

# Letters

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## ASIC fails fair test with Hardie

Your headline “ASIC plays hardball on Hardie” (January 18) says it all. Despite being under an obligation to act as a model litigant, the Australian Securities and Investments Commission is acting as a private combatant.

It is under a duty to act fairly yet, according to the *AFR* report, the word fairness is not mentioned once in the special leave application to the High Court of Australia.

ASIC refuses to answer the basic issue that it failed to do the right thing by consciously deciding not to call on important material witness in the James Hardie case.

How can that be justified? It certainly cannot be sidetracked on the basis that all litigation is uncertain (“Criticism of ASIC litigation cases is overdone”, Opinion, January 20), where regard is had to litigation risks, not the underlying requirement of ASIC to act fairly.

Given the hardball position taken by ASIC, it is now necessary to amend the government’s model litigant rules to expressly provide that agencies must not ‘cherry-pick’ calling witnesses or deny providing to the defendant evidence which they might have in their possession.

This is a necessary obligation when an organisation like ASIC is given such extensive powers to collect evidence, compulsorily examine witnesses and phone tap (none of which is available to a defendant in proceedings instituted by ASIC).

The Rule of Law Institute of Australia will be writing to the Attorney-General seeking his support for these changes.

**Richard Gilbert**  
Chief executive  
Rule of Law Institute of Australia  
Sydney NSW