

THE RIGHT TO BE HEARD: CAN COURTS LISTEN ACTIVELY AND EFFICIENTLY TO CIVIL LITIGANTS?

SONYA WILLIS*

This article considers the current and prospective role of the hearing rule in counterbalancing Australia's legislative focus on efficiency in civil litigation to maintain access to justice and public faith in courts. It is undisputed that courts must provide litigants with procedural fairness and yet express consideration of the right to be heard is rare in civil litigation despite its prevalence in administrative and criminal law. Civil procedure legislation rarely includes express requirements of procedural fairness but implicitly supports the common law and underlying moral right to be heard. The COVID-19 pandemic redefined the right of litigants to have their 'day in court' and provided judicial opportunities to refocus on the right to be heard. This article concludes that active judicial focus on the right to be heard provides an elegantly simple means of optimising the management of civil cases.

I INTRODUCTION

Australian civil procedure aims to deliver affordable, accessible justice to Australian society. Unfortunately, these commendable aims engage ancient and intractable conflicts between the lofty ideals of justice, fairness, and efficiency.¹ It is uncontroversial that the interests of society are best served where justice is easily, cheaply and speedily available. It is also indisputable that justice requires that parties receive procedural fairness. A well-functioning and widely trusted legal system is critical to an optimal society.² Through the proper operation of the common law, 'the legislature and government are allowed efficacy but forbidden

* BEc (Syd), LLB (Hons) (UTS), LLM (Cantab), PhD (Syd); Senior Lecturer, Macquarie University. The author thanks Associate Professor Amy Barrow and the anonymous referees for their helpful suggestions on this article.

1 Brian Opeskin, 'Rationing Justice: Tempering Demand for Courts in the Managerialist State' (2022) 45(2) *University of New South Wales Law Journal* 531, 543 <<https://doi.org/10.53637/LEQD4918>>.

2 World Justice Project, *Rule of Law Index 2022* (Report, 2022) 8, 13 <<https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIIndex2022.pdf>>. The World Justice Project, based in the United States, demonstrates the high correlation between high functioning countries and faith in legal systems by collecting 'current, original information reflecting the experiences and perceptions of the general public and in-country legal practitioners and experts in 140 countries and jurisdictions worldwide': at 12. Australia's ranking in Civil Justice is 15th of 140 states: at 34. Denise Meyerson, 'Why Should Justice

oppression'.³ Difficulties arise because efficiency-motivated case management reforms risk reducing the content, or perception, of litigants' right to be heard which, in turn, undermines justice and societal faith in institutions. These problems compete with equally valid concerns that excessive delay and cost threaten justice, access to justice and procedural fairness, making efficiency objectives essential. The abrupt and unanticipated move to online court necessitated by the COVID-19 pandemic exacerbated the conflicts faced by courts in delivering procedural fairness efficiently but also allowed renewed judicial focus on the right to be heard.

Case management decisions are ubiquitous in civil litigation and pivotal to the delivery of justice. The current legislative approach in Australian jurisdictions promotes active case management.⁴ Procedural fairness, also described as natural justice,⁵ comprises the right to be heard (*audi alteram partem*; hear the other side, incorporating the right to notice); and the right to an unbiased decision maker (*nemo debet esse iudex in propria sua causa*; no one may judge his or her own cause).⁶ This article focuses on the right to be heard which is the aspect of procedural fairness rarely researched in the context of civil procedure. Twenty-first century Australian courts predominantly rely on overriding or overarching judicial obligations to proceed justly and efficiently but these active case management provisions provide minimal judicial guidance as to how to deliver procedural fairness and efficiency given the conflicts inherent in these procedural aims, let alone as to how to manage a crisis such as a pandemic.⁷

Be Seen to Be Done?' (2015) 34(1) *Criminal Justice Ethics* 64, 73 <<https://doi.org/10.1080/0731129X.2015.1019780>>.

3 Sir John Laws, *The Common Law Constitution* (Cambridge University Press, 2014) 3 <<https://doi.org/10.1017/CBO9781139939478>>.

4 In *Kadam v MiiResorts Group 1 Pty Ltd [No 4]* (2017) 252 FCR 298, Lee J discusses the breadth of active case management's acceptance in Australia: at 300–1 [1]–[4]. See also *Dyczynski v Gibson* (2020) 280 FCR 583, 678–80 [408] (Lee J).

5 The terms 'natural justice' and 'procedural fairness' are commonly used interchangeably: see, eg, *Kioa v West* (1985) 159 CLR 550, 583 (Mason J), 601 (Wilson J), 631 (Deane J) ('*Kioa*'); Kristina Stern, 'Procedural Fairness: Its Scope and Practical Application' (2008) (56) *Australian Institute of Administrative Law Forum* 2, 2–3, 9–12; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 397. According to Deane J in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 365–6, 'procedural fairness' is a more appropriate term than 'natural justice' or its predecessor the 'duty to act judicially', because 'natural justice' can be confused with broader public and theological or philosophical concepts of 'natural law'.

6 Stern (n 5); Aronson, Groves and Weeks (n 5) chs 8–9.

7 The active case management provisions currently operating in Australia can be summarised as follows. Three jurisdictions have 'overarching' purposes of justice and efficiency, being Victoria, the Commonwealth and Tasmania: *Civil Procedure Act 2010* (Vic) pts 2.1, 2.3 ('*CPA* (Vic)'); *Federal Court of Australia Act 1976* (Cth) ss 37M–37N ('*FCAA*'); *Supreme Court Rules 2000* (Tas) r 414A. Two jurisdictions have 'overriding' purposes of justice and efficiency, being New South Wales ('NSW') and Queensland: *Civil Procedure Act 2005* (NSW) ('*CPA* (NSW)') ss 56–60; *Uniform Civil Procedure Rules 1999* (Qld) r 5 ('*UCPR* (Qld)'). Three jurisdictions have stated purposes of justice and efficiency which appear to have general application although they are not expressed as either 'overarching' or 'overriding', being South Australia, Western Australia and the Australian Capital Territory: *Uniform Civil Rules 2020* (SA) r 1.5 ('*UCR* (SA)'); *Rules of the Supreme Court 1971* (WA) ord 1 r 4B ('*RSC* (WA)'); *Court Procedures Act 2004* (ACT) s 5A. Only the Northern Territory does not have a general provision requiring justice and efficiency but it still has a general efficiency provision with broad application: *Supreme Court Rules 1987* (NT) r 1.10.

Given the importance of procedural fairness as a component of justice, there is surprisingly little research evaluating the role of procedural fairness in Australian civil procedure. This article aims to address that lacuna by determining the current scope of the procedural fairness hearing rule and how it applies to civil procedure decisions. This analysis will be essentially doctrinal although it touches on underlying philosophical and moral arguments. First, this article will demonstrate the unambiguous requirement for procedural fairness in case management including the growing role of human rights legislation in the management of cases. It will then demonstrate the statutory imperative for the right to be heard in case management and the contrasting risk to that right posed by efficiency measures, particularly summary disposition. The analysis will consider how the administrative law interpretation of *audi alteram partem* can inform the delivery of procedural fairness in civil procedure cases and how the COVID-19 pandemic provided courts with an opportunity to re-evaluate the right to be heard. The analysis concludes that the focus on efficiency in the active case management provisions must be counterbalanced by explicit, rather than implicit, consideration of procedural fairness by the judiciary in making case management decisions.

II THE HUMAN RIGHT TO BE HEARD FAIRLY

A litigant's right to be heard in judicial decision-making is, at its core, a moral right and a human right which is commonly equated to the right to a fair trial. Procedural fairness has been variously linked back to Seneca,⁸ Roman natural law,⁹ the Magna Carta¹⁰ and the Bible,¹¹ although it has foundations in underlying moral concepts of fairness¹² and is recognised in international human rights law.¹³

Lawrence Solum proposes that both notice and the right to be heard are essential requirements for 'meaningful participation' in the litigation process¹⁴ such that procedural justice requires procedural fairness, not just efficiency and finding the

8 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 45 [140] (Callinan J) ('*Lam*').

9 *Dr Bonham's Case* (1610) 8 Co Rep 113b; 77 ER 646, quoted in Chief Justice Robert S French, 'Procedural Fairness: Indispensable to Justice?' (Sir Anthony Mason Lecture, University of Melbourne Law School, 7 October 2010) 9–10.

10 *Magna Carta 1297* (Eng) 25 Edw 1, c 9, ch 29. See also HH Marshall, *Natural Justice* (Sweet & Maxwell, 1959) 18; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

11 *R v Chancellor of the University of Cambridge* (1723) 1 Str 557; 93 ER 698, 704 [567] (Fortescue J).

12 Lawrence B Solum, 'Procedural Justice' (2004) 78(1) *Southern California Law Review* 181, 227–30 <<https://doi.org/10.2139/ssrn.508282>>.

13 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 ('*ICCPR*').

14 Solum (n 12) 183.

right answer.¹⁵ Similarly, legal theorists Jeremy Waldron,¹⁶ Stuart Hampshire¹⁷ and Denise Meyerson¹⁸ emphasise the importance of the right to be heard. International treaty obligations and human rights statutes reflect the fundamental nature of the right to be heard through fair trial provisions.¹⁹

The *International Covenant on Civil and Political Rights* ('ICCPR'),²⁰ ratified by Australia,²¹ provides in article 14(1) that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...²²

Although article 14 of the *ICCPR* predominantly concerns the right to a fair trial in criminal law proceedings, article 14(1) extends its operation to rights and obligations in 'a suit of law', thereby encompassing civil proceedings which affect a party's rights and obligations. The Australian Law Reform Commission ('ALRC') argues that article 14 of the *ICCPR* provides a basis for procedural fairness as well as setting out the circumstances of its potential exclusion.²³

In the Australian Capital Territory ('ACT'), Victoria and Queensland, the right to a fair hearing is now enshrined as a human right through section 21 of the *Human Rights Act 2004* (ACT) ('*HRA* (ACT)'), section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter* (Vic)')²⁴ and section 31 of the *Human Rights Act 2019* (Qld) ('*HRA* (Qld)').²⁵ These Acts elevate procedural fairness beyond its position as a fundamental common law entitlement although

15 Ibid. See also Lawrence B Solum, 'Natural Justice' (2006) 51(1) *American Journal of Jurisprudence* 65, 105 <<https://doi.org/10.1093/ajj/51.1.65>>.

16 Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3, 6, 15, 19 <<https://doi.org/10.2139/ssrn.1688491>>.

17 Stuart Hampshire, *Justice is Conflict* (Princeton University Press, 2000) 8–9 <<https://doi.org/10.1515/9780691187518>>.

This is a short list of indispensable procedures and institutions that all involve the fair weighing and balancing of contrary arguments bearing on an unavoidable and disputable issue. They are all subject to the single prescription *audi alteram partem* (hear the other side). Herbert Hart drew my attention to the centrality of this phrase, defining the principle of adversary argument, when justice is to be done and seen to be done. In each case the fairness of the public procedure depends as its necessary condition upon this very general prescription's being followed.

18 Meyerson (n 2).

19 Laws (n 3). His Honour Sir John Laws, then a United Kingdom Court of Appeal Judge (now Goodhart Visiting Professor Cambridge University), discussed the complex interplay between statute and common law (at 3–30), and treaty and common law (at 57–86), and argued for the power of the common law to influence the interpretation of statute and treaty.

20 *ICCPR* (n 13).

21 Australia signed the *ICCPR* (n 13) in December 1972 and ratified it in August 1980: 'UN Treaty Body Database', *United Nations Human Rights Treaty Bodies: Ratification Status for Australia* (Web Page) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN>.

22 *ICCPR* (n 13). Australia has no reservations to article 14(1) of the *ICCPR* (n 13).

23 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Interim Report No 127, July 2015) 435–6 ('*Traditional Rights and Freedoms*').

24 Section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter* (Vic)') provides that 'a party to a civil proceeding has the right to have the ... proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.

25 Section 31(1) of the *Human Rights Act 2019* (Qld) is identical to section 24(1) of the *Charter* (Vic) (n 24).

the judiciary frequently equate the statutory rights to common law concepts of procedural fairness. Human rights legislation makes it more difficult, although not impossible, to abrogate procedural fairness.²⁶

The *HRA* (ACT) was the first Australian act to legislate the right to a fair hearing. In *Islam v Director-General, Justice and Community Safety Directorate* (*'Islam'*), the Supreme Court of the Australian Capital Territory explicitly relied on the High Court's 1989 common law decision in *Jago v District Court (NSW)* in interpreting section 21 of the *HRA* (ACT), to hold that the concept of a fair trial is flexible, unable to be catalogued and requires intuitive judgment.²⁷ However, *Islam* also demonstrates the potential for section 21(1) to expand the right to a fair trial by finding, in Mr Islam's favour, that section 21(1) had been breached through the imposition of disciplinary measures, including solitary confinement, pursuant to the *Corrections Management Act 2007* (ACT) during Mr Islam's imprisonment.²⁸ The court weighed up all the relevant considerations and determined that five factors combined to constitute a breach of section 21(1) of the *HRA* (ACT).²⁹

In Victoria, section 24 of the *Charter* (Vic), which enshrines the right to a fair hearing, has also been compared and equated to the common law.³⁰ The Victorian Law Reform Commission's *Civil Justice Review* Report, which preceded the *Civil Procedure Act 2010* (Vic) (*'CPA* (Vic)'), suggested that section 24 of the *Charter* (Vic) might constitute a potential constraint on legislation seeking to confer case management powers on courts.³¹ However, most attempts to rely on section 24 of the *Charter* (Vic) in Victorian court case management decisions have been misconceived attempts by self-represented litigants.³² Numerous cases have

26 George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880, 898.

27 (1989) 168 CLR 23, 57 (Deane J), quoted in *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33, [109] (McWilliam AsJ) (*'Islam'*).

28 *Islam* (n 27) [1], [111] (McWilliam AsJ).

29 *Ibid* [111]–[119]. The five factors were the vulnerability of Mr Islam due to his incarceration, the requirements of the *Corrections Management Act 2007* (ACT) and its intention to cover section 21 of the *Human Rights Act 2004* (ACT) (*'HRA* (ACT)'), the serious effect of further liberty deprivation on a person already incarcerated, the fact that there was no external review at all such that the entire statutory process miscarried, and finally that the breaches were neither isolated nor inadvertent and were, therefore, systemic.

30 *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 681–2 [178] (Bell J); *Bashour v Australia and New Zealand Banking Group Pty Ltd* [2022] VSC 252, [49], [60] (Daly AsJ) (*'Bashour'*).

31 Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008) 291–2.

32 In *Knight v Wise* [2014] VSC 76 [35]–[36], Forrest J equated section 24 of the *Charter* (Vic) (n 24) with procedural fairness in denying leave to appear for a vexatious litigant. In *Carwoode Pty Ltd and Cardinia Shire Council* [2008] VCAT 1334, the tribunal found no infringement of section 24 of the *Charter* (Vic) (n 24) and no curtailment of its procedural powers under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic): at [217]–[237] (Presiding Member Martin and Member Rae). Presiding Member Martin and Member Rae also concluded compliance with procedural fairness as requiring the granting of 'a fair crack of the whip': at [201]. The *Charter* (Vic) (n 24) is commonly raised, unsuccessfully, by self-represented litigants: see, eg, *Collis v Bank of Queensland Ltd* [2021] VSC 724, [23] (Matthews AsJ); *Austin v Dwyer* [2021] VSCA 306, [83] (Beach and Sifris JJA).

interpreted section 24 of the *Charter* (Vic) requirement for procedural fairness as the need to ‘avoid practical injustice’.³³

Section 24 of the *Charter* (Vic) also has the potential to influence undertakings in relation to documents where access is essential for a fair trial.³⁴ This case management application of section 24 has recently been confirmed in the employment dispute of *Bashour v Australia and New Zealand Banking Group Pty Ltd* (*‘Bashour’*), an appeal from the Victorian Civil and Administrative Tribunal (‘VCAT’) where Ms Bashour had been denied repeated requests for discovery.³⁵ The Supreme Court of Victoria applied section 24 of the *Charter* (Vic) in partially allowing the appeal and ordering limited discovery despite holding that discovery refusal ‘will only impede Ms Bashour’s right to a fair hearing if the refusal of the discovery request materially compromises her ability to adduce relevant and probative evidence before VCAT at the final hearing of the VCAT proceeding’.³⁶ The court noted that the consideration of a fair hearing included ‘broader considerations of efficiency and case management’ but still found that VCAT had erred in denying several categories of discovery.³⁷ *Bashour* demonstrates Victoria employs human rights obligations to promote balancing procedural fairness entitlements against efficiency obligations in a case management context.

The *HRA* (Qld) commenced on 1 January 2020 meaning that most of the Queensland courts’ opportunity to explore the scope of its section 31 fair hearing rule has occurred across the backdrop of court procedures disrupted by the COVID-19 pandemic. The Queensland Court of Appeal decision of *Day v Woolworths Group Ltd* involved a self-represented litigant who slipped on a shallot at Woolworths prior to the commencement of the *HRA* (Qld), but their trial was held to have also provided a fair hearing in accordance with section 31.³⁸ In *Attorney-General (Qld) v Haynes*, the Supreme Court of Queensland confirmed the section 31 requirement for a fair hearing applied equally to civil cases as to criminal cases.³⁹ Jackson J criticised the provision of voluminous pages of poorly organised ‘mostly irrelevant’ material by the Attorney-General and noted that ‘[t]he chronic underfunding of both Legal Aid Queensland and the inability of that agency to provide adequate remuneration by way of fees to counsel ... already borders on institutionalised unfairness’.⁴⁰ This comment underscores the complexity of procedural fairness in the context of uneven litigant resources which persist in civil disputes.

33 *Roberts v Harkness* (2018) 57 VR 334, 354 [47] (Maxwell P, Beach and Niall JJA); *Doughty-Cowell v Kyriazis* [2018] VSCA 216, [63] (Maxwell P, Beach and Niall JJA); *Carroll v Goff* [2021] VSCA 267, [86] (Maxwell P, Kennedy and Walker JJA). Each judgment adopts the wording of Gleeson CJ in *Lam* (n 8) at 14 [38].

34 *Ambridge Investments Pty Ltd v Baker [No 3]* [2010] VSC 545, [35] (Vickery J), cited in *Kritsidimas v Dimitrakakis [No 2]* [2021] VSC 677, [55] (Irving AsJ).

35 *Bashour* (n 30).

36 *Ibid* [54] (Daly AsJ).

37 *Ibid* [62], [132].

38 *Day v Woolworths Group Ltd* (2021) 398 ALR 743, 753 [39], 769 [101] (Henry J, Mullins JA agreeing at 745 [1], Williams J agreeing at 781 [169]).

39 [2020] QSC 348, [20] (Jackson J). This case concerned the supervision of a convicted sex offender after the completion of his sentence.

40 *Ibid* [20], [34].

Australia does not have a federal Bill of Rights. It has been criticised for not fully implementing the *ICCPR* through domestic legislation and, arguably, has witnessed reduced judicial reliance on the *ICCPR*.⁴¹ In the Australian Government's third Universal Periodic Review national report to the United Nations, reviewing Australia's progress in protecting and promoting human rights, there is no mention of article 14 of the *ICCPR* nor the right to be heard.⁴² The human right in article 14 of the *ICCPR* and fair hearing provisions of the *HRA* (Qld), *HRA* (ACT) and the *Charter* (Vic) often do little more than reinforce Australians' fundamental common law right to procedural fairness. However, this, perhaps, indicates the fundamental human rights nature of the common law entitlement to procedural fairness. The consistency of treaty, statute and common law interpretations strengthens the significance of litigants' entitlement to procedural fairness in court cases.

III THE COMMON LAW RIGHT TO BE HEARD IN COURT

Procedural fairness is a creation of the common law⁴³ which requires courts and administrative decision makers to proceed fairly.⁴⁴ It has been extensively considered by the High Court of Australia,⁴⁵ but seldom in its application to civil procedure case-management decisions. This is problematic as the right to be heard is inextricably intertwined with case management decisions, despite being largely overlooked by the active case management provisions themselves.⁴⁶ The right to

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- 41 Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 436–7, 454–7. In 1995, following the High Court's decision in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, it appeared that the courts would provide common law protection for article 14 of the *ICCPR* (n 13) requirements on the basis of legitimate expectations. However the doctrine of legitimate expectations was subsequently rejected in Australia and judicial reliance on treaty obligations has reduced: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ) ('*Kaur's Case*'); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ), 343–4 [63] (Gageler and Gordon JJ) ('*WZARH*'). See also Margaret Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 204, discussing how Australia could have more fully implemented the *ICCPR* (n 13) through the doctrine of legitimate expectations, which has since been judicially rejected.
- 42 Attorney-General's Department (Cth), *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21* (Universal Periodic Review No 3, 24 December 2020) <<https://www.ag.gov.au/sites/default/files/2020-12/national-report-of-australia-upr-2021.pdf>>.
- 43 *Annetts v McCann* (1990) 170 CLR 596, 604 (Brennan J) ('*Annetts*'). For a detailed historical discussion, refer to Marshall (n 10) and French (n 9) at 3–9. The common law origin of procedural fairness is discernible in the 1615 Court of King's Bench decision of Coke CJ in *Bagg's case* (1615) 11 Co Rep 93b; 77 ER 1271. *Bagg's case* is discussed in French (n 9) 3–6.
- 44 Michael Barnett, 'Dobbing-in the High Court: *Veal* Refines Procedural Fairness' (2007) 30(1) *University of New South Wales Law Journal* 127, 128–9.
- 45 See, eg, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 ('*SZBEL*'); *Kioa* (n 5); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 ('*VEAL*'); *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 ('*CNY17*').
- 46 Aronson, Groves and Weeks (n 5) 399–408, 625–42. It has been suggested that the right to notice should be separate from the right to be heard, thereby creating three elements: see, eg, Barnett (n 44) 128–9.

be heard interacts with active case management because efficiency measures have the potential to deny hearings or reduce their content. Compared with substantive decision making, procedural fairness obligations in case management are easy to overlook in the morass of daily decisions facing the judiciary in civil courts particularly where such obligations conflict with expressly stated efficiency aims. While well-resourced judges hearing ‘mega-litigation’ may consider procedural fairness as a ‘fundamental’ ‘touchstone’ of their procedural decision making,⁴⁷ even they acknowledge parties cannot be granted limitless opportunities to be heard.⁴⁸ Conversely, in lower level courts, inordinate volumes of cases and unpredictable litigants, who commonly fail to comply with fundamental procedural requirements, lead to unenviably brief timeframes for judicial procedural decision making.⁴⁹

There is no dispute that courts have common law procedural fairness obligations.⁵⁰ As French CJ notes in *International Finance Trust Co Ltd v New South Wales Crime Commission* (‘*International Finance Trust*’):

Procedural fairness or natural justice lies at the heart of the judicial function. ... It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it.⁵¹

International Finance Trust concerned case management of third party interlocutory injunctive proceedings.⁵² French CJ describes the crucial nature of procedural fairness, its constitutional protection, the variability of its content and the potential for compromise of the right to be heard.⁵³ Express reference to the application of procedural fairness to court decisions dates back at least to the much cited reference in the 19th century United Kingdom case of *Capel v Child*.⁵⁴ The High Court of Australia similarly confirmed the application of procedural fairness to courts, noting in *South Australia v Totani* (‘*Totani*’), that ‘[p]rocedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process’,⁵⁵ in *RCB v Forrest* that ‘the requirements of procedural fairness ... are an essential characteristic of any judicial proceeding’,⁵⁶ and in *Condon v*

47 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) 133.

48 Ibid 134–5.

49 Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-legal Analysis* (Routledge, 2021) 31–2 <<https://doi.org/10.4324/9781315180045>>.

50 *Ball v McInerney* [2014] NSWCA 331, [56] (Gleeson JA). Gleeson JA states that ‘[i]t is uncontroversial that a judge is required to conduct judicial proceedings in accordance with natural justice (often called procedural fairness)’.

51 (2009) 240 CLR 319, 354 [54] (‘*International Finance Trust*’). See also *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395 (Dixon CJ and Webb J) (‘*Tanos*’).

52 *International Finance Trust* (n 51) 354 [54] (French CJ).

53 Ibid. For a detailed analysis of the High Court’s approach to its power under Chapter III of the *Australian Constitution* prior to *International Finance Trust* (n 51), refer to Will Bateman, ‘Procedural Due Process under the Australian Constitution’ (2009) 31(3) *Sydney Law Review* 411.

54 (1832) 2 Cr & J 558; 149 ER 235, 244 (Bayuey B), quoted in *Adamson v Ede* [2009] NSWCA 379, [53] (Campbell JA) (‘*Adamson*’).

55 (2010) 242 CLR 1, 43 [62] (French CJ) (‘*Totani*’). See also *Tanos* (n 51) 395 (Dixon CJ and Webb J). The history of the application of procedural fairness to courts is also discussed by the NSW Court of Appeal in *Adamson* (n 54) at [53]–[63] by Campbell JA.

56 (2012) 247 CLR 304, 309 [3] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

Pompano Pty Ltd ('*Pompano*') that procedural fairness is 'an essential attribute of a court's procedures'.⁵⁷

IV STATUTORILY CONFINING PROCEDURAL FAIRNESS IN ADMINISTRATIVE AND CRIMINAL LAW

Whilst human rights statutes and common law support the hearing rule's application to civil disputes, legislation can also vary, confine, and exclude the scope of procedural fairness. These statutory limitations have received significant consideration in both administrative and criminal law. The common law hearing rule has been refined predominantly through administrative law decisions some of which concern judicial decision making. The administrative law test requires a party be given 'an adequate opportunity to be heard' and is described in terms which extend to court based civil dispute resolution.⁵⁸ In *CPCF v Minister for Immigration and Boarder Protection*, Gageler J noted that '[t]he implication of procedural fairness is the product of a strong common law presumption applicable to any statutory power the exercise of which is capable of having an adverse effect on legally recognised rights or interests'.⁵⁹

One key requirement of procedural fairness, identified in administrative law cases, is notice.⁶⁰ Lack of notice and knowledge effectively deny a party the opportunity to persuade the decision maker to come to a different conclusion.⁶¹ Another requirement is the opportunity to present evidence and arguments, described as being 'a principle at the core of our legal system', in *Tomlinson v Ramsay Food Processing Pty Ltd*.⁶²

The modern administrative law hearing rule test has its origins in *Kioa v West*⁶³ where Mason J defined a broad common law duty to accord procedural fairness in administrative decisions which 'affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention'.⁶⁴ Deane J confirmed that the precise content of procedural fairness would vary depending on

57 (2013) 252 CLR 38, 99 [156] (Hayne, Crennan, Kiefel and Bell JJ) ('*Pompano*').

58 *Tanos* (n 51) 395 (Dixon CJ and Webb J).

59 (2015) 255 CLR 514, 622 [367] ('*CPCF*'). See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 256 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) ('*Saeed*').

60 *VEAL* (n 45). Cf *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 ('*M47/2012*'), where procedural fairness did not require the applicant to see an ASIO report because of the consequential risk to national security.

61 *SZBEL* (n 45) 164–6 [41]–[47] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

62 (2015) 256 CLR 507, 523 [38] (French CJ, Bell, Gageler and Keane JJ).

63 *Kioa* (n 5). The High Court determined that a Tongan couple were denied procedural fairness when the Immigration Minister's delegate failed to put prejudicial allegations against them before deciding to order their deportation.

64 Ibid 584. The term 'legitimate expectation' has since been rejected in Australia: *Lam* (n 8) 27–8 [81]–[82] (McHugh and Gummow JJ), 45 [140] (Callinan J); *Kaur's Case* (n 41) 658 [65] (Gummow, Hayne, Crennan and Bell JJ). In *Kaur's Case* (n 41) the majority described the term as 'an unfortunate expression which should be disregarded'. The High Court most recently described the legitimate expectations doctrine as 'both unnecessary and unhelpful': *WZARH* (n 41) 335 [30] (Kiefel, Bell and Keane JJ).

the circumstances of the case,⁶⁵ but that it would be rare for circumstances to exist that would exclude or even modify the entitlement⁶⁶ and statutory exclusion required ‘clear legislative intent’.⁶⁷ The concept of the ‘interests’ required in a decision in order to attract procedural fairness obligations, has been defined inclusively and has expanded to cover status, business, personal reputation, liberty, confidentiality, livelihood and financial interests.⁶⁸ Many High Court decisions on procedural fairness concern the *Migration Act 1958* (Cth) (*‘Migration Act’*) which expressly limits procedural fairness.⁶⁹ Accordingly, such cases raise different issues to case management decisions because the ‘requirements of procedural fairness ... depend upon the legislative framework and the circumstances of the particular case’.⁷⁰ The operation of procedural fairness must be interpreted in the context of applicable legislation.⁷¹ It is unnecessary for statutes to expressly entitle a party to a hearing as ‘the justice of the common law will supply the omission of the legislature’,⁷² and the *Australian Constitution* protects the judicial branch from legislative or executive interference with its powers, including the procedural fairness requirement.⁷³

However, it is possible (although difficult) to expressly exclude procedural fairness.⁷⁴ It is, therefore, necessary to briefly consider the potential for legislation to exclude procedural fairness to ensure there is nothing in civil procedure legislation, including case management provisions, which excludes or varies the content of the procedural fairness requirement. Due to the centrality of procedural fairness to judicial function, it is, arguably, significantly more difficult for legislation to exclude procedural fairness obligations of courts than other administrative decision makers.⁷⁵

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- 65 *Kioa* (n 5) 633. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 91–2 [17] (Gaudron and Gummow JJ, Gleeson CJ agreeing at 89 [5]–[6]) (*‘Aala’*); Bruce Dyer, ‘Determining the Content of Procedural Fairness’ (1993) 19(1) *Monash University Law Review* 165, 165.
- 66 *Kioa* (n 5) 633 (Deane J). Necessity is one such circumstance (such as where the proceedings concerned a party who was in hiding).
- 67 *Ibid.* Similar statutory exclusion formulations are discussed in the judgment: at 594 (Wilson J), 584 (Mason J), 609 (Brennan J). The subsequent dispute as to the source of the procedural fairness obligation (Brennan J considered implied statutory intention rather than common law was the source: at 609–11) has been largely resolved by the conclusion that the ‘common law’ implies, ‘as a matter of statutory interpretation’, a condition that statute based executive power ‘be exercised with procedural fairness to those whose interest may be adversely affected’: *Kaur’s Case* (n 41) 666 [97].
- 68 Aronson, Groves and Weeks (n 5) 416–17.
- 69 *Migration Act 1958* (Cth) ss 357A, 473DA (*‘Migration Act’*). See, eg, *CNY17* (n 45) 86–7 [16] (Kiefel CJ and Gageler J).
- 70 *CPCF* (n 59) 606 [306] (Kiefel J).
- 71 *SZBEL* (n 45) 160 [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). See also Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39(2) *Monash University Law Review* 285, 285, 302.
- 72 *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 420 (Byles J).
- 73 Chapter III (sections 71 to 80) of the *Australian Constitution* supports the operation of the federal judicature including the High Court of Australia. Legislation which seeks to control judicial obligations poses a threat to the judicial independence enshrined in the *Australian Constitution*: see authorities discussed in *Adamson* (n 54) [55] (Campbell JA); Rebecca Ananian-Welsh and George Williams ‘Judicial Independence from the Executive: A First-Principles Review of the Australian Case’ (2014) 40(3) *Monash University Law Review* 593, 603.
- 74 *Annetts* (n 43) 598 (Mason CJ, Deane and McHugh JJ). For examples of legislated exclusion of procedural fairness, see French (n 9) 2–3 and Groves (n 71).
- 75 Groves (n 71) 285–6.

The High Court has given significant consideration to the requirements of procedural fairness, particularly in the criminal law context of the right to a fair trial and the required autonomy of the Court pursuant to the separation of powers in Chapter III of the *Australian Constitution* in *Pollentine v Bleijie*,⁷⁶ *Pompano*,⁷⁷ *Lee v NSW Crime Commission*,⁷⁸ *X7 v Australian Crime Commission*,⁷⁹ and *Totani*.⁸⁰ The high level of specificity required to exclude procedural fairness obligations has become increasingly evident from administrative law decisions arising under the *Migration Act*⁸¹ such as *Saeed v Minister for Immigration and Citizenship*⁸² although such exclusion was achieved in *Plaintiff M/21 v Minister for Home Affairs*.⁸³

In *Pompano*, which concerned whether the Finks Motorcycle Club Gold Coast Chapter could be declared a criminal organisation under the *Criminal Organisation Act 2009* (Qld), French CJ noted that the ‘common law tradition is “a method of administering justice”’ requiring independent judges to preside over public courts where ‘each party has a full opportunity to present its own case and to meet the case against it’.⁸⁴ In *Pompano*, procedural fairness was held to be a common law protection which may be varied in the public interest, recognising that statutory adaptation of the common law right to procedural fairness for both parties may be necessary in the public interest where national security, commercially sensitive documents and protection of police informants are involved.⁸⁵ Although distinctions between private and public law influence the conduct of civil proceedings as compared with criminal and administrative decisions, it would require extreme clarity of legislative intention for active case management to reduce litigant entitlements to procedural fairness. The analysis below demonstrates there is no such exclusionary or limiting intention in the case management provisions.

76 (2014) 253 CLR 629.

77 *Pompano* (n 57).

78 (2013) 251 CLR 196.

79 (2013) 248 CLR 92.

80 *Totani* (n 55).

81 Procedural fairness is described in the *Migration Act* (n 69) as ‘natural justice’.

82 *Saeed* (n 59) 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) stating that ‘[t]he presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality which ... “governs the relations between Parliament, the executive and the courts”’. See also *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 315 [58] (McHugh J).

83 (2022) 400 ALR 417. Kiefel CJ, Keane, Gordon and Stewart JJ (with Gageler J agreeing at 431 [43]), found that the rules of natural justice did not apply to a visa cancellation decision under section 501(3A) of the *Migration Act* (n 69) where there was potential for the plaintiff to apply for a protection visa: at 420 [10], citing *Migration Act* (n 69) s 501(5). However, Edelman J and Gleeson J, each writing in dissent, separately held that the delegate had denied procedural fairness in making a non-revocation decision regarding the plaintiff’s visa cancellation given non-refoulement obligations and the risk of persecution for the appellant if returned to South Sudan: at 445 [100] (Edelman J), 449–50 [115] (Gleeson J).

84 *Pompano* (n 57) 46 [1].

85 *Ibid* 47 [5] (French CJ). In the judgment, Gageler J concluded: ‘Suggestions that there are exceptions to procedural fairness in the common practices of courts in Australia are unfounded. The suggested exceptions are more apparent than real.’: at 109 [192]. See also at 105 [177] (Gageler J). Similarly, Hayne, Crennan, Kiefel and Bell JJ stated ‘the Supreme Court retains its capacity to act fairly and impartially. Retention of the Court’s capacity to act fairly and impartially is critical to its continued institutional integrity’: at 102 [167].

V APPLYING THE HEARING RULE TO CIVIL PROCEDURE AND CASE MANAGEMENT LEGISLATION

In the civil procedure context, the hearing rule, *audi alteram partem*,⁸⁶ provides that each party's case must be heard by the court as a basic requirement of procedural fairness.⁸⁷ However, the potential for denial of procedural fairness in case management decisions is more substantial than mere evidentiary limitations particularly in summary disposition cases (which proceed as interlocutory but are final in their effect).⁸⁸ Summary disposition is the area of case management which most threatens procedural fairness because summary disposition constitutes the final determination of a case often without any presentation of evidence or even discussion of the issues in dispute.⁸⁹ However, deference to efficiency considerations in all case management decisions, where it distracts from the right to be heard, risks denial of procedural fairness.

Significantly, courts take the view that fairness is, essentially, practical rather than abstract which thereby increases the importance of procedural aspects of dispute resolution.⁹⁰ The circumstances and scope within which courts apply the procedural fairness doctrine continues to develop.⁹¹ The practical variability of procedural fairness depending on case context means there is no concrete base level of procedural fairness required for all case management decisions.⁹² This reinforces the requirement for careful judicial consideration of procedural fairness obligations when making case management determinations. These obligations are both common law and statutory with common law developing through interpretation of the current case management statutes. This section of the article delineates the role of Australian civil procedure legislation in prescribing procedural fairness, both explicitly and inherently. Significantly, this analysis seeks both to define the current statutory boundaries of the right to be heard in civil litigation and to demonstrate that, unlike the *Migration Act* in administrative law, there is no statutory exclusion of the hearing rule in civil procedure legislation.

There is considerable variation between jurisdictions regarding the incorporation of procedural fairness concepts into civil procedure legislation. Overall, it receives little express legislative consideration and such references to procedural fairness which exist in civil procedure legislation tend to expressly endorse it as a requirement. The ALRC suggests that laws limiting or denying procedural

86 The Latin moniker for the hearing rule was first adopted by Lord Kenyon in *R v Gaskin* (1799) 8 TR 209; 101 ER 1349, 1350 and was adopted in Australia by the first NSW Supreme Court Chief Justice, Sir Frances Forbes, in *Ex parte Mathews* (Supreme Court of New South Wales, 1 May 1827), reported in *Sydney Gazette and New South Wales Advertiser* (Sydney, 16 May 1827) 2; French (n 9) 8–9, 18.

87 *International Finance Trust* (n 51) 338 [4], 354 [54] (French CJ).

88 *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* (2016) 338 ALR 360, 370–1 [33] (Nettle J).

89 See, eg, *Mutton v Baker* [2014] VSCA 43 ('Mutton'); *Kapoor v State Transit Authority of NSW* [2010] NSWCA 143 ('Kapoor'); *Finch v Arnold Thomas & Becker Pty Ltd* [2016] VSCA 117 ('Finch').

90 *Lam* (n 8) 14 [17] (Gleeson CJ), cited in *M47/2012* (n 60) 66 [139] (Gummow J).

91 Aronson, Groves and Weeks (n 5) 398–9; *Annetts* (n 43) 599–600 (Mason CJ, Deane and McHugh JJ).

92 As Gleeson CJ noted in *Lam* (n 8) 14 [37], fairness is 'essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.'

fairness ‘may be justified on policy grounds, typically in the interests of quick and efficient decision-making’.⁹³ In light of the High Court’s statements in migration cases, the suggestion that the pursuit of efficiency is ever a sufficient basis for denying procedural fairness in case management, must be rejected. However, case management decisions frequently influence the content of procedural fairness⁹⁴ because many case management decisions influence the opportunity of the parties to be heard: ‘[T]he obligation to accord procedural fairness is an obligation affecting how the decision maker is to go about the task of decision making. It is a limitation on the power to decide.’⁹⁵

A Inherent Preservation of Procedural Fairness in Civil Procedure Legislation

The Commonwealth,⁹⁶ Western Australian,⁹⁷ ACT,⁹⁸ Northern Territory,⁹⁹ South Australian (‘SA’)¹⁰⁰ and Victorian¹⁰¹ jurisdictions do not expressly consider procedural fairness in their civil procedure legislation but include general or overriding purposes based on justice and other judicial discretions to vary court rules. Such discretions, arguably, protect the common law doctrine of procedural fairness by ensuring that routine procedural obligations (eg, time frames for lodging pleadings), which might otherwise operate to exclude procedural fairness in certain cases, may be overridden where procedural fairness requires.

In addition to this tacit protection of procedural fairness, section 64 of the *CPA* (Vic) entitles a court to proceed to trial ‘despite there being no real prospect of success’¹⁰² where summary dismissal would not be ‘in the interests of justice’¹⁰³ or the nature of the case makes a full hearing appropriate. This provision supports

93 *Traditional Rights and Freedoms* (n 23) 434 [15.99].

94 See, eg, *Kapoor* (n 89); *Singh v Singh* [2017] NSWCA 15; *Shaw v Yarranova Pty Ltd* [2014] VSCA 48; *Finch* (n 89); *George v Fletcher* [2010] FCAFC 53; *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301; *SZWBH v Minister for Immigration and Border Protection* (2015) 229 FCR 317 (‘*SZWBH*’); *UBS AG v Tjyne* (2018) 265 CLR 77 (‘*Tjyne*’).

95 *Aala* (n 65) [168] (Hayne J, Gaudron and Gummow JJ agreeing at [59] and Kirby J agreeing at [132]) (emphasis added).

96 *FCAA* (n 7). There is the overarching purpose to facilitate the just resolution of disputes in section 37M of the *FCAA* but neither the *FCAA* nor the *Federal Court Rules 2011* (Cth) directly engage with the right to be heard. Rule 2.02 of the *High Court Rules 2004* (Cth) provides blanket judicial discretion not to apply the rules.

97 *Supreme Court Act 1935* (WA) s 25(9) and *RSC* (WA) (n 7), noting order 1 rule 4A and rule 4B promote ‘just’ procedural direction.

98 ‘The main purpose of the civil procedure provisions is to facilitate the just resolution of disputes (a) according to law; and (b) as quickly, inexpensively and efficiently as possible’: *CPA* (ACT) (n 7) s 5A(1).

99 *Supreme Court Act 1979* (NT) contains no reference to procedural fairness but requires the court to give effect to all common law rights except where such entitlements are overridden by equitable rights and subject to the right of the court to stay proceedings: at ss 67–8.

100 *UCR* (SA) (n 7) r 12.1(1).

101 *CPA* (Vic) (n 7). The key ‘overarching purpose’ provision is at pt 2.1.

102 *Ibid* s 64(a).

103 *Ibid* s 64(b).

the importance of the right to be heard in Victorian civil procedure by expressly overriding efficiency objectives where ‘justice’ favours a hearing.¹⁰⁴

South Australia removed its express reference to procedural fairness in case management with the introduction of its new *Uniform Civil Rules 2020 (SA)* (‘*UCR (SA)*’) which repealed the *Supreme Court Civil Rules 2006 (SA)*.¹⁰⁵ The previous 2006 *Rules* contained rule 10 which required the Supreme Court to give directions about procedure in order ‘to achieve procedural fairness in the circumstances of a particular case’.¹⁰⁶ The *UCR (SA)* rule 12.1, has a very broad judicial discretion which empowers the Supreme Court to make ‘any order that it considers appropriate in interests of justice’ and which may present a proxy for procedural fairness. The Supreme Court is invited, but not required, by rule 12.2 to give consideration to the object of the rules which are set out at rule 1.5 ‘to facilitate the just, efficient, timely, cost-effective and proportionate resolution or determination of the issues in proceedings governed by these Rules’.¹⁰⁷ Rule 12.2 includes a lengthy list of considerations which include efficiency but not procedural fairness or the right to be heard.

B Express Preservation of Procedural Fairness in Civil Procedure Legislation

Queensland, Tasmania and New South Wales (‘NSW’) each contain provisions in their civil procedure legislation which, in a variety of ways, expressly preserve the entitlement of litigants to procedural fairness in case management decisions.

The *Uniform Civil Procedure Rules 1999 (Qld)* (‘*UCPR (Qld)*’) contains express reference to the preservation of natural justice in circumstances where the normal procedures are otherwise dispensed with.¹⁰⁸ For example, rule 515(d)(iii) of the *UCPR (Qld)* expressly requires that the court ‘must observe the rules of natural justice’.¹⁰⁹ Similarly, rules enabling estate assessors and costs assessors to decide the appropriate procedure for assessments stipulate that the procedure chosen must be ‘consistent with the rules of natural justice’.¹¹⁰ The *UCPR (Qld)* also contains rule 29(6) applicable to originating process applications and specifying that a

104 However, the Victorian court has found alternate uses for section 64, such as in *Paolo v Salta Constructions Pty Ltd [No 2]* [2016] VSC 741 where Ginnane J used section 64 to conclude that possible future amendment of a contribution notice by one party could enable prospects of success not currently evident in the proceedings: at [66]–[83]. The court in *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27, 29 [3] suggested that ‘[a] test case or case involving matters of public importance may fit into’ section 64. See also *Feldman v Frontlink Pty Ltd* [2014] VSCA 27; *Mutton* (n 89), discussed below. The court may also refuse to apply section 64 due to lack of justification for its application as occurred in *Byrne v Javelin Asset Management Pty Ltd* [2016] VSCA 214.

105 *UCR (SA)* rule 1.3 repeals the ‘Previous Rules’ as defined in rule 1.2(a) to include the *Supreme Court Civil Rules 2006 (SA)* (‘*SCCR (SA)*’).

106 *SCCR (SA)* (n 105) r 10(2)(c).

107 *UCR (SA)* (n 7) rr 1.5, 12.2.

108 In contrast, there is no reference to procedural fairness in the *Supreme Court of Queensland Act 1991 (Qld)*.

109 *UCPR (Qld)* (n 7) r 515 applies only to Magistrates Courts and acts to ‘simplify procedures’ by excluding certain evidentiary and procedural rules.

110 *Ibid* rr 651(2)(b), 720(2)(b).

respondent's failure to comply with service notice provisions does not affect the respondent's right to be heard on the application.

In Tasmania, the importance of preserving procedural fairness is expressly evident in relation to appeals from the Magistrates Court to the Supreme Court which are limited for minor civil cases to very limited express circumstances including where a party was 'denied natural justice' in the proceeding.¹¹¹

The most complex references to procedural fairness in civil procedure legislation occur in NSW. Neither 'procedural fairness' nor 'natural justice' are expressly addressed in either the *Civil Procedure Act 2005* (NSW) ('CPA (NSW)') or the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR (NSW)') and yet section 62 of the CPA (NSW), which concerns 'directions as to the conduct of hearings', includes explicit support for the hearing rule by providing for the right to a 'fair hearing' and a 'reasonable opportunity' to lead evidence, make submissions, present a case and cross-examine witnesses.¹¹² Section 61 of the CPA (NSW) provides broad judicial discretion to make appropriate orders, including the express entitlement, in section 61(3), to summarily dismiss proceedings in whole or part, to strike out claims or defences or make any other appropriate orders where parties have failed to comply with previous directions of the court. A 'hearing' is defined in section 3 of the CPA (NSW) to include both interlocutory and trial hearings. If any section 61 'directions' might not amount to a 'hearing', the section 62(4) fair hearing protection would not apply, and this might provide potential for judges to restrict litigants' opportunity to be heard where parties have failed to comply with directions.

Section 62(4) CPA (NSW) bears some resemblance to the *Migration Act* provisions sections 357A and 360 governing tribunal procedure discussed by the High Court in *Minister for Immigration and Citizenship v Li* ('Li').¹¹³ *Li* also discussed section 353 of the *Migration Act* which then required tribunals to be 'fair, just, economical, informal and quick', which resembles the overriding purpose in section 56 CPA (NSW). However, unlike anything in CPA (NSW), section 357A of the *Migration Act* purports to be an 'exhaustive statement of the natural justice hearing rule'. *Li* demonstrates the High Court's extreme reluctance to dispense with procedural fairness and its insistence on discretion being exercised reasonably so as to enable an opportunity to be heard.¹¹⁴ The power in section 62(4) CPA (NSW) supports the judiciary's common law obligation to provide procedural fairness and *Li* indicates courts should interpret the interaction between sections 56, 61 and 62 of the CPA (NSW) so as to preserve the entitlement to procedural fairness. The

111 *Magistrates Court (Civil Division) Act 1992* (Tas) s 28(2)(a)(ii). See also section 34(2) of the *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas) which entitles the Magistrates Court to devise its own procedure, not bound by rules of evidence and aimed at minimising formality but subject to the rules of natural justice. There is no reference to procedural fairness in the *Supreme Court Civil Procedure Act 1932* (Tas) or the *Supreme Court Rules 2000* (Tas).

112 See below for a discussion of the 'opportunity to be heard'. There is also a reference to 'denial of natural justice' in section 41(2) of the CPA (NSW) (n 7) in the context of referrals to arbitration.

113 (2013) 249 CLR 332 ('Li').

114 *Li* (n 113) 345 [16], 356 [18], 357 [21] (French CJ), 358–9 [51]–[53], 362 [61]–[63] (Hayne, Kiefel and Bell JJ).

summary disposition power in section 61 *CPA* (NSW) is also countered by the operation of the *UCPR* (NSW) rule 36.15 which empowers courts to set aside judgments and orders made ‘irregularly, illegally or against good faith’ and by rule 36.16(2)(b) which provides express judicial authority to reverse judgments made where one or more parties have not been heard.¹¹⁵

Australian civil procedure legislation contains extensive provisions regarding pleadings and service of process and may also prescribe evidentiary requirements so as to prevent surprise during hearings.¹¹⁶ Thus, far from excluding procedural fairness, civil procedure provisions reinforce the common law rules of procedural fairness at their core.¹¹⁷ The requirement that parties are confined to their pleadings in civil litigation derives from the requirements of procedural fairness.¹¹⁸ However, pleadings and service requirements are also influenced by case management provisions which enable courts to make directions in relation to their reduction, expedition and, even, elimination.¹¹⁹

There is no clear intention to exclude or restrict procedural fairness entitlements in any Australian civil procedure legislation despite variances across jurisdictions regarding case management requirements of procedural fairness. This lack of legislative exclusionary intention combines with the operation of a single Australian common law,¹²⁰ which reinforces procedural fairness entitlements,¹²¹ to confirm that procedural fairness obligations must apply to case management decisions.

VI ASSESSING THE OPPORTUNITY TO BE HEARD IN CASE MANAGEMENT DECISIONS

The content of the hearing rule depends largely on the circumstances of the case.¹²² The right to be heard has long been,¹²³ and remains, an ‘opportunity’ to

115 The second reading speech of Bob Debus is not sufficiently detailed to consider provisions such as rule 36.16: New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 April 2005, 15115 (Bob Debus). Judicial Commission of New South Wales, ‘Civil Trials Bench Book’ (Bench Book, March 2022) [2-6640] supports the purpose of rule 36.16(2), being to protect the right to be heard, following *Goater v Commonwealth Bank of Australia* (2014) 88 NSWLR 362.

116 See, eg, in NSW, the *Uniform Civil Procedure Rules 2005* (NSW) (‘*UCPR* (NSW)’) governs pleadings in parts 6, 9 and 14; service of process in parts 10, 11 and 11A and evidentiary disclosure through discovery in part 21, interrogatories in part 22, medical examinations/property inspection in part 23, examination other than at trial in part 24, and subpoenas at part 33 as well as trial procedures at part 29, and trial evidence at part 31.

117 This is consistent with the analysis of Gageler J in *Li* (n 113) 372 [94]–[97] in the similar context of the implied statutory obligation for a tribunal to act reasonably.

118 *Clarke v Great Southern Finance Pty Ltd (in liq)* [2014] VSC 516, [5], [246], [1323] (Croft J).

119 See, eg, *UCPR* (NSW) (n 116) part 12 concerning summary disposition are predominantly case management provisions and are, themselves, influenced by the part 6 case management provisions.

120 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

121 *International Finance Trust* (n 51) 354 (French CJ).

122 *WZARH* (n 41) 336 [33] (Kiefel, Bell and Keane JJ).

123 *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337–8 (Lord Denning); *Victims Compensation Fund Corporation v Nguyen* (2001) 52 NSWLR 213, 219–20 [37] (Mason P).

be heard rather than an entitlement to the full content of a hearing in a court in every situation.¹²⁴ Case management decisions, particularly summary dismissal decisions, permanent stay decisions and decisions relating to notice requirements, have an enormous impact on what courts hear and should therefore be a decision making point where careful judicial consideration is given to balancing procedural fairness and efficiency. Reliance on technology has the potential to exacerbate potential conflicts between fairness and efficiency as the move to online hearings necessitated by the COVID-19 pandemic has demonstrated. Part VI analyses the complexity and uncertainty inherent in the scope of procedural fairness in case management decisions, such as those involving provision of notice, yet also the simplicity with which the judiciary can explicitly demonstrate its delivery. The discussion below demonstrates how a focus solely on efficiency or justice issues can obscure the important right to be heard discretion at the heart of procedural decision making.

A The Role of Procedural Fairness in Judicial Discretion

Case management decisions often involve an exercise of judicial discretion as to the content of the right to be heard even where this is not expressly mentioned in the decision. The cases discussed below establish that the right to be heard in civil disputes requires no more than a reasonable opportunity to be heard including sufficient notice that the hearing is occurring. The cases also demonstrate the variance in what constitutes a reasonable opportunity to be heard and the level of case-by-case judicial discretion required to determine sufficiency of opportunity.

In *Adamson v Ede*,¹²⁵ Campbell JA suggested that many rules of civil procedure are founded on the principles of procedural fairness including: the system of pleadings, service of process requirements and the rule in *Browne v Dunn* (1893) 6 R 67.¹²⁶ Campbell JA discussed how procedural fairness can be affected by court procedures¹²⁷ and observed that the right to be heard has often been translated by courts into the right to a ‘fair trial’¹²⁸ or a ‘reasonable opportunity to present’ a case¹²⁹ rather than a guaranteed right to be heard regardless of circumstance.

Due to the adversarial nature of civil litigation and the doctrine of open justice,¹³⁰ notice-based disputes do not commonly arise in the case management of civil litigation.¹³¹ However, lack of notice causing procedural unfairness can arise in a case management context resulting in denial of procedural fairness. For example,

124 See, eg, *Tyne v UBS AG [No 3]* (2016) 236 FCR 1, 60 [423] (Greenwood J).

125 *Adamson* (n 54).

126 *Ibid* [56]–[57], [62].

127 *Ibid* [57], quoting *J v Lieschke* (1987) 162 CLR 447, 456 (Brennan J).

128 *Ibid* [58], quoting *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane and Dawson JJ).

129 *Ibid* [59], quoting *Re Association of Architects of Australia; Ex parte Municipal Officers Association of Australia* (1989) 63 ALJR 298, 305 (Gaudron J).

130 *Rinehart v Rinehart* (2014) 320 ALR 195, 198–9 [21]–[31] (Jacobson J).

131 Civil procedure legislation contains caveats against surprise and requires parties to keep each other fully informed: see, eg, *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2006] NSWSC 223, [160]–[161] (Einstein J)..

in *Morris v Riverwild Management Pty Ltd*, the Victorian Court of Appeal found the VCAT had committed a jurisdictional error in breaching *audi alteram partem* by making a case management decision ‘without first informing counsel that it intended to do so and giving counsel a reasonable opportunity to present evidence and argument in support of the claim’.¹³²

The areas of litigation which potentially involve procedural unfairness due to lack of notice are expanding. Of these, the most obvious are interlocutory ex parte orders, such as freezing and search orders,¹³³ where one or more parties are denied knowledge of the hearing due to urgency or where such knowledge would defeat the purpose of the order sought.¹³⁴ In addition, documentary processes involving documents owned by, or confidential to, non-parties create potential for issues of rights and interests to be raised by non-parties or absent parties in relation to obligations of procedural fairness in case management decisions.¹³⁵ These cases require judges to balance threats against the administration of justice against the right of every party to be heard.

In *International Finance Trust*, French CJ defined procedural fairness as requiring a court to ‘provide each party to proceedings before it with an opportunity to be heard’.¹³⁶ This distinction between a hearing and an ‘opportunity to be heard’ is particularly critical in a case management context. A party whose matter is summarily disposed of without hearing has been denied a hearing of its substantive dispute but may not have been denied a reasonable opportunity to be heard.

It is, therefore, important to consider what constitutes a reasonable opportunity to be heard in a case management context. This has been discussed in appeals from decisions to deny a full substantive hearing where the appellate question was whether a breach of procedural fairness occurred.¹³⁷ Such cases rarely, however, give specific consideration as to what constitutes sufficient hearing opportunity to afford procedural fairness. Cases which do discuss the scope of such opportunity give limited guidance for future decision makers.

In *Re Coldham; Ex parte Municipal Officers Association of Australia* (*‘Re Coldham’*), Gaudron J held that a reasonable opportunity to be heard would include ‘an opportunity to lead evidence and make submissions by reference to the principles of law to be applied’ even where such questions became apparent after the hearing concluded.¹³⁸ Gaudron J concluded there had not been a denial

132 *Morris v Riverwild Management Pty Ltd* (2011) 38 VR 103, 111 [30] (Nettle and Redlich JJA). This was cited with approval in *Mercier Rouse Street Pty Ltd v Burness* [2015] VSCA 8, [203] (Santamaria JA).

133 Such as freezing orders (also known as *Mareva* injunctions) and search orders (also known as *Anton Piller* orders); see, eg, *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 (for freezing orders); *Fordyce v Ho* [2015] NSWCA 240 (for search orders).

134 *International Finance Trust* (n 51) 383 [150] (Heydon J), citing *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] 1 WLR 1405, 1408 [13]] (Lord Hoffmann for the Board).

135 *Commissioner of Police v Channel Seven Adelaide Pty Ltd* [2008] SASC 164.

136 *International Finance Trust* (n 51) 354 [54].

137 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648; *CPCF* (n 59).

138 *Re Coldham; Ex parte Municipal Officers Association of Australia* (1989) 84 ALR 208, 219–20 (*‘Re Coldham’*). Gaudron J (with Dawson J agreeing at 215, Brennan J in dissent at 215) held there was no breach of natural justice in a case concerning the registration of the Australian Architects Association: at 220.

of procedural fairness relying on the decision of Deane J in *Sullivan v Department of Transport*¹³⁹ that procedural fairness requires only ‘a reasonable opportunity to present’ the case not ‘that a party takes the best advantage of the opportunity to which he is entitled’. However, the considerable discretion inherent in considering the relevant circumstances and what constitutes a ‘reasonable opportunity’ is evident from the dissenting judgment of Brennan J in *Re Coldham* who, having considered all the circumstances, found the decision was ‘procedurally unfair’.¹⁴⁰ Aronson, Groves and Weeks conclude that ‘the requirements imposed under the hearing rule can be anywhere from very demanding to almost nothing’.¹⁴¹ In a case management context, this variability poses risks given the focus on efficiency in the active case management provisions which encourages judicial discretion towards reducing litigants’ opportunity to be heard.

Determining the reasonable opportunity to be heard always requires the careful exercise of judicial discretion. The question in each case is how the extent of such opportunity should be assessed in the context of case management. The cases provide only minimal guidelines, such as in *Parker v Comptroller-General of Customs*, where Gummow, Hayne and Kiefel JJ referred to ‘sufficient opportunity to be heard’ but without clarification as to what constitutes sufficiency.¹⁴² Similarly, *Aon Risk Services Australia Ltd v Australian National University* (‘*Aon Risk Services*’) emphasised the ACT legislation allowing ‘sufficient opportunity’ to identify issues as the basis for limiting parties’ right to amend pleadings despite their acknowledged ‘right’ to bring proceedings and choose how to frame them.¹⁴³

In 2003, in the High Court cases of *Dovuro Pty Ltd v Wilkins* (‘*Dovuro*’)¹⁴⁴ and *Gattellaro v Westpac Banking Corporation* (‘*Gattellaro*’),¹⁴⁵ Kirby J, in dissent, relied on procedural fairness first as a basis for holding parties to their concessions in courts below and then as a basis for remitting a matter for the hearing of a new issue. Kirby J accepted that the court may need to revisit some dicta in light of recent case management efficiency imperatives but noted that *Dovuro* did not override the duty of courts to ‘the determination of justice as between the parties according to law’.¹⁴⁶ The remaining High Court judges in both *Dovuro* and *Gattellaro* did not refer at all to procedural fairness nor whether the result of their decision might constitute a denial of procedural fairness.¹⁴⁷

139 (1978) 20 ALR 323, 343, quoted in *Re Coldham* (n 138) 220 (Gaudron J).

140 *Re Coldham* (n 138) 214.

141 Aronson, Groves and Weeks (n 5) 643.

142 (2009) 252 ALR 619, 649 [137].

143 (2009) 239 CLR 175, 271 [112] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (‘*Aon Risk Services*’).

144 (2003) 215 CLR 317, 346 [88], 347 [91] (‘*Dovuro*’). Kirby J raised procedural fairness in concluding that the appellant could not resile from a concession made at trial as to its duty of care.

145 (2004) 204 ALR 258, 279 [94].

146 *Dovuro* (n 144) 347 [91].

147 There are other High Court cases in which Kirby J is alone in the High Court in raising the issue of procedural fairness as a possible bar to a party raising a new issue on appeal: see, eg, *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592; *A-G (WA) v Marquet* (2003) 217 CLR 545.

In *Hans Pet Constructions Pty Ltd v Cassar*,¹⁴⁸ Allsop ACJ discussed the interaction between case management and procedural fairness including consideration in the trial decision and initial appeal. His Honour upheld the single judge appeal decision to quash the magistrate's striking out of the defence. Allsop ACJ extracted the Local Court transcript in which the magistrate denied there was any issue of natural justice because, in the magistrate's view, the defendant had been granted the opportunity to be heard.¹⁴⁹ Allsop ACJ also extracted from the ex-tempore judgment where Magistrate Heilpern described the opportunity to be heard as competing with the court's obligation to provide 'quick, just and cheap resolution' of the dispute.¹⁵⁰ Magistrate Heilpern's rejected analysis apparently concluded section 56 of the *CPA* (NSW) relates solely to efficiency ignoring the "justice" requirement.

Allsop CJ astutely identified the apparent tension between the powers granted in section 61 of the *CPA* (NSW) and the requirements of procedural fairness including the conflict between efficiency imperatives and procedural fairness and the potential for section 61 *CPA* (NSW) to reduce the content of procedural fairness:

Of course, there was no denial of any opportunity to be heard at the procedural argument before the Magistrate. Rather, the Cassars had been denied an opportunity to be heard on the substantive claim. Yet, as *Hans Pet* pointed out on appeal, such is the very kind of consequence contemplated by s 61.¹⁵¹

B Efficiency Focus Can Distract from Procedural Fairness

Brian Opeskin suggests that the role of the courts as 'central suppliers of justice' is now in question due to the legislative focus on efficiency which occurs at the potential expense of numerous 'system values' including justice and fair process.¹⁵² The High Court decisions of *Minister for Immigration and Border Protection v SZVFW* ('*SZVFW*')¹⁵³ and *UBS AG v Tyne* ('*Tyne*')¹⁵⁴ indicate the potential for efficiency imperatives to erode the practical right to a hearing in Australian common law. In *SZVFW*, the High Court overturned the trial judge's decision that the Tribunal had acted with legal unreasonableness by proceeding in *SZVFW* and *SZVFX*'s absence when the only notice given of the hearing had been by mail despite the appellants providing an e-mail address and telephone number.¹⁵⁵ The trial judge indicated that this amounted to a denial of procedural fairness but that her Honour was not required to consider this due to the legal unreasonableness finding.¹⁵⁶ The High Court gave no consideration to procedural

148 [2009] NSWCA 230.

149 Ibid [20].

150 Ibid [23].

151 Ibid [42].

152 Opeskin (n 1) 566–7.

153 (2018) 264 CLR 541 ('*SZVFW*').

154 *Tyne* (n 94).

155 *SZVFW v Minister for Immigration and Border Protection* (2016) 311 FLR 459, 474–5 [83]–[84] (Barnes J) ('*SZVFW*').

156 Ibid 474–5 [83]–[84] (Barnes J). This comment was made in obiter and procedural fairness was not expressly raised in either the Full Federal Court appeal, which upheld the trial decision, or the High Court

fairness when overturning the Full Court of the Federal Court and trial judge decisions effectively denying SZVFW and SZVFX the opportunity to be heard.¹⁵⁷

Tyne was the High Court decision in a complex series of private international law cases in relation to a failed investment in Kazakhstan bonds prior to the 2008 global financial crisis including decisions in multiple Australian jurisdictions and Singapore.¹⁵⁸ In *Tyne*, the High Court, in a 4:3 decision, summarily dismissed *Tyne*'s proceedings as an abuse of process because it found the issues should have been agitated in earlier proceedings.¹⁵⁹ The majority, Kiefel CJ, Bell, Keane and Gageler JJ, focused purely on pro-efficiency case management arguments such as the reduction of cost and delay and cases such as *Aon Risk Services*.¹⁶⁰ Conversely, the minority, Nettle, Edelman and Gordon JJ, undertook a more sophisticated analysis including the private international law background of the dispute concluding that the Federal Court proceedings were not an abuse of process or any finality doctrine and were consistent with efficiency principles.¹⁶¹ Gordon J, importantly for demonstrating the risk *Tyne* presents to the right to be heard, concluded:

The trustee's contention should be accepted. UBS has not been 'twice vexed'. None of the issues pleaded in the Federal Court Proceedings has ever been the subject of a decision on the merits. Indeed, none of the allegations has ever been responded to by UBS by way of a pleaded defence.¹⁶²

Unfortunately, judicial efforts to promote efficiency in the *Tyne* saga have instead resulted in a decade of strategic litigating and forum shopping without the substantive law case of any of the *Tyne* entities ever being heard.¹⁶³

Although the right to a fair hearing remains fundamental, judicial focus on efficiency imperatives threatens its implementation. Where self-represented litigants explicitly claim procedural unfairness or lack of a fair hearing, they rarely succeed due to failing to focus their claims on common law accepted content of the opportunity to be heard.¹⁶⁴ This is particularly relevant in summary dismissal cases where, by definition, there is no hearing on the merits such that the interlocutory

judgment which overruled it: *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1; *SZVFW* (n 155).

157 *SZVFW* (n 155).

158 *Tyne* (n 94) 110–11 [94], 112 [97]–[99], 117 [107]–[108], 121 [117], 123–4 [122] (Nettle and Edelman JJ) 126–7 [129]–[135], 128 [139], 130 [148]–[149] (Gordon J). For more detailed procedural background, it is necessary to consider earlier decisions: see, eg, *Telesto Investments Ltd v UBS AG* (2012) 262 FLR 119, 128–9 [30]–[32] (Ward J); *Telesto Investments Ltd v UBS AG* (2013) 94 ACSR 29 ('*Telesto Investments*'). There have also been subsequent decisions: see, eg, *Tyne v UBS AG* [2019] FCA 628.

159 *Tyne* (n 94).

160 *Ibid* 93–4 [38], 97 [48], 97–8 [50], 99 [55] (Kiefel CJ, Bell and Keane JJ), discussing *Aon Risk Services* (n 143), 107 [80] (Gageler J). Kiefel CJ, Bell and Keane JJ's analysis of 'modern civil litigation' relies on active case management overriding obligations: at 93 [38].

161 *Ibid* 110–11 [94] and 112–13 [97]–[99], 121 [117] and 123–4 [122] (Nettle and Edelman JJ), 126–7 [129]–[135], 128 [139] and 130 [148]–[149] (Gordon J).

162 *Ibid* 129 [143].

163 This is because *Tyne* did not appear at the only substantive hearing of the case (in Singapore) because he disputed that Singapore had the requisite jurisdiction: *UBS AG v Telesto Investments Ltd* [2011] SGHC 170; *Telesto Investments* (n 158).

164 *Proietti v Proietti* [2022] NSWCA 234, [77]–[83] (Mitchelmore JA); *Matsoukatidou v Yarra Ranges Shire Council* [2013] VSC 299; *Luck v Independent Broad-based Anti-corruption Commission* [2013] VCAT 1805, [81] (Jenkins V-P).

process constitutes the entire opportunity to be heard.¹⁶⁵ Summary disposition cases involving self-represented litigants constitute an even higher risk due to the vulnerability and needs of self-representation which reduces comprehension of the litigation process.¹⁶⁶ Explicit judicial attention to the sufficiency of that right to be heard is necessary to ensure its role as a fundamental common law right is preserved.

C Justice-based Arguments Can Be Equally Problematic

Procedure-based High Court cases such as *Rozenblit v Vainer*¹⁶⁷ ('*Rozenblit*') and *Victoria International Container Terminal Ltd v Lunt*¹⁶⁸ ('*Victoria International Container Terminal*') acknowledge that summarily dismissing and staying proceedings should be avoided except where required for the administration of justice. In many respects, these cases represent a positive rebalancing of priorities between efficiency and the right to be heard. Unfortunately, interlocutory dispute cases which decide in favour of proceeding to trial rarely explicitly acknowledge the procedural fairness imperatives to do so. They are also less likely to explicitly discuss the countervailing considerations of cost and efficiency, including the minimisation of undue costs for the opposing party. This can reduce the appearance of consistency in the test that the courts are applying across the spectrum of cases where the essential determination is whether there has been a sufficiency of opportunity to be heard to enable a case management decision that finalises the proceedings without a substantive hearing.

There was no mention of procedural fairness or the opportunity to be heard in the 2018 High Court decision of *Rozenblit* although there was a significant discussion of the need for efficiency and reference to *Aon Risk Services*.¹⁶⁹ In *Rozenblit*, the Victorian Court of Appeal stayed proceedings on the basis that an order for immediate payment of interlocutory costs had not been met due to the impecuniosity of the plaintiff. This stay would have resulted in the plaintiff not being heard. The High Court unanimously overturned the Court of Appeal on the basis that the behaviour of the plaintiff leading to the adverse interlocutory costs orders was not vexatious and 'the Court could not be satisfied that granting a stay of the proceedings pending payment of the Costs was the "only practical way to ensure justice between the parties"'.¹⁷⁰ Gordon and Edelman JJ emphasised that, in some circumstances, a stay may be warranted for failure to pay a costs order but concluded that 'overarching obligations do not displace the need for the court to safeguard the administration of justice in the context of ordering a

165 *Mutton* (n 89) [19] (Santamaria JA).

166 *SZWBH* (n 94) 324 [27] (Mansfield, Tracey and Mortimer JJ). Neil Andrews, 'Affordable and Accurate Civil Justice: Challenges Facing the English and Other Modern Systems' (2014) 25(4) *European Business Law Review* 545, 550 <<https://doi.org/10.54648/EULR2014025>>; Sonya Willis, 'Could Civil Case Management Benefit from a Litigant Vulnerability Assessment Scheme' (2018) 7(2) *Journal of Civil Litigation and Practice* 94, 95–8 ('Litigant Vulnerability').

167 (2018) 262 CLR 478 ('*Rozenblit*').

168 (2021) 271 CLR 132 ('*Victoria International Container Terminal*').

169 *Rozenblit* (n 167) 491–2 [41]–[42] (Keane J), discussing *Aon Risk Services* (n 143) 494 [47] (Keane J), 501 [76] (Gordon and Edelman JJ).

170 *Rozenblit* (n 167) 495 [53] (Gordon and Edelman JJ). Followed in subsequent cases: see, eg, *Hastwell v Kott Gunning* [2021] FCAFC 70, [133] (McKerracher, Kerr and Charlesworth JJ).

stay for abuse of process'.¹⁷¹ In *Rozenblit*, their Honours reiterated that obligations on parties and lawyers regarding cost and efficiency are relevant aspects for the court's consideration as factors in the balancing equation which do not 'displace or alter the primary consideration of the courts to safeguard the administration of justice'.¹⁷² Kiefel CJ and Bell J agreed, concluding: 'If a stay order is contemplated and its effect may be to bring the proceedings to an end it is necessary that all reasonable alternatives to such an order be investigated.'¹⁷³ The High Court in *Rozenblit* did not sacrifice the importance of costs or efficiency but weighed those against the failures of the plaintiff and the importance of the matter being heard in overturning the Court of Appeal's stay decision. Despite the lack of express mention of procedural fairness or the right to be heard, *Rozenblit* represents an excellent balancing of the competing objectives of efficiency and procedural fairness.

However, in the 2021 High Court decision of *Victoria International Container Terminal*, there is no reference to procedural fairness, the right to be heard, or efficiency.¹⁷⁴ The High Court unanimously upheld the decision of the Full Court of the Federal Court finding that proceedings commenced by Mr Lunt in relation to alleged breaches of a work enterprise agreement were not an abuse of process.¹⁷⁵ The Court held that the mutual interests and supporting role of the Construction, Forestry, Maritime, Mining and Energy Union did not render Mr Lunt's claim an abuse of process while acknowledging that:

the doing of justice may require the court to protect the due administration of justice by protecting itself from abuse of its processes. The power to stay, or summarily dismiss, proceedings because one party has abused the processes of the court is concerned to prevent injustice ...¹⁷⁶

Victoria International Container Terminal, while not expressly mentioning procedural fairness, devoted considerable discussion to the requirements of a fair trial. The plurality emphasised that the court's powers regarding abuse of process are to protect the court's processes, not to act as a deterrent or punishment of a litigant.¹⁷⁷ The Court held that:

where a court is able, by means less draconian than summary termination, to cure any apprehended prejudice to a fair trial so as to ensure that justice is done, the court's responsibility to the parties, and to the community, requires that those other means be deployed so that the matter before the court is heard and determined in accordance with the justice of the case.¹⁷⁸

On its surface, *Victoria International Container Terminal* seems consistent with *Rozenblit* reflecting a swing away from excessive focus on efficiency and towards the right to be heard. Also, *Victoria International Container Terminal* concerned alleged abuse of process through choice of litigant rather than inefficiency, so the

171 *Rozenblit* (n 167) 496–7 [57]–[60], 501 [76].

172 *Ibid* 501 [76].

173 *Ibid* 490 [34].

174 *Victoria International Container Terminal* (n 168).

175 *Ibid*. Joint judgment of Kiefel CJ, Gageler, Keane and Gordon JJ with a separate concurring decision by Edelman J at [36].

176 *Ibid* 141 [18] (Kiefel CJ, Gageler, Keane and Gordon JJ).

177 *Ibid* 141 [20].

178 *Ibid*.

lack of discussion about efficiency is understandable. However, it is concerning how closely the language of *Victoria International Container Terminal* resembles the wording of *Queensland v JL Holdings Pty Ltd* which caused over a decade of procedural inefficiency by stating ‘that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim’.¹⁷⁹

Victoria International Container Terminal has already been cited frequently in relation to its findings on abuse of process.¹⁸⁰ There is no explicit balancing of efficiency and the right to be heard in *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International BV* (‘*Federal Treasury Enterprise (FKP) Sojuzplodoimport*’) which overturned a permanent stay decision regarding the inadequate provision of discovery by a foreign entity, citing *Victoria International Container Terminal* on the basis that ‘[g]ranting a permanent stay is a draconian remedy’.¹⁸¹ The only reference to efficiency in *Federal Treasury Enterprise (FKP) Sojuzplodoimport* was to the federal case management provision section 37M.¹⁸² Although the decision is sound, the reasoning is problematic. It is suboptimal for courts to reject stays and summary dismissal without explicitly balancing the right to be heard against the countervailing costs of proceeding inefficiently. Always erring in favour of hearing a matter is just as problematic as curtailing the opportunity to be heard.

Reassuringly, the Victorian Court of Appeal in *Baumgartner v Victorian Workcover Authority* followed its reference to *Victoria International Container Terminal* immediately with a reference to *Aon Risk Services* noting the limitations on parties to make amendments late in litigation because ‘in seeking the just resolution of the dispute, reference is made to the parties having a sufficient opportunity to identify the issues they seek to agitate’.¹⁸³ Hopefully, other courts will follow the Victorian Court of Appeal’s lead in balancing *Aon Risk Services*’ message of efficiency with *Victoria International Container Terminal*’s message of ensuring the right to a fair hearing.

D COVID-19 and the Right to Be Heard in Person

The COVID-19 pandemic forced an abrupt and unplanned change to entirely virtual court which created suboptimalities in both efficiency and the opportunity

179 (1997) 189 CLR 146, 154 (Dawson, Gaudron and McHugh JJ); Sonya Willis, ‘Should Uniform Civil Case Management Principles “Overarch” or “Override”? Comparing Victorian and New South Wales Active Case Management after a Decade of the *Civil Procedure Act 2010* (Vic)’ (2021) 10(1) *Journal of Civil Litigation and Practice* 55, 60.

180 See, eg, *Walton v ACN 004 410 833 Ltd (in liq)* (2022) 399 ALR 1, 34 [133] (Edelman and Steward JJ).

181 (2021) 389 ALR 612, 670 [386] (Katzmann, Beach and Markovic JJ) (‘*Federal Treasury Enterprise (FKP) Sojuzplodoimport*’). This case also referred, at 627 [120] (Katzmann, Beach and Markovic JJ), with approval to *Rozenblit* (n 167) and *Victoria International Container Terminal* (n 168). The case was rejected for a High Court appeal due to its interlocutory practice and procedure nature: *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2021] HCASL 197.

182 *Federal Treasury Enterprise (FKP) Sojuzplodoimport* (n 181) 622 [75], 626 [119] (Katzmann, Beach and Markovic JJ).

183 [2022] VSCA 21, [47]–[48] (Beach and Niall JJA, Gorton AJA) (emphasis in original).

to be heard.¹⁸⁴ This unavoidable experiment created a new procedural fairness issue which highlighted the balancing act between procedural fairness and efficiency by putting pressure on both aims. Lawyers and courts have been gradually adopting new and emerging technology into litigation practice for decades but the COVID-19 pandemic was the first time Australian courts had been forced to consider whether the right to be heard could be delivered through an entirely virtual hearing.¹⁸⁵ The circumstances of the COVID-19 pandemic thus provided the judiciary with a rare opportunity to judicially discuss the inherent strengths and limitations of numerous aspects of the traditional litigation process in the context of moving compulsorily to a virtual format. Many COVID-19 decisions employed terms such as ‘justice’ or ‘the administration of justice’ rather than ‘procedural fairness’. However, judicial consideration of how to manage cases online and whether to adjourn proceedings during lockdowns, were, at their heart, analyses of the courts’ ability to deliver the right to be heard when no one was allowed to have their day in a physical courtroom.¹⁸⁶ The alternative, to defer hearings until lockdowns ended, exemplified the flipside of the equation; delay and its associated costs.

A detailed analysis of the potential effect of virtual proceedings on various aspects of civil procedure in Australia was contained in *Capic v Ford Motor Co of Australia Ltd* (*Capic*) decided by Perram J in the Federal Court early in the pandemic during the first lockdown in April 2020.¹⁸⁷ *Capic* considered the *Federal Court of Australia Act 1976* (Cth) overarching purpose provision, section 37M, holding that ‘exhortations to speed, thrift and efficiency are subject to the rider that this be achieved so far “as possible”’ in contrast to the ‘inflexible’ requirement that proceedings be conducted according to the law.¹⁸⁸ Perram J balanced the need to comply with legislative requirements restricting movement and health imperatives of not working in offices against the obligation of the court, as a public institution to ‘do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice’.¹⁸⁹

In *Capic*, Perram J considered several factors common in hearings which raise additional considerations of efficiency and procedural fairness in the context of virtual proceedings. His Honour recommended a virtual trial as the only viable way to avoid postponement while acknowledging such virtual proceedings

184 Natalie Byrom, Sarah Beardon and Abby Kendrick, ‘The Impact of COVID-19 Measures on the Civil Justice System’ (Research Report, Civil Justice Council, May 2020) 9 [1.20], 52–6 [5.74]–[5.77], [5.80]–[5.84], 58–9 [5.89]–[5.92]. See also Felicity Bell, ‘“Part of the Future”: Family Law, Children’s Interests and Remote Proceedings in Australia during COVID-19’ (2021) 40(1) *University of Queensland Law Journal* 1, 7–8 <<https://doi.org/10.38127/uqlj.v40i1.5619>>; Michael Legg, ‘The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality’ (2021) 49(2) *Federal Law Review* 161, 170, 180, 183–4 <<https://doi.org/10.1177/0067205X21993139>>.

185 Lyria Bennett Moses, ‘Artificial Intelligence in the Courts, Legal Academia and Legal Practice’ (2017) 91(7) *Australian Law Journal* 561, 561–2; Legg (n 184) 164–5; Michael Legg and Anthony Song, ‘The Courts, the Remote Hearing and the Pandemic: From Action to Reflection’ (2021) 44(1) *University of New South Wales Law Journal* 126, 128 <<https://doi.org/10.53637/ZATE4122>>.

186 Legg (n 184) 169–79.

187 [2020] FCA 486.

188 *Ibid* [2].

189 *Ibid* [5].

may not be feasible in some trials including for a non-English speaking person in detention.¹⁹⁰ His Honour considered a range of issues including: the varying strength of internet connections, needing messaging services for communications between lawyers, expert witnesses being required to confer with counsel and with each other virtually, lay witnesses struggling with technology, being coached off screen, having poor chemistry, lack of formality, virtual document bundles, and possible interruptions for any participants due to illness or family commitments.¹⁹¹ *Capic* emphasised the suboptimality of a virtual hearing describing aspects of the process as ‘aggravating’, ‘poor’, ‘tedious’, ‘expensive’ and ‘undesirable’ but also concluding the difficulties in that particular case were ‘not insurmountable’ or ‘unfair or unjust’.¹⁹² *Capic* concluded that, at least so far as that commercial class action relating to car engines went, a virtual trial would be inefficient and suboptimal but not unjust or unfair when the alternative was indefinite adjournment. The analysis in *Capic* demonstrates the judicial instinct to prioritise procedural fairness over efficiency and the consistency of this approach with the overarching purpose of civil procedure.

In the early days of the first COVID-19 pandemic lockdown, courts sometimes adjourned hearings in the hope physical court would return soon, concluding that a virtual hearing would be unable to deliver procedural fairness.¹⁹³ For example, in March 2020, Sackar J in the Supreme Court of New South Wales case of *Quince v Quince* was unwilling to proceed with an online cross-examination because witness credit was critical to the intended cross-examination concerning allegations of fraudulent signing of documents.¹⁹⁴ Again, such cases strongly preference procedural fairness over efficiency.

The potential for virtual hearings to result in procedural unfairness, sometimes combined with inefficiency, was particularly apparent for cases involving self-represented litigants. Analysis by the United Kingdom’s Civil Justice Council indicated that online civil procedure might be both efficient and fair in the context of uncontested interlocutory commercial matters, with well-funded legally represented parties, but neither efficient nor fair for trials involving self-represented litigants.¹⁹⁵ Australian self-represented litigant cases raised numerous problems including remoteness, lack of technology, disabilities preventing use of technology, and inability to obtain representation. Courts found it impossible to deliver procedural fairness or efficiency to litigants locked down in remote indigenous communities with no access to telephones let alone computers and had no choice but to adjourn such matters.¹⁹⁶ In *Hanwood Pastoral Co Pty Ltd*

190 Ibid [6]–[7].

191 Ibid [10], [13]–[21].

192 Ibid [10]–[23].

193 See, eg, *Australian Securities and Investments Commission v Wilson* (2020) 146 ACSR 149 (‘Wilson’).

194 [2020] NSWSC 326.

195 Byrom, Beardon and Kendrick (n 184) 9 [1.19], 11 [1.29], 61 [6.3], 65–8 [6.16]–[6.23].

196 SI Strong, ‘Procedural Law in a Time of Pandemic: Australian Courts’ Response to COVID-19’ (Legal Studies Research Paper Series No 20/38, University of Sydney Law School, July 2020) 3, 10, citing *Mongoo v Fiduciary Administration Services Pty Ltd* [2020] WASC 109, [46] (Allanson J), *Saunders v Queensland* [2020] FCA 563, [57] (JRangiah J) and *Wharton v Queensland* [2020] FCA 574, [9] (Rangiah J).

v Kelly [No 2], the Federal Court accepted that a self-represented litigant with hearing difficulties was unable to effectively participate in Microsoft Teams case management hearings during lockdowns but could attend in person once lockdown lifted.¹⁹⁷ In the case of *Begum v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 222 (*'Begum'*), the Federal Court delayed hearings for five months due to the litigant's inability to instruct a lawyer while locked down in a Sydney Local Government Area of concern and then for a further eight days due to the litigant being overseas attending to a sick family member.¹⁹⁸ However, at the hearing, Farrell J denied a further adjournment citing the limited merits of the case (though ascertained in circumstances where Ms Begum made no submissions) and 'the many opportunities given to Ms Begum'.¹⁹⁹ The analysis in *Begum* is an excellent example of giving sufficient consideration to procedural fairness while acknowledging its limitations. The ability of courts to juggle procedural fairness and efficiency is always more challenging for litigants with vulnerabilities but the above cases demonstrate how COVID-19 exacerbated the challenge of protecting procedural fairness during lockdowns.²⁰⁰

Between 2020 and 2022, the balance varied between the suboptimality of virtual hearings and the justice costs associated with adjournment delays.²⁰¹ Jackson J, in *Australian Securities and Investments Commission v Wilson [No 2]* (*'Wilson [No 2]'*), allowed an application for a United States witness to give evidence remotely having decided against this in early 2020.²⁰² A significant reason for the change in the court's 'calculus' was improved understanding of the likely extent of the delay in waiting for a face to face court opportunity and the prejudice occasioned by it (such as the witness forgetting what had been said).²⁰³ *Wilson [No 2]* exemplifies the intersection between efficiency and procedural fairness whereby delaying proceedings itself is a potential cause of procedural unfairness. As Jackson J noted in *Australian Securities and Investments Commission v Wilson*:

There can be circumstances where effectively denying the other party the ability to proceed to trial for an indefinite period of time can produce significant injustice to that party as well. I accept that the process of deliberation required in order to exercise the discretion properly is accurately described as a balancing exercise.²⁰⁴

Short adjournments and last-minute changes in procedure caused by COVID-19 continued in 2022. For example, in *Lally v Grubisa*, the Land and Environment Court of New South Wales held a case management hearing on 22 March where it agreed to switch from an onsite hearing on 24 March to Microsoft Teams due to a solicitor being required to self-isolate as a COVID-19 close contact.²⁰⁵

197 [2022] FCA 850, [79], [82] (Halley J) (*'Hanwood Pastoral'*).

198 *Begum v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 222, [15] (Farrell J).

199 *Ibid* [16].

200 'Litigant Vulnerability' (n 166) 100.

201 *Australian Securities and Investments Commission v Wilson [No 2]* (2021) 153 ACSR 649 (*'Wilson [No 2]'*).

202 *Wilson* (n 193); *ibid*.

203 *Wilson [No 2]* (n 201) 661–2 [38]–[44].

204 *Wilson* (n 193) 157 [36].

205 [2022] NSWLEC 1279, [4] (Douglas AC).

Technology and the familiarity of courts and other stakeholders with virtual hearings improved significantly between March 2020 and August 2022 resulting in a greater judicial and litigant willingness to undertake more complex aspects of procedure virtually.²⁰⁶ However, courts noted that improvements in technology did not fully offset the disadvantages of virtual hearings particularly where witness evidence was involved.²⁰⁷ As lockdowns have lifted and international travel has resumed, so have judicial preferences for face-to-face evidence. In *Liu v Option Funds Management Ltd*, Wigney J rejected an application for witness evidence by video link and granted a two-month adjournment describing video link evidence as ‘very much a second-best alternative ... [and] rarely preferable to receiving the evidence in person in court’.²⁰⁸ However, some Australian courts have retained, perhaps permanently, more online procedures than before COVID-19, particularly for shorter pre-trial procedures such as directions hearings, recognising the efficiency and cost savings for practitioners and their clients from not having to physically attend court.²⁰⁹

Cases decided during the COVID-19 pandemic contribute in three ways to analysis of the right to be heard in civil procedure. First, the COVID-19 pandemic demonstrates why the scope of the right to be heard is an evolving by creating a new conflict between procedural fairness and efficiency in cases where a face-to-face hearing was considered essential but was temporarily impossible due to the pandemic.²¹⁰ Second, the COVID-19 cases illustrate the inextricable links between the *right to be heard* and *fairness, justice* and the *administration of justice*. Finally, the COVID-19 cases evidence the value of judges explicitly engaging with the conflict between efficiency and the right to be heard in accordance with the recommendations of this article.

E Delivering the Right to Be Heard

As the above analysis demonstrates, the content of the right to be heard and what constitutes sufficient attention to its preservation will vary from case to case and is influenced by external factors including limited court resources and pandemics. However, demonstrating sufficient judicial attention to the right to be heard need not be complex nor difficult for litigants to comprehend. Acquitting a

206 *Wilson [No 2]* (n 201) 659–60 [34] (Jackson J); *Palmer v McGowan [No 2]* (2022) 398 ALR 524. See also Carolyn McKay ‘Cross-Examination and Remote Access Technologies: A Changing Calculus?’ [2022] (Autumn) *Bar News: Journal of the NSW Bar Association* 9, citing *Wilson [No 2]* (n 201).

207 *Wilson [No 2]* (n 201) [34] (Jackson J); *Liu v Option Funds Management Ltd* [2022] FCA 444 (‘*Liu*’).

208 *Liu* (n 207) [40]. See also court practice notes and protocols. The Victorian County Court released new in court hearing protocols in October 2022: Victoria County Court, *COVID-19 Response: In-Person Hearing Protocol*, 17 October 2022. The Supreme Court of New South Wales ended COVID-19 protocols from 1 October 2022: Supreme Court of New South Wales, *Announcement: Ending of Supreme Court Covid-19 Protocols*, 29 September 2023.

209 See, eg, ‘District Court and Dust Diseases Tribunal COVID-19 Update’ (Document, District Court of New South Wales, 28 February 2022) <https://districtcourt.nsw.gov.au/content/dam/dcj/ctsd/districtcourt/documents/covid-19-communications/24222District_Court_COVID-19_Update_24.2.22.pdf>.

210 See, eg, *Hanwood Pastoral* (n 197).

judicial obligation for explicit reference to the right to be heard might require as little as a brief acknowledgement in a judgment such as:

Although the effect of this decision is to curtail Litigant A's opportunity to be heard, having considered all the circumstances of the case, I/we have formed the view that this remains a procedurally fair decision. Litigant A has had X, Y and Z opportunities to be heard, which it has, unfortunately, wasted. To grant Litigant A any further opportunity would come at an unreasonable cost to Litigant B and/or the limited resources of this court.

Even such a limited statement demonstrates that the court has considered the litigant's right to be heard and has weighed that against countervailing efficiency and justice considerations in coming to its case management decision. The right to be heard may be delivered very briefly and simply but deserves explicit attention.

VII CONCLUSION

A court system which is simultaneously procedurally efficient and procedurally fair is universally desired by all litigation stakeholders. The challenge facing the judiciary lies in paying sufficient attention to both the right to be heard and the need for efficiency to maximise the extent to which both can be achieved simultaneously. The active case management provisions have, arguably, emphasised efficiency at the expense of the right to be heard. However, this article has demonstrated that consideration of the content of the right to be heard and renewed focus on recognising its effect on civil procedure, are potentially achievable at minimal cost to efficiency. Litigants are entitled to a reasonable opportunity to be heard and this opportunity cannot be illusory or vanishing, but neither can it be immutable. The nature of procedural fairness makes the opportunity to be heard necessarily variable and reliant on case-by-case decision making which engages with the practicalities of the case and the judge's assessment of fairness in all the relevant circumstances.²¹¹ However, case management decisions demonstrate that explicit consideration of procedural fairness leads to a more optimal and just balance with efficiency imperatives.

Case management decisions during the COVID-19 pandemic forced judges to rebalance the procedural fairness and efficiency equation in the context of delivering services purely online during COVID-19 lockdowns. Purely virtual hearings created new potential efficiencies, but these were not evenly distributed and often came at a potential cost to the right to be heard. Judges openly acknowledged the suboptimality of virtual hearings in delivering the right to be heard but, as always, there was potential for lengthy delays and adjournments to create greater procedural unfairness. The changing face of COVID-19 has required frequent rebalancing of the equation between procedural fairness and efficiency which has seen judges pay welcome additional attention to the right to be heard.

This article concludes that the case management challenge can best be met through explicit judicial focus on both efficiency and procedural fairness. Explicit

211 *Pompano* (n 57) 47 [5] (French CJ), 105 [177] (Gageler J), discussed above in this article.

judicial reference to procedural fairness considerations is particularly important in cases which significantly affect litigants' right to be heard, such as summary disposition cases and stays of proceedings. The benefit of judgments explicitly balancing procedural fairness and efficiency considerations is greatest where such cases involve self-represented litigants who are less likely to appreciate the competing obligations and limited resources of the court. The COVID-19 pandemic has demonstrated judicial ability and desire to grapple more explicitly with the right to be heard. While enormously difficult for both litigants and judges, a silver lining of the pandemic may be the reinvigoration of judicial attention on delivering procedural fairness in the most efficient way possible.