James Hardie and Corporate Law' (2005) 14(2) *Griffith Law Review* 280; H J Glasbeek, 'Contortions of Corporate Law: James Hardie Reveals Cracks in Liberal Law's Armour' (2012) 27(2) *Australian Journal of Corporate Law* 132.

[2] New South Wales, Special Commission of Inquiry into the Medical Research and Compensation Foundation, *Report* (2004); Corporations and Markets Advisory Committee (CAMAC), *The Social Responsibility of Corporations* (2006); Parliamentary Joint Committee on Corporations and

that warrants close examination and has significant implications: that is, judicial views about the nature and extent of the Australian Securities and Investments Commission's (ASIC) duty of fairness in pursuing breaches of the *Corporations Act 2001* (Cth) (*Corporations Act*). This has significant implications for the future regulation of corporations, directors and officers, and, more broadly, for government lawyers as they consider or pursue litigation.

Government litigants have long been said to have a 'duty of fairness' in the conduct of litigation.[3] However, the extent of this obligation, and the significance of a breach, does not appear to be settled. In 2010, the NSW Court of Appeal decision in *Morley v ASIC* overturned the findings against the directors of James Hardie on the basis that ASIC had failed to comply properly with its 'duty of fairness'.[4] The crux of this decision was that ASIC had failed to call a particular witness. This decision was ultimately overturned by the High Court in *ASIC v Hellicar* and the findings against the directors were reinstated.[5] The fact that these two superior courts could come to such diverse conclusions about the nature and effect of the duty is problematic. The duty of fairness has been recognised for government litigants since 1912.[6] Model Litigant Rules, which expand on the nature of the duty, have been in place at Commonwealth level since 1999, and are now in their second iteration.[7] ASIC itself has been part of the legal landscape for more than 20 years.[8] It is given primary responsibility as the corporate regulator, or 'corporate watchdog', under the *Corporations Act*.[9] Given that the institution and the rules have been in place for so long, how can it be that the duty of fairness and ASIC's obligations in litigation are not well understood? As Spender has explained, the High Court has 'left us wondering'.[10]

Litigation against corporations and their officeholders can be complex and resource-intensive. It is also in the public interest that such litigation is pursued and illegal conduct sanctioned. The James Hardie litigation was no exception. This article explores the 'technical' argument that undid the findings against James Hardie directors and officers in the NSW Court of Appeal. Fairness, found by that

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Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006).

3 See, eg, *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 ('*Moorehead*').

4 *Morley v Australian Securities and Investments Commission (ASIC)* (2010) 274 ALR 205 ('*Morley*').

5 *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 247 CLR 345 ('*Hellicar*'). The related case of *Shafron v Australian Securities and Investments Commission (ASIC)* (2012) 247 CLR 465, involving James Hardie's general counsel and company secretary, was heard and determined simultaneously.

6 See, eg, *Moorehead* (1912) 15 CLR 333, 342.

7 The *Legal Services Directions 1999* (Cth) commenced on 1 September 1999. The *Legal Services Directions 2005* (Cth) ('*Legal Services Directions*') commenced operation on 1 March 2006. The directions are made under the *Judiciary Act 1903* (Cth) s 55ZF ('*Judiciary Act*').

8 ASIC was created by the *Australian Securities and Investments Commission Act 1989* (Cth). ASIC's 20-year anniversary was in 2011. Prior to its inception, the role of the regulator was given to the National Companies and Securities Commission, and the state and territory corporate affairs offices.

9 *Corporations Act* s 5B; *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2) ('*ASIC Act*').

10 Peta Spender, 'Wavering Alternations of Valour and Caution: Commercial and Regulatory Litigation in the French CJ High Court' (2013) 2 *Journal of Civil Litigation and Practice* 111, 122.

Court to be so critical, is examined by returning to first principles and identifying justice and equality as its components. However, this duty cannot be examined in isolation. In the case of ASIC, its powers and duties are extensive and shaped by the legislative framework largely contained in the *Corporations Act* and the *Australian Securities and Investments Commission Act 1989* (Cth). One aspect of this framework creates the civil penalty regime and, as part of that, a barrier to any interpretations of the duty of fairness that incorporate elements that properly appear in the criminal context.[11] Within this limit, the duty of fairness is flexible enough to respond to the demands of justice and equality as assessed by the court in a particular case. Such assessments should respond to real disadvantage and real threats to the delivery of justice. To do more or less is to undermine the system in ways that disadvantage us all.

Part II of the article will explain the analysis of the duty of fairness in the James Hardie cases. In Part III, the concept of fairness is examined and a theoretical model of fairness is proposed. The way that the duty is interpreted in the context of government litigation is considered in Part IV and this is compared with the theoretical model. Part V of the article scrutinises the legal framework for Commonwealth government lawyers and ASIC itself. It considers whether fairness, in its theoretical and judicial conceptions, fits with that framework and the regulatory goals that underlie corporate regulation. Part VI concludes the article.

II James Hardie and the Duty of Fairness

ASIC chose to pursue James Hardie, and its directors and officers, for breaches of the *Corporations Act* arising from an announcement that was alleged to be false and misleading. In contending that the directors had approved false and misleading announcements, it was necessary for ASIC to establish, in part, that the announcement had been approved by the board. In order to do this, ASIC relied on evidence of the minutes of the meeting stating that the announcement had been considered and approved. ASIC also relied on evidence from various persons involved in the preparation of the announcement, and that of a Mr Baxter, whose evidence that he would have taken the announcement to the meeting in accordance with normal practice was ultimately accepted.[12] There was no evidence from the directors, or anyone else present at the meeting, that the announcement had been approved, or even that they recalled the announcement.[13] However, it was uncontested that the directors, at the subsequent meeting in April 2004, had approved minutes stating that the announcement had been approved.

Mr Robb, a lawyer from Allens Arthur Robinson (as it was then known), was the witness whose absence at trial was found to be critical, and the failure to call him a breach of the duty of fairness. Mr Robb had prepared the minutes in advance, attended the meeting, and settled the minutes after the meeting.[14]

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11 See, eg, *Corporations Act* s 1317L.

12 *ASIC v MacDonald (No 11)* (2009) 256 ALR 199, 241. Mr Baxter was senior vice president, Corporate Affairs within James Hardie.

13 Ibid 239–40.

14 Ibid 379.

A *The NSW Court of Appeal Judgment*

The NSW Court of Appeal in *Morley* found that ASIC, as a 'government agency … owes an obligation of fairness'.[15] This obligation is a flexible one that is 'continually adapted to new and changing circumstances'.[16] In the context of actions for breaching civil penalty provisions the obligation is not drawn from the duties of a prosecutor, where it is well accepted that there is an obligation to call material witnesses.[17] As the James Hardie matter was a civil one, such obligations do not apply.[18] However, the Court reasoned that in this case ASIC was no 'ordinary civil litigant'[19] and that the Court must direct its attention to the content of the duty in light of the 'intermediate' position occupied by civil penalty provisions.[20] In such a context, the content of the obligation must be informed by an understanding of the 'attributes of a fair trial'.[21] The demand for a fair trial led the Court to conclude that

> [a] body in the position of ASIC, owing the obligation of fairness to which it was subject, was obliged to call a witness of such central significance to critical issues that had arisen in the proceedings … if only with a view to showing (if it were the case) that he could not in fact recall anything on the factual issues and for cross examination by the appellants, a witness of such potential importance.[22]

The Court clearly contemplated the possibility that the witness could not add anything of moment to the account of the meeting, but nonetheless found the failure to call him was problematic. It was held that the failure of ASIC to call Mr Robb was a breach of its obligation of fairness.

On finding that the obligation of fairness had been breached, the next question for the Court was the effect of this failure on the outcome of the case. This was resolved by a consideration of the 'cogency' of ASIC's proof regarding the passing of the resolution approving the announcement in view of the fact that Mr Robb was not called.[23] The Court treated the minutes as creating an inference that the announcement was considered at the meeting, rather than as evidence of that fact in itself. Such an inference was capable of being confirmed or refuted by witnesses present at the meeting. The failure to call such a witness, and the late notice of the fact he was not going to be called, was unfair to the appellants and undermined the evidence suggesting that the announcement had been approved at the meeting. The Court noted that while

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15 *Morley* (2010) 274 ALR 205, 333 [702]. In its judgment, the NSW Court of Appeal refers to an 'obligation' of fairness. By contrast the High Court refers to a 'duty' of fairness. As far as is possible I have followed the terminology of the High Court.

16 Ibid 334 [707], 335 [714].

17 Ibid 329 [679].

18 Ibid 331 [689]. The courts are instructed to apply the 'rules of evidence and procedure for civil matters' when hearing proceedings for civil penalty provisions and pecuniary penalty orders: *Corporations Act* s 1317L.

19 *Morley* (2010) 274 ALR 205 [728].

20 Ibid 332 [694]–[696].

21 Ibid 335 [714].

22 Ibid 347 [775].

23 Ibid 350 [794].

> [t]here was some basis for finding that the draft ASX announcement resolution had been passed … [h]aving regard in particular to the failure to call Mr Robb, with consequences for the cogency of ASIC's case, we do not think ASIC discharged its burden of proof.[24]

As a consequence the Court allowed the appeal.

The NSW Court of Appeal analysed fairness in a way that elevates process over outcome. The fact that the Court concluded that the witness was unlikely to change the outcome does not derogate from the importance of ensuring the process is fair. It also relied on the common law conceptions of prosecutorial fairness in the context of criminal trials and notions of the vulnerability of the individual to the might of the state.[25] The Court presented a broad brush analysis untrammelled by an analysis of the specific context of ASIC and the civil penalty regime, or even federal legislation.

B *The High Court Judgments*

On appeal, the majority of the High Court in *Hellicar* (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) took issue with the reasoning of the NSW Court of Appeal on a number of levels.[26] They disagreed with the Court of Appeal's reasoning about the content of that duty and the effect of a failure to meet the requirements imposed by the duty.[27] The majority did accept, for the purposes of the argument at least, that ASIC was subject to a duty of fairness.[28] They noted for the purpose of this particular case that it was 'neither necessary nor desirable to explore the issues about source and content of the asserted duty in any detail'.[29] This suggests that the comments they do make about the duty are obiter dicta.[30]

The High Court's decision not to explore the nature of ASIC's duty further is an interesting one. It may be that they were disinclined to propound definitively on the duty of fairness applicable to ASIC due to the contextual nature of fairness. As Heydon J noted in his separate but concurring judgment, '[q]uestions of fairness do not operate in the abstract, but by reference only to what is fair in a particular case'.[31] Perhaps the High Court's reluctance stemmed from a concern that their decision could be applied more generally than was intended. Having said that, much of the High Court's reasoning is both compelling and consistent with well-established principles. The Court noted that the nature of any duty of fairness imposed on ASIC is a question that involves consideration of the legal framework within which ASIC operates.

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24 *Morley* (2010) 274 ALR 205, 350 [796] quoted by the High Court in *Hellicar* (2012) 247 CLR 345, 372–3 [35].

25 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) 407.

26 Heydon J also disagreed with the NSW Court of Appeal, but delivered a separate judgment.

27 *Hellicar* (2012) 247 CLR 345, 408 [153]–[155].

28 Ibid 407 [152].

29 Ibid 406 [148].

30 To which we are bound to give the 'very greatest respect and attention': *Eslea Holdings Ltd (formerly Ipec Holdings Ltd) v Butts* (1986) 6 NSWLR 175, 186; *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 made an even stronger case for following the High Court's obiter dicta.

31 *Hellicar* (2012) 247 CLR 345, 439 [148].

The status of ASIC is that it is the Commonwealth.[32] This has several implications when considering the duty of fairness. For example, the extent to which the law might impose a duty will depend in part on the source of the duty. If the duty flows from state or territory legislation (which appears unlikely) or common law, its application is regulated by the provisions of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). In particular the Court noted that ss 79 and 80 of the *Judiciary Act* would need to be considered. It also referred briefly to arguments made by the appellant that s 64 of that Act prevents a duty being imposed on ASIC as the section requires that in 'any suit to which the Commonwealth … is a party, the rights of the parties shall be as nearly as possible the same … as in a suit between subject and subject'.[33] The content and nature of the duty could also be affected by the provisions of the *ASIC Act* and the *Corporations Act*.[34] Whether and how these contextual matters might shape ASIC's obligations is alluded to, rather than analysed, by the Court. The balance of the judgment assumes, without deciding, that the duty applies.[35]

On the assumption that the duty applies, the High Court found that, even if there was unfairness, the appropriate remedy was not to discount the evidence that was led in support of ASIC's case.[36] The Court noted that the

> remedy for the breach of the duty would lie in concluding that the primary judge could prevent such unfairness by directing ASIC to call the witness or staying proceedings until ASIC agreed to do so or, if the trial went to verdict, in concluding that the appellate court should consider whether there was a miscarriage of justice that necessitated a retrial.[37]

By applying some indeterminate discount to the evidence led by ASIC, the NSW Court of Appeal had effectively punished the regulator, and undermined the public interest.[38] The High Court concluded that such an approach lacked satisfactory foundation or certainty. The appropriate consequence of failing to call a witness in a criminal context was that the matter be either remedied by the trial judge directing ASIC to call the witness,[39] or, if that moment had been missed, considered in an evaluation as to whether there had been a miscarriage of justice.[40] Not only had rules more appropriate in a criminal context been applied, but also the consequence of the failure was more drastic than that which would have applied in the criminal context.

Further, the High Court was satisfied that the failure to call Mr Robb did not lead to any unfairness in the James Hardie case.[41] The Court reasoned that the only advantage for the respondents that might emerge had Mr Robb been called was if he

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32 *Hellicar* (2012) 247 CLR 345, 406–7 [149]; see also *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 580–81 [39]–[40].
33 *Judiciary Act* s 64; see also *Hellicar* (2012) 247 CLR 345, 407 [150].
34 *Hellicar* (2012) 247 CLR 345, 406–7 [149].
35 Ibid 407 [152].
36 Ibid 406 [147].
37 Ibid 408 [155].
38 Ibid 409 [155].
39 Ibid 408 [155].
40 Ibid.
41 Ibid 406 [148].

recalled that there was no announcement tabled or approved. However, this outcome was extremely unlikely, as he drafted the minutes before the meeting, settled the minutes after the meeting, and rendered a bill for doing so. This meant that, in effect, what was being posited was that he would reveal that the minutes were false. As Heydon J noted, with apparent incredulity, in the proceedings before the High Court, '[h]e would be cross-examined to say that, "The minutes which I supervised the preparation of and settling of do not constitute an accurate record of the meeting"?'.[42] This possibility was, according to Heydon J, 'inherently very unlikely'.[43]

Heydon J also reflected adversely on the 'largely unsolicited bounty' that the NSW Court of Appeal had conferred on the directors.[44] Describing the lower Court's reasoning as 'avowedly novel',[45] he considered its three main arguments in turn. First, Heydon J found that the model litigant obligations applied to ASIC but did not give rise to an obligation to call a material witness. The 'procedural rules are not modified against model litigants — they apply uniformly'.[46] Second, he disputed the Court of Appeal's conclusion that the need to secure a fair trial required the witness to be called and, in the absence of that, the evidence to be discounted.[47] Third, he turned to the aspect of the Court of Appeal's reasoning that suggested that ASIC has a special obligation, which flows from its extensive powers, to call witnesses. Heydon J pointed out that imposing special obligations in this way is to 'undermine the legislative regime requiring the civil proceedings as the mode of trial for civil penalties'.[48]

Having disposed of the Court of Appeal's reasoning, Heydon J proceeded to put forward several reasons why that Court's conception of the duty of fairness is problematic. The judgment considers the circumstances that led to Mr Robb's non-appearance and determines that no blame could be attached to ASIC, and no opportunity was provided for ASIC to adjust to the 'new rule' as the respondents had not made submissions consistent with the Court of Appeal's reasoning.[49] Heydon J's final point on the duty of fairness was to explain the improbability that Mr Robb would have contributed anything that would assist the respondents.[50]

In contrast to the approach taken by the Court of Appeal, the High Court recommended — though the majority does not undertake — a contextual analysis of the duty of fairness. It also appeared to prioritise outcome over process, by noting that even if the witness had been called, no difference in outcome was likely. However, the judgment leaves several live questions. While the High Court conceded that ASIC may well be subject to some form of duty of fairness, the foundation, nature and extent of the duty are not elucidated. Heydon J's singular judgment is more expansive and helpful but, obviously, of limited weight. This

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42 *Australian Securities and Investments Commission (ASIC) v Hellicar* [2011] HCATrans 293 (25 October 2011).
43 *Hellicar* (2012) 247 CLR 345, 440 [249].
44 Ibid 433 [236].
45 Ibid 434 [237].
46 Ibid 435 [240].
47 Ibid 435–6 [241].
48 Ibid 437 [243].
49 Ibid 439 [247].
50 Ibid 440 [249].

leaves a degree of uncertainty over ASIC proceedings, which is problematic. The next part of this article will attempt to fill that gap by considering the concept of fairness from theoretical and judicial perspectives.

III Fairness in Theory

The concept of fairness is a difficult one. Lord Justice Lawton noted that trying to define fairness was '[l]ike defining an elephant, it is not easy to do'.[51] Though he, less helpfully, goes on to reflect that 'fairness in practice has the elephantine quality of being easy to recognise'.[52] On the contrary, defining or recognising fairness is not always straightforward, as the James Hardie litigation indicates. In fact, '[a]nalysts often use words like fairness without defining them'.[53] It may be that it is easy to recognise both fairness and unfairness at their extremes. However, the point where the line between the two is drawn is, perhaps unsurprisingly, more difficult.

Zajac states, '[e]xcept for professional moral philosophers, few persons give much thought to what is fair. But they know when they have been treated unfairly'.[54] This suggests that fairness is more easily understood in its absence. This has certainly been the case in the judicial approach to unfairness, where it attracts comment only when there is a perceived deficit, and the most compelling expositions of the duty occur when a court finds it has been breached.[55] Nonetheless, it is worth considering what fairness is in order to try to understand what such a duty might be trying to achieve.

The other factor that contributes to the difficulties associated with fairness is its flexibility. Raphael argues that fairness is inherently flexible:

> Justice sets out rigid rules and can be qualified by equity. Equity is not rigid: it is, as Aristotle said, malleable like lead and can be adjusted to special circumstances. The relationship between justice and fairness in moral discourse is not so clear-cut, but there is a hint of the notion that justice is bound by a regard for firm rules while fairness has more of a free rein.[56]

This suggests fairness may well require different things in different contexts. Consideration of the history of the litigious process provides a useful illustration.[57] Modern understandings of a fair process for a criminal matter would be decidedly at odds with standard processes adopted in earlier times. For example, prior to its abolition in 1215, trial by ordeal incorporated a 'physical test "fraught with danger" the outcome of which would reveal God's judgment'.[58] In later versions of

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51 *Maxwell v Department of Trade and Industry* [1974] QB 523, 539.

52 Ibid.

53 Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press, 2002) 45.

54 Edward J Zajac, *Political Economy of Fairness* (MIT Publishing, 1995) 117.

55 See, eg, *Scott v Handley* (1999) 58 ALD 373.

56 D D Raphael, *Concepts of Justice* (Oxford University Press, 2001) 237.

57 See, eg, Franck's use of changing ideas about the fairness of slavery to illustrate fairness as a product of 'social context and history': Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995) 14.

58 Anthony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial: Volume 3* (Hart Publishing, 2007) 23 (citations omitted).

the trial, the accused was not permitted to know the charge in advance as their reaction to its revelation was seen as highly probative of their guilt or innocence.[59] This suggests that fairness is contextual; that is, determined by its 'social context and history'.[60]

A further aspect of this is that fairness may vary according to the type of matter under consideration. The expectations of fairness, for example, in a criminal trial are rightly more rigorous than those afforded the defendant in a civil trial.[61] Within the civil realm, where a matter falls within the jurisdiction of the 'minor civil claims' court, a process that limits legal representation and adopts short form pleadings is seen as fair.[62] The courts have also found that the requirements of fairness are higher for judicial or quasi-judicial decision-making as opposed to administrative decision-making.[63] This seems to reflect a cost-benefit analysis. Where the stakes are higher, the costs of unfairness are greater and this leads to a more conservative definition of fairness.

The benefit of flexibility is that fairness can be adapted to particular contexts and provide appropriate responses. However, this flexibility is not without difficulty. In the context of procedural fairness, Aronson and Groves have argued that 'the less able the courts are to express … how they balance issues to decide what fairness requires, the more one might suspect that something is concealed'.[64] This lack of clarity and the consequent unpredictability weakens the potential for the duty of fairness to shape the behaviour of government litigants. As Franck explains, '[i]ndeterminate normative standards make it harder to know what conformity is expected, which in turn makes it easier to justify non-compliance'.[65] Litigants, upon whom the duty rests, are less likely to modify their behaviour in accordance with the duty as they will be uncertain as to its content. Further, judges will be battling this lack of clarity when they are called on to make difficult decisions about the duty in the course of litigation. In part, the Model Litigant Rules can be seen as addressing the uncertainty by providing further guidance about the duty of fairness as imposed upon those who represent government in litigation.[66] However, useful as these are, as explained in Part V below, they do not provide a comprehensive response to the problems posed by fairness requirements.

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59 Ibid 32.

60 Franck, above n 57, 14.

61 For example, the requirements of disclosure and prosecutorial fairness.

62 *Magistrates Court (Civil) Rules 2013* (SA) rr 13(4), 24.

63 David J Mullan, 'Fairness: The New Natural Justice' (1975) 25 *University of Toronto Law Journal* 281, 283; see also Aronson and Groves, above n 25, 509.

64 Aronson and Groves, above n 25, 492.

65 Franck, above n 57, 31.

66 The Model Litigant Rules were implemented following a review of Attorney-General's Department in 1997. The Review recommended that legal services be restructured to allow greater referral to, and competition with, the private sector. The *Legal Services Directions*, incorporating the Model Litigant Rules, were intended to ensure, despite this recommendation, that government legal services supplied by a range of providers 'are consistent and coordinated, that they promote the interests of the whole of government and that public interest considerations are met, including that persons are treated fairly': Basil Logan, David Wicks QC and Stephen Skehill, *Report of the Review of the Attorney-General's Legal Practice* (March 1997) 205.

Yablon considered fairness in relation to fiduciary duty litigation in the United States. He stated:

> whether a price in fiduciary duty litigation is fair is a difficult question in much the same way that it is a difficult question whether a man whose height is 5 feet 10 1/2 inches is tall or a temperature of seventy-eight degrees Fahrenheit in June is hot. In all of these cases, the problem is not lack of information about the thing to be evaluated (we know exactly what the price, height or temperature is). Rather, it is the nature of the criteria we are using to evaluate the thing which leads to the uncertainty in the evaluation. Since those criteria are not crisply defined, but fuzzy, we may find it difficult to give a simple yes or no answer to the question presented.[67]

In the same way, an assessment of fairness in the context of the process of a trial is difficult without an understanding of the criteria against which the process is being evaluated.

This suggests that the remedy for uncertainty about the concept of fairness is that a set of criteria be used as a guide for the identification and implementation of the duty. Such criteria should allow for adaptation to meet the requirements of particular circumstances, but also provide touchstones that promote public and judicial understanding, and greater certainty for litigants. Clear criteria can also promote recognition of the importance of fairness in litigation, and reduce the likelihood that parties to litigation opt for non-compliance.

It is also likely that when we evaluate fairness, we are dealing not with a simple binary, but instead with a continuum with fairness at one end and unfairness at the other.[68] In between the two extremes where the requirements for fairness are quite clear; there must be a zone where the requirements of fairness need further evaluation. Giles JA explains:

> A fair trial does not mean an ideal trial … It must be a question of judgment in each case whether the trial may be (in the words of Hodgson JA) 'acceptably fair'. These words do not provide a bright-line test and 'acceptably' reveals the judgment over and above the imprecision of 'fair'.[69]

In these 'hard' cases, it is likely that the characteristics of the parties and nature of the case will determine whether the case is assessed as fair or unfair. Within the 'zone' of evaluation there are two aspects of the litigation that must be considered: the process that has led to the decision, and the decision itself. Understanding the extent to which they both are relevant to an assessment of fairness is an important first step.

The process by which a decision is arrived at is relevant to an assessment of its legitimacy. In Tyler's examination of procedural justice, he argues that 'those affected by the decisions of third-parties react to the procedural justice of the

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67 Charles Yablon, 'On the Allocation of Burdens of Proof in Corporate Law: An Essay on Fairness and Fuzzy Sets' (1991) 13 *Cardozo Law Review* 497, 509.

68 See also Aronson and Groves, above n 25, 500. The authors argue in favour of an approach to procedural fairness that considers a spectrum and procedural model approach to determining the demands of procedural fairness.

69 *Commonwealth v Smith* [2007] NSWCA 168 (13 July 2007), [52] (citations omitted).

decision-making process at least as much, and often more, than they react to the decision itself'.[70] His empirical work found that litigants consider a number of aspects of the judicial process including '[t]he authorities' motivation, honesty, and ethicality; the opportunities for representation; the quality of the decisions; the opportunities for error correction; and the authorities' bias'.[71] Franck too recognises 'a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied'.[72]

I have argued above that the flexibility of fairness provides the courts with the opportunity to respond to any particular case with a nuanced approach. However, there is an inherent danger that such flexibility might transition into uncertainty unless it is guided by principle. The next section will draw on theory and judicial understanding in order to identify the criteria that can be used to evaluate fairness in any particular case.

Fairness Criteria

It is perhaps useful to begin with a basic definition of fairness. The *Australian Oxford Dictionary* defines fair as 'just, unbiased, equitable, in accordance with the rules'.[73] The *Macquarie Dictionary* states that fair means '1. free from bias, dishonesty or injustice: *a fair decision; a fair judge* 2. that is legitimately sought, pursued, done, given, etc.; proper under the rules: *a fair game; a fair stroke; a fair fight*'.[74]

Both these definitions suggest that fairness as a concept is closely related to justice. The link between these two concepts has been explicitly recognised elsewhere. As Rawls states, 'fundamental to justice is the concept of fairness which relates to right dealing between persons who are cooperating with or competing against one another'.[75] Raphael counsels that while justice and fairness are not synonyms, 'nevertheless they are very close to one another, so that it is usually possible to substitute one for the other without serious change of meaning'.[76]

While this promises a useful starting point it seems to lead us from one uncertain term, 'fairness', to another, 'justice'. The potential for circularity is also evident in the definition of justice as 'just conduct' and 'fairness'.[77] According to

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70 Ibid. See also Tom R Tyler, 'What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law and Society Review 103, 128. See also *Condon v Pompano* (2013) 295 ALR 638, 693 [209] citing *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 97 [19].

71 Tyler, above n 70, 128; see also Joel Brockner, Ariel Y Fishman, Jochen Reb, Barry Goldman, Scott Spiegel and Charlee Garden, 'Procedural Fairness, Outcome Favorability and Judgments of an Authority's Responsibility' (2007) 92(6) *Journal of Applied Psychology* 1657, 1669.

72 Franck, above n 57, 7–8.

73 *Australian Oxford Dictionary* (Oxford University Press, 2nd ed, 2004).

74 *Macquarie Dictionary* (Macquarie, 5th ed, 2009).

75 John Rawls, 'Justice as Fairness ' in B A Brody (ed), *Justice and Equality* (Prentice-Hall, 1971) 89.

76 Raphael, above n 56, 1.

77 *Australian Oxford Dictionary* (Oxford University Press, 2nd ed, 2004).

Berlin, 'some of the major languages in the world do not even have clearly distinguished words for the two. French, for example, does not have specialised terms for one without the other: "justice" has to serve both the purposes'.[78]

In the context of litigation, however, we might discern a distinction between fairness and justice. That is, we might see fairness as a mediate virtue that, when employed within the litigious process, ensures that the end result is just. This seems to fit with the NSW Court of Appeal discussion in *Morley* that considers fairness in terms of what might be required to deliver a 'fair trial'.[79] So fairness in this sense might be a precursor to justice, or a pathway that enables justice to be achieved.

If we consider, then, justice as synonymous with a just outcome, fairness should be evaluated according to whether it is capable of delivering that outcome. The concept of a just outcome is not a simple one. The litigious process has always had to balance the desire to seek justice with consideration of the costs and benefits involved in any particular search. Rules about case management, for example, operate to balance the rights of the parties to ventilate their dispute with the public interest.[80] As the High Court stated:

> The judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the public interest … What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.[81]

This suggests that the interests of the immediate parties to the action must be balanced against the interests of other litigants in the system and the public more widely. A similar approach has been taken in cases that have focused on the effect of s 56(1) of the *Civil Procedure Act 2005* (NSW) and similar provisions that place an obligation on the parties to a civil dispute to 'facilitate the just, quick and cheap resolution of the real issues' in a case.[82] In such cases, the courts have endorsed an approach that considers the interests of other parties awaiting the court's attention.[83]

While such balancing is an important aspect of the judge's role, there is another element that needs to be considered. The parties' interests do not exist in a vacuum and their adjudication has impacts beyond their personal affairs. For

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78 Isaiah Berlin cited in Amartya Sen, *The Idea of Justice* (Belknap Press, 2009) 72.

79 *Morley* (2010) 274 ALR 205, 335 [714].

80 For an analysis of the various case management schemes in place in Australia, see Bernard C Cairns, *Australian Civil Procedure* (Thomson Reuters, 10th ed, 2014) 49–115.

81 *Sali v SPC Ltd* (1993) 116 ALR 625, 629 (Brennan, Deane, McHugh JJ).

82 Johnson J stated that s 56 means that 'every litigant … is now a model litigant': *Priest v New South Wales* [2007] NSWSC 41 (2 February 2007), [34]. For similar rules and provisions, see *Uniform Civil Procedure Rules* 1999 (Qld) r 5; *Supreme Court Civil Rules 2006* (SA) r 3; *Civil Procedure Act 2010* (Vic) s 7; *Supreme Court Rules 2000* (Tas) r 414A; *Rules of the Supreme Court 1971* (WA) O1 r 4B.

83 *Aon Risk Services Australia Ltd v ANU* (2009) 239 CLR 175, 217 [112]–[114]; *Badraie v Commonwealth* [2005] NSWSC 1195, [93].

example, the adjudication of their case may determine a point of law that will be applied in subsequent cases that ventilate a similar or related point. Further, the exposition of their case may create legal rules that shape the conduct of parties outside the sphere of litigation.

Solum's theory of procedural justice considers that an adjudicated outcome can be evaluated according to two perspectives: its 'case accuracy'; and its 'systemic accuracy'.[84] Case accuracy is achieved where the outcome in a particular piece of litigation is correct. Systemic accuracy has an eye to future litigation and describes a result that will shape the legal system, and actions of potential litigants, in ways that are useful. Ideally, an outcome will meet both criteria, but some legal rules, such as *res judicata* and statutes of limitations, prioritise systemic accuracy over case accuracy.[85] Solum proposes that these two possible outcomes be reconciled as follows:

> (1) where systemic accuracy and case accuracy are congruent, the system of procedure aims at both; (2) where systemic accuracy would impair case accuracy, the system usually aims at case accuracy; and (3) systemic accuracy may be preferred over case accuracy if systemic accuracy can be obtained through general and public rules, so long as it is possible for those affected to comply with those rules by reasonable good faith efforts.[86]

Using this approach, procedural rules could be modified to deliver systemic accuracy provided the parties have appropriate notice of that possibility. In the case of civil penalty litigation, it could be argued that notice is already provided by the legislative provisions that explicitly provide that the matter is to be determined according to civil rules of procedure.[87] Using Solum's approach, due to this advance notice, systemic accuracy could be preferred to case accuracy.

In addition to the link between fairness and just outcome explored above, there also seems to be an association between fairness and equality. Rawls, for example, argues that the first principle of justice is to ensure that each person has 'an equal right to a fully adequate scheme of equal basic rights and liberties', including the rule of law.[88] In the context of litigation, this might mean that there should be a level playing field so that parties can enter the adversarial system with each of them having equal advantages and disadvantages. In some cases, there may be factors that weight the fairness evaluation in favour of, or against, one party. Where one party is carrying a particular burden or advantage, that might justify an adjustment in the assessment of fairness to take account of this issue. As Feinberg argued in his formulation of the principle of distributive justice, '[e]quals should be treated equally and unequals unequally, in proportion to relevant similarities and differences'.[89] This suggests that fairness seems often to involve the 'presence of comparison: the fairness is a matter of making or allowing the same provision for

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84 Lawrence B Solum, 'Procedural Justice' (2004) 78(1) *Southern California Law Review* 181, 247.
85 Ibid 246.
86 Ibid 252.
87 *Corporations Act* s 1317L.
88 John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14(5) *Philosophy & Public Affairs* 223, 227.
89 Feinberg quoted in Zajac, above n 54, 105.

each or all or the persons concerned'.[90] Where one party has some advantage not available to the other party, the comparison will indicate that fairness will be lost, unless some compensatory action is taken.

A related issue is that fairness, or unfairness, is often judged though the eye of the beholder.[91] That is, when considering the price of, say, a coffee, there may be a 'significant difference between the determination that a price is fair in the abstract, and that it is fair to a particular individual'.[92] Whether a particular individual assesses that coffee to be a fair price might depend on the regular price they pay, the amount they earn, the quality of the coffee, whether they emerged from 'the right side of the bed', and so on. Of course, here there is a strong element of self-interest feeding into the fairness appraisal. Zajac reminds us that our assessment of fairness may well be tainted by our

> proclivity toward self-serving behavior … As a result, it is not always easy to separate cynical, self-serving arguments from sincere ones. This proclivity explains a common observation that economists make: regardless of their basis, justice or fairness arguments seem always to end up favoring those presenting them.[93]

So the expectations of the seller and the buyer may well be both legitimate and profoundly different. As a consequence, the role of the judge is to pick the 'line of best fit' between the two perspectives that provides the fairest outcome possible.

I have argued above that in order to understand and apply a duty of fairness we need to understand fairness as a concept. In doing so we need to consider the relationship of fairness to just outcome, bearing in mind the balancing of cost and benefit, and equality. It is these two criteria that appear to be most useful in examining whether fairness has been achieved in any litigious context. They provide the basis for determining what is in the 'evaluation zone' set out above. Once in the zone, evaluating what fairness might demand in this context should incorporate responding to the particular case and the nature of the parties involved. This then means that those upon whom the duty rests must consider what obligations are spawned by the duty, and how these are to be managed in the context of particular cases.

The next section of this article considers how these ideas about fairness might affect the activity of government lawyers. In particular, the section examines the role of the 'public interest', the Model Litigant Rules, and judicial interpretations of fairness. In each respect, the extent to which these elements pick up or depart from the theoretical model is noted.

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90 Raphael, above n 56, 237.

91 As Aristotle notes 'most people are bad judges in their own case': Aristotle, *Politics* (Benjamin Jowett trans, 1984) III, 9 [trans of: Πολιτικά (first published 350 BCE)] <http://classics.mit.edu/Aristotle/politics.3.three.html>.

92 Yablon, above n 67, 508.

93 Zajac, above n 54, 132–3.

IV How Might this Play Out in the Context of Government Litigation?

Where one party to litigation is an arm of government, there is an assumption that the government has an advantage. One common assertion is that the government enjoys resources that are not available to the other party.[94] In addition, government and its agencies are frequently granted investigatory powers that may assist them in preparing and pursuing litigation.[95] But there are also potentially other, more subtle, advantages enjoyed by a government litigant, as Cameron and Taylor-Sands explain:

> The Commonwealth enjoys advantages over non-repeat litigants, or so-called one-shotters. First, having litigated before, the Commonwealth has greater expertise and access to specialist knowledge in relation to substantive law and court processes. Secondly, the Commonwealth's regular appearances in litigation allow it to build a good reputation before courts and tribunals based on past conduct. This reputation may lead judges to defer to the Commonwealth more frequently than to other litigants … Finally, the government's continuing interest in developing rules enables it to litigate the same point repeatedly, which in turn allows it to be selective with the cases it runs (or declines to settle) in order to maximize the chances of obtaining a favourable outcome.[96]

In order to address these advantages, court formulations and Model Litigant Rules adopt a conception of the duty of fairness founded on the idea that there should be adjustments put in place to ensure that there is reasonable equality between the parties. What is needed to deliver such equality should be, presumably, flexible, as the relative advantages or disadvantage of the parties may be different depending on the circumstances and the precise arm of government involved.

The second factor that appears to set government litigants apart is that they act in the public interest. This, it has been suggested, enhances their obligation to act in an exemplary manner.[97] In *Morley*, it was held that the public interest required that:

> the usual rules and practices of the adversary system may call for modification. The most significant modification, likely to be true of most regulatory agencies, is that the public interest can only be served if the case

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94 See, eg, Kirby J in *Thomas v Mowbray* (2007) 233 CLR 307, 399 [260]: '[t]he Commonwealth is the best-resourced litigant in the nation. See also, the Hon Jeffrey Spender's statement that 'the Commonwealth is perceived to have superior access to resources and experience': Jeffrey Spender, 'Acting for the Government in Criminal and Civil Jurisdictions: Expectations and Ethical Obligations' (Speech delivered at the Conference of the Bar Association of Queensland, Gold Coast, 15–17 February 2008).

95 See, eg, the investigatory powers given to ASIC by the *ASIC Act* pt 3.

96 Camille Cameron and Michelle Taylor-Sands, '"Playing Fair": Governments as Litigants' (2007) 26(Oct) *Civil Justice Quarterly* 497, 505–6. Cameron and Taylor-Sands draw on the analysis of Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95.

97 P M Meadows, 'Disputes Involving the Commonwealth: Observations from the Outside — A Solicitor's View' (1999) 92 *Canberra Bulletin of Public Administration* 41, 42.

> advanced on behalf of the regulatory agency does in fact represent the truth, in the sense that the facts relied upon as primary facts actually occurred.[98]

This was stated by the High Court to be a false premise on the basis that it places higher obligations on the parties than would exist in criminal trials where the trial 'is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt and innocence'.[99] In addition, according to the Court, it seems to require the regulator to usurp the Court's role by making a 'final judgment'.[100]

Nonetheless, the High Court accepts there is a public interest at stake. The difficulty is that the public interest is a broad concept and there are, arguably, tensions between various conceptions of the public interest.[101] Examples of the contested nature of the 'public interest' can be seen in its varying formulations in the NSW Court of Appeal and High Court decisions discussed above. The NSW Court of Appeal drew on the public interest to require ASIC to advance the truth.[102] On the other hand, the High Court noted the potential for the legislative framework to modify the common law duty,[103] and criticised the Court of Appeal for failing to 'recognise that the regulatory authority seeks the remedy it does for public and not its own private purposes'.[104]

The uncertainty inherent in the concept of the public interest may be less problematic where it is considered in the context of a legislative scheme. The potential for a legislative framework to shape the public interest is consistent with the approach taken by Finn J in *Hughes Aircraft*.[105] In that case, the Court considered the Civil Aviation Authority's obligations and stated that the public interest 'is to be determined from what is express or implied in the [*Civil Aviation Act 1988* (Cth)] itself'.[106] In the corporate context, a legislative view has been expressed about the public interest and this legislative framework within which ASIC operates will be considered in Part V, below, to inform the consideration of the public interest.

A *Model Litigant Rules*

Model litigant rules can also provide general information about the nature and content of fairness.[107] In the Commonwealth jurisdiction, the Model Litigant Rules

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98 *Morley* (2010) 274 ALR 205, 336 [717].
99 *Hellicar* (2012) 247 CLR 345, 404 [142] quoting *Re Ratten* [1974] VR 201, 214.
100 *Hellicar* (2012) 247 CLR 345, 405 [143].
101 Gabrielle Appleby, 'Government as Litigant' (2014) 37(1) *UNSW Law Journal* 94, 98.
102 *Morley* (2010) 274 ALR 205, 336 [717].
103 *Hellicar* (2012) 247 CLR 345, 406–7 [149].
104 Ibid 409 [155].
105 *Hughes Aircraft Systems International v Airservices Australia [No 3]* (1997) 76 FCR 151 ('*Hughes Aircraft*').
106 Ibid 196. The legislative scheme is also important in determining the public interest for administrative decision-making: see *Boucher v Australian Securities Commission* (1996) 71 FCR 122, 128–9.
107 Appleby, above n 101, 110.

have been in place since 1999.[108] Their role is to guide lawyers acting for the Commonwealth Government in their understanding, and implementation, of the duty of fairness.[109] Overall, the Model Litigant Rules provide fairly limited information about what fairness might mean. The obligation to act 'fairly' is undefined.[110] The specific rules are slightly more helpful, but adopt a fairly conservative interpretation of fairness as one that seeks to address the potential for the government litigant to take advantage of superior resources. As noted by Heydon J, nothing in these Rules suggests that different procedural rules might apply to the Commonwealth.[111]

The relationship between the abstract standard of 'fair play' and these Rules has been stated to be that the Model Litigant Rules are a manifestation of the standard and are not exhaustive.[112] They cannot be raised in any proceeding, except by, or on behalf of, the Attorney-General.[113] They are only enforceable by the Attorney-General, rather than by the courts on application by a litigant.[114] The failure to comply with the Model Litigant Rules can be relevant to a court's determination of costs;[115] however, of itself, is unlikely to lead to indemnity costs.[116] In addition, it has been noted that the 'model litigant rules are sometimes used against government lawyers as a litigation tactic'.[117]

The content of the Model Litigant Rules demonstrates the difficulty in pinning down the content of the duty of fairness. As explained by the Australian Law Reform Commission, the 'model litigant rules require fair play, but not acquiescence, and government lawyers must press hard to win points and defend decisions they believe to be correct'.[118] Whitlam J endorsed this approach, stating:

> While the Commonwealth is no doubt a behemoth of sorts, it is not obliged to fight with one hand behind its back in proceedings. It has the same rights as any other litigant notwithstanding it assumes for itself, quite properly, the role of a model litigant.[119]

The Model Litigant Rules create an overall requirement that the Commonwealth and its agencies act 'honestly and fairly'.[120] Beyond that, a number of specific rules attempt to equalise the parties to litigation and put in place a limited requirement to act in the public interest.

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108 The Model Litigant Rules, which are contained in the *Legal Services Directions* app B, apply to the conduct of litigation by the Commonwealth and its agencies: *Judiciary Act* s 55ZF.

109 *Australian Competition & Consumer Commission (ACCC) v Leahy Petroleum Pty Ltd* [2007] FCA 1844 (27 November 2007) [25].

110 *Legal Services Directions* app B p 2.

111 *Hellicar* (2012) 247 CLR 345, 435 [240].

112 *Hughes Aircraft* (1997) 76 FCR 151, 197.

113 *Judiciary Act* s 55ZG(3).

114 Ibid s 55ZG(2).

115 *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 1568 (3 December 2004), [18]; *AT v Commissioner of Police* [2010] NSWCA 131 (4 June 2010), [32].

116 *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 1844 (27 November 2007), [25].

117 Australian Government Solicitor (AGS) consultation cited in Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System*, Report No 89 (2000) 307 .

118 Ibid 306.

119 *Brandon v Commonwealth* [2005] FCA 109 (9 February 2005), [11].

120 *Legal Services Directions* app B para 2.

Some of the Model Litigant Rules attempt to move those acting on behalf of the Commonwealth to positions that are more closely equivalent to those experienced by ordinary litigants. These Rules can be understood as efforts to equalise the parties. So, for example, by 'endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible' and 'keeping the costs of litigation to a minimum', the Commonwealth's agents are being placed in a position that is similar to that faced by an individual litigant who must meet the costs of their own case.[121] The possibility that the Commonwealth might act as if money was no object is also addressed by the requirement that it 'not [take] advantage of a claimant who lacks the resources to litigate a legitimate claim'.[122]

The rule that the Commonwealth not pursue 'technical' defences arguably reaches beyond preventing the Commonwealth taking advantage of its deep pockets.[123] Even ordinary litigants who have limited funds might pursue technical points where it is advantageous for them to do so. However, that requirement is tempered by the rider that technical defences can be pursued where the failure to avoid them prejudices the Commonwealth.[124] Other rules address the possibility that the Commonwealth's size might lead to incoherence or delay.[125] The possibility that the Commonwealth or its agencies might act inconsistently or be slow to react has potential to impinge on litigants, but also has public interest implications, as it has the potential to affect other litigants within the system. These latter rules can be seen as extending beyond simply equalising the parties (though there is clearly an element of that) to prioritising the public interest.

B *Fairness: Judicial Perspectives*

Additional information about the content of the duty of fairness can be found in judicial expressions of the common law duty of fairness. The first Australian formulation of the duty of fairness is generally attributed to Griffith CJ who, in the 1912 case of *Melbourne Steamship Co Ltd v Moorehead*,[126] referred to 'the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects'.[127] This oft-cited formula is the general starting point for any discussion of fairness.[128] While this statement provides a standard — that of 'fair play' — against which government conduct should be measured, it does little to flesh out the criteria which indicates whether the conduct satisfies that standard.

An examination of the cases that have drawn on the *Moorehead* formula reveals that the courts have embraced the need for flexibility when considering the

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121 Ibid app B paras 2(d)–(e).
122 Ibid app B para 2(f).
123 Ibid app B para 2(g).
124 Ibid.
125 See, eg, *Legal Services Directions* app B paras 2(a), (c).
126 *Moorehead* (1912) 15 CLR 333.
127 Ibid 342.
128 See, eg, *Morley* (2010) 274 ALR 205, 333 [702]; *Yong v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155, 166; *Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning* [2009] NSWLEC 155 (24 September 2009), [16].

specific obligations that flow from the duty of 'fair play'. In *Scott v Handley*, the Court noted that '[a]s with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases'.[129] Similarly, in *Morley* the Court states that 'the terminology of "model litigant" should not detract from the flexibility of an idea of an obligation of fairness'.[130] Therefore, the judicial approach fits with the idea that there is a zone of evaluation where the requirements of fairness will be adjudicated.

The criteria for adjudicating fairness once a case is being evaluated are less explicitly expressed. In essence, however, these decisions seem to fit with the analysis above. That is, the duty of fairness is considered in relation to the two touchstones of justice and equality.

The idea that the executive branch of government has an obligation to ensure a just outcome can be traced to the Crown's position as the 'fountain and head of justice and equity'.[131] This places on executive government an obligation to ascertain and obey the law and, in situations where the law is in doubt, to place the matter, or enable another party to place the matter, before the court. In any proceeding there is an obligation to assist the court in arriving at a 'proper and just result'.[132] In *Scott v Handley*, the Court noted that the duty has positive and negative elements.[133] The Court affirmed that one positive obligation is to assist the court in arriving at the 'just' outcome.[134] The obligation of government to abide by the just result was also stated in *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd*.[135] In cases where the executive government disputes the court's findings, they should challenge them in appropriate ways, such as by undertaking law reform or through the appeal process.[136]

The obligation to ensure justice can be seen to have driven the Federal Court in its ruling that the government should not take technical points.[137] It is also used to permit new contentions to be placed before the court in amended pleadings.[138] Justice has been found to be the 'paramount consideration' where the Commonwealth sought to amend its defence in circumstances where there had been failures to comply with the Model Litigant Rules.[139] The Court's finding in *Mahenthirarasa v State Rail Authority of NSW* — that it was inappropriate for the State Rail Authority to put the plaintiff to proof in circumstances where it had

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129 *Scott v Handley* (1999) 58 ALD 373, 383 [45].

130 *Morley* (2010) 274 ALR 205, 334 [707].

131 *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366, 383 quoting *Dyson v Attorney General* [1911] 1 KB 410, 421–2.

132 Ibid 383. This approach has been endorsed in a number of cases: see, eg, *Pacific National (ACT) Ltd v Queensland Rail* (2005) 215 ALR 544, 559–60 [54].

133 *Scott v Handley* (1999) 58 ALD 373, 383 [45].

134 Ibid.

135 *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325, 327.

136 Ibid.

137 *Yong v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155, 166. This requirement was explicitly set out in the Model Litigant Rules subsequent to this case.

138 *Gould v Company Auditors and Liquidators Board and ASIC* (2007) 98 ALD 662, 670 [51].

139 *Badraie v Commonwealth* (2005) 195 FLR 119, 141 [115].

decided that the claim could not be defended — also seems to be consistent with the idea that justice is paramount.[140]

Equality seemed to be at the forefront of the Court's mind in *Scott v Handley*.[141] In that case, the Commonwealth successfully sought dismissal of a claim made by an unrepresented litigant who was unready to proceed. The Court refused an application for an adjournment without realising that the litigant's unpreparedness was due to the late service of affidavits by an officer of the Commonwealth. The Court held that the government

> was in a position of obvious advantage in relation to unrepresented litigants; (ii) was significantly in default in complying with procedures designed to secure the fair and orderly preparation of the matter for hearing; (iii) served the affidavits on the appellants at an extremely late date with the consequential likely impairment of their capacity to prepare properly for a final hearing; (iv) did not inform his Honour of the default and of its possible consequences; and (v) took advantage of the inability of the appellants to articulate properly the basis for, and to secure, an adjournment. In our view the conclusion is inescapable that the second respondent has fallen considerably short of the standard properly to be expected of the Commonwealth.[142]

In *ASIC v Loiterton*, the Court also considered the fact that two of the three defendants were unrepresented in finding that ASIC had breached its duty of fairness by failing to ensure that the 'prosecution case has clarity and is fair'.[143] The contrast here between the unrepresented litigant and the government is an extreme one, which the courts have found warrants high expectations of government behaviour.

While justice or equality concerns may appear to be particularly important in some cases, in others the two may be both in issue. For example, in *Nelipa v Robertson*,[144] the Court noted the Commonwealth's obligation 'to approach the issue of discovery in document intensive cases in a way that defines the issues for the court's consideration when managing the discovery process … and assist in the just, quick and cheap resolution of the real issues'.[145] This obligation was framed to make its connection to justice perfectly clear. However, there is also a significant impact on the equality of the parties if discovery is not conducted in this way. Not only could one party be at a disadvantage in their access to appropriate information, but also if the discovery was excessive, it could have resource implications.[146]

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140 *Mahenthirarasa v State Rail Authority (NSW)* (2008) 72 NSWLR 273, 279.

141 *Scott v Handley* (1999) 58 ALD 373.

142 Ibid [46].

143 *Australian Securities and Investments Commission (ASIC) v Loiterton* [2004] NSWSC 172 (1 April 2004), [38].

144 *Nelipa v Robertson* [2008] ACTSC 16 (6 March 2009).

145 Ibid [95].

146 Problems with discovery including under and over-discovery were noted in the Australian Law Reform Commission's review of the civil justice system, which noted that '[t]he discovery process is used strategically by parties. Such tactics can result in significant costs, involve repeated interlocutory hearings and be very time consuming': Australian Law Reform Commission, above n 117, [6.68].

In *ASIC v Rich*, Austin J asserted that there are two reasons for the duty of fairness.[147] First, the role of the State as prosecutor in criminal trials requires it to seek the whole truth and ensure that justice is done. Second, there is a danger of 'oppression due to the imbalance of resources'.[148] In his analysis, he asserts that in civil proceedings the first does not 'necessarily apply, but the second reason (the potential for oppression inherent in the imbalance of resources) invariably does'.[149]

This statement rightly recognises the two key elements for determining the duty of fairness. However, it creates an overly dogmatic approach to the duty. The suggestion that there is always an imbalance of resources seems implausible. In fact, in the context of the James Hardie litigation, the evidence suggests that the parties were relatively well matched. It was reported that James Hardie had spent 'more than $20 million' on the case at the point of the NSW Court of Appeal judgment.[150] As at September 2010, a freedom of information application revealed ASIC's costs had been $17.64 million.[151] It has been noted by one informed commentator that the idea that the Commonwealth has access to 'vast resources' is a myth.[152] In fact, the government litigant may be at resource disadvantage in some circumstances. There is evidence that ASIC faces considerable resource challenges that affect its ability to pursue litigation.[153] Of course, corporate litigation against the 'big end of town' is likely to be exceptional in this regard and there are undoubtedly cases where the government has the benefit of significantly more resources than the other party. Nonetheless, assuming a resource balance is always present appears simplistic.

Similarly, the position that there is a limited obligation to seek justice outside of the criminal sphere is problematic. An evaluation that includes a contextual analysis (including consideration of the civil or criminal context) is nonetheless one that fits with the ideas about fairness as proposed above in Part III of this article.

The next section turns to the specific context within which ASIC operates. It considers the extent to which the existing framework can guide the evaluation of fairness.

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147 *Australian Securities and Investments Commission (ASIC) v Rich* (2009) 236 FLR 1, 113 [518].

148 Ibid 113 [519].

149 Ibid 115 [522].

150 Elizabeth Sexton and Philip Wen, 'Ex-Hardie Directors Get Ban Overturned', *The Sydney Morning Herald* (online), 18 December 2010 <http://www.smh.com.au/business/exhardie-directors-get-ban-overturned-20101217-190ss.html>.

151 Susannah Moran, 'ASIC Costs to Soar with James Hardie Director Payouts', *The Australian* (online), 20 December 2010 < http://www.theaustralian.com.au/business/asic-costs-to-soar-with-james-hardie-director-payouts/story-e6frg8zx-1225973576923>.

152 Dale Boucher, 'The Commonwealth as a Litigant: An Insider's View II' (1999) 92 *Canberra Bulletin of Public Administration* 29, 31.

153 James Mayanja, 'Promoting Enhanced Enforcement of Directors' Fiduciary Obligations: The Promise of Public Law Sanctions' (2007) 20(2) *Australian Journal of Corporate Law* 157, 163.

V The Legal Framework

The High Court noted in *Hellicar* that any understanding of the duty of fairness, as it applies to ASIC, would need to flow from a consideration of the legal framework that underlies the area.[154] It referred in particular to ss 79 and 80, as well as s 64 of the *Judiciary Act*.

A *The* Judiciary Act

The interpretation of the first two sections mentioned by the High Court, ss 79 and 80, have been the cause of some difficulty. They contain significant ambiguities that have led to conflicting judicial approaches and consequent uncertainty.[155] However, in the context of ASIC's duty of fairness, they seem not to be problematic. Section 70 of the *Judiciary Act* permits federal courts to apply state or territory laws 'relating to procedure, evidence and the competency of witnesses'. Therefore, as matters where ASIC seeks to enforce the *Corporations Act* involve federal courts exercising federal jurisdiction, s 79 is of limited significance. Section 80 appears to be more helpful in that it grants federal courts the power to 'apply and develop' the single common law of Australia.[156] Presumably this section would act effectively to 'pick up'[157] any common law duty of fairness imposed on government litigants.

The other section of the *Judiciary Act* that the High Court mentioned in *Hellicar* is s 64. This section provides that, '[i]n any suit to which the Commonwealth … is a party, the rights of parties shall as nearly as possible be the same … as in a suit between subject and subject'.[158] In *Hellicar*, ASIC argued that this section precluded the operation of a duty of fairness as such a duty would not be 'consistent' with s 64.[159] The counterargument made by the respondents was that this section was intended to extend to private litigants rights that they would otherwise be unable to access, such as the right to discovery.[160] This latter argument seems to better meet the purpose of the section, which appears to be to remove the traditional Crown immunities and enable the Commonwealth to be sued using a variety of causes of action.[161] As Hill argues, 'the whole purpose of s 64 is to remove special privileges and immunities that the Commonwealth and the States would otherwise enjoy'.[162] It would be ironic if the section trying to facilitate the rights of citizens was then used to undermine them.

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154 *Hellicar* (2012) 247 CLR 345, 406–7 [149]–[151].

155 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 (Cth*), Report No 92 (2001) 596.

156 Graeme Hill, 'The Common Law and Federal Jurisdiction — What Exactly Does Section 80 of the *Judiciary Act* Do?' (2006) 34 *Federal Law Review* 75, 76.

157 This is the term adopted by the High Court in *Hellicar* (2012) 247 CLR 345, 407 [149].

158 *Judiciary Act* s 64.

159 *Hellicar* (2012) 247 CLR 345, 407 [150].

160 Ibid 407 [151].

161 Susan Kneebone, 'Claims Against the Commonwealth and States and Their Instrumentalities in Federal Jurisdiction: Section 64 of the Judiciary Act' (1996) 24 *Federal Law Review* 93, 96–7.

162 Graeme Hill, 'Private Law Actions Against the Government — (Part 2) Two Unresolved Questions About Section 64 of the Judiciary Act' (2006) 29(3) *UNSW Law Journal* 1, 2.

It is also arguable that s 64 is inapplicable when 'purposes or functions peculiar to government' are being considered.[163] As the section only purports to equalise the Commonwealth with another litigant 'as nearly as possible', it leaves the door open to differences between the parties. Further, in the context of functions peculiar to government, there seems to be no logic to equating proceedings to matters between subject and subject. There is a line of authority that supports the idea that s 64 would not be enlivened in such cases.[164] According to Hill,

> this analysis would also prevent section 64 from operating in 'regulatory' proceedings (that is, proceedings where a government is seeking a remedy) because there proceedings do not arise between subject and subject. These regulatory proceedings would include … proceedings under the *Corporations Act 2001* (Cth) to disqualify a person as a director.[165]

Therefore there appears to be nothing in the *Judiciary Act* that prevents the Court from finding that ASIC is subject to a duty of fairness. Section 80 permits the 'picking up' of the common law duty, and s 64 does not operate to remove it.

B *The Role and Powers of ASIC*

The next question posed by the High Court was the extent, if any, to which this duty is modified by the operation of the *Corporations Act* or the *ASIC Act*. The *ASIC Act* has, as its object, among others, to 'provide for ASIC's functions, powers and business'.[166] Further, it states that ASIC should 'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth'.[167] The courts have characterised the importance of this role as follows:

> ASIC's regulatory role is vital to the proper functioning of the Australian financial and investment system, on which the prosperity of the Australian community is dependent. Fraud and incompetence can cause catastrophic damage to thousands of individuals.[168]

Parliament has sought to grant ASIC sufficient powers to effect this role. These powers include both investigative and enforcement options. So, for example, ASIC has the power to require persons to appear for examination, and provide reasonable assistance in the course of its investigations.[169]

Among the panoply of enforcement options given to ASIC, Parliament created a new 'hybrid' action to enable ASIC to pursue individuals and corporations more effectively: the civil penalty provision. This option provides ASIC with an additional alternative to the traditional civil options and criminal offences. It recognises the nature of the civil penalty as a 'statutory remedy, a

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163 Ibid 16–7; Kneebone, above n 161, 115.
164 See, eg, *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 265.
165 Hill, above n 162, 15.
166 *ASIC Act* s 1(b).
167 Ibid s 2(g).
168 *Australian Securities and Investments Commission (ASIC) v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227, 237 [49].
169 *ASIC Act* s 19.

product of regulatory legislation where the focus is on compliance'.[170] Introduced in 1993, the civil penalty provision has become a key part of the regulator's toolkit in dealing with the misdeeds of corporate officeholders.[171] In particular, the introduction of civil penalties flowed from concerns that the existing legislation was too draconian in its reliance on criminal penalties.[172]

A number of sections have been introduced to support the effectiveness of the civil penalty regime. These sections appear to be shoring up the credentials of the civil penalty regime as 'civil', rather than 'criminal', in nature. As Kirby J noted in his dissenting judgment in *Rich v ASIC*:

> the language employed by the Act was designed to draw a sharp distinction between remedies for the enforcement of corporations law that are to be classified as 'criminal' (or 'penal') in character and those that are to be classified as 'civil' … Such a distinction is particularly important where the law in question is addressed to the regulation of economic conduct, including the management of corporations.[173]

Heydon J in *Hellicar* also identified the civil nature of the proceedings as significant and founded in the legislative scheme.[174] The emphasis on the civil nature of the civil penalty scheme can be seen in a number of sections. Section 1332 provides that the standard of proof is the civil one: on balance of probabilities. Section 1317L provides that the court 'must apply the rules of evidence and procedure for civil matters when hearing proceedings' for a declaration of contravention (which is required before a civil penalty can be imposed) or a pecuniary penalty order. Section 1349 removes the privilege against exposure to penalty in relation to certain proceedings in the *Corporations Act* such as disqualification.[175]

The introduction of the civil penalty provisions was not, however, the silver bullet that it was hoped to be. A review conducted by Welsh in 2004 found that '[w]hile the number of civil penalty applications issued by ASIC is not large, the regulator has been successful in its use of the provisions'.[176] Despite this, some concerns have emerged. Comino argues that this is due to 'ASIC [being] hampered in its work by the failure of [the regulatory] structure to provide a solid foundation

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170 Peta Spender, 'Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation' (2008) 26 *Company and Securities Law Journal* 249, 250.

171 Civil penalty provisions were introduced by the *Corporate Law Reform Act 1992* (Cth). The regime has since been expanded by increasing the number of provisions to which civil penalties apply: see, eg, *Company Law Review Act 1998* (Cth). See generally R P Austin and Ian M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis, 15th ed, 2013) 98–9 [3.400].

172 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (AGPS, November 1989) 187–91.

173 *Rich v Australian Securities and Investments Commission (ASIC)* (2004) 220 CLR 129, 160 [69].

174 *Hellicar* (2012) 247 CLR 345, 437 [243].

175 Section 1349 was inserted in 2007 as a response to the High Court decision in *Rich v ASIC* (2004) 220 CLR 129 extending the privilege against penalty to disqualification cases.

176 Michelle Welsh, 'Eleven Years On — An Examination of ASIC's Use of an Expanding Civil Penalty Regime' (2004) 17(2) *Australian Journal of Corporate Law* 175, 192.

for its major regulatory efforts'.[177] She describes a process whereby the courts have struggled to develop an approach to civil penalty proceedings that did not adopt procedures more usually seen in criminal trials, and called for Parliament to enact 'a "new procedural road map" to govern the law and procedure of civil penalty provisions'.[178] Spender, who warns that 'the utility of the remedy is rapidly diminishing as the courts impose criminal procedural protections', has expressed similar disquiet.[179] The NSW Court of Appeal decision in *Morley* is a perfect example of this.

As this analysis indicates, in the context of ASIC, the civil penalty regime is intended to provide a regulatory option that avoids the expense, inefficiency and stigma associated with a criminal prosecution. I have argued earlier in this article that the public interest should be considered when determining what the duty of fairness requires in a particular case. Further, the content of the public interest should take account of the Parliament's conception of the public interest as expressed in the legislative scheme. In the regulation of corporations and their officers, the legislative desire to make corporate litigation under the civil penalty scheme easier has been made clear over several decades — and, in particular, through a number of legislative reactions to judicial decisions. Introducing protections — that are properly in place in criminal trials — in the context of civil penalty proceedings would appear to undermine this clearly expressed legislative aim.

VI Conclusion

Despite its importance, the tendency is to analyse fairness reflexively with little expression of the criteria being used to judge whether a matter is 'fair' or 'unfair'. This lack of attention to foundational principles has the potential to undermine clarity and effectiveness. This article has argued that duty of fairness is a flexible one. It is drawn from the common law and widely accepted to apply to government litigation in all its forms. Both the theoretical discussions and the judicial approaches indicate that the touchstones of justice and equality are useful ways of thinking about fairness and framing any decisions as to its content. These can be used to assist in determining whether a particular litigious process is in the evaluation zone, thus requiring further consideration of the demands of the duty of fairness.

Turning first to justice, it is appropriate to consider what is necessary to achieve a just outcome. However, striving for a just outcome is not without limits. The court must balance the needs of the immediate litigants with those of others within the system and the wider public. This reinforces the idea that a just outcome, and, therefore, fairness is contextual; determined in part by the need for 'systemic accuracy' and instrumental concerns.

Contextual analysis is also relevant to the second touchstone, equality. While the achievement of equality between the parties, where one party is the

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[177] Vicky Comino, 'Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem' (2009) 33(3) *Melbourne University Law Review* 802, 805–6.

[178] Ibid 807 (citations omitted).

[179] Spender, above n 170, 249.

government, is traditionally seen in terms of the might of the state against the vulnerability of the individual, this is not an appropriate approach in all cases. There can be no question that the government regularly enjoys power advantages that are not shared by individual litigants. However, these power advantages may or may not be relevant in a particular case. If we take the James Hardie litigation as an example, the parties appear to have devoted similar resources to the litigation.[180] It is therefore difficult to argue that there was significant inequality between them. The idea that the government litigant is advantaged as a repeat player over the 'one-shotter' individual or company may also not reflect reality. In cases where resources are more evenly balanced, both parties have the ability to seek and obtain specialised legal advice that can guide their actions and provide the advantages of excellent legal expertise.

The duty of fairness is flexible enough to accommodate the idea that there is no inequality in a particular case. Unfortunately, at times the reflexive approach taken by the courts seems to assume there is automatic inequality where a government litigant is involved. This is perhaps because courts are particularly sensitive to threats to individual rights. However, this sensitivity should be exercised with discernment to recognise real disadvantage where it occurs, and respond accordingly. Casting the net too wide potentially undermines the coherence of the duty of fairness, as well as endangering efforts made in the public interest to regulate corporate activity.

Should a matter be identified as one where fairness is at risk, consideration should be given to the legal framework relevant to the matter. This framework may well modify the demands of fairness. As the High Court correctly pointed out in *Hellicar*, the statutory framework can modify the common law duty of fairness. In the context of ASIC and the civil penalty provisions, it is arguable that this has occurred. The *Corporations Act* makes it perfectly clear in several sections that the intention is that civil penalty provisions be treated as 'civil' in nature. The purpose of these provisions is to facilitate the efficient regulation of corporations and their officeholders. If this is correct, then it is appropriate that any interpretation of the duty of care be framed in ways that respect Parliament's sovereignty and do not undermine the essentially 'civil' nature of the proceedings. This suggests, therefore, that ASIC's duty of fairness must be understood with reference to the parliamentary intention that civil penalty proceedings do not become 'quasi-criminal' in nature.

The final point is that decisions about fairness will remain difficult. These determinations can have a profound effect on the rights of parties and, therefore, will be hotly contested. The claim of unfairness may even be asserted for tactical reasons in the cut and thrust of litigation. Litigants and judges must determine the demands of fairness in full knowledge that it matters, and its content could have a profound effect on the outcome of the particular case, as well as public regard for the justice system. Identifying, and reflecting on, the criteria by which such decisions should be made deserves our attention.

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[180] See above n 150 and accompanying text.