EQUALITY OF ARMS IN ADMINISTRATIVE REVIEW

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The many principles that govern judicial and merits review of administrative decisions are a valuable body of doctrinal law, but they are not comprehensive. This article examines an important gap in those laws, which arises from the vast inequality that often exists between individuals and the government. This inequality of arms can take many forms, such as in differences in financial resources, in knowledge of institutional processes, or in the quality of legal representation (or the ability to retain lawyers). These differences can place those seeking review of an official decision at a serious disadvantage, but the laws governing administrative review contain no requirement of equality of arms. This article examines several distinct principles relevant to the review of administrative decisions and argues that they provide courts and tribunals with no clear means to address inequality of arms in administrative review. That gap in our law should be addressed.

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I Introduction

A key tenet of Australian administrative law is that the focus of judicial review is on procedure rather than substance. That distinction was central to the constitutional demarcation identified by Brennan J in *Attorney-General (NSW) v Quin*, by which the courts have the exclusive role of deciding whether administrative action is lawful as distinct from substantively correct.[1] According to this view, the merits of a decision are a matter for the executive and its agencies. Justice Brennan explained that if a supervisory court 'avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error'.[2] This reasoning is consistent with the Australian conception of procedural fairness, in which courts emphasise the fairness of the process of decision-making as opposed to the fairness of its outcome.[3] The procedure–substance distinction has come under increasing criticism,[4] partly because it is widely accepted that judicial review has long operated in practice with one eye upon issues of substantive fairness or the merits of decisions.[5]

This article examines an issue that lies at the intersection of the procedure–substance distinction but that arises during court and tribunal review of decisions, rather than as a consequence of those decisions. That issue is the 'equality

[1] (1990) 170 CLR 1, 35–6 ('*Quin*').

[2] Ibid 36. Justice Brennan stated that the role of the courts does 'not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power'. But he added that '[i]f, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error'.

[3] Procedural fairness and natural justice are often used interchangeably. This article adopts the former term.

[4] The weakening of the distinction in Australian law has been acknowledged: see, eg, *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, 490 [124] (Edelman J). It was also strongly doubted by the Supreme Court of the United Kingdom in *Pathan v Secretary of State for the Home Department* [2020] 1 WLR 4506, 4517–18 [37]–[38] (Lady Arden JSC) ('*Pathan*').

[5] Some judges have direct experience in these matters. Prior to his appointment to the High Court, Brennan J served as President of the Commonwealth Administrative Appeals Tribunal ('AAT'). His Honour acknowledged the ability of merits review to correct 'injustice in a particular case' in the landmark decision of *Re Drake and Minister for Immigration and Ethnic Affairs [No 2]* (1979) 2 ALD 634, 645. One scholar noted that Brennan J

> was one of the key figures in the Australian High Court's so-called 'swing jazz period' of innovation across a range of areas, from the recognition of native title to the radical expansion of the scope and depth of the rules of natural justice … [and] was profoundly concerned to avoid 'administrative injustice'.
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> Mark Aronson, 'Process, Quality, and Variable Standards: Responding to an *Agent Provocateur*' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5, 21 (citations omitted).

of arms' between the parties to a challenge to an administrative decision.[6] Equality of arms is the idea that any fight should be a fairly balanced one, in which both sides to a dispute have a level of resources or expertise that puts them both on a relatively level playing field.[7] That idea of equality does not sit easily with the longstanding recognition that governments have a 'litigation advantage'[8] because they are a well-resourced 'repeat player' in legal proceedings.[9] This notion of inequality is distinct from, and quite different to, the conceptions of non-discrimination which are central to equal opportunity and anti-discrimination law.[10] The notion of equality of arms is also distinct from procedural fairness,[11] though we shall see that issues of inequality are often analysed through the prism of fairness. The rules of fairness operate to ensure that public decision-makers act fairly towards those who may be affected by the exercise of their powers. The procedural focus of those requirements means that they do not address wider, more systemic issues such as whether there is (or should be) an equality of arms between parties.[12]

[6] The phrase was used in *DOB18 v Ng* [2019] FCA 1575, [46] (Stewart J) ('*DOB18*'). See also *MZAIB v Minister for Immigration and Border Protection* (2015) 238 FCR 158, 186 [124] (Mortimer J) ('*MZAIB*'); *CMC18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1358, [42] (Mortimer J) ('*CMC18*').

[7] In European human rights law, the concept was first mentioned in *Neumeister v Austria* (1968) 8 Eur Court HR (ser A) 39–40.

[8] A phrase used in Gabrielle Appleby, 'The Government as Litigant' (2014) 37(1) *University of New South Wales Law Journal* 94, 98–9. Justice Whitlam more colourfully described the Commonwealth as 'no doubt a behemoth of sorts' in *Brandon v Commonwealth* [2005] FCA 109, [11] ('*Brandon*').

[9] This phrase was coined in the influential article by Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 (Fall) *Law and Society Review* 95, 97.

[10] The key issues of discrimination law include: whether an attribute is protected; whether the respondent's (allegedly discriminatory) action occurs in a stipulated sphere of activity (eg employment or the provision of goods and services); and whether the action in fact constitutes direct or indirect discrimination. The authors of a leading work on anti-discrimination note that the finer detail governing these key issues remains unclear in Australian law and lament the 'joint failure of legislatures and courts to develop clear principles in relation to the concept of unlawful discrimination': Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 89.

[11] But the fair hearing rights protected by common law fairness and the human right to a fair hearing, of which equality of arms is a part, overlap: *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 681–2 [178]–[179] (Bell J) ('*Matsoukatidou*').

[12] United Kingdom ('UK') law is different. While equality of arms is not recognised as a distinct, enforceable legal principle of judicial review, supervisory review in the UK can extend to more systemic issues that could give rise to an inequality of arms. See, eg, *R (Detention Action) v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341, where the English Court of Appeal held that the procedural rules governing a scheme for fast-track disposal of

There is no constitutional or other legal requirement in Australian law that the resources of parties should be equally matched,[13] but some judges have expressed unease about the disparity in public law hearings that often exists between government departments and those challenging official decisions.[14] This article analyses those cases and their associated principles. The article argues that, while there is no single principle that supports an equality of arms in public law hearings, the complexity of many public law cases and the obvious disparity between the resources of parties in many of those cases makes the absence of such a principle a gap in our public law framework that requires further analysis.[15] One aim of this article is to provide a comprehensive assessment of the many fragmented principles which are relevant to the notion of equality of arms. Many of these principles, such as the rules governing costs or model litigants, are typically viewed as discrete bodies of doctrine, which precludes a more holistic assessment of their operation and the practical gaps they create. First, however, it is necessary to briefly explain the general requirements of procedural fairness and why they do not address the issue of inequality of arms. That apparent gap in the general principles of procedural fairness is important to understanding why the constituent elements of that doctrine have not yet evolved in a manner that could be deployed to address an inequality of arms.

appeals of asylum claims were structurally unfair: at 5354 [45], 5355 [49] (Lord Dyson MR, Briggs LJ agreeing at 5355 [50], Bean LJ agreeing at 5355 [51]). This ruling was approved by the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931, 3959–60 [67]–[68] (Lord Sales JSC and Lord Burnett CJ) and *R (TN (Vietnam)) v Secretary of State for the Home Department* [2021] 1 WLR 4902, 4905 [2] (Lady Arden JSC, Lords Briggs and Stephens JJSC agreeing), 4919 [75] (Lord Sales JSC, Lords Lloyd-Jones, Briggs and Stephens JJSC agreeing).

[13] The same appears true in the UK: *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765, 801 [88]–[89] (Lord Reed PSC) ('*Begum*'). That case is discussed in later sections of this article: see below nn 57–74 and accompanying text.

[14] See, eg, *MZAIB* (n 6) 186 [124] (Mortimer J); *CVV16 v Minister for Home Affairs* [2019] FCA 1890, [54] (Mortimer J); *DOB18* (n 6) [46] (Stewart J); *CMC18* (n 6) [42] (Mortimer J).

[15] The focus on public law is not intended to downplay the existence and impact of similar problems in private law proceedings. In *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, Gleeson CJ discussed the inequality of bargaining power that often exists between parties to a commercial contract: at 64 [11]; and concluded that such difference 'is a disability that affects people in many circumstances in commerce, and in life. It is not one against which the law ordinarily provides relief': at 65 [17].

II Practical Injustice and the Holistic Approach to Fairness

The duty to observe the requirements of procedural fairness is so fundamental to the exercise of official powers[16] that it is protected by the principle of legality.[17] The requirement to be fair may be constant and applicable to virtually all statutory powers, but the content of the duty to act fairly is 'acutely sensitive to context'.[18] The statutory context of a decision is an important influence on the precise content of fairness in a given case.[19] This amplifies the contextual nature of the requirements of fairness because the purpose and content of each statute is distinct.[20] A range of procedural requirements may be implied by the courts to satisfy the duty of fairness, but there is no 'pre-designed set of rules' that decision-makers must comply with.[21] The core elements of fairness require that affected people receive notice of an adverse decision and the material it is based upon,[22] as well as an opportunity to argue against that decision.[23] Even these core requirements may contract when circumstances require. Notice of relevant material, for example, may be provided in only general terms. A limited level of

[16] There are exceptions, such as some vice-regal or other non-statutory powers, which are not relevant for present purposes.

[17] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [13]–[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[18] *R (L) v West London Mental Health NHS Trust* [2014] 1 WLR 3103, 3124 [67] (Beatson LJ). See also *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, where Allsop CJ, Middleton and Foster JJ noted that fairness is 'normative, evaluative, context-specific and relative': at 388 [86].

[19] The influential statement of Kitto J to this effect in *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1963) 113 CLR 475, 503–4 ('*Mobil Oil*') has been repeatedly endorsed by the High Court: see, eg, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160–1 [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

[20] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 442 [34] (Bell, Gageler and Keane JJ) ('*SZMTA*'); *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 43 [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Pathan* (n 4) 4522–3 [55] (Lady Arden JSC).

[21] *Pathan* (n 4) 4522 [55] (Lady Arden JSC). Justice Edelman similarly commented in *SDCV v Director-General of Security* (2022) 405 ALR 209 ('*SDCV*') that 'the mere fact that a procedure might be improved, or made fairer, is not sufficient': at 270 [237]. Those remarks were in the context of judicial procedure, but his Honour's point is surely of general application.

[22] Justice Flick has held that notice is 'not a mere formal requirement; it is a matter of substance going to the very heart of procedural fairness': *Ruatita v Minister for Immigration and Citizenship* (2013) 212 FCR 364, 378 [55].

[23] The central role of opportunity was affirmed in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 338 [38]–[39], 339–40 [45]–[46] (Kiefel, Bell and Keane JJ), 341 [52]–[53] (Gageler and Gordon JJ) ('*WZARH*'). See also *SZMTA* (n 20) 443 [38] (Bell, Gageler and Keane JJ).

notice strikes a balance by providing enough information to enable an affected person to respond adequately, while also preserving the confidence expected by the person who provided the material to be disclosed.[24] When a decision must be made in urgent circumstances, requirements to provide prior notice and a hearing may be perfunctory at best.[25] The limitations on fairness in such cases illustrate a recognition by the courts that fairness should not operate in a manner that frustrates the purpose of the statute from which the authority to act arises.[26]

The reduction or narrowing of specific aspects of fairness has raised questions of whether the doctrine can be reduced to nothingness in an appropriate case.[27] That question has been overtaken by the influential suggestion of Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* that '[f]airness is not an abstract concept' but is instead 'essentially practical'.[28] It followed, his Honour explained, that 'the concern of the law is to avoid practical injustice'.[29] That approach invites an overall assessment of a hearing or procedure to consider whether the entire process was fair. This holistic assessment diverts focus from the presence or absence of specific procedures towards a more functional investigation of whether the process as a

[24] See *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 225 CLR 88 ('*Applicant VEAL*'), where the High Court pointedly declined to 'state some all-encompassing rules' about how officials should manage such issues: at 99 [25] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

[25] A distinction can be drawn between those powers that, 'by their very nature, are inconsistent with an obligation to accord an opportunity to be heard' and those which sometimes must be exercised in urgent circumstances: *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 241 (Wilcox J). See also *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594, 615 [105] (Leeming JA, McColl JA agreeing at 597 [1], Macfarlan JA agreeing at 597 [2]).

[26] That explanation strongly influenced the interpretation of powers granted to maritime officials in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 621–3 [365]–[368] (Gageler J, Crennan J agreeing at 586 [227]).

[27] A possibility anticipated by Brennan J in *Kioa v West* (1985) 159 CLR 550, 615–16. In *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 ('*Condon*'), Gageler J suggested that instances where fairness in the courts was said to have been reduced to nothingness were merely isolated procedures within processes that were fair as a whole: at 110 [193]. His Honour adhered to and further explained that position in *SDCV* (n 21): at 243–7 [137]–[151]. Justice Gordon expressly left the question of whether it might be constitutionally possible for legislation to reduce procedural fairness to 'nothingness' open: at 253 [175].

[28] (2003) 214 CLR 1, 14 [37] (Gleeson CJ) ('*Lam*').

[29] Ibid. This approach has been repeatedly endorsed by the High Court: see, eg, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329, 348 [39], 349 [41] (Steward J, Kiefel CJ agreeing at 333 [1], Keane J agreeing at 333 [2], Gordon J agreeing at 333 [3], Edelman J agreeing at 333 [4]).

whole was unfair.[30] Two other aspects of fairness should also be noted. One is the well-known statement of Kitto J that fairness 'is not a one-sided business'.[31] This caution serves as a useful reminder that any assessment of fairness should not solely be through the eyes of an aggrieved party. Any wider or holistic assessment of fairness must necessarily consider the position of all parties to a case or claim. The other notable issue is the regular reminders provided by courts that fairness is more than an exercise in compliance or 'box ticking'.[32] That means a hearing, or its constituent elements, should be 'real and meaningful',[33] or 'real and fair',[34] rather than being some sort of 'empty gesture' or sham.[35] The importance of these two aspects of fairness will become apparent later in this article.

The principles just described guide the decision-making of administrative officials and tribunals, but the wider framework of administrative review includes the supervisory and appellate functions of courts. While the functions and limitations of courts are governed by constitutional principles, many of those principles draw from or are parallel to the ones just discussed. A brief survey illustrates several issues relevant for present purposes, namely that

[30] This approach has a parallel in the test for the right to a fair hearing provided by art 6(1) of the *European Convention on Human Rights*: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(1); *Regner v Czech Republic* (2018) 66 EHRR 403, 435 [151] ('*Regner*').

[31] *Mobil Oil* (n 19) 504. In *SDCV* (n 21), Edelman J rejected the suggestion that questions of fairness in cases involving competing interests should be determined by looking 'beyond fairness to a person': at 268 [230]. His Honour's reasoning implies a strong rejection of the idea that fairness could ever be a 'one-sided' matter.

[32] *Minister for Immigration and Multicultural and Indigenous Affairs v Landers* [2003] FCA 1485, [20] (Heerey J). This caution can be seen as a specific instance of wider cautions about elevating form over substance in administrative law principles. See, eg, David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5, 10.

[33] The quoted phrase was used to describe the nature of an invitation to a hearing by a migration tribunal in *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553, 561 [37] (Gray, Cooper and Selway JJ). The status of this formula has not been entirely settled but similar wording was used in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 362 [61] (Hayne, Kiefel and Bell JJ) ('*Li*').

[34] *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212, 215 [9], 219 [24] (Allsop CJ).

[35] The quoted phrase was used to describe requirements for an invitation to a migration hearing by Hayne, Kiefel and Bell JJ in *Li* (n 33) 362 [61].

fairness can be limited, is assessed holistically and requires consideration of competing interests.[36]

'Procedural fairness lies at the heart of the judicial function',[37] which makes observance of its requirements an essential element of courts exercising judicial power.[38] The central role of fairness to the judicial function means that courts cannot be required by legislation to 'act in a manner contrary to natural justice'.[39] Such statements may suggest that the entrenched level of judicial review is mirrored by an entrenched level of judicial fairness,[40] but there are two issues that qualify any absolute approach to fairness in the courts. First, the flexible, contextually sensitive character of fairness noted above also applies in the courts.[41] Second, the courts have long allowed procedures which are arguably unfair, such as ex parte proceedings. Hearings that occur without notice to an affected person breach basic requirements of notice, yet the courts have long accepted that ex parte hearings are permissible in limited circumstances.[42] The

[36] A key point of disagreement between the majority and dissenting opinions in *SDCV* (n 21) is the extent to which, in legislation affecting the courts, parliaments may legislate to decide how such interests are balanced. No clear view emerged: at 231–3 [84]–[90] (Kiefel CJ, Keane and Gleeson JJ), 253–5 [175]–[178] (Gordon J) (suggesting that the extent to which legislation can validly strike the balance is more limited, though expressly not deciding the boundaries of that authority), 290 [311] (Steward J) (agreeing with the plurality in according greater latitude to parliamentary power to determine the balance struck).

[37] *HT v The Queen* (2019) 269 CLR 403, 430 [64] (Gordon J) ('*HT*'), citing *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ). See also *Condon* (n 27) 106–8 [184]–[187], where Gageler J noted that procedural fairness was central to the institutional integrity of courts. Other core features of judicial power, such as independence and impartiality, are not relevant for present purposes.

[38] *Condon* (n 27) 72 [68] (French CJ), 99 [156] (Hayne, Crennan, Kiefel and Bell JJ), 106–7 [184] (Gageler J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel and Bell JJ); *SDCV* (n 21) 236 [106] (Gageler J).

[39] *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ). The point was stated in positive terms in *HT* (n 37), when Kiefel CJ, Bell and Keane JJ accepted that it was a 'fundamental principle … that all courts … are obliged to accord procedural fairness to parties': at 416 [17]. Justice Gordon expressed the concept in inverse terms when finding that a legislative provision was invalid because its operation meant 'the Court is deprived of any capacity to consider and mould its procedures to avoid practical injustice to the parties': *SDCV* (n 21) 259 [194].

[40] This is the protected jurisdiction recognised in *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476, 489–90 [25] (Gleeson CJ), which was essentially extended to state Supreme Courts in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 579–81 [95]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[41] See, eg, *HT* (n 37) 417 [18] (Kiefel CJ, Bell and Keane JJ), 430 [64] (Gordon J).

[42] Justice Gageler adopted that approach to reject suggestions that exceptions to fairness are not uncommon in Australian courts, holding that procedures that are supposedly unfair, such as ex parte hearings, occurred within processes that were fair when viewed as a whole: *Condon* (n 27) 109–10 [192].

courts can also limit the access of parties to certain documents to preserve the confidentiality of that material.[43] In *HT v The Queen* ('*HT*'), Kiefel CJ, Bell and Keane JJ suggested that these examples illustrated that it was possible in 'certain classes of cases' for courts to depart from the general rules of fairness when 'justified for good reason'.[44] Their Honours reasoned that the existence of such cases 'makes it difficult to suggest that the court lacks jurisdiction to vary the basic principles of open and natural justice'.[45] Justices Nettle and Edelman explained that they were 'less sanguine … as to how far courts may go' in protecting confidential information.[46] Their Honours thought that the 'competing needs' of providing full information to judges and of protecting confidential information 'calls for a detailed legislative solution'.[47]

The division of opinion in *HT* is a more subtle continuation of that which was evident in *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Condon*'), where the High Court upheld legislation that denied people access to so-called 'criminal intelligence' that could be considered by a court when making adverse orders against those people.[48] Those restrictions required analysis of the extent to which procedures affecting elements of fairness in the courts might be modified by statute. All members of the High Court accepted the centrality of fairness to the courts and judicial power but differed slightly as to the strictness with which that principle should be applied. Justices Hayne, Crennan, Kiefel and Bell stated:

> To observe that procedural fairness is an essential attribute of a court's procedures is descriptively accurate but application of the observation requires close analysis of all aspects of those procedures and the legislation and rules governing them.[49]

When legislation contained 'novel procedures' that departed from well-settled rules, their Honours saw the decisive question as being 'whether, taken as a

[43] Many examples are given in *HT* (n 37) 423–4 [45] (Kiefel CJ, Bell and Keane JJ) and *SDCV* (n 21) 254–5 [177] (Gordon J).

[44] *HT* (n 37) 424 [46].

[45] Ibid.

[46] Ibid 427 [56].

[47] Ibid. Justices Nettle and Edelman identified several settled principles of law that governed many, though not all, of the problems at hand: at 427–9 [57]–[61]. Their Honours' joint judgment on these issues was notable because they adopted quite different positions in an earlier case that concerned the restrictions on providing information to courts in judicial review: *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 23 [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[48] *Condon* (n 27) 82 [97]–[98], 102–4 [167]–[173] (Hayne, Crennan, Kiefel and Bell JJ).

[49] Ibid 99 [156].

whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice".[50] Justice Gageler adopted what might be described as a more purist position to the connection between judicial power and the observance of fairness. His Honour held that procedural fairness was an 'immutable characteristic' of all Australian courts and that fairness 'has a variable content but admits of no exceptions'.[51] Within that scope of power, Gageler J held that legislation could determine how, rather than whether, fairness was provided.[52] He reasoned that fairness

> can be provided by different means in different contexts and may well be provided by different means in a single context. The legislative choice as to how procedural fairness is provided extends to how procedural fairness is accommodated, in a particular context, to competing interests.[53]

The common law requirements of procedural fairness and the constitutional principles governing the immutable qualities of a court have many similarities. Both adopt a flexible conception of fairness which allows the content of that doctrine to be restricted in appropriate circumstances, such as when the purpose and content of the applicable legislation requires it.[54] That flexible conception allows the use of procedures that are arguably unfair so long as the key requirements of a fair hearing can be provided in the process as a whole.[55] Whether any process meets or fails these standards is gauged by a holistic assessment of the relevant judicial or administrative process.[56] The extent of any holistic assessment of a process is limited to the decisional process rather than its wider setting. Issues that originate outside this realm of considering, making

[50] Ibid 100 [157]. Justices Hayne, Crennan, Kiefel and Bell elsewhere noted that the mere novelty of legislative procedures did not answer questions of their validity: at 94 [138].

[51] Ibid 105 [177]. See also at 110 [194].

[52] Ibid 111–12 [195].

[53] Ibid 111 [195] (citations omitted). Consistent with the majority, Gageler J accepted that legislation could alter fundamental procedural requirements, but pointedly refused to examine the 'limits of that legislative choice': at 111 [196].

[54] The scope for legislation to do so when affecting the operation of courts is clearly narrower than what is possible for administrative officials.

[55] What exactly may constitute that 'whole' was left uncertain by *SDCV* (n 21). That case concerned the validity of s 46 of the *Administrative Appeals Tribunal Act 1975* (Cth), which restricted the disclosure of information in certain appeals from the AAT to the Federal Court. The section prohibits disclosure of certain confidential information to appellants or their lawyers. In assessing the overall effect of s 46, the majority took account of the operation of the alternative right of judicial review: *SDCV* (n 21) 230 [77]–[79] (Kiefel CJ, Keane and Gleeson JJ, Steward J agreeing at 277 [269]). That approach was rejected by the dissenting members of the Court: at 241 [127]–[128] (Gageler J), 260 [195]–[198] (Gordon J).

[56] *Condon* (n 27) 100 [157] (Hayne, Crennan, Kiefel and Bell JJ).

and providing notice of a decision, such as the lack of legal experience or financial means of an applicant, do not generally engage the hearing rule. That limitation of the hearing rule highlights the limited nature of another important aspect of procedural fairness, which is that people should have a fair opportunity to present their case or views before an adverse decision is made. When people come to the administrative process with a serious disadvantage, or perhaps several of them, the extent to which the trappings of fairness can overcome those problems must be questioned.

Sometimes people face such extensive disadvantage that participating in a hearing is not merely difficult, but almost impossible. The decision of the Supreme Court of the United Kingdom in *R (Begum) v Special Immigration Appeals Commission* ('*Begum*') illustrates the limited extent to which fairness can address such problems.[57] Ms Begum had left Britain with friends, when all were young teenagers, to travel to Syria and to live in the (then) emerging self-proclaimed religious territory managed by the Islamic State.[58] That journey was catastrophic for Ms Begum, who was twice married, twice widowed, and gave birth to three children, all of whom died soon after birth.[59] Shortly after Ms Begum was captured by Syrian forces, she was stripped of her British citizenship and left with nominal Bangladeshi citizenship.[60] Ms Begum challenged the removal of her British citizenship and sought leave to enter Britain so that she could properly prosecute her case.[61] The Home Secretary refused that request.[62] Ms Begum faced a significant further procedural disadvantage because the Home Secretary certified that his decisions to revoke Ms Begum's citizenship and to refuse her leave to enter were each based on information which, in the Home Secretary's opinion, should not be disclosed for reasons of national

[57] *Begum* (n 13).

[58] Ibid 781 [16] (Lord Reed PSC, Lord Hodge DPSC, Lords Lloyd-Jones and Sales JJSC and Lady Black agreeing).

[59] Ibid.

[60] Ibid. Ms Begum's citizenship can be described as nominal because it was assumed that she might have Bangladeshi citizenship by ancestry, but her right of entry to Bangladesh has not been clearly settled in the courts: see *R (Begum) v Special Immigration Appeals Commission* [2020] 1 WLR 4267, 4275 [8] (Flaux LJ) ('*Begum (Court of Appeal)*').

[61] *Begum* (n 13) 778 [3], 783 [26] (Lord Reed PSC, Lord Hodge DPSC, Lords Lloyd-Jones and Sales JJSC and Lady Black agreeing). Decisions to strip citizenship are made under the *British Nationality Act 1981* (UK) s 40(2). Appeals against these decisions are possible under the *Special Immigration Appeals Commission Act 1997* (UK) s 2B. Neither of those provisions, nor the wider processes they sit within, provide affected people with a right to enter or remain in Britain during any appeal. Thus, questions about Ms Begum's leave to enter were distinct from her appeal.

[62] *Begum* (n 13) 778 [4] (Lord Reed PSC, Lord Hodge DPSC, Lords Lloyd-Jones and Sales JJSC and Lady Black agreeing).

security.[63] Ms Begum's appeal against the revocation of her British citizenship was heard by a specialist security tribunal.[64] The statute governing this tribunal was silent on the procedure to be used when parties were prevented by circumstance from fully presenting their case. The tribunal held that these extraordinary circumstances did not preclude it from conducting a hearing.[65] It conducted a hearing and found against Ms Begum.[66] The Court of Appeal held that the practical obstacles faced by Ms Begum were so serious that she should be granted leave to enter.[67] This finding presumed that the right to be heard and the associated right of a fair process created two possible solutions: either an appeal that could not be heard fairly should be allowed on that ground, or the court should identify a means by which a hearing could be sufficiently fair.[68]

The Supreme Court held that the correct solution was to stay any appeal until Ms Begum could be present to argue her case.[69] The Court did not approach the problem before it as one of equality of arms, but instead addressed it as one of significant unfairness. Lord Reed, with whom all other members of the Court agreed, reasoned that 'fairness is not one-sided and requires proper consideration' of the position of both parties to the case.[70] Any such consideration must include the position of the government agency involved in the case. Lord Reed explained:

> As Eleanor Roosevelt famously said, justice cannot be for one side alone, but must be for both. It follows that an appeal should not be allowed merely because

[63] Ibid 777 [2], 778 [5]. This apparent legislative gap was curious because earlier decisions about cases containing issues of national security had wrestled with the extent to which courts could fashion procedures for such cases in the absence of clear legislative guidance: see generally Daniella Lock, 'A New Chapter in the Normalisation of Closed Material Procedures' (2020) 83(1) *Modern Law Review* 202, 211–15. That article traces the increasing growth of so-called 'closed hearings', in which many parts of a case can be conducted without an affected person being present.

[64] That body was the Special Immigration Appeals Commission, which was established by the *Special Immigration Appeals Commission Act 1997* (UK).

[65] *Begum* (n 13) 800 [85] (Lord Reed PSC, Lord Hodge DPSC, Lords Lloyd-Jones and Sales JJSC and Lady Black agreeing).

[66] Ibid 779 [9].

[67] *Begum (Court of Appeal)* (n 60) 4305–6 [118]–[121] (Flaux LJ, Singh LJ agreeing at 4308 [130], King LJ agreeing at 4308 [131]).

[68] Ibid 4303 [107], 4304 [111].

[69] *Begum* (n 13) 801–2 [90]–[91], 814 [135] (Lord Reed PSC, Lord Hodge DPSC, Lords Lloyd-Jones and Sales JJSC and Lady Black agreeing). The Court of Appeal had rejected this solution: ibid 4305 [116]–[117] (Flaux LJ, Singh LJ agreeing at 4308 [130], King LJ agreeing at 4308 [131]).

[70] *Begum* (n 13) 801 [90].

> the appellant finds herself unable to present her appeal effectively: that would be unjust to the respondent. There are, indeed, many situations in which a party to legal proceedings may be unable to present her case effectively: for example, because of the unavailability of evidence as a result of the death, illness or incapacity of a witness.[71]

Lord Reed suggested that the extent to which courts could effectively address these problems was often limited.[72] He reasoned:

> If the problem is liable to be temporary, the court may stay or adjourn the proceedings until the disadvantage can be overcome. If the problem cannot be overcome, however, then the court will usually proceed with the case. The consequence is not that the disadvantaged party automatically wins her case: on the contrary, the consequence is liable to be that she loses her case, if the forensic disadvantage is sufficiently serious.
>
> Where, on the other hand, the difficulty is of such an extreme nature that not merely is one party placed at a forensic disadvantage, but it is impossible for the case to be fairly tried, the interests of justice may require a stay of proceedings.[73]

This reasoning is notable on several counts. One is the Supreme Court's acceptance that disadvantage itself is not to be equated with unfairness. The Court appeared to accept that some level of forensic disadvantage is often inevitable or at least not sufficiently remarkable to find unfairness. The 'many situations' that the Supreme Court noted that could impede the presentation of a case, such as the unavailability of evidence or witnesses, are common ones. The other common difficulty encountered in public law cases, that could easily be added to this list, is the significant disparity between the resources of the parties. If so, the issues that commonly ground claims of inequality of arms appear unlikely to be accepted as the basis for a claim of unfairness. That conclusion is consistent with the Supreme Court's emphasis on the need to consider the position of the other party to a public law case, which later parts of this article will show is a recurring issue in public law cases. The difficult aspect of *Begum* is the uncertain distinction that lies between a forensic disadvantage, which the Supreme Court accepted could be so serious as to make the loss of a case

[71] Ibid.

[72] Ibid 801–2 [90]–[91].

[73] Ibid. This extraordinary remedy was granted in *R v Lehrmann [No 3]* (2022) 369 FLR 458, 463–4 [36]–[38] (McCallum CJ).

inevitable, and something of 'an extreme nature' that prevents the fair hearing of a case.[74]

The circumstances in *Begum* and the finding of the Supreme Court that any substantive hearing of Ms Begum's appeal should be stayed are remarkable. Does such a remarkable outcome accord with the values that are said to underpin our public law? Those values are important because the distinct nature of public law cases raises issues which are often not present in private law proceedings.[75] As Allsop CJ has noted, public law cases are distinct because 'there is something super-added, something meaningful, sometimes something menacing in the presence of state authority'.[76] When that authority is exercised in the form of using resources and expertise that are so different and unequal that the weight of the state may appear almost overwhelming, the menace envisaged by Allsop CJ becomes apparent and surely lies behind the concerns expressed in the passages quoted above. Judicial concern about the existence and consequences of the significant disparity between the state and citizens in public law cases reflects the enduring influence of Dicey's conception of the rule of law, which included elements of equality such as the idea that all citizens should be 'subject to the ordinary law of the realm' which disclaimed the possibility of any exemption to that obligation for public officials.[77] The *Australian Constitution* does not contain any 'broad implication of legal equality'[78] which might provide a stepping stone to addressing the concerns expressed by some judges

[74] The holistic assessment in *Lam* (n 28) also appears to be unsuitable for such problems because it operates to examine questions of whether a process *was* fair in practice: see above nn 28–9 and accompanying text. The problem in cases such as *Begum* (n 13) is different as it concerns those instances where a hearing that has not been held cannot possibly be fair.

[75] Whether public law is truly distinctive remains disputed among scholars. This article proceeds on the assumption that public law is 'distinctive enough' to raise special issues: see David Feldman, 'The Distinctiveness of Public Law' in Mark Elliot and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 17, 36.

[76] Chief Justice James Allsop, 'Values in Public Law' (2017) 91(2) *Australian Law Journal* 118, 118. Thomson has argued cogently that such hegemony is not unique to the state: see Stephen Thomson, 'Judicial Review and Public Law: Challenging the Preconceptions of a Troubled Taxonomy' (2017) 41(2) *Melbourne University Law Review* 890, 919. While that argument has great force, it does not detract from the singular authority exercised by governments and their agencies.

[77] AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, 1885) 177–8.

[78] *Palmer v Western Australia* (2021) 274 CLR 286, 300 [24] (Edelman J). That view accords with the assessment of Simpson, who identifies several threads of constitutional doctrine that support notions of equal treatment, but acknowledges that the High Court 'has refused to countenance for Australia a broad constitutional guarantee of equality': Amelia Simpson, 'Equal Treatment and Non-Discrimination through the Functionalist Lens' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 195, 201.

about the inequalities in many public law cases,[79] but the disparities their Honours identify are clearly at odds with what has been described as the 'Diceyan-style aspiration to the level playing field' that underpins Australia's public law framework.[80]

If the rule of law is viewed as 'a principle of institutional morality',[81] the notion of a level playing field can be fleshed out in practical and normative terms. Administrative law, which necessarily encompasses the making and reviewing of administrative decisions, has seen considerable scholarly attention devoted to matters of theory and values.[82] The issue of values is most relevant to the present analysis because values seek to better explain the purpose of our administrative law system.[83] There is no single agreed set of values that is thought to entirely underpin or fully explain administrative law, but there is general agreement that administrative law can be explained by the quest for accountability, [84] transparency, legality (as distinct from the principle of legality),

[79] See above n 14.

[80] Mark Aronson, 'Public Law Values in the Common Law' in Mark Elliot and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 134, 142 ('Public Law Values in the Common Law').

[81] Jeffrey Jowell, 'The Rule of Law' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (Oxford University Press, 8th ed, 2015) 13, 27. Whether that morality is a shared or common one is another matter. Crawford has cogently argued that notions of shared morality are 'nonsense', in so far as they are used to identify fundamental values central to conceptions of the rule of law: Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 186–92. That point is a complex one when applied to notions such as fairness. Most people would surely agree that fairness is a shared or common value, and one thought essential to the legitimate exercise of public power, but precisely what can or should constitute sufficient fairness in any case is likely to be more contested. While Crawford forcefully questions the extent to which courts can coherently articulate the detail of supposed shared values, the vast body of doctrine about fairness suggests this is one area where they do so.

[82] However, many recent works have questioned the value of any attempt to identify a grand or unifying theory. See, eg, Bell, who strongly questions the quest for a single overall theory: Joanna Bell, *The Anatomy of Administrative Law* (Hart Publishing, 2020) ch 7; and Daly, who argues that 'a plurality of values' is the best solution: Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford University Press, 2021) 21–2.

[83] Chief Justice French referred to 'themes and values', which seems to be a more rounded approach: Chief Justice RS French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24.

[84] This issue is examined in useful detail by Ellen Rock: see generally Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020).

participation, the rule of law, access to justice (in the form of grievance mechanisms and administrative review), fairness, and human rights.[85]

The generalised nature of these values, and the varying interpretations that may be given to each of them, limits the extent to which they can provide clear guidance to amorphous procedural problems, such as the significant inequality between parties, but they are useful to frame any consideration of the purpose of fair hearings.[86] While fairness is a part of public law, the doctrine is usually supported with reasons that are more discrete than those used to support public law more generally. Fairness can be justified on instrumental and non-instrumental grounds. The instrumental purposes can include fostering participation,[87] ensuring better and more accurate decisions,[88] improving standards of decision-making,[89] promoting transparency, and enabling possibly wrong decisions to be detected and prevented.[90] The most commonly mentioned non-instrumental rationales for fairness are increasing trust in government (the fair process effect), [91] which is closely related to enhancing the legitimacy of

[85] This list is drawn compendiously from the following sources: Michael Taggart, 'The Province of Administrative Law Determined?' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 1, 3; Aronson, 'Public Law Values in the Common Law' (n 80) 144–5; Paul Daly, 'Administrative Law: A Values-Based Approach' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 23, 23; Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 4th ed, 2022) 54–6; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 7th ed, 2022) 3.

[86] A hearing is not simply an oral one conducted by a court or tribunal. It can also include the decision-making process of administrative officials, which is often conducted wholly in written form as part of a bureaucratic process.

[87] This can take the form of sufficient participation by affected people in the making and review of particular decisions. A wider form of participation can be achieved through a duty of consultation. Australian law has not adopted such a duty as an aspect of procedural fairness, but a limited duty that evolved in the lower UK courts was endorsed by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947, 3956–8 [23]–[25] (Lord Wilson JSC, Lord Kerr JSC agreeing).

[88] The requirement to provide advance notice of a decision and the issues under consideration can foster participation (by allowing people to put forward their views) and improve the quality of decision-making (by allowing affected people to provide relevant material and arguments which a decision-maker may not have).

[89] *Pathan* (n 4) 4522 [52] (Lady Arden JSC). See also *R (Dawson) v United Lincolnshire Hospitals NHS Trust* [2021] EWHC 928 (Admin), [113] (Linden J), where the Court noted that decisions affecting service provision were likely to be more informed if officials had consulted the people who used those services.

[90] See, eg, *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531, 551 (Lord Mustill).

[91] That means people more easily 'accept and obey decisions made in ways they evaluate as fair, regardless of the favorability of the outcome': Tom R Tyler and E Allan Lind, 'Procedural

individual decisions and government more generally,[92] and demonstrating official respect for those affected by the exercise of official power (the dignitarian argument).[93] Most accept that fairness is best explained by both instrumental and non-instrumental factors,[94] which arguably reflects a mixture of pragmatism and principle. Later parts of this article will show that the practice of fairness provides relatively little scope for courts to directly address inequality of arms.

III What Is Inequality of Arms and Why Is It a Problem in Public Law Cases?

The facts of *Begum* were novel but anyone with experience in the law will have seen other forms of vast inequality between parties. Litigation involving banks, tobacco companies and insurance companies, for example, often pits people with limited resources against corporations with immense experience in litigation and a seemingly endless budget to further that experience.[95] The scope of disparity between parties is often conceived in financial terms. One party can afford expensive and highly skilled lawyers, while the other is unrepresented. The well-financed party is also able to seek judgment on various interlocutory points which have the effect of delaying a final decision, whether or not that is

Justice' in Joseph Sanders and V Lee Hamilton (eds), *Handbook of Justice Research in Law* (Kluwer Academic Publishers, 2001) 65, 68.

92 Lord Reed explained that officials observing fair procedures helps 'promote congruence between the actions of decision-makers and the law which should govern their actions': *R (Osborn) v Parole Board* [2014] AC 1115, 1150 [71] ('*Osborn*'). The leading scholar of this field (Tom R Tyler) explains that this public acceptance of official institutions and the rule of law fosters the authority of judges and others to make decisions: Tom R Tyler, 'Understanding the Force of Law' (2016) 51(2) *Tulsa Law Review* 507, 513, 517; Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375, 379; Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283, 292.

93 See, eg, *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, [5] (Allsop CJ); *Osborn* (n 92) 1149 [68] (Lord Reed JSC); *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 137 [40] (Nettle J), 147–8 [72] (Edelman J); *SDCV* (n 21) 268 [230] (Edelman J).

94 See, eg, *Condon* (n 27) 107 [186] (Gageler J); Denise Meyerson, 'The Inadequacy of Instrumentalist Theories of Procedural Justice' in Denise Meyerson, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Routledge, 2021) 159, 172.

95 These examples can be seen as instances of a more systemic bias in the legal system against poor and disadvantaged people: Ronald Sackville, 'Law and Poverty: A Paradox' (2018) 41(1) *University of New South Wales Law Journal* 80, 84–5.

the intention behind pursuing them.[96] The prospect of an adverse award of costs may also be so ruinous that it inhibits a party from commencing action or lodging an appeal.[97] The High Court faced some of these issues in *Northern Territory v Sangare*.[98] A lower court had refused to make a costs order because it was obvious that the litigant, who had sued government officials for defamation, could not possibly meet the costs order sought by the government.[99] The High Court held that the financial position of the litigant was not itself reason enough to depart from the ordinary rules governing costs because '[w]hether a party is rich or poor has, generally speaking, no relevant connection with the litigation'.[100] The Queensland Court of Appeal acknowledged these issues in a case where a couple sought modification of the normal costs rules because they had sued a bank that had vastly superior funds and other resources.[101] In rejecting that argument, the Court of Appeal conceded that '[d]isparities in the wealth of parties to civil litigation, including civil appeals, are not unusual'.[102] The Court continued:

> Large, rich institutions, such as banks, are better placed than parties with limited financial resources to absorb adverse costs orders in the event of failure … But

96 A striking example is *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. That decision usefully illustrates how the use of litigation by a well-funded party will not necessarily run afoul of the rules that seek to prevent an abuse of process: at 328–34 (Mason CJ). Mr Bond raised an important interpretative question which, along with his substantive case, was lost. The substantive decision was still delayed for some time.

97 In *Oshlack v Richmond River Council* (1998) 193 CLR 72, 106 [90] (McHugh J, Brennan CJ agreeing at 75 [2]–[3]), McHugh J accepted that the prospect of an adverse award of costs was likely to inhibit many public law claims but concluded that this was not a sufficient reason to vary normal costs rules. His Honour was sceptical about the prospect of special costs rules for public interest litigation, largely because of the 'inherent imprecision' of the notion of 'public interest litigation': at 98–9 [71]–[72].

98 (2019) 265 CLR 164.

99 Ibid 171–2 [16]–[20] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

100 Ibid 175 [32]. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 230 [130], where McHugh J held that whether or not a party had insurance was normally not relevant to questions of liability. Such statements do not sit easily with the practice of the High Court to sometimes grant special leave in cases that involve large corporations or government agencies on the condition that the agency or corporation pays costs regardless of the outcome. An analysis of those decisions has suggested that the High Court has not yet articulated a principled basis for these decisions: Kieran Pender, 'The "Price" of Justice? Costs-Conditional Special Leave in the High Court' (2018) 42(1) *Melbourne University Law Review* 149, 187–8.

101 *Westpac Banking Corporation v Jamieson* [2015] QCA 84, [8], [16]–[25] (Applegarth J, Margaret McMurdo P agreeing at [2], Morrison JA agreeing at [3]).

102 Ibid [16].

> the starting point for all parties is [that] … [t]he usual order applies to successful parties, rich and poor.[103]

These concerns illustrate a clear judicial awareness of the disparity in resources and knowledge that regularly occurs in legal proceedings, but they do not suggest any solution.[104] When these same problems are raised in other areas, the courts have held that generalised references to the relative inequality between the parties does not provide any basis to stay a case or to issue orders that might ameliorate inequalities, such as ordering that legal representation be provided.[105] Such orders are considered later in this article.

Costs are only one form of disadvantage that arises in legal proceedings. Applicants involved in litigation with governments and their agencies also usually lack the institutional knowledge about bureaucratic processes and the expertise in public law litigation with which government parties are generally awash.[106] These problems are often exacerbated by the administrative process itself. An easy example can be taken from the *Migration Act 1958* (Cth) which was 1,093 pages long when this article was drafted and is almost certainly longer now.[107] The length of the Act is only one of its many problems. It has a complex structure, is drafted in highly technical language and can only be understood, even then only scarcely, by reference to an enormous body of judicial decisions that is notoriously difficult to understand and apply. Applicants who lack legal training and cannot afford a lawyer will naturally struggle to understand and apply this formidable body of law.[108] They may also struggle to understand how the opportunities which lie at the heart of procedural fairness, such as the right to know the case against them and the chance to put their own case, are little

[103] Ibid [16]–[17].

[104] The limited exception applicable to some criminal cases which arises from *Dietrich v The Queen* (1992) 177 CLR 292 ('*Dietrich*') is discussed below in Part V.

[105] See, eg, *Sanderson v Bank of Queensland Ltd* [2016] QCA 137, [23] (Philip McMurdo JA, Morrison JA agreeing at [1], Burns J agreeing at [30]), where the Court held that

> the equality of arms principle does not entitle the present applicants to legal representation or of itself, provide a basis for permanently staying or dismissing this proceeding if they remain unrepresented.

It is explained later in this article that courts generally lack the power to make such orders in civil cases: see below Part V.

[106] In *Thomas v Mowbray* (2007) 233 CLR 307, Kirby J stated that '[t]he Commonwealth is the best-resourced litigant in the nation': at 399 [260].

[107] This statute is clearly only one example of a wider phenomenon: Lisa B Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159, 164–6.

[108] These problems are also longstanding ones in social security cases in the UK: Neville Harris, 'Complexity, Law and Social Security in the United Kingdom' (2006) 8(2) *European Journal of Social Security* 145, 166.

more than attractive rhetoric in processes that they cannot hope to really understand.

Justice Stewart acknowledged these issues in *DOB18 v Ng* when he noted that many applicants in migration cases were able to secure pro bono representation,[109] but conceded that

> in any many [sic] other cases, no one comes forward. On the other side of the case, the Minister is well resourced and has panels of solicitors and counsel regularly appearing for him, including some of the finest public lawyers in the country. There is nothing approaching equality of arms.[110]

Those concerns echoed ones previously expressed by Mortimer J about the inequality of arms that was common in migration cases. Her Honour wondered whether this continued problem could eventually be viewed in constitutional terms.[111] Justice Mortimer explained:

> At some stage, courts may have to confront more squarely the increasing disparity of resources and capacities attending the way judicial review proceedings in the migration jurisdiction are conducted. They may have to confront what needs to be done to ensure that what occurs in Ch III courts does not appear to be but a veneer of fairness.[112]

The suggestion of a 'veneer of fairness' distinguishes between the appearance of fairness and its reality. That distinction is arguably one consequence of the distinctly procedural conception of fairness that prevails in Australian law though, as explained in Part II, the principles of fairness require a holistic assessment of the fairness of a hearing or decision-making process.

The equality of arms principle reflects many of these imperatives but places greater emphasis on the need for a fair or balanced contest between the opposing parties in criminal proceedings.[113] The concept is an important procedural

[109] *DOB18* (n 6) [46]. Pro bono representation is typically drawn from those practitioners who agree to be placed on a panel of practitioners willing to accept such work. In *ADF15 v Minister for Immigration and Border Protection* [2018] FCA 1099, Flick J suggested that pro bono referrals should not be made simply because a party was unrepresented: at [29]. His Honour suggested referrals should be limited, 'generally, [to] those cases which are perceived to have some merit and in circumstances where the Court would be assisted by the input of a legal practitioner'.

[110] *DOB18* (n 6) [46].

[111] *MZAIB* (n 6) 186 [124].

[112] Ibid.

[113] That general statement is qualified by the duty of prosecutors to be fair. For example, in *Nguyen v The Queen* (2020) 269 CLR 299 ('*Nguyen v The Queen*'), Kiefel CJ, Bell, Gageler, Keane and Gordon JJ explained that '[w]hilst the creation of a tactical advantage might be permissible in civil cases, in criminal cases it may not accord with traditional notions of a prosecutor's function': at 317–18 [45].

protection, which the Supreme Court of the United Kingdom has accepted to be 'part of the wider concept of a fair trial' that is protected by human rights instruments.[114] At its simplest, equality of arms embodies the right of a party to know and to be able to effectively challenge the case against them. The concept is closely connected to adversarial ideals in criminal cases, operating to ensure that prosecuting authorities do not gain even greater advantages beyond those provided by the vast machinery of the state.[115] Equality of arms is not an absolute requirement. The United Nations Human Rights Committee acknowledged that impossibility in its *General Comment No 32*, which explained that equality of arms required

> the same procedural rights … to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[116]

Lord Kerr explained that '[e]quality of arms, or a properly set adversarial contest, requires that both parties have equal, or at least a sufficient, access to the material that will be deployed against them'.[117] This suggestion of a sufficient opportunity provides an important qualification because it enables a level of inequality that can often be unavoidable, such as in cases where material must be withheld or released only in summary form because of national security concerns.[118] Lord Kerr's reference to a sufficient opportunity also reflects the reality of litigation and the wider context in which it occurs, which any procedural right would struggle to erase. One leading United Kingdom ('UK') scholar explained:

> It is impossible to devise a system in which economic resources make no difference in litigation. But the principle of equality of arms dictates that the

[114] *Tariq v Home Office* [2012] 1 AC 452, 503–4 [71] (Lord Hope DPSC) ('*Tariq*'). Lord Bingham even went so far as to suggest that the concept lies 'at the heart of the right to a fair trial': *Brown v Stott* [2003] 1 AC 681, 695.

[115] The vast institutional powers held by official authorities weighed heavily on the influential early European decision of *Jespers v Belgium* (1983) 5 EHRR 305, 307 [55]–[58].

[116] Human Rights Committee, *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc CCPR/C/GC/32 (23 August 2007) 3 [13]. That concession is not unlike that in s 64 of the *Judiciary Act 1903* (Cth), which requires that '[i]n any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same'.

[117] *Tariq* (n 114) 519 [124]. See also *Foucher v France* (1997) II Eur Court HR 1, 12 [34].

[118] This was a central issue in *Tariq* (n 114), where the applicant was denied full access to the material that was claimed to suggest that he could not continue his job: at 471–2 [1]–[3] (Lord Mance JSC). Somewhat ironically, the job required the applicant to examine defence and national security information. The case is strikingly similar to *Regner* (n 30) 409 [9]–[15].

> law should try to ensure, as much as possible, that litigants compete on a level playing field.[119]

Most of the European cases that consider equality of arms have focused on the particular problems of criminal cases, such as the failure to disclose relevant material,[120] but the concept has been considered outside of that area. In a civil case of breach of contract, the European Court of Human Rights accepted that equality of arms was not provided when a witness was prevented from giving evidence for the defendant.[121] That restriction breached the equality of arms requirement to provide the party 'a reasonable opportunity to present his case … under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[122] The requirement of a reasonable opportunity to present a case was also held to have been breached by an administrative court in *Steck-Risch v Liechtenstein* when the defendants were not provided with a copy of the submissions opposing their case or given a chance to reply to them.[123] When these requirements were revisited in a case involving the revocation of the security clearance of a bureaucrat, a majority of the Grand Chamber of the European Court of Human Rights accepted that the equality of arms requirement was not absolute and could be qualified on grounds such as national security so long as the qualification had a clear basis and any restrictions were 'sufficiently counterbalanced' by procedures that sought to address the disadvantage.[124] The Grand Chamber held that, when the proceedings were viewed as a whole, the counterbalancing measures were sufficient to prevent inequality of arms.[125]

Equality of arms has also received judicial attention in Victoria, mainly as an aspect of the right to a fair hearing contained in s 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').[126] The

[119] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 4th ed, 2021) 164 [3.169].

[120] See, eg, *Fitt v United Kingdom* (2000) 30 EHRR 480, where a majority of the European Court of Human Rights rejected a complaint that non-disclosure had breached the right to a fair hearing because withholding limited material on public interest grounds was permissible, but affirmed the role of equality of arms between the prosecution and defence: at 510–12 [44]–[50].

[121] *Dombo Beheer BV v The Netherlands* (1993) 274 Eur Court HR (ser A) 6–7 [12]–[16], 15 [35].

[122] Ibid 15 [33].

[123] (2006) 42 EHRR 373, 378 [20], 384 [54]–[59].

[124] *Regner* (n 30) 434 [148].

[125] Ibid 437 [161].

[126] An interesting Australian perspective on the doctrine is provided in Willem de Lint and Wondwossen D Kassa, 'Bent into Security: Barrister Contribution to a Skewed Order in Two

right is contained in other Australian statutory charters of rights,[127] but none of those instruments has yet generated the depth of judicial consideration about equality of arms that has occurred in Victoria. The first significant case was *Ragg v Magistrates' Court of Victoria*, where a defendant facing charges of tax evasion issued two summonses to obtain documents from tax officials.[128] Justice Bell held that the magistrate had not erred in refusing to strike out the summonses because the defendant was entitled to be given, or at least to seek, documents required for a fair trial.[129] His Honour held that the *Victorian Charter* did not apply to the case,[130] but nonetheless examined the equivalent rights to s 24(1) contained in international human rights instruments.[131] His Honour referred to the concept as 'an international human rights principle that picks up the language of the battle to explain some aspects of the most important of those rules — the right to a fair trial'.[132] Justice Bell held that the failure of the police to provide copies of relevant reports was 'precisely the situation at which the equality of arms principle is aimed', which his Honour said could inform questions of whether the prosecutor had failed to discharge the duties required of him by fairness.[133]

Several subsequent Victorian decisions have suggested that equality of arms can essentially be equated with the requirements of the hearing rule of natural justice.[134] Justice Bell appeared to do so in *Matsoukatidou v Yarra Ranges*

Terrorism Prosecutions in Australia' (2017) 44(2) *Journal of Law and Society* 169. The authors argue that procedural and legislative restrictions in many prosecutions of terror-related offences make any equality of arms impossible: at 183–94.

127 *Human Rights Act 2004* (ACT) s 21(1); *Human Rights Act 2019* (Qld) s 31(1).

128 (2008) 18 VR 300, 301 [1] (Bell J) ('*Ragg*').

129 Ibid 327–8 [118]–[121].

130 Ibid 308 [36]. This aspect of the decision was strongly criticised in Jeremy Gans, '(Mis)applying the Charter's Stupidest Section', *Charterblog* (Blog Post, 25 January 2008) <https://charterblog.wordpress.com/2008/01/25/when-do-proceedings-commence-under-charter-s-492-ragg-v-magistates-court/>, archived at <https://perma.cc/25WF-LQY8>.

131 *Ragg* (n 128) 307–8 [35].

132 Ibid 310 [45].

133 Ibid 315–16 [66]. Justice Cavanough pointedly rejected the conclusion that relevance was itself a sufficient reason to require production of material in criminal cases, or that the failure to provide relevant material meant prosecuting officials had not discharged their duties of disclosure: *Holloway v Victoria* (2015) 73 MVR 145, 159 [44]–[45], 161 [51]. Those doubts were vindicated in *Madafferi v The Queen* (2021) 287 A Crim R 380, 400 [98] (Emerton, Weinberg and Osborn JJA).

134 See, eg, *Knight v Wise* [2014] VSC 76, [36] (T Forrest J); *Deputy Commissioner of Taxation (Cth) v Bourke* [2018] VSC 380, [73] (Cameron J). These cases do not make it entirely clear whether equality of arms is thought to be relevant to the decision subject to judicial review or to the conduct of that judicial review proceeding, or both.

Council when considering the duties owed to unrepresented parties.[135] His Honour suggested that the hearing rights required by procedural fairness and those contained in human rights instruments for fair hearings were

> so close and overlapping that a court or tribunal is almost always entitled to proceed upon the basis that advice and assistance which satisfies the common law standard will also represent reasonable adjustments and accommodations under the human rights standard, and vice versa.[136]

That comparison has been made by others. In a detailed analysis of the right to a fair criminal trial under European law, Sidhu explained that equality of arms between parties affirms 'our intuitive sense of procedural fairness'.[137] If the need for some level of relative equality between parties is seen to express an elementary or intuitive form of fairness, it is not easy to understand why that sense of fair play should be limited to criminal proceedings, rather than being applicable to proceedings between the state and its citizens more generally. Some considerations point the other way. One was suggested recently by the Federal Court of Canada when it noted that 'there is no issue of "equality of arms" between an administrative tribunal and a party subject to the administrative process. In the administrative context, they are not "enemies"'.[138] The High Court has made similar remarks about hearings in migration tribunals, cautioning that administrative proceedings often do not lend themselves to adversarial notions such as that of opposing sides.[139] These statements arguably reflect an idealistic view

135 *Matsoukatidou* (n 11).

136 Ibid 682 [180] (Bell J).

137 Omkar Sidhu, *The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights* (Intersentia, 2017) 75. This assessment aligns with the procedures that the United Nations has identified will provide equality of arms, such as sufficient notice and time to prepare a case, disclosure of adverse material and so on: United Nations Office on Drugs and Crime, *Handbook on Criminal Justice Responses to Terrorism* (United Nations, 2009) 85–6. These procedures are strikingly similar to those required by the principles of natural justice for a fair hearing.

138 *ArcelorMittal Exploitation Minière Canada SENC v A-G (Canada)* [2021] FC 998, [48] (McHaffie J).

139 See, eg, *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, 221 [62] (French CJ, Kiefel, Bell and Keane JJ) ('*Uelese*'). In rejecting arguments that a tribunal had not erred by failing to consider issues not expressly included in the claimant's own material, French CJ, Kiefel, Bell and Keane JJ made clear that the tribunal's 'inquisitorial review function' should not be defined by the use of 'notions appropriate to adversarial proceedings' such as the 'formal rules of pleading'. Such remarks do not mean that clearly adversarial processes, such as criminal cases, are immune to the notions normally associated with administrative proceedings. An example is the duty of fairness owed by prosecutors, which was recently examined in *Nguyen v The Queen* (n 113). Justice Edelman noted that 'the prosecutor's duty of fairness

of administrative proceedings. Another reason is that criminal cases involve the potential penalty of imprisonment, sometimes for the rest of a defendant's life. While that penalty is unique, later parts of this article note that many applicants in migration proceedings face the possibility of indeterminate administrative detention, which is arguably imprisonment in all but name.[140] The same essential point applies to other outcomes of civil proceedings that are devastating to people, such as bankruptcy, exclusion from a profession or loss of the custody of children.

IV Costs and Inequality of Arms

The previous part commenced by noting that a significant disparity in resources between parties is not rare, is generally not an issue that bears upon litigation, and does not itself provide a reason to vary normal costs rules. Those general statements require adjustment in public law because this area has long fostered special principles that govern public interest litigation.[141] Very few of the statutes that enable review of public decisions make special provision for modifying normal costs rules.[142] An issue of particular relevance to the question of inequality of arms is the crushing effect that an award of costs may have. A means to address that problem that has particular relevance to inequality of

depends upon all the circumstances at trial': at 321 [54]. Chief Justice Kiefel, Bell, Gageler, Keane and Gordon JJ explained that a prosecutor 'is not to be expected to be detached or disinterested in the trial process … [but] is to be expected to act to high professional standards and therefore to be concerned about the presentation of evidence to the jury': at 317 [45]. These statements offer an inverse parallel of those in *Uelese* (n 139), suggesting that notions of adversarial

proceedings are not entirely divorced from the basic notions of fairness typically associated with non-adversarial proceedings.

[140] The technical distinctions between imprisonment and administrative detention remain important for reasons of constitutional and tort law: see, eg, *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 342–4 [23]–[33] (Kiefel CJ, Bell, Keane and Edelman JJ); *Alexander v Minister for Home Affairs* (2022) 401 ALR 438, 499–500 [246] (Edelman J).

[141] In his careful analysis of costs in public law litigation, Dal Pont concludes that litigants are not allowed a 'free kick' or some sort of general immunity in litigation against government: GE Dal Pont, *Law of Costs* (LexisNexis, 5th ed, 2021) 281 [9.2].

[142] A notable exception is the *Judicial Review Act 1991* (Qld) ss 49–50. Sections 49(2)(a)–(b) require courts to take account of specified issues, which include the financial resources of a party, and whether the case involves an issue that affects the public interest. Section 50(b)(i) provides that an applicant who seeks reasons for an administrative decision may only be ordered to pay the costs of the respondent if the application is 'wholly unsuccessful'. The principles that have developed under these provisions are usefully examined in Narelle Bedford, 'The Winner Takes It All: Legal Costs as a Mechanism of Control in Public Law' (2018) 30(1) *Bond Law Review* 119, 128–33.

arms is protective costs orders. The leading UK case of *R (Corner House Research) v Secretary of State for Trade and Industry* ('*Corner House*') suggests that protective costs orders can ameliorate inequality of arms between parties, though that aspect of UK law may reflect a peculiar rule of court.[143] *Corner House* involved a novel rule that required courts to deal with costs orders 'justly' and provided that this should include, 'so far as is practicable … ensuring that the parties are on an equal footing'.[144] In granting a protective costs order in *Corner House*, the Court was influenced by the distinct nature of public law cases, which often contain 'a public interest in the elucidation of public law by the higher courts' that was additional to any interests of the parties.[145] The Court granted the order because the case at hand raised issues of general public importance and of statutory interpretation that might not receive judicial attention if the claimant feared a substantial costs order should the case fail.[146] UK law still contains an express procedural requirement for courts to consider the possible 'equal footing' of parties,[147] which has enabled the principles identified in *Corner House* to become well-settled ones in the UK.[148]

Australian rules of court do not generally expressly mention the need to ensure that parties 'are on an equal footing', but our courts have adopted principles quite similar to those of *Corner House*. Perhaps the most detailed are those stated by Bennett J in *Corcoran v Virgin Blue Airlines Pty Ltd* ('*Corcoran*'), which included a broad range of factors, such as the complexity of the factual and legal issues raised; whether the case was arguable, contained a significant public interest element, or raised significant questions of statutory interpretation; and the ability of a party to pay any award of costs.[149] Subsequent Australian cases have made it clear that these criteria, and also those of *Corner House*, are useful but should not be viewed rigidly.[150] The possibility that these principles might

143 [2005] 1 WLR 2600, 2625 [74], 2626 [76] (Lord Phillips MR for the Court) ('*Corner House*').

144 This was the (now modified) *Civil Procedure Rules 1998* (UK) SI 1998/3132, r 1.1(2)(a) ('*CPR*'), which was reproduced in *Corner House* (n 143) 2623 [66] (Lord Phillips MR for the Court).

145 *Corner House* (n 143) 2624 [70] (Lord Phillips MR for the Court).

146 Ibid 2640 [137]–[138].

147 One of the overriding objectives of the *CPR* (n 144) maintains the requirement to ensure that 'parties are on an equal footing': r 1.1(2)(a). Other aspects of costs rules in public law cases have since been amended by the *Criminal Justice and Courts Act 2015* (UK) ss 88–9.

148 Recent developments are usefully reviewed in *Swift v Carpenter* [2020] EWCA Civ 165, [31]–[51] (Sir Terence Etherton MR and Irwin and Davies LJJ).

149 [2008] FCA 864, [6]–[7], [10]–[11], [36].

150 See, eg, *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 22, 32 [36], where Preston J held that these factors and those applied in *Corner House* (n 143) 'may, in appropriate cases, provide guidance but [that] they should not be elevated to become fixed criteria governing the exercise of the discretionary power to make a maximum costs order'.

evolve to include some sort of equality of arms appears unlikely in the wake of two notable decisions of the Victorian Court of Appeal.

The first of those decisions was *Bare v Small* ('*Bare*'), where a claimant sought a protective costs order during his complex case against the police which involved a human rights claim and a claim of judicial review.[151] An agreement had been reached on costs for the initial hearing of the case but not in the appeal.[152] The Court of Appeal held that jurisdiction to make a protective costs order arose from the power conferred by s 65C of the *Civil Procedure Act 2010* (Vic) to fix or cap costs where the court 'considers [it] appropriate to further the overarching purpose' of that Act.[153] Section 7(1) of the statute declares that the overriding purpose of the Act and the rules of court is to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute' in civil proceedings.[154] The Court of Appeal held that these imperatives conferred a discretionary power to fix or cap the costs liability of a party in suitable cases.[155] Three aspects of that finding are important for present purposes. First, the Court of Appeal accepted that the factors identified in *Corcoran* provide a range of relevant considerations that form neither a rigid test nor an exhaustive list for the grant of protective costs orders.[156] The issues that weighed most heavily on the Court were that the appeal 'has the quality of a "test case" about it', that it raised complex questions of law about the *Victorian Charter* and that the claimant did not seek damages.[157] Second, the Court of Appeal left open the question of whether it should grant some sort of reciprocal order that might constrain the costs to the appellant if his claim succeeded.[158] The Court found that factors supporting the grant of a protective costs order were clear in the case at hand and removed any need to consider any reciprocal order.[159] It also noted that the Victorian legislation contained no equivalent to the requirement

151 (2013) 47 VR 255, 258 [5] (Hansen and Tate JJA) ('*Bare*').

152 Ibid 265 [39].

153 Ibid 259 [15], 264 [35].

154 *Civil Procedure Act 2010* (Vic) s 7(1). There are equivalent mandates in the *Federal Court of Australia Act 1976* (Cth) s 37M, the *Civil Procedure Act 2005* (NSW) s 56(1), the *Supreme Court Rules 2000* (Tas) r 414A, and the *Rules of the Supreme Court 1971* (WA) ord 1 r 4B. These provisions owe their origin to Lord Woolf's famed report: see generally Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Report, July 1996).

155 *Bare* (n 151) 264 [35] (Hansen and Tate JJA).

156 Ibid 264 [37].

157 Ibid 265 [42]–[43], 267 [48]. Very similar considerations would prevail in Hong Kong: Stephen Thomson, *Administrative Law in Hong Kong* (Cambridge University Press, 2018) 62–3.

158 *Bare* (n 151) 267 [48] (Hansen and Tate JJA).

159 Ibid.

of 'equal footing' that was central to *Corner House*,[160] which suggests that the statutory requirement for the 'just' resolution of cases does not include one of equality. Third, the Court of Appeal was mindful that the appeal would very likely be abandoned if the costs order was not granted.[161]

A differently constituted Victorian Court of Appeal faced similar issues a year later in *Khalid v Secretary, Department of Transport, Planning and Local Infrastructure* ('*Khalid*'), where the claimant in a discrimination case sought a protective costs order to enable him, as an indigent party, to pursue an issue he claimed had wider public importance.[162] The claimant argued that the order would foster an equality of arms between the parties and that this rebalancing of sorts was required by s 7(1) of the *Civil Procedure Act 2010* (Vic).[163] The Court of Appeal accepted that protective costs orders could be made for a range of reasons, but held that equality of arms was not contained in either the *Act* or the rules of court.[164] The Court concluded that, in view of the 'long history of these rules' and 'in the absence of clear words to the contrary', it could not accept that the *Act* impliedly incorporated such a significant new principle.[165]

Justice Richards considered herself bound by *Khalid* when considering the costs application of an unrepresented party in *Michos v Eastbrooke Medical Centre Pty Ltd [No 2]*.[166] The unrepresented applicant in that case sought a protective costs order because of his parlous financial position.[167] Justice Richards approached the applicant's appeal to equality of arms in the following terms:

> Related to the concept of 'equal footing' is the principle of 'equality of arms', which is an aspect of the right to a fair hearing in s 24(1) of the *Charter*. The principle of equality of arms is concerned with procedural equality, and requires that a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent. It has particular relevance in a case such as this one, where one party has legal representation and the other is self-represented.[168]

[160] Ibid. The key aspects of the English *CPR* (n 144) are otherwise very similar to the *Civil Procedure Act 2010* (Vic).

[161] *Bare* (n 151) 266 [46] (Hansen and Tate JJA).

[162] [2014] VSCA 115, [21], [25] (Warren CJ and Santamaria JA).

[163] Ibid [25], [27].

[164] Ibid [30].

[165] Ibid.

[166] [2019] VSC 437, [43]–[44].

[167] Ibid [7] (Richards J).

[168] Ibid [42] (citations omitted).

This suggestion that the concepts of equal footing and equality of arms are related does not bear close scrutiny. Equality of arms is clearly tailored to the circumstances of all cases to which that hearing right applies. By contrast, the notion of equal footing as developed in *Corner House* can only apply to a narrow class of public law cases, namely those which involve questions of wider importance that can be contained in complex questions of statutory interpretation or a test case. On these issues, there is little substantive difference between the approaches of *Corner House* and *Bare*. The notion of equal footing is not, as Richards J suggested, similar or related to equality of arms. It instead bears a parallel to the statutory requirement to facilitate the just resolution of proceedings. *Bare* appears to have conceived the notion of 'just' as a requirement to remove disadvantage, which is not necessarily equivalent to equality of arms. *Khalid* suggests that a doctrine of far-reaching consequences for the conduct of legal proceedings, such as a requirement of equality of arms that was somehow enforceable, requires clear legislative sanction. *Khalid* also suggests that any transmission of concepts from the *Victorian Charter* that may have significant impact might require a legislative imprimatur beyond that of the *Charter* itself. That possibility means it is unlikely that equality of arms may become a more general part of Victorian law by some process of implication from the *Charter*.

V The *Dietrich* Case: Limited Equality of Arms, or Something Else?

Perhaps the most obvious means by which parties can be placed on a more equal footing is through legal representation. The benefits of legal representation are well known,[169] but in many instances parties cannot afford to engage a lawyer. The common law has never recognised a right to state-funded representation, but the High Court recognised a limited and indirect right in

[169] Analysis of judicial review claims in the Federal Circuit Court of Australia revealed strikingly higher rates of success for represented parties: Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh, 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia' (2022) 45(3) *University of New South Wales Law Journal* 1085, 1101. See also Catherine Barnard and Amy Ludlow, 'Administrative (In)justice? Appellants' Experiences of Accessing Justice in Social Security Tribunals' [2022] (July) *Public Law* 406, 417, concluding that '[l]egal representation appeared to make a tangible difference when it featured'. These studies are consistent with wider empirical research which has found that legal representation leads to favourable results. The correlation between lawyers and success varies greatly between studies but it is clear that lawyers are particularly effective in using their expertise to manage procedural issues: Rebecca L Sandefur, 'Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact' (2015) 80(5) *American Sociological Review* 909, 926.

Dietrich v The Queen ('*Dietrich*').[170] That case held that a criminal trial of serious charges can be adjourned or permanently stayed until legal representation is provided.[171] *Dietrich* did not recognise a right to state-funded counsel, but instead confirmed that a stay could be issued in some instances to ensure a fair trial.[172] The High Court emphasised the requirement of a fair trial rather than 'the attainment of perfect justice'.[173] Justice Dawson drew from a (then) recent statement by Brennan J:

> If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it. Were it otherwise, trials would be prevented and convictions would be set aside when circumstances outside judicial control impair absolute fairness.[174]

This passage does not doubt the possibility of 'perfect justice' and 'absolute fairness', only the ability of judges to achieve them single-handedly. That realism acknowledges the limited capacity of courts to remedy the institutional and other wider problems that often manifest before courts and tribunals. The idea that trials can only be as fair as the courts can make them is not only realistic, but also acknowledges the limited role of courts in ameliorating the effect of those external issues they cannot directly control. Such considerations may have been why Dawson J accepted that the 'the interests of justice cannot be pursued in isolation' from wider issues, such as the cost of any remedial measures the courts might order.[175]

Any possibility that *Dietrich* might be extended beyond a limited range of criminal proceedings was quickly foreclosed in *New South Wales v Canellis* ('*Canellis*'), where the High Court unanimously rejected extending the *Dietrich* remedy to an administrative inquiry.[176] The High Court conceded that *Dietrich* 'may possibly be regarded as a manifestation of the rules of procedural fairness',

[170] *Dietrich* (n 104).

[171] Ibid 311–12, 315 (Mason CJ and McHugh J), 337 (Deane J), 362 (Toohey J), 371 (Gaudron J).

[172] Ibid 315 (Mason CJ and McHugh J), 331–2 (Deane J), 357 (Toohey J), 365 (Gaudron J). This can be contrasted with *Gideon v Wainwright*, 372 US 335, 344–5 (Black J for the Court) (1963), where the Supreme Court of the United States held that the 14th Amendment required the state to appoint counsel for indigent defendants facing felony charges. That duty removes the need to stay hearings.

[173] *Dietrich* (n 104) 345 (Dawson J).

[174] Ibid 345 (Dawson J), quoting *Jago v District Court (NSW)* (1989) 168 CLR 23, 49 (Brennan J).

[175] *Dietrich* (n 104) 349.

[176] (1994) 181 CLR 309, 329 (Mason CJ, Dawson, Toohey and McHugh JJ), 335 (Brennan J) ('*Canellis*').

but held that the function and powers of the administrative inquiry were so different to those of a court conducting criminal proceedings that there was no coherent foundation to extend *Dietrich*'s remedy.[177] The High Court was also mindful that any extension of *Dietrich* would impose a 'very considerable' cost upon governments.[178] The facts of *Canellis* arguably provided an unsuitable instance to consider the possible operation of *Dietrich* in administrative proceedings. Mr Canellis had been called to give evidence but was not the main focus of the inquiry.[179] Nor did he face the grave penalties of conviction and imprisonment that loomed large in *Dietrich*.[180]

Canellis did not make clear whether the adverse consequences faced by an unrepresented person might be relevant. If *Dietrich* is conceived as a mechanism to protect unrepresented people from the serious possible consequences of adverse official action more generally, rather than just the consequences of the kind that could occur in criminal proceedings, it is only a small conceptual step to accept that the remedy should encompass those cases where serious consequences can flow from administrative proceedings. Some guidance on that possibility can be gleaned from the principles governing civil penalties in regulatory or disciplinary proceedings.[181] The courts have made clear that *Dietrich* cannot be invoked in such cases because the courts have no clear power to order that representation be provided or to stay a proceeding in the alternative.[182] This reliance on the lack of judicial remedial powers relieves courts of the need to consider deeper questions about the interests at stake or the impact of official power. The full import of that gap may explain the decision in *Nguyen v Minister for Immigration and Multicultural Affairs*, where a Full Court of the

177 Ibid 329 (Mason CJ, Dawson, Toohey and McHugh JJ). See also at 328.

178 Ibid 331. A major review of UK tribunals similarly concluded that 'legal representation at the taxpayer's expense in every administrative dispute or tribunal case would be disproportionate and unreasonable': Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243, 2004) 48 [10.3].

179 See *Canellis* (n 176) 322 (Mason CJ, Dawson, Toohey and McHugh JJ).

180 The importance of the presence or absence of these penalties reflects what has been described as the unique 'structural imbalance' of criminal proceedings and the emphasis placed by the common law on avoiding wrongful imprisonment: Shai Agmon, 'Undercutting Justice: Why Legal Representation Should Not Be Allocated by the Market' (2021) 20(1) *Politics, Philosophy and Economics* 99, 110.

181 *Elliott v Australian Securities and Investments Commission* (2004) 10 VR 369, 412 [162] (Warren CJ, Charles JA and O'Bryan AJA) ('*Elliott*'); *Australian Securities and Investments Commission v Reid [No 1]* (2006) 151 FCR 540, 545 [21] (Lander J); *Foster v Australian Competition and Consumer Commission* [2012] FCA 953, [18]–[19] (Perram J).

182 *Elliott* (n 181) 412 [162] (Warren CJ, Charles JA and O'Bryan AJA). These limitations apply to other civil proceedings, such as child protection cases: *F v Minister for Education and Child Development* [2017] SASCFC 71, [66] (Blue J, Vanstone J agreeing at [3], Peek J agreeing at [4]) ('*F v MECD*').

Federal Court saw 'nothing to suggest' that the reasoning in *Dietrich* applied to a hearing by the Administrative Appeals Tribunal ('AAT') to review a deportation order.[183] The Full Court continued:

> On the contrary, the rationale underlying *Dietrich*, namely the power of a court to stay proceedings in order to prevent an unfair criminal trial taking place, does not apply to an administrative review conducted by a tribunal no matter how serious the consequences for the individual concerned.[184]

Similar reasoning was adopted in a series of cases which made clear that *Dietrich* had no application to the specialist migration tribunals that consider claims for refugee status and other migration issues.[185] While the judicial review jurisdiction of superior courts has proven to be an equally barren terrain for the *Dietrich* principle,[186] the absence of representation in tribunals often has greater practical significance. In the federal sphere, for example, most unrepresented parties appear in migration cases and do not speak English.[187] In *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* ('*WABZ*'), French and Lee JJ acknowledged that these people face a 'crippling disadvantage' in judicial review proceedings, but suggested that 'the lack of representation at the earlier stage of merits review is probably of greater significance in terms of its effect upon the eventual outcome'.[188] That was because 'the Tribunal hearing is generally the first and last opportunity that an applicant has for merits review of the original decision'.[189] The lack of legal representation for

[183] (2000) 101 FCR 20, 26 [24] (Sackville, Marshall and Lehane JJ).

[184] Ibid. See also *Commissioner of Taxation v La Rosa* (2002) 196 ALR 139, 162 [122] (Nicholson J), where it was held that *Dietrich* (n 104) had no application to taxation review proceedings in the AAT.

[185] See, eg, *SZHTI v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 702, [3]–[4] (Gyles J); *MZXFU v Minister for Immigration and Multicultural Affairs* [2006] FCA 1593, [8] (Sundberg J); *SZKMG v Minister for Immigration and Citizenship* [2008] FCA 1062, [31] (Reeves J) ('*SZKMG*'); *Bodenstein v Minister for Immigration and Citizenship* [2009] FCA 50, [17] (Perram J). These cases concerned the Refugee Review Tribunal and the Migration Review Tribunal, which were both abolished when their jurisdiction was transferred to the AAT by the *Tribunals Amalgamation Act 2015* (Cth).

[186] See, eg, *Palu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1736, [74] (Rangiah J); *Daher v Bell* [2021] VSCA 192, [48] (Kyrou, Kaye and Kennedy JJA) ('*Daher*'). Each case held that *Dietrich* (n 104) does not apply to judicial review proceedings.

[187] See, eg, *SZKMG* (n 185) [16] (Reeves J); *MZAIB* (n 6) 185 [119] (Mortimer J); *CMC18* (n 6) [51] (Mortimer J).

[188] (2004) 134 FCR 271, 295 [69].

[189] Ibid. It should not be assumed that unrepresented parties are aware of these differences. A recent empirical study of English migration litigation suggested that some claimants 'struggle

applications in many migration tribunal hearings often continues in a judicial review application in the Federal Circuit Court. Those first instance judicial review claims are typically disorganised and either omit or fail to clearly articulate arguable grounds. Many of those problems inevitably come to the fore on appeal, where claimants are more likely to be represented. Justice Mortimer acknowledged the ongoing dilemma that these issues present in the Federal Court in *CMC18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[190] Her Honour stated:

> If a broad and equitable system of publicly funded legal representation were available in the first instance migration judicial review jurisdiction of the Federal Circuit Court, then this Court could consider issues of leave to raise new arguments on appeal from that court with a different perspective on where the interests of the administration of justice might lie. However, there is no such system.[191]

In the absence of any scheme of comprehensive legal assistance, the courts have developed detailed principles to govern the question of whether the absence of legal representation may constitute a denial of natural justice. The general nature of these principles means that they provide guidance to hearings in both courts and tribunals. The requirements of procedural fairness clearly do not support a right to state-funded legal representation.[192] It follows that any assessment of the fairness of a hearing is not determined by the absence of a lawyer, but is instead gauged by the more general question of whether the hearing was fair in all the circumstances of the case.[193] This contextual approach means the fact that a party is unrepresented in a hearing is 'a factor which may be taken into account' when deciding whether a denial of procedural fairness has occurred, but it is generally accepted that the lack of representation alone will not

with the conceptual difference between an appeal and review': Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Palgrave Macmillan, 2021) 141.

190 *CMC18* (n 6).

191 Ibid [42].

192 See, eg, *SZQRU v Minister for Immigration and Citizenship* [2012] FCA 1234, [24] (Katzmann J) ('*SZQRU*'); *Doepgen v Mugarinya Community Association Inc* [2014] WASCA 67, [12] (Pullin and Newnes JJA); *Maere v Minister for Home Affairs* [2019] FCAFC 121, [9] (Davies, O'Bryan and Snaden JJ); *CWT17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 588, [37] (O'Bryan J). Some cases express this principle in more general terms: see, eg, *WZARX v Minister for Immigration and Border Protection* [2014] FCA 423, [13], where McKerracher J held that '[t]here is no automatic entitlement for an appellant to have legal representation in a civil claim of this or any other nature'.

193 This criterion reflects the touchstone of 'practical injustice': see above Part III.

inevitably lead to a finding of unfairness.[194] That standard is not an easy one to satisfy. The fact that the lack of representation is 'disadvantageous', or that a party 'might have had a better chance' if represented, does not alone appear to breach the requirements of procedural fairness.[195]

These principles highlight an inconsistency within the principles of procedural fairness. On the one hand, the courts have long accepted that the potential impact of a decision or other official action is relevant to deciding whether fairness applies and what it requires.[196] As was noted above, the courts have made clear that a hearing or an invitation to attend and participate in a hearing cannot be a hollow gesture or a sham.[197] At the same time, however, the contextual approach to fairness does not provide a clear means for courts and tribunals to take account of the multiple disadvantages faced by many litigants. A useful example is the decision of a Full Court of the Federal Court on the potential reach of procedural fairness in *NWQR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*NWQR*').[198] The applicant in that case was not well educated, had a very low IQ, had been held in immigration detention and was unrepresented until his case before a Full Court of the Federal Court.[199] Counsel appearing for the appellant, NWQR, in the Full Court compared the many disadvantages of his client with the position of the Minister, who was represented by a very experienced barrister instructed by an equally experienced solicitor.[200] Counsel for NWQR argued that the lack of representation in the earlier hearing was a denial of natural justice and that the difficulties his client faced while in immigration detention were a sufficient reason to distinguish the many limits in *Dietrich*.[201] The Full Court flatly rejected that argument, holding the fact that the case 'was a public law matter concerning an impecunious individual in immigration detention' provided 'no principled reason' to extend either the reach of *Dietrich* or the requirements of natural

194 *AMF15 v Minister for Immigration and Border Protection* (2016) 241 FCR 30, 53 [52] (Flick, Griffiths and Perry JJ).

195 The quoted words are taken respectively from *BPI17 v Minister for Immigration and Border Protection [No 2]* [2020] FCA 252, [8] (O'Bryan J) and *SZQRU* (n 192) [24] (Katzmann J).

196 The duty to observe the requirements of procedural fairness is now so broad that it is accepted that '*any* clear form of possible adverse affectation is sufficient to qualify as an interest that may attract the protection of natural justice': Aronson, Groves and Weeks (n 85) 419 (emphasis in original).

197 See above nn 35–7.

198 [2021] FCAFC 30 ('*NWQR*').

199 Ibid [25] (Farrell, Wigney and Perry JJ).

200 Ibid.

201 Ibid [25]–[26].

justice to fashion a right to state-funded representation.[202] The Court also approved a statement from a differently constituted Full Court, which accepted that

> [n]othing is added to a procedural fairness ground by seeking to constitutionalise it because the requirements of the *Constitution* do not exceed what is required by the common law principles of fairness.[203]

The extent to which constitutional principles might support any extension of *Dietrich*, particularly in the guise of fairness, is limited by the malleable nature of fairness. An example of the flexible content of fairness relevant for present purposes is the suggestion of Lord Mance that the 'balance is struck somewhat differently in criminal and civil law contexts'.[204] When Kiefel CJ, Bell and Keane JJ recently approved those remarks,[205] their Honours did not mention Lord Mance's important point that '[i]n a civil law context, the liberty of the subject is not at stake'.[206] That qualification is generally true in England, where the prolonged or indefinite immigration detention that has become common in Australia is a very rare practice.[207] This difference means that some parties in civil proceedings, most notably applicants in many migration cases, can face detention so lengthy as to make any recourse to the requirements of fairness in the civil cases of other jurisdictions wholly inapt. Variation between jurisdictions is not the only relevant distinction. Another is that of the distinction

[202] Ibid [26].

[203] Ibid, quoting *CMU16 v Minister for Immigration and Border Protection* (2020) 277 FCR 201, 217 [65] (Jagot, Yates and Stewart JJ).

[204] *Al Rawi v Security Service* [2012] 1 AC 531, 594 [101] (Lord Mance JSC, Baroness Hale JSC agreeing) ('*Al Rawi*').

[205] *HT* (n 37) 421 [33].

[206] *Al Rawi* (n 204) 594 [102]. The quoted remarks are subject to the point at the conclusion of Part III that many consequences of civil proceedings are ruinous and life-changing.

[207] The number of people held in immigration detention in the UK is quite large but most are held for periods that are short when compared to Australian practice: see Home Office (UK), 'National Statistics: How Many People Are Detained or Returned?', *GOV.UK* (Web Page, 18 June 2021) <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2021/how-many-people-are-detained-or-returned>, archived at <https://perma.cc/KC65-9CR2>; Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 30 June 2021) 12 <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention>, archived at <https://perma.cc/LD8T-3EU4>. This more sparing use of prolonged immigration detention may be due, in part, to the repeated acceptance of the UK Supreme Court that damages for false imprisonment are available to those wrongfully held by immigration authorities: *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] AC 698, 713 [26] (Lord Kerr JSC, Lord Wilson, Lady Black and Lord Kitchin JJSC agreeing); *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 280 [89] (Lord Dyson JSC).

between judicial and other proceedings. It is well settled that any requirement of fairness fashioned for the courts should not be transposed without question to other forms of decision-making.[208] The variable nature of the precise requirements of fairness within the courts and the uncertain nature of the extent to which those principles will apply to decision-making outside the courts means that any modest extension of the *Dietrich* principle within the courts would not necessarily apply outside of them.

The remedy provided by *Dietrich* — the grant of a stay — can also be in tension with the range of interests often present in public law proceedings. That possibility weighed heavily on the Court in *F v Minister for Education and Child Development*, where two parents sought to stay the guardianship proceedings about their child because they were unrepresented.[209] The Court accepted that any order 'removing a child from the custody of his or her parents is a serious exercise of State power', but cautioned that

> [t]here is a public interest in the expeditious determination of what is in the best interests of the child which would be jeopardised by the grant of a stay having regard only to the interests of the parents.[210]

That caution is a useful reminder of how administrative decisions can affect many parties. That is why the requirements of procedural fairness are not limited to the interests or concerns of whoever is challenging a decision.[211] The requirement of even-handed treatment which lies at the heart of procedural fairness means that any application of the doctrine must take account of the interests of all the parties to a hearing. It follows that an order to stay a hearing because one party is unrepresented may distort the purpose of fairness by enabling the interests of one party to overwhelm all others.[212]

The origin of most administrative proceedings highlights another reason *Dietrich*'s remedy is unsuited to administrative proceedings. Criminal proceedings are commenced and maintained by the state. The dilemma posed by *Dietrich*'s remedy is one faced by the state in proceedings it has initiated. Criminal conduct may go unpunished if proceedings are stayed, but state-funded legal representation is a burden upon the public purse. The state is faced with an

[208] *Applicant VEAL* (n 24) 98 [24] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

[209] *F v MECD* (n 182) [38] (Blue J, Vanstone J agreeing at [3], Peek J agreeing at [4]).

[210] Ibid [66].

[211] The point at which an administrative decision affects many people, but no-one in particular, is a different and quite difficult issue: see generally Aronson, Groves and Weeks (n 85) 427–35.

[212] This issue has a loose parallel with the obligation of a court to assist an unrepresented party, which is discussed below in Part VI.

election of sorts — fund the defence or forgo prosecution?[213] That choice can only serve to benefit an accused person. The quite different origins of public law proceedings can subvert this operation of the *Dietrich* remedy. Any claim for judicial review or statutory appeal is typically brought by the person affected by an official decision.[214] Some judicial review cases have been content to label *Dietrich*'s remedy as 'counterproductive … where the unrepresented person is the initiator of the legal proceeding'.[215] The focus of such cases on the logical problem presented by any issue of the *Dietrich* remedy in public law proceedings has arguably distracted attention from a deeper problem for any applicant who seeks that remedy. When a person who commences a proceeding seeks an order to stay that case, is the relief sought so contradictory that it may provide a sufficient basis for the case to be dismissed as an abuse of process?

VI Unrepresented Parties before Courts and Tribunals

The absence of any general right to state-funded representation outside serious criminal proceedings has led the courts to devise detailed principles governing unrepresented parties who appear before them.[216] There is no definitive data on just how many unrepresented litigants appear before courts and tribunals, or their precise impact, [217] but it is widely accepted that accommodating

[213] In *Dietrich* (n 104), Gaudron J noted pointedly that '[t]he question whether public funds should be allocated for the legal representation of persons charged with criminal offences is one for governments, not the courts': at 365. Justice Brennan similarly noted that 'courts do not control the public purse strings; nor can they conscript the legal profession to compel the rendering of professional services without reward': at 323.

[214] As a matter of logic, governments do not normally challenge the decisions of their own officials and agencies. In many cases, they have no right to do so: see, eg, *Migration Act 1958* (Cth) s 347(2), which provides that applications for review of various decisions to refuse a visa may be made by applicants or other specified people, such as the sponsor of a business visa application. The group of nominated people who may seek review does not include any public official or agency.

[215] *Russell v Eaton* [2020] VSCA 249, [104] (Kyrou JA). See also *Daher* (n 186) [48] (Kyrou, Kaye and Kennedy JJA); *NWQR* (n 198) [27] (Farrell, Wigney and Perry JJ).

[216] Some argue that equality of any real sort is impossible when one party is unrepresented because both substantive law and procedural issues create disadvantages which cannot be fully overcome. An extended such argument is made in Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (Oxford University Press, 2015) 2–6. Assy challenges the longstanding common law assumption that parties should have an unfettered right of choice between engaging a lawyer or acting in person. That position was powerfully countered in Bridgette Toy-Cronin, 'A Defence of the Right To Litigate in Person' (2016) 37(1) *Oxford Journal of Legal Studies* 238.

[217] These limitations on the data about unrepresented parties include information on how they fare: Liz Richardson, Genevieve Grant and Janina Boughey, *The Impacts of Self-Represented*

unrepresented parties remains one of the greatest contemporary problems for our courts and tribunals. In the absence of any comprehensive legal aid program for civil cases, or any likely extension of the *Dietrich* rule into civil cases, the enduring dilemma for courts and tribunals is balancing the effective use of their resources with the need to ensure that unrepresented parties have a sufficient chance to put their case.[218]

The judicial principles devised to manage these issues reflect a balance between two imperatives of fairness that can come into tension: opportunity and impartiality. Fairness requires that those affected by a decision, or appearing before a court, have a reasonable opportunity to know and respond to the case against them and to present their own arguments.[219] An unrepresented party can require assistance from a court to do so, but too much assistance can imperil the actual or perceived impartiality of the court. In the leading case of *Hamod v New South Wales* ('*Hamod*'), the New South Wales Court of Appeal noted that this tension was due to the obligations of fairness owed to all parties.[220] Justice of Appeal Beazley explained that the duty of a judge

> is not solely to the unrepresented litigant. The obligation is to ensure a fair trial for all parties. For this reason, the duty is usually stated in terms that require that the impartial function of the judge is preserved, whilst also requiring the judge to intervene where necessary to ensure the trial is fair and just …[221]

Hamod identified several ways this duty could be discharged. An important one was for a judge to 'take appropriate steps' to ensure that unrepresented parties have 'sufficient information about the practice and procedure of the court, so far as is reasonably practicable for the purpose of ensuring a fair trial'.[222] A duty that extends so far as is 'reasonably practicable' has an elasticity which enables it to be varied greatly according to the context of its operation. As this duty requires the court to consider the capacity of an unrepresented party to

Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice (Report, October 2018) ii–iii.

218 These imperatives have been described as a 'case management tightrope' that judges and other decision-makers must balance: Sarah Murray, *The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (Federation Press, 2014) 93.

219 The importance of this opportunity was made clear in *WZARH* (n 23) 338 [38]–[39], 339–40 [45]–[46] (Kiefel, Bell and Keane JJ), 341 [52]–[53] (Gageler and Gordon JJ).

220 [2011] NSWCA 375, [310], [315] (Beazley JA, Giles JA agreeing at [829], Whealy JA agreeing at [830]) ('*Hamod*'). The principles articulated in this case have been approved by many courts: see, eg, *SZRUR v Minister for Immigration and Border Protection* (2013) 216 FCR 445, 452–4 [37] (Robertson J, Allsop CJ agreeing at 455 [47], Mortimer J agreeing at 456 [56]).

221 *Hamod* (n 220) [310] (Beazley JA, Giles JA agreeing at [829], Whealy JA agreeing at [830]).

222 Ibid [311].

formulate and articulate the case they wish to present,[223] it almost certainly also requires courts to assess the willingness of those parties to accept guidance. Assessments on the capacity of people to understand and argue their own case or their willingness to accept judicial counsel are clearly relevant to the nature and amount of assistance needed.[224] An important issue that was not directly addressed by *Hamod* is when judges and other decision-makers should refer a party to a pro bono assistance scheme. That highly discretionary issue has received little attention. The contextual nature of these many issues led Mortimer J to describe them as a 'suite of obligations' that are difficult to fully articulate or to easily apply.[225]

The scope of these various judicial duties is, however, subject to one very clear limitation noted above in Part III. Fairness requires decision-makers to provide affected people with the reasonable opportunity of a fair hearing. This duty does not oblige officials to ensure that the opportunity is used as effectively as possible, or even at all. *Hamod* noted that this limitation meant that the duty to unrepresented parties 'does not extend to advising … as to how his or her rights should be exercised' or somehow oblige 'the court to give judicial advice to, or conduct the case on behalf of, the unrepresented litigant'.[226] The absence of any such affirmative duty helps to preserve the impartiality of judges and other decision-makers by ensuring that judges do not cross the nebulous point at which they may be perceived as having intervened so much in the conduct of a case that an apprehension of bias arises.[227]

These principles appear modest when compared to the activism advocated by Chayes in his classic article, 'The Role of the Judge in Public Law

[223] *Roberts v Harkness* (2018) 57 VR 334, 356 [54] (Maxwell P, Beach and Niall JJA). An illuminating recent study of tribunals found that many tribunal members tacitly perform this function: Therese MacDermott et al, 'The Relational Dimensions of Procedural Fairness in a Tribunal Setting' (2022) 31(3) *Journal of Judicial Administration* 169, 180–1.

[224] A related but distinct question is whether a party is competent to participate in proceedings. That difficult question is beyond the scope of this article.

[225] *MZAIB* (n 6) 173 [59].

[226] *Hamod* (n 220) [312] (Beazley JA, Giles JA agreeing at [829], Whealy JA agreeing at [830]). See also *In the Marriage of Johnson* (1997) 139 FLR 384, 407 (Ellis, Baker and Lindenmayer JJ).

[227] It is well settled that excessive judicial intervention can create unfairness or an apprehension of bias, or both: see, eg, *Jorgensen v Fair Work Ombudsman* (2019) 271 FCR 461, 484–7 [97]–[105], 500 [152] (Greenwood, Reeves and Wigney JJ); *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343, 352 [35] (Greenwood, Besanko and Reeves JJ); *Serafin v Malkiewicz* [2020] 1 WLR 2455, 2464–5 [41] (Lord Wilson). The intervention in such cases typically occurs after a hearing has commenced, such as when witnesses are being examined or submissions are being made, but it could in theory occur at the start of a hearing when a judge provides so much advice and assistance to one party that the appearance of impartiality is lost.

Litigation'.[228] Chayes identified a rise in American courts of a 'public law litigation model' in which judges were 'active, with responsibility … for organizing and shaping the litigation to ensure a just and viable outcome'.[229] The volume, variety and complexity of public law litigation in our courts makes it difficult, perhaps impossible, to accurately gauge the extent to which the Chayes model, or any other model, might be prevalent in Australian courts. For present purposes, migration cases can provide useful examples. Many migration cases contain extraordinary inequality between the parties. The applicant may have limited or no formal education, not speak English, have no understanding of Australian law and have endured many years in immigration detention. That person will typically face an experienced barrister who is briefed by equally knowledgeable solicitors and departmental officials. In one such case, Mortimer J noted the applicant 'was required to struggle in a legal system with which he had no familiarity, and in a language with which he had no familiarity, operating through an interpreter'.[230] Her Honour continued:

> The fact that this is the predicament of a majority of migration applicants in the Federal Circuit Court and in this Court should not inure the Court to the inequalities and disadvantages which it presents. In this situation, it is not necessarily appropriate to apply, without modification, principles developed in an adversarial system that is accustomed to all parties being legally represented, or makes that assumption. Especially so when what is in issue is the lawfulness of the exercise of public power, in circumstances where ultimately people's liberty is at stake.[231]

The suggestion of Mortimer J that the majority of *all* migration applicants in the federal courts face multiple disadvantages in the conduct of their cases provides some insight into the sheer scale of these problems.[232] When addressing these same issues in *NWQR*, Farrell, Wigney and Perry JJ stated:

> There are unfortunately many individuals who appear before the Federal Court and in other courts without legal representation, including in migration matters

[228] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89(7) *Harvard Law Review* 1281.

[229] Ibid 1302.

[230] *CMC18* (n 6) [42].

[231] Ibid.

[232] Especially when viewed in light of the overall number of migration cases in those courts. In the Federal Circuit Court of Australia, 6,555 migration cases were filed in 2019–20 and 5,236 filed in 2020–21: Federal Circuit Court of Australia, *Annual Report 2020–2021* (Report, 2021) 2. The number of pending migration cases in the Federal Court was 12,158 in 2019–20 and 14,445 in 2020–21: Federal Court of Australia, *Annual Report 2020–2021* (Report, 2021) 198.

> where the individuals concerned may also be impecunious, in immigration detention, and suffer other disadvantages … While the Court's duty in such cases does not extend to a duty to obtain legal representation for unrepresented litigants, duties are owed by the Court to all litigants to ensure the trial is fair through procedural means.[233]

Both passages illustrate an awareness of the difficulties that many parties in migration cases face, though a subtle difference seems apparent. The remarks of Farrell, Wigney and Perry JJ affirm the limits of the existing rules of procedural fairness and the limits that they place on the role of judges, while those of Mortimer J hint at a preparedness to rethink some of those same issues. The extent to which judges may be criticised for affirming and applying existing law must necessarily be muted, but the very nature of the common law presumes judges may refine even well-settled rules.[234] The remarks of Mortimer J hint at a willingness to begin laying the foundations for such steps.

VII The Limited and Fragmented Statutory Duties That Address Inequality of Arms in Tribunals

Most of the principles discussed so far are ones devised by courts exercising supervisory jurisdiction. The functions and powers of administrative tribunals are quite distinct from the supervisory jurisdiction of the courts and therefore warrant separate consideration.[235] Despite those differences, parties to tribunal proceedings experience many of the disadvantages explained above, such as having a lack of legal representation, facing a well-resourced government party and seeking to challenge the exercise of a power that is part of an immensely complex legislative regime. The very purpose of tribunals arguably acknowledges the existence of those problems because tribunals are intended to provide

[233] *NWQR* (n 198) [27]. Many of the same disadvantages are, of course, experienced by people facing criminal proceedings or by those involved in cases about disability support payments: see, eg, *Dietrich* (n 104) 366–7 (Gaudron J).

[234] On rare occasions, those steps can be large. Writing extra-judicially, Chief Justice Robert French noted that some of Coke's seminal decisions had little clear support in precedent, which made Coke 'the paradigm of what today would be called "an activist judge"': Chief Justice Robert S French, 'Procedural Fairness: Indispensable to Justice?' (Sir Anthony Mason Lecture, Melbourne Law School, 7 October 2010) 7.

[235] However, any coherent distinction between courts and tribunals cannot rest on the argument that tribunals do not exercise judicial power: Janine Pritchard, 'Australian Civil and Administrative Tribunals: Challenges and Opportunities' (2020) 100 *AIAL Forum* 148, 155.

a less formal, less adversarial alternative to courts.[236] This central rationale of tribunals is one reason why they are conferred with many powers and duties which may help address some aspects of significant inequality between parties. The statutory mandates of tribunals require them to provide means of review that are quick, informal, economical and just.[237] Thomas has argued that the importance of these mandates is the normative influence they have in the form of values and principles that inform how tribunal procedures are applied.[238] While such provisions clearly inform the ethos, culture and operation of tribunals, the extent to which they provide enforceable rights is another matter. Justice Griffiths, for example, described the statutory objective of this nature contained in the *Administrative Appeals Tribunal Act 1975* (Cth) as 'aspirational or exhortatory in nature, rather than as a source of directly enforceable rights and obligations'.[239] In an important recent empirical survey on the leaders of Australian tribunals, Creyke suggested that these statutory goals were often given effect by taking practical steps such as providing plain English information about rules and processes on tribunal websites that contain information about tribunal processes, or implementing procedures to help applicants with physical or cultural disadvantages.[240]

Many of the more specific requirements governing tribunals arguably provide a more secure means to create greater procedural equality between parties because they remove or simplify complexities that often apply in the courts. For example, tribunal statutes usually require officials to lodge all relevant material when an application is commenced.[241] These provisions effectively remove the

236 Creyke has noted that the common statutory requirement for tribunals to adopt 'more flexible procedures' inevitably means 'more flexible than courts': Robin Creyke, 'Australian Tribunals: Impact of Amalgamation' (2020) 26(4) *Australian Journal of Administrative Law* 206, 221.

237 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(b); *ACT Civil and Administrative Tribunal Act 2008* (ACT) ss 6–7; *Civil and Administrative Tribunal Act 2013* (NSW) s 3(d); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) ss 10(d)–(e), (g); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b); *South Australian Civil and Administrative Tribunal Act 2013* (SA) ss 8(1)(c)–(d); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ss 10(1)(c)–(d); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d); *State Administrative Tribunal Act 2004* (WA) ss 9(a)–(b). The content of each formula differs slightly.

238 Robert Thomas, 'Administrative Justice and Tribunals in the United Kingdom: Developments; Procedures; and Reforms' (2020) 26(4) *Australian Journal of Administrative Law* 255, 262.

239 *Fard v Secretary, Department of Immigration and Border Protection* [2016] FCA 417, [80].

240 Creyke (n 236) 212–13.

241 *Administrative Appeals Tribunal Act 1975* (Cth) s 37; *ACT Civil and Administrative Tribunal Procedures Rules 2020* (ACT) rr 129–30; *Civil and Administrative Tribunal Act 2013* (NSW) s 38(6); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) ss 53(2)(d), 55(b); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(2); *South Australian Civil*

need for a separate discovery process. The absence of discovery serves to shorten and simplify tribunal proceedings, thus making it easier for those who lack legal representation or experience to maintain an application. Tribunals are also typically exempt from strict compliance with the rules of evidence and are directed to proceed with as little formality as a fair hearing of cases may permit.[242] In *Shord v Federal Commissioner of Taxation* ('*Shord*'), two members of the Federal Court explained that the purpose of such provisions

> is to discourage decision-makers from adopting an overly adversarial attitude in proceedings in the Tribunal. Instead, decision-makers are positively required in the manner of their conduct of the proceedings to assist the Tribunal to come to a decision which is correct in law and on the evidentiary material.[243]

Many tribunal statutes include a duty to this effect. The relevant statutes of the Commonwealth and of Queensland, South Australia, Tasmania and Western Australia include a requirement that decision-makers whose actions are subject to review use their 'best endeavours to assist the Tribunal to make its decision in relation to the proceeding'.[244] These powers also appear to have been interpreted as aspirational ones of limited practical scope. When a Full Court of the Federal Court considered the effect of the statutory requirement of decision-makers to assist a tribunal in *Shord*, Siopis and White JJ held that the provision

and Administrative Tribunal Act 2013 (SA) ss 35(2), 43(2)(a); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ss 76(2), 83(3)(a); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 49; *State Administrative Tribunal Act 2004* (WA) s 24.

242 *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1)(b)–(c); *ACT Civil and Administrative Tribunal Act 2008* (ACT) ss 6(c), 8; *Civil and Administrative Tribunal Act 2013* (NSW) ss 3(d), 38(2), (4); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) ss 10(g), 53(2)(b)–(c); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 28(3)(b), (d); *South Australian Civil and Administrative Tribunal Act 2013* (SA) ss 8(1)(f), 39(1)(a)–(b); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ss 79(a)–(b); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 98(1)(b), (d); *State Administrative Tribunal Act 2004* (WA) ss 9(b), 32(2). The content of each formula differs slightly.

243 (2017) 253 FCR 157, 178 [132] (Siopis and White JJ) ('*Shord*').

244 *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1AA); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 35(1); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 76(1); *State Administrative Tribunal Act 2004* (WA) s 30. There is no such requirement in the tribunal statutes of Victoria, New South Wales and the Australian Capital Territory. In Victoria, the principal registrar of the Victorian Civil and Administrative Tribunal is required to provide assistance that he or she 'considers appropriate' to a party or to someone considering making an application, though this duty is expressly stated as not extending to providing legal advice: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 32AA.

> does not impose a wider obligation on decision-makers to seek out themselves evidence which may bear on the decision, although it is to be expected that they would consider and facilitate any reasonable requests for assistance.[245]

This interpretation aligns with the wider reluctance of Australian courts to sanction any wideranging duty to inquire in administrative tribunals.[246] It also arguably reflects a more general tendency of tribunals in the common law world to adopt a mode of operation that essentially puts 'an inquisitorial gloss to a basically adversarial process'.[247] This lingering effect of the adversarial method will inevitably constrain the extent to which tribunals may seek to use their procedural powers to compensate for significant inequality between parties.[248]

References to the label of 'adversarial' are often pejorative and might be particularly unhelpful in the present context. A useful alternative is the division Cane suggested between active and passive decision-making, which could inform review functions and the gathering of evidence.[249] In the passive model,

> the reviewer plays no part in the collection of evidence. In the presentation of evidence the passive reviewer plays a management role (keeping order, for instance, and regulating the admission of evidence), but does not participate as a presenter.[250]

In the active model, a reviewer could

> manage collection of evidence by the parties particularly in order to prevent wastage of time and resources. The active reviewer may go further and participate in collection by requiring parties to gather specified evidence or evidence on specified matters, or even by gathering evidence personally. In the presentation of evidence, the active reviewer may go beyond managing the presentation of evidence to assisting (or 'enabling') the parties (especially the applicant) to

245 *Shord* (n 243) 178 [132] (Siopis and White JJ).

246 The High Court has acknowledged that tribunals *might* have to make further inquiries in only very limited circumstances: see, eg, *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, 434–6 [18]–[25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 603 [22] (French CJ and Kiefel J); *Minister for Home Affairs v DUA16* (2020) 271 CLR 550, 564–6 [28]–[33] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

247 Tom Mullen, 'A Holistic Approach to Administrative Justice?' in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010) 383, 391.

248 The perceptive analysis of an AAT member suggested that an adversarial–adjudicative culture was tacitly fostered in the AAT hearings by early decisions of the Federal Court in its appellate jurisdiction over the AAT: Joan Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20(2) *Federal Law Review* 252, 264–8.

249 Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 239.

250 Ibid.

> present evidence, or — especially where the evidence is presented in writing rather than orally — to marshalling evidence provided by the parties …[251]

Cane's typology echoes the important *Leggatt Review* of UK tribunals conducted earlier by Sir Andrew Leggatt, who would go on to become a member of the UK Supreme Court.[252] Two of Leggatt's findings are important for present purposes. One was his conclusion that lawyers were often an impediment to access to justice in tribunal hearings because many of their professional habits often worked against the ability of tribunals to provide an informal, quick and inexpensive service.[253] Leggatt's second and closely related conclusion was that tribunal members hearing cases involving unrepresented parties should adopt an 'enabling' role that would see them

> supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal's capacity to compensate for the appellants' lack of skills or knowledge.[254]

Any suggestion that tribunal members could enable parties to better participate in hearings is clearly directed to those who are likely to be unrepresented and overwhelmed by the proceeding. This conception of the enabling function of tribunal members also suggests that the role of tribunal member comprises much more than the sum of their formal procedural powers and duties. This possibility is supported by recent empirical studies.

In an empirical survey of Australian tribunals, MacDermott et al found considerable evidence that members were quite sensitive to the imperatives that underscored Leggatt's enabling role. That study found that tribunal members were acutely sensitive to the disadvantaged position of many of those who appeared before them and adopted a range of informal practices to better enable those people to participate in hearings.[255] The study found that tribunal

[251] Ibid. Cane acknowledged that this active model has not taken root in the common law world: see at 242.

[252] Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (Her Majesty's Stationery Office, 2001) ('*Leggatt Report*'). The relative distinction between the passive court model and the active model of non-judicial bodies was also noted in *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29, 38 [30] (Maxwell P, Neave JA agreeing at 40 [41], Weinberg JA agreeing at 40 [43]) and *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422, 443 [71] (Warren CJ, Maxwell P and Osborn AJA).

[253] *Leggatt Report* (n 252) 48 [4.21]. Subsequent assessments of UK tribunals have emphasised that the impact of lawyers, whether positive or negative, depends heavily on the quality of the relevant lawyer: see, eg, Gráinne Mckeever, 'A Ladder of Legal Participation for Tribunal Users' [2013] (July) *Public Law* 575, 593, 595.

[254] *Leggatt Report* (n 252) 86 [7.4].

[255] MacDermott et al (n 223) 180–1.

members thought that a fair hearing often required them to undertake 'active engagement in guiding … providing explanations, and steering [parties] to provide the information and evidence required to support their case'.[256] It also found that tribunal members effectively apply the holistic approach to fairness expounded in *Lam*'s case by adopting an 'iterative process' that paid 'continuous regard to the specific circumstances of the parties involved'.[257] These conclusions closely mirror those of a recent study on UK social security tribunal hearings, which found that many members adopted something akin to the 'enabling role' envisaged by Leggatt and that this overcame many of the disadvantages and inequalities experienced by many claimants.[258] Importantly, however, that study found that even a well-conducted tribunal hearing presided over by an empathetic decision-maker was still often an extremely distressing experience for applicants.[259] That finding suggests that the extent to which well-conducted hearings can address deeper issues of disadvantage or inequality are necessarily limited, partly because most of the root causes of those issues precede any hearing, but also because hearings are unhappy experiences even for those who win their case.[260]

VIII Model Litigant Rules

The final part of this article considers whether federal model litigant rules might provide a means to lessen inequalities between parties. Those rules arguably recognise and formalise the suggestion of Griffith CJ over a century ago that there is an 'almost instinctive … standard of fair play to be observed by the Crown in dealing with subjects' that is 'elementary' to litigation involving government.[261] This article will focus on the federal model litigant rules contained in the *Legal Services Directions 2017* (Cth) ('*Model Rules*'),[262] which are similar in content and purpose to the equivalent rules of other Australian

256 Ibid 181. Those authors did not expressly refer to Leggatt's conception of the enabling role of tribunal members.

257 Ibid 182.

258 Barnard and Ludlow (n 169) 421.

259 See ibid 414, 421.

260 See ibid 421–6.

261 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

262 *Legal Services Direction 2017* (Cth) app B ('*Model Rules*'), as made under the *Judiciary Act 1903* (Cth) s 55ZF. The first version of these rules was made in 1999 but the expectation of the Commonwealth to act as a model litigant predates the rules: *Yong v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155, 166 (Beaumont, Burchett and Goldberg JJ).

jurisdictions.[263] These rules impose obligations designed to simplify and minimise litigation involving the federal government and its agencies. The obligations imposed include requirements for government litigants to act honestly, fairly and with a view to minimising the cost of litigation; to limit the scope of cases where possible, such as by not requiring proof of issues that government agencies know to be true; to avoid technical defences where possible; to deal with claims promptly and without causing unnecessary delay in claims or litigation;[264] and to not commence or pursue appeals unless they have a reasonable prospect of success or are somehow justified in the public interest.[265] The rules which extend these requirements to merits review also make it clear that Commonwealth litigants should use their best endeavours to assist the relevant tribunal.[266] One commentator suggested that that aspect of the *Model Rules* was a 'buttress' to the requirement noted in Part VII that decision-makers use their best endeavours to assist the AAT.[267] The *Model Rules* to this effect have an arguably distinct impact by clearly extending the obligation contained in the AAT legislation to the lawyers who act for decision-makers.[268]

263 *Law Officer (Model Litigant) Guidelines 2010* (ACT); Department of Premier and Cabinet (NSW), *Model Litigant Policy for Civil Litigation* (Premier's Memorandum No M2016-03, 29 June 2016); Department of Premier and Cabinet (NSW), *Litigation Involving Government Authorities* (Premier's Memorandum No M1997-26, 8 October 1997); Department of the Attorney-General and Justice (NT), *Revised Model Litigant Policy* (Policy, 12 December 2019); Queensland Government, *Model Litigant Principles* (Policy, 4 October 2010); Greg Parker, Crown Solicitor (SA), *The Duties of the Crown as a Model Litigant* (Legal Bulletin No 2, 10 June 2011); Michael O'Farrell, Solicitor-General (Tas), *Model Litigant Guidelines* (Guidelines, 14 May 2019); 'Victorian Model Litigant Guidelines', *Department of Justice and Community Safety (Vic)* (Web Page, 8 July 2022) <https://www.justice.vic.gov.au/justice-system/laws-and-regulation/victorian-model-litigant-guidelines>, archived at <https://perma.cc/WV4U-VHRP>. Many of these rules are supplemented by further rules for the conduct of historical claims of sexual abuse that occurred in state institutions: see, eg, Attorney-General's Department (Cth), *Guiding Principles for Commonwealth Entities Responding to Civil Claims Involving Institutional Child Sexual Abuse* (Guidance Note No 13, June 2018).

264 In *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372, Kiefel CJ, Bell, Gageler, Keane and Gordon JJ gave the example of a defence or plea that required a party to refile and which led to fresh proceedings that were out of time: at 394 [35]. Their Honours noted such conduct 'would affect the Commonwealth's model litigant obligations'.

265 *Model Rules* (n 262) rr 2(a), (d)–(e), (g)–(h).

266 Ibid r 4.

267 Peter Billings, 'Evaluating the Pedagogic Value of Mooting and "Nooting" at the Administrative Appeals Tribunal (Cth)' (2017) 43(3) *Monash University Law Review* 687, 704, referring to *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1AA)–(1AB).

268 *Re General Merchandise & Apparel Group Pty Ltd and CEO of Customs* (2009) 114 ALD 289, 336 [145] (Deputy President Forgie); *Dimitropoulos and Australian Securities and Investments Commission* [2018] AATA 2160, [7] (Senior Member Kirk); *Secretary, Department of Social Services and Dawson* [2021] AATA 3442, [47] (Dr Evans-Bonner).

The most important duty for the purposes of this article is one expressly prohibiting the Commonwealth from 'taking advantage of a claimant who lacks the resources to litigate a legitimate claim'.[269] A Full Court of the Federal Court has suggested that this and other aspects of the *Model Rules* recognise that the Commonwealth is 'often … larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar'.[270] When viewed in this way, the *Model Rules* clearly have the potential to alleviate some of the inequalities that exist in legal proceedings that involve the Commonwealth. Many question whether the *Model Rules* can do so. An official within the AAT suggested to this effect that the *Model Rules* 'are designed to assure the individual and the public that the government is using its power responsibly. It may be, however, that in some cases the power imbalance is just too wide'.[271]

While aspirations to create a level playing field between government and individuals can never be absolute,[272] there are some reasons for such scepticism. The limits to the effectiveness of the *Model Rules* stem from its aim to 'require fair play, but not acquiescence', which enables and may even require government lawyers to 'press hard to win points and defend decisions they believe to be correct'.[273] Justice Heydon thought that these and other aspects of the *Model Rules* meant that the government and its lawyers were required to 'act fairly, with complete propriety … but within the same procedural rules as govern all litigants'.[274] If so, the *Rules* are intended to prevent unnecessary or unfair conduct in litigation, but not necessarily to address the problems inherent to litigation. The directions on costs illustrate that possibility. While a

269 *Model Rules* (n 262) r 2(f).

270 *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, 176 [42] (North, Logan and Robertson JJ). This 'moral' aspect distinguishes the role of government litigants from any other better resourced party: see above n 15.

271 Niamh Kinchin, 'Mediation and Administrative Merits Review: An Impossible Goal?' (2007) 18(4) *Australasian Dispute Resolution Journal* 227, 231. That author suggested that the regular and very significant imbalance between parties in many merits review claims made them unsuitable for mediation or alternative dispute resolution because those processes required a level of equality. A thoughtful contrary argument is provided in Katherine Hooper, 'Model Litigants, Migration, Merits Review and … Mediation?' (2013) 32(1) *University of Queensland Law Journal* 157.

272 See, eg, *Judiciary Act 1903* (Cth) s 64; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 556–7 [12] (Gleeson CJ).

273 A point made by the Australian Law Reform Commission shortly after the *Model Rules* (n 262) were first promulgated: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 17 February 2000) 306 [3.139].

274 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 435 [240]. See also *Brandon* (n 8), where Whitlam J reasoned that the obligations of the *Model Rules* (n 262) did not mean the Commonwealth is 'obliged to fight with one hand behind its back in proceedings': *Brandon* (n 8) [11].

breach of the *Model Rules* can provide a discretionary basis to make special costs orders,[275] the *Rules* do not preclude the Commonwealth from 'enforcing costs orders or seeking to recover its costs'.[276]

The practical force of the *Model Rules* is arguably qualified in other ways. The *Rules* expressly provide that the Attorney-General may impose a sanction for non-compliance.[277] That discretion is limited by the fact that a breach of the *Rules* does not confer any separate cause of action to affected parties.[278] It is also clear that other parties cannot use a failure to comply with the *Model Rules* 'as a foundation for gaining some forensic advantage'.[279] Another important practical aspect of the *Model Rules* arises from the nature of those cases where significant inequality of arms occurs. In such cases, where an often unrepresented person faces a behemoth in the form of the government or one of its agencies, that person will typically be swamped with documents, legislation and rules of court and other procedure. The *Model Rules* may appear to these people little more than another piece of paper on an already large pile; in fact, the *Rules* may not even come to their notice.[280] As the *Model Rules* apply to governments and to their agencies and lawyers, it is quite likely that many of those who routinely face government litigants will be aware of them.

The many qualifications or limits to the *Model Rules* invite the question of whether they are like the statutory objectives of the AAT, namely whether they are aspirational and exhortatory.[281] There are, however, some clear signs that the *Model Rules* have a clear and useful impact. One is the sheer number of references to them in the decisions of courts and tribunals, many of which make clear that adherence to the *Model Rules* is a regular and expected aspect of

[275] *Bob Brown Foundation Inc v Sustainable Timber Tasmania* [2022] TASFC 3, [95] (Geason J). See also *Slaveski v Victoria* [2010] VSC 569, [92]–[95], where Kyrou J reduced the costs payable to the successful state defendant by 10 per cent because of its failure to adhere to the standards of a model litigant.

[276] *Model Rules* (n 262) r 2 note 5.

[277] Ibid r 14.1. See also Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) 528, which notes that most of the equivalent rules of the states and territories do not contain (or require) such a statement because they are administrative policies rather than legislative documents and by their character are not directly enforceable against the government they were issued by.

[278] *Malone v Queensland* (2021) 287 FCR 240, 288 [217] (White and Stewart JJ); *Tucker v Broderick* [2021] FCA 1492, [4] (O'Callaghan J).

[279] *Tran v Minister for Home Affairs* (2019) 79 AAR 273, 282 [34] (Derrington J).

[280] Though some federal agencies publicise the *Model Rules* (n 262) and their adherence to them: see, eg, 'Our Obligations as a Model Litigant', *Australian Taxation Office* (Web Page, 4 May 2023) <https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/our-obligations-as-a-model-litigant/>, archived at <https://perma.cc/NUQ2-S3NM>.

[281] See above n 239 and accompanying text.

federal litigation which clearly benefits those involved in litigation with government parties.[282] Examples include the government party agreeing to orders that it prepare part of the materials before the court, such as parts of an appeal book, that would have normally fallen to the other party;[283] drawing the court's attention to an error in the reasons of the decision-maker that was compounded by a failure to include material before the court of first instance in the subsequent review of that decision;[284] or seeking to ascertain the most likely grounds that could be drawn from the appellant's unclear notice of appeal.[285] Another point is that government parties brief external law firms (in addition to the Australian Government Solicitor) to handle much of their work, and adherence to the spirit and letter of the *Model Rules* is important to remaining on the panel of firms briefed to conduct such work. These and other examples reinforce the view, expressed by one judge writing extra-judicially, that the *Model Rules* provide 'an ethical, rather than a legal, standard' that is usually reflected 'in terms of general concepts such as [the] fairness and integrity' of those to whom it applies.[286]

These particular examples are just that and cannot convey the wider effect of the *Model Rules*. Some evidence can be drawn from the public information made available by the Office of Legal Services Coordination ('OLSC'), which administers the *Model Rules*, and by other federal agencies. Departments and agencies are required to report their compliance with the *Model Rules* to the OLSC on an annual basis, which includes very sparse information about overall compliance by the government as a small section of the very large annual report of the Attorney-General's Department.[287] The OLSC also publishes statistics about compliance with the *Model Rules* but that material provides only bare statistical information and reveals nothing about individual cases.[288] It has been suggested that further information, which essentially 'name[d] and shame[d]' agencies for particular transgressions, would be unhelpful and could not

[282] Searches on AustLII reveal many hundreds of references to the *Model Rules* (n 262) in federal court and tribunal decisions.

[283] *Ultimate Vision Inventions Pty Ltd v Innovation and Science Australia* [2022] FCA 669, [10] (Wheelahan J).

[284] *CDJ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 345, [33] (Markovic J).

[285] *Onassys v Comcare* [2022] FCA 90, [28] (Abraham J).

[286] Justice GT Pagone, 'The Model Litigant and Law Clarification' (Speech, ATP Leadership Workshop, 17 September 2008) 2.

[287] See Attorney-General's Department (Cth), *Annual Report 2020–21* (Report, 2021) 21–2.

[288] See, eg, Office of Legal Services Coordination, 'Statistics on Compliance with the *Legal Services Directions 2017*' (Document, 16 June 2023) <https://www.ag.gov.au/legal-system/publications/olsc-compliance-statistics-2021-22>, archived at <https://perma.cc/GV9L-VHWQ>.

convey the complexity of any particular case in a useful way.[289] Two important academic studies of the *Model Rules* reached a different view when they concluded that greater transparency on the part of the OLSC would improve knowledge of and compliance with the *Model Rules*. Appleby reasoned that, while courts might often detect conduct at odds with the *Model Rules*, the complex nature of many public law cases meant that the courts might only ever see 'a snapshot that often will not reveal the complexities of the entire situation'.[290] That conclusion aligns with an earlier study of the enforcement processes of the OLSC, which acknowledged many benefits in the compliance program of that office, but concluded that the *Model Rules* were largely supported by a program of education and information rather than by clear and systematic procedures of enforcement.[291] While both studies identified shortcomings in the *Model Rules*, both also acknowledged their real and practical benefit.

IX Concluding Observations

This article has drawn attention to a paradox. On the one hand, fairness is categorised as a fundamental common law right that is protected by the principle of legality. That protection means legislation which seeks to remove or restrict the rights encompassed by procedural fairness will be interpreted strictly. That interpretative approach enables the courts to enforce minimum standards of fairness upon the exercise of statutory powers in administrative decision-making. At the same time, however, the judicial processes involved in the review of those administrative decisions may themselves contain unfairness in the form of an inequality of arms. The many constitutional requirements governing fairness in judicial proceedings do not include one that proscribes an inequality of arms. Even if such a requirement existed in the courts, it would not necessarily apply in tribunals and other administrative bodies.[292] The absence of any constitutional principles, of course, does not mean that the *Australian Constitution* somehow sanctions inequality of arms — it simply does not prohibit this problem.

289 Zac Chami, 'The Obligation To Act as a Model Litigant' (2010) 64 *AIAL Forum* 47, 57.

290 Appleby (n 8) 123.

291 Michelle Taylor-Sands and Camille Cameron, 'Regulating Parties in Dispute: Analysing the Effectiveness of the Commonwealth Model Litigant Rules Monitoring and Enforcement Processes' (2010) 21(3) *Public Law Review* 188, 198.

292 Although the High Court did not reach a unanimous position on many of the constitutional requirements governing fairness in judicial proceedings in *SDCV* (n 21), no member of the Court suggested that the principles governing courts applied to tribunals and other non-judicial bodies. Justice Edelman accepted that 'administrative tribunals are not required to meet the standards of judicial fairness': at 265 [218].

The different principles examined in this article suggest that the judicial tolerance of inequality of arms is not supported by a single positive rule or doctrine. It is instead the consequence of a range of disparate common law rules and limited statutory duties. The indirect right of legal representation established by *Dietrich*, for example, has not been extended beyond a defined range of criminal proceedings. The limited scope of *Dietrich*'s principle means that no right of legal representation exists in administrative proceedings in the courts or administrative tribunals. The inherent power of courts to stay a proceeding on the ground that it would be an abuse of the judicial process for the case to continue, to which the *Dietrich* case is largely tethered, is also clearly limited. The constraints of that power were illustrated in *Begum*, which made clear that the power of courts to stay or adjourn administrative proceedings will be influenced by the balance that courts must strike. The UK Supreme Court held that in many instances when disadvantage cannot be overcome, a court must proceed to hear a case as fairly as possible, even if the hearing may be an imperfect one. The *Begum* case leaves open a difficult question: when does a disparity of resources move from being a significant forensic disadvantage, which is undesirable but not unlawful or unfair, to a problem of such an 'extreme nature' that the interests of justice may require the proceedings to be stayed? The principles of fairness do not provide an easy answer.

The extent to which the principle of equality of arms can address the difficulties of a case like *Begum* is questionable. The doctrine appears to have been conceived as an aspect of equality to ensure an equal battle or a 'fair fight' in criminal proceedings. While public law cases may often appear adversarial, they are not characterised as such by the courts. So long as that characterisation remains, concepts such as equality of arms, which have arisen in other areas of law, might struggle to find a clear place in public law. The concern expressed by Mortimer J in *MZAIB* draws attention to a possible constitutional dimension, but not necessarily an answer. To characterise a significant disparity of resources between the parties in migration cases, or any other public law proceeding, as a constitutional issue does not address the underlying problems. The number of decisions made by governments is immense. The complexity of the legislation and of the individual circumstances involved in those decisions is also immense. A huge number of hugely complex decisions creates a huge problem, but it is clearly not one limited to the migration caseload of our federal courts. A cursory glance at the work of migration tribunals reveals that the problem identified by Mortimer J is perhaps greater in those bodies than in the courts. Those who preside over or appear in family law proceedings or litigation involving banks would be aware that problems of inequality of arms extend well beyond migration cases.

A constitutional solution of the type that might answer the concerns expressed by Mortimer J could encounter several other problems. Any solution anchored to the exercise of judicial power would cover only a minority of public law cases. Any solution that was limited to the courts would essentially ignore the vast number of decisions made by administrative tribunals. That limit would highlight the difficulty noted in *WABZ*, which is that the disadvantages faced by many claimants in public law cases are felt most acutely in the first instance hearings that occur in tribunals. If any solution to inequality of arms was limited to public law proceedings, such as a requirement to provide a minimum level of legal assistance to those applicants very clearly 'outgunned' by a well-resourced government agency, the financial implications would still be immense. Those potential costs would be more limited if any requirement to provide legal assistance was confined to a single area of decision-making such as migration, but any limitation would invite further question. Why this area but not that one? If the department responsible for migration issues is thought to be an overwhelming leviathan, how are tax or social security officials any less so? An obvious answer is that, from a political view, migration issues are perceived quite differently from social security and taxation issues. Differences in political perceptions hardly provide a coherent basis for distinguishing the issues examined in this article. The same questions arise for many corporate litigants such as banks and insurance companies, whose resources and expertise in litigation often surpass those of government agencies.[293] These problems do not disappear if questions about equality of arms are framed in constitutional terms. They do, however, draw attention to a point noted by the High Court when it dramatically refashioned the principles governing the freedom of interstate trade. In *Cole v Whitfield*, the High Court conceded that its reformulation of the doctrine 'will not of course resolve all problems', but suggested that it would at least 'permit the identification of the relevant questions'.[294] This, surely, is what Mortimer J and others who have raised issues of inequality of arms point toward.

The analysis in this article has not sought to identify the relevant questions, but instead to identify the relevant gaps. The many different principles examined in this article reveal one common gap, namely that none of them provide a clear means to address inequality of arms in public law cases. The principles examined in this article are varied and distinct, but to continue to view distinctive aspects of the law in isolation only serves to obscure more systemic

[293] That point is one of the many reasons for caution about any rigid distinction between public and private law.

[294] (1988) 165 CLR 360, 408 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

problems such as inequality of arms. The purpose of this article was not simply to catalogue the shortcomings of the areas examined, but so far as they concerned inequality of arms, it was also to invite the questions that the analysis inevitably poses. If judges have begun to express concern about inequality of arms, are they signalling a willingness or perhaps even a need to adjust the content or scope of the principles examined in this article? If those individual doctrinal principles cannot adequately address inequality of arms, does the case for change at the constitutional level become stronger? In my view, these questions admit only one answer.