MONASH University

Business and Economics

Considerations of Fairness and Conflicts of Interest in the Regulation of Financial Markets

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xploration of Fairness examines a concept that is
aneously simple and extraordinarily complex – fairness.
in that we often intuitively understand situations to be fair
air. Complex, in that the notion of fairness is very much
ded in where we are situated, including race, gender, class,
mic status, country, and life experience. There is considerable
rship on the concept of fairness, but this volume is unique in
oad range of research disciplines that have come together to
ne in depth what is meant by fairness, how it can be achieved,
red, shared. From its application in law, economics and
ss to how it can be interpreted in cognitive neuroscience,
pmental psychology and kinesiology, it integrates the visual
erforming arts as essential features of fairness. Through this
sciplinary lens, the ethical and normative dimensions of
s are understood, drawing on its historical and philosophical
and its role in citizenship and political obligation. Each
ine, each chapter, informs the others, to deepen our
tanding of fairness.

indebted to the Peter Wall Institute for Advanced Studies at
niversity of British Columbia for supporting this uniquely
sciplinary exchange of ideas.

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over: The Colours of Fairness, from a work by textile artist Luisa Milan

An Exploration of Fairness
Edited by Dr. Janis P. Sarra
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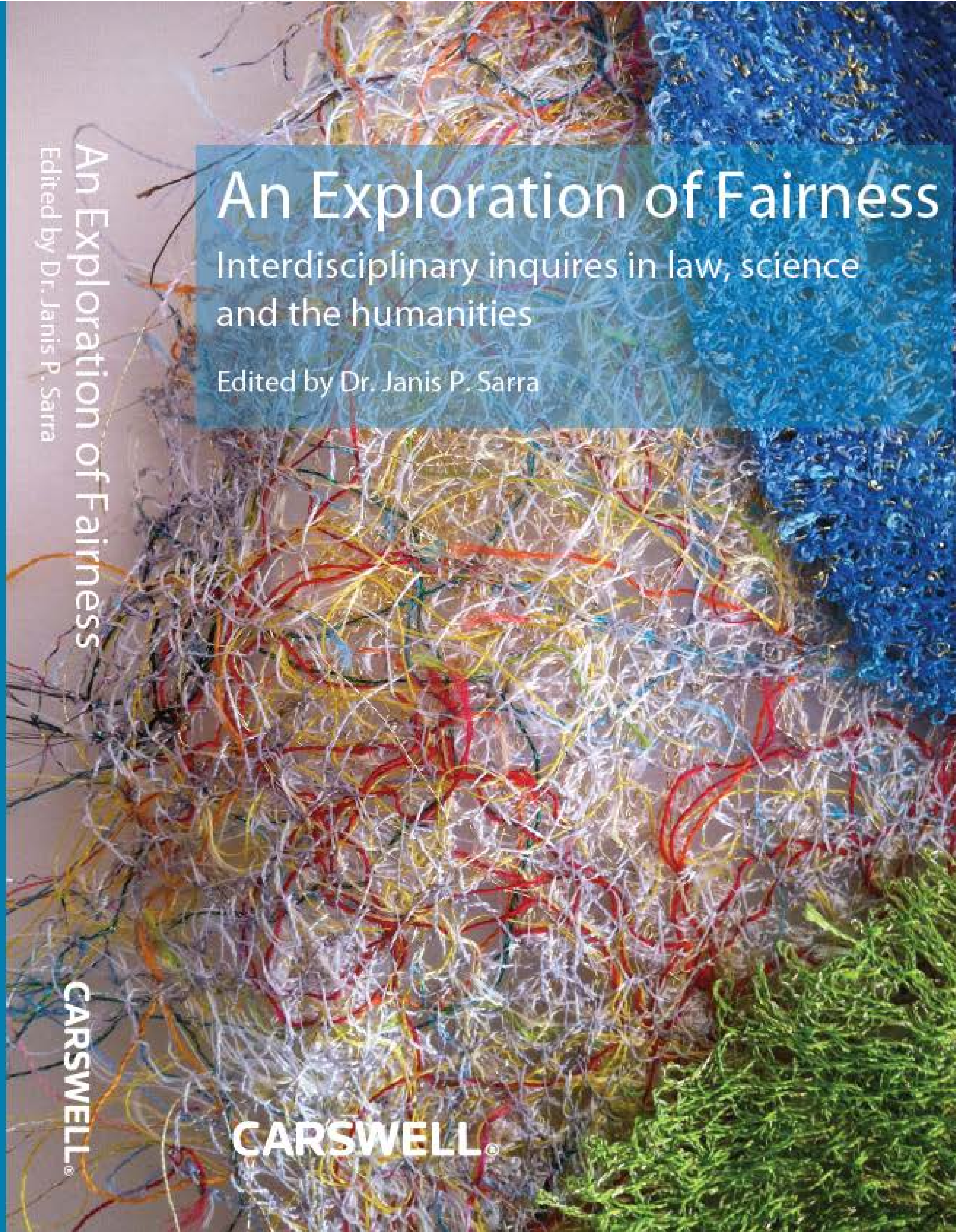

An Exploration of Fairness

Interdisciplinary inquires in law, science and the humanities

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The regulators

- The Australian Securities and Investments Commission (ASIC)

- The Hong Kong Securities and Futures Commission

Exercising Regulatory Discretion

Any exercise of enforcement powers involves discretion. Determinations must be made as to :

- Which matters should be investigated?
- Whether any enforcement action should be taken?
- Where there is a choice of more than one - which type of enforcement mechanism should be utilized?
- What remedies should be sought?

Fairness

- “Fairness requires consideration be given to the perspectives of others who are impacted by our actions.” (Warren 2013)

- Who will be impacted by the action/inaction of the public regulator?
  - the defendant who may be the subject of the enforcement action
  - the investors who have suffered a loss as a result of the contravention
  - the public

Potential defendants

- The interests of any potential defendant will be best served if the regulator determines that a lenient approach be adopted.
- Reasons why a regulator may adopt a lenient approach

  (1) little public interest in the action
  (2) resource constraints

- Individuals and corporates who are pursued may believe they have been treated unfairly.

Investors who have suffered a loss

- The interests of investors who have suffered a loss as a result of the contravention in question.
- An expectation that the regulator should act on their behalf.

TWO QUESTIONS

(1) Is it appropriate for publicly funded regulators to be empowered to seek compensation for investors?

(2) Should the interests of investors prevail over the interests of other stakeholders? Should obtaining compensation be the regulator's priority?

The Public Interest

- The public has a legitimate interest in the likely impact the enforcement action will have on the market.
- What is the role of public regulation?
- What is the Role of the Public regulator?

What is the role of regulation?

‘the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes.’ (Julia Black 2002)

What is the role of a public regulator?

Applying Black's definition - the primary or principal role of a public regulator is to utilise the enforcement mechanisms at its disposal for the purpose of altering the behaviour of persons who may be inclined towards non-compliance with the rules governing financial markets.

The public interest that regulators should aim to serve is to bring about an increase in compliance and a corresponding decrease in the harmful behaviour that results from non-compliance.

Can the regulator achieve this?

- Can the regulator’s enforcement policies and practices result in an increase in compliance and a corresponding decrease in the harmful behaviour that results from non-compliance?
- Responsive regulation – Ayres and Braithwaite.
- Must act strategically - sometimes leniently, sometimes punitively.

The Questions

- What is the role of public regulation of financial markets?
- What is the role of the public regulator?
- Whose interests should the public regulator represent?

- Who will be impacted by the action/inaction of the public regulator?
  - the defendant who may be the subject of the enforcement action
  - the investors who have suffered a loss as a result of the contravention
  - the public

Potential Conflict between interests of investors and the public interest.

- May not be a conflict - the best regulatory response from an impact on the market perspective may include the obtaining of compensation.
- Conflicts may arise – budgets or other constraints, strategic reasons,
- Where conflicts arise “fairness requires consideration be given to the perspectives of others who are impacted by our actions.” (Warren 2013)
- Impact on current victims and the public interest

Conclusion

Is it appropriate for publicly funded regulators to be empowered to seek compensation for investors?

Should the interests of investors prevail over the interests of other stakeholders? Should obtaining compensation be the regulator's priority?

- Michelle Welsh, ‘Considerations of Fairness and Conflicts of Interest in the Regulation of Financial Markets’ in Dr Janis P Sarra (ed) *An Exploration in Fairness: Interdisciplinary Inquiries in Law, Science and the Humanities* (2013) Carswell.
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ACKNOWLEDGMENTS

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