Remedies for government liability: Beyond administrative law

Janina Boughey, Ellen Rock and Greg Weeks*

Control of government power is traditionally regarded as the province of administrative law. To the extent that other causes of action (such as claims in equity, contract and tort) can be brought against government, such claims are typically treated as a secondary, rather than primary, function of the law. The topic of government liability outside traditional public law parameters is in turn treated as something of a specialist topic, rather than a core area of legal doctrine. Placing the law into spheres of 'public' and 'private' — and the further subcategorisation of causes of action within those spheres — offers the promise of neat categories that can be deployed to study legal doctrine in the abstract. However, legal practitioners, particularly those involved in litigation, learn quickly that clients are rarely interested in the intricacies of legal doctrine that might be thrown up by their case. Lawyers are interested in the law; clients want to know about outcomes: what remedy they might get, their chances of getting it and what seeking it will cost them. On that reckoning, there are few things as useful for a practitioner to know in detail as the various remedies that might assist their clients. Where the case is one that involves harm occasioned by a government defendant, one unfortunate symptom of academic attraction to 'public' and 'private' law categories is to obscure the many and varied ways in which the law might respond to that harm.

Approaching legal doctrine through this dichotomous lens is not only a limitation from a practical perspective. Rather than treating government liability as a specialist topic, there is much to be gained from gathering together the various 'public' and 'private' claims that can be made against government. By adopting a wholesale view of the field of 'government liability', we are better able to identify common themes and connections between areas of law. While it is true that the capacity to obtain remedies against government is full of specialist doctrine that does not apply directly to private bodies, we can learn much about these general doctrines by painting a comprehensive picture of government liability across the realms of public and private law. This article explores the main public and private law 'remedies' available against governments, their benefits and limitations, and the links between them.

Dividing 'public law' and 'private law'

Collecting doctrines and remedies under the broad 'compendium' headings of 'public law' and 'private law' is a recent development,[1] albeit one which makes a distinction lacking a conceptual basis.[2] Beneath each compendium heading, smaller subheadings are included as 'silos'. These subheadings — which in private law include contracts, torts,[3] equity, restitution and civil practice in litigation — are older than the compendium headings above them but are still of relatively recent origin.[4] They belong within 'private law' on the

* Janina Boughey is a Senior Lecturer at the University of New South Wales Law School. Ellen Rock is a Lecturer at the UTS Faculty of Law. Greg Weeks is an Associate Professor at the ANU College of Law, Australian National University.

1 See Jason NE Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 39, 41.

2 Carol Harlow, '"Public" and "Private" Law: Definition Without Distinction' (1980) 43 *Modern Law Review* 241.

3 Prior to the middle of the 20th century, 'tort law was conceived of and practised as a collection of unrelated writs': David W Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 770. It remains preferable to refer to the law of *torts*, since the legal doctrines under that heading cannot truly be unified in the sense that talking of a law of *tort* might suggest.

4 For example, restitution has a history going back to *Moses v Macferlan* (1760) 2 Burr 1005. However, its arrangement as a body of law has only relatively recently been acknowledged widely: see Robert Goff and Gareth H Jones, *The Law of Restitution* (Sweet and Maxwell, 1966); Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985). The same is true of public law, in which administrative law is a relatively recent invention: Varuhas, above n 1, 42–3.

basis that they create, regulate and enforce relationships between individuals, or between individuals and government where the latter derives no special position or privilege from its status; by contrast, 'administrative law and criminal law [belong] entirely to the sphere of public law'.[5]

Like private law, public law also includes 'silo' subheadings within which writs and forms of action might be classified, such as administrative law.[6] However, as Allsop CJ warned in his 2019 Whitmore Lecture:

> [To speak of 'administrative law'] may for some purposes be too narrow and too evocative of the abstraction of administration. Administrative law is better conceptualised as part of the law that controls and shapes public power. It is not separate and distinct from fields of law, principle and conceptions that likewise deal with public power, such as the criminal law and the law of bankruptcy. One only needs to recall that one of the most influential judgments of the High Court in examining the exercise of discretionary power[7] was a sentencing appeal to appreciate this proposition'.[8]

Private law subjects are joined by a 'through-line': they are at base about relationships and obligations. It is harder to draw a 'through-line' so neatly between subjects under the heading 'public law'. Indeed, that term tends only to describe administrative law and constitutional law. Criminal law and bankruptcy and insolvency law each has its own concerns; and taxation law and industrial law both sit between public and private law as much as they do under either heading. The involvement of government, even marginally, is the point that these subjects have in common. It is hard to connect them more specifically than that.

Adherents of the public–private dichotomy view the principles, rules, procedures and remedies available in public and private law as being informed by different rationales and serving different purposes. A common example is that, if Person A punches Person B, there is more than one possible legal response. Public law proceedings might follow, in which the state prosecutes Person A for criminal assault (no doubt calling Person B as a witness), and the considerations in passing sentence include Person A's rehabilitation, the protection of the public and the need to punish Person A. There might also be private law proceedings relating to the same incident, in which Person B brings an action for the tort of battery and seeks damages to compensate them for their injuries. It is usually necessary to determine whether a particular situation should be governed according to public or private law principles, as one will usually be more apt than the other. Considerations in the example above might include the likelihood that Person A has sufficient money to meet an order for damages.

Notwithstanding the limitations of the approach which separates public from private,[9] the modern law school curriculum is broken up into the 'silos' that fall under the compendium headings of private and public law.[10] Hence, a student will study torts, contracts, criminal law, administrative law and so forth. Organisation of the curriculum in law schools has, of

5 *Wake v Northern Territory* (1996) 5 NTLR 170, 182 (Martin CJ and Mildren J); citing the definition of 'private law' in the *Oxford Companion to Law* (Clarendon Press, 1980).

6 Mark Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179, 183–4.

7 *House v R* (1936) 55 CLR 499.

8 Chief Justice James Allsop, 'The Foundations of Administrative Law' (Speech delivered at the 12th Annual Whitmore Lecture, Council of Australasian Tribunals, NSW Chapter, 4 April 2019).

9 Illustrated by the fact that evidence and procedure subjects cannot be said to fit into either public or private law.

10 A discussion paper called 'Redrafting the Academic Requirements for Admission', circulated by the Law Admissions Consultative Committee (LACC) during 2019, called for 'revised descriptions' of the standard 'Priestley 11' subjects developed for LACC by a committee chaired by Justice LJ Priestley of the NSW Court of Appeal for LACC in 1992.

course, changed over time, as have the names of these subjects.[11] However, many of the subjects which have been taught consistently for over a century were initially developed for the benefit of only one category of people: the authors of textbooks.[12] Collecting certain doctrines and causes of action together under a generic name had much to recommend it, not least that it created a convenient way of organising classes for lecturers. We are not here to knock the use of convenient labels, provided we do not forget what the labels obscure.

What was lost when legal subjects started to take their now familiar form was the understanding that practitioners had always had (and the best of them still have) that the law does not really work only as a collection of 'silos'. Students who go on to careers in legal practice learn quickly that there is rarely a case which is solely about property law or contains only questions of evidence law.[13] Public lawyers can go further and say that there has never been a case that is *only* about judicial review. Administrative law almost universally shares the stage with some other legal subject matter. This might be criminal law (for example, was I prosecuted under a properly enacted law?);[14] or property law (for example, do my proprietary rights protect me from statutorily approved destruction of my property without a hearing?);[15] or contract law (for example, can a public authority breach its contract with me and not be liable for damages?).[16] Legal invalidity is an element of causes of action in tort[17] and restitution.[18] Administrative law and equity have deep and abiding links that go back centuries.[19] Countless administrative law points have arisen in matters about migration issues and social security. Our point is that there is virtually no area of law that administrative law cannot and does not touch.

It does not follow that administrative law provides all the answers where government liability is alleged. There is an important distinction between establishing that a public authority has exceeded its authority and obtaining the remedy or remedies from public authorities that are most advantageous to one's client. Government liability comes in various forms and the remedies by which it is addressed are also various. Each remedy is a tool, designed to perform a specific, specialised task. Judicial review's remedies are important tools, adapted to perform a certain set of tasks, and extremely effective in specific circumstances. They are also inherently limited: their effectiveness where a public authority acts beyond the scope of its legal powers is undoubted but does not operate far

11 For example, the first Australian textbook on administrative law appeared years after textbooks in comparable subjects and was only 118 pages long: Wolfgang Friedmann, *Principles of Australian Administrative Law* (Melbourne University Press, 1950). One of the reasons for this was that administrative law was taught until at least the 1970s in most Australian law schools as an add-on to the constitutional law course.

12 For a detailed history of the writing of legal treatises, see AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *University of Chicago Law Review* 632.

13 Criminal law is arguably an exception, although there are abiding connections between criminal law and torts, especially intentional torts. Their objects are different, as are the parties to any litigation, but many acts which lead to tort actions might also lead to criminal prosecutions. Some torts and criminal offences even go by the same name — eg assault, misfeasance in public office. This is in part a hangover from the fact that, early in the development of the common law, 'crime and tort were not sharply distinguished': Kenneth W Simons, 'The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives' (2008) 17 *Widener Law Journal* 719, 719.

14 See Mark Aronson, 'Criteria for Restricting Collateral Challenge' (1998) 9 *Public Law Review* 237. There were formerly explicit procedural links between criminal and administrative law: see eg John Shortt, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition* (Wm Clowes and Sons Ltd, 1887).

15 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

16 *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454.

17 In false imprisonment, where one of the elements is that the defendant lacked legal authority: see eg *Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637.

18 In an action under the 'Woolwich' reason for restitution: see *R v Inland Revenue Commissioners; ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400 and *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

19 See JJ Spigelman, 'The Equitable Origins of the Improper Purpose Ground' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 147; PD Finn, 'Public Trusts, Public Fiduciaries' (2010) 38 *Federal Law Review* 335.

beyond that. Furthermore, they have developed from highly technical writs but not any principled or normative basis.[20]

Government liability in 'public law'

Public law is a contestable heading. It is sometimes defined as the laws governing the relationships between government and individuals, which would certainly include criminal law, taxation and a wide range of other topics.[21] If, however, it is defined as the legal principles concerned with the scope and limits of public power[22] then many aspects of criminal law would not fall within its scope. In law schools and textbooks, the latter, narrower definition tends to prevail: 'public law' subjects include constitutional law and administrative law, and commonly now an introductory course set out on more theoretical lines. In the section which follows, we take this approach, though use the term both more narrowly (we claim no expertise in either constitutional law or theory) and more broadly, to include certain subject matter that commonly falls outside the scope of administrative law as it is taught.

Tribunal justice

There is a belief in some parts of the profession and the academy that tribunals and merits review do not deserve to be taken as seriously, or warrant as much attention, as judicial review by courts.[23] Tribunals are creatures of statute, built around the provision of appeals against decisions of public authorities on their merits. Notwithstanding their long history,[24] tribunals do not have the same common law pedigree enjoyed by state Supreme Courts or the legitimacy bestowed on the High Court by the *Constitution*.[25] There is consequently a view that they provide a forum for review which is somehow inferior. Tribunals and their members nonetheless tend to be happy in their own skins,[26] largely perhaps because they are too busy to be concerned with the way they are perceived by those not directly involved in their processes.

Year after year, however, tribunals settle many times more cases than courts, in addition to which they are more accessible and it is easier to establish the basis for relief. Tribunals have immense practical utility that does not rely on the sort of legitimacy enjoyed by courts.[27] Furthermore, the importance of tribunals has only increased with time. Take, for example, Robertson J's observation from before the existence of the Federal Court of Australia, when the Administrative Appeals Tribunal (AAT) was in its infancy:

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20 Aronson, above n 6, 185; Stephen Gageler, 'Administrative Law Judicial Remedies' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 368, 368.

21 Chief Justice James Allsop, 'Values in Public Law' (Speech delivered at James Spigelman Oration, Sydney, 27 October 2015).

22 Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) 1; Chief Justice Robert French 'Public Law — An Australian Perspective' (Speech delivered at Scottish Public Law Group, 6 July 2012).

23 This is demonstrated in many important ways but also some which are no more than symbolic — for example, the fact that as many administrative law courses teach tribunal justice and merits review *before* judicial review as *after* it, suggesting disagreement about its proper place.

24 The General Commissioners of Income Tax was created by Pitt the Younger through the *Income Tax Act 1799* (UK) and functioned for over 200 years, becoming the oldest extant tribunal in the UK: Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge University Press, 2006) 2. It was eventually replaced by the Tax Chamber of the First-tier Tribunal. There were also many merits review tribunals in Australia prior to the creation of the Administrative Appeals Tribunal (AAT): see Justice JR Kerr et al, *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 (1971) (Kerr Committee Report) 6–8 [18].

25 Nor, however, does the Federal Court of Australia, which is nonetheless of vital importance: see Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018).

26 Although the AAT, in particular, tends to be a target for political attack: see eg Greg Weeks, 'Attacks on Integrity Offices: A Separation of Powers Riddle' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 25, 34–5.

27 The AAT is said to have represented 'a new and substantially unprecedented regime of administrative merits review': *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629, [14] (Kiefel CJ, Keane and Nettle JJ); citing DC Pearce, 'The Australian Government Administrative Appeals Tribunal' (1976) 1 *University of New South Wales Law Journal* 193, 193.

> Which courts were hearing federal administrative law cases as the Federal Court was being established and being given judicial review jurisdiction? First, there were very few such cases. Second, such cases as were brought were heard by either the High Court or by the State Supreme Courts exercising federal jurisdiction. By my count in 1976 the High Court decided only two federal administrative law cases and those were in its original jurisdiction ...[28] It now seems remarkable that there was only one case under the *Migration Act* [*1958* (Cth)] in the High Court in a calendar year. In 1977 that Court decided only three federal administrative law cases ...[29]

As remarkable as the dearth of migration matters might seem looking back over 40 years, it is also notable that two of the cases to which Robertson J referred were heard by a High Court judge sitting alone — Stephen J in both cases.[30] The Federal Court eventually saw to it that High Court judges sit alone in a very limited number of circumstances and has picked up a great proportion of matters in federal jurisdiction. For example, the Court's Annual Report for 2017–18 reported:

> In 2017–18, the total number of filings (including appeals) in the Court increased by 4 per cent to 5,921. Filings in the Court's original jurisdiction (excluding appeals) remained consistent at 4,659.[31]

By contrast:

> [The number of applications lodged with the AAT in 2017–18] was 14 per cent higher than the number lodged in 2016–17, which was 24 per cent higher than the number of lodgements in the previous year. Finalisations in the reporting period fell by five per cent from the 42,224 applications finalised in 2016–17. The overall number of applications on hand at 30 June 2018 is 54 per cent higher than at 30 June 2017.[32]

By sheer weight of numbers, the AAT deals with many times more matters in a year than the court with the equivalent jurisdiction.[33] The significance of tribunals is also marked at state and territory level, given that, with the exception of Tasmania, each now has a single dominant tribunal.[34] Tribunals do not conduct judicial review and are not limited to seeking legal (or jurisdictional) error as a basis for granting relief. They provide the 'correct or preferable' decision on the facts before them — an expression the definition of which was expressed by Kiefel J to be based on the following distinction:

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28 *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475; *Salemi v MacKellar (No 1)* (1976) 137 CLR 388. Two other cases decided in 1976 are familiar to most Australian administrative lawyers — namely, *Paull v Munday* (1976) 9 ALR 245 and *Buck v Bavone* (1976) 135 CLR 110. However, both were appeals from South Australia and *Buck v Bavone* is probably better understood as a constitutional matter. Similar reasoning excludes from a reckoning of 1977 cases matters such as *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 and *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487.

29 *Green v Daniels* (1977) 13 ALR 1; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396; *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461. See Justice Alan Robertson, 'The Federal Court and Administrative Law: How Does the Court Deal with Findings of Fact on Judicial Review?' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 83, 90.

30 *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475; *Green v Daniels* (1977) 13 ALR 1.

31 Federal Court of Australia, *Annual Report 2017–18*, 17 <http://www.fedcourt.gov.au/__data/assets/pdf_file/0003/52716/AR-2017-18.pdf>. The Federal Circuit Court of Australia finalised over 95 000 matters in the same period, but an overwhelming majority (87 015) were in family law, with the remainder spread across bankruptcy, migration, industrial law and other general federal law matters: Federal Circuit Court of Australia, *Annual Report 2017–18*, 8 <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fc867070-55d9-423b-a1ea-c747d671456c/2941-FCC_AnnualReport_2017-18_WEB.pdf?MOD=AJPERES&CVID=>.

32 Administrative Appeals Tribunal, *Annual Report 2017–18*, 24 <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201718/AAT-Annual-Report-2017-18.pdf>.

33 The AAT's workload varies significantly between divisions: see AAT, *Annual Report 2017–18*, 25.

34 *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act); *State Administrative Tribunal Act 2004* (WA) (SATWA Act); *ACT Civil and Administrative Tribunal Act 2008* (ACT) (ACAT Act); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act); *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act); *South Australian Civil and Administrative Tribunal Act 2013* (SA) (SACAT Act); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (NTCAT Act).

> 'Preferable' is apt to refer to a decision which involves discretionary considerations. A 'correct' decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the [AAT] agrees.[35]

By necessity, such an approach requires tribunals to have regard to the relevant statutory provisions in determining what is correct or preferable in a given case.

We are also told that a tribunal's 'function and duty … is to review administrative decisions *on their merits*'.[36] Like 'correct or preferable', the 'merits' does not owe its provenance to legislation[37] but is a turn of phrase that developed through the common law. However, in contrast, the 'merits' of a matter is a metaphorical concept that is not apt to be defined in the way that 'correct or preferable' was by Kiefel J in *Shi v Migration Agents' Registration Authority*. As a method of decision-making distinct from that performed by judicial review courts (where establishing a legal or jurisdictional error is a prerequisite to obtaining a remedy), tribunals can facilitate greater access to justice. To put it simply, the hallmark of tribunal justice is the capacity to ask for (and stand a chance of obtaining) the thing you want: the licence, or the visa, and so forth. While it is an oversimplification, there is nonetheless some truth to the statement that judicial review only gives a successful applicant the chance to go back to the start and do it all again.

Judicial review

Many would regard judicial review as the centrepiece of administrative law. Its importance is reflected in modern law school curriculums, academic commentary and texts, which tend to pay it far more attention than other 'administrative law' review mechanisms. To some degree, the focus of lawyers and academics on judicial review is understandable given its constitutional entrenchment[38] and complexity relative to other forms of administrative law review (meaning that more time and attention are needed to unpick that legal complexity). However, such a view does not reflect the practical utility of judicial review remedies compared with other forms of relief; nor does it reflect the many significant limitations of judicial review and its remedies.

Judicial review remedies are overly technical, complicated and limited in application. As Professor Kenneth Culp Davis famously wrote of American judicial review in the first edition of his *Administrative Law Treatise*, published in 1958:

> An imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between the remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generality, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.[39]

Several Australian governments have sought to address these issues by enacting judicial review statutes and by simplifying the process for applying for judicial review remedies.

35 *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286, 327 [140] (citations omitted).
36 *Re Control Investments Pty Ltd & Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88, 91 (emphasis added).
37 Although, as Kiefel J explained, 'it is often used to explain that the function of the [AAT] extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision': *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286, 327 [140].
38 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
39 Kenneth Culp Davis, *Administrative Law Treatise* (West Publishing Company, 1958) 388.

These attempts have been only partially successful.[40] They have undoubtedly made aspects of judicial review simpler and fairer — in particular, the availability of reasons and standing to seek review. But some new problems have also been created, such as the limits associated with the jurisdictional formula set out in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).[41] Furthermore, as recent cases such as *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*,[42] *Hossain v Minister for Immigration and Border Protection*[43] and *Kaldas v Barbour*[44] demonstrate, there remain many aspects of judicial review remedies that are yet to be resolved.[45] This is in part due to the fact that judicial review also contains many holes: areas into which its principles and remedies do not seem to reach.[46] These include its limited recognition of 'soft law'[47] and the fact that privatised and outsourced public powers are not (yet) subject to its remedial reach.[48]

Perhaps most importantly from a client's perspective, judicial review remedies will often be deeply unsatisfying. Where a government official has acted unlawfully in making a decision to deny a person a benefit, such as a social security payment, visa or licence, a reviewing court cannot order the government to give the person that benefit. Where government has unlawfully revoked a person's benefit or entitlement, a reviewing court can quash that decision but cannot ordinarily make an order preventing the government from remaking its decision to the same effect, provided that the government acts according to law in doing so. Similarly, courts can order a government official to exercise a power that they are under a duty to exercise but cannot direct the official as to *how* that power must be exercised. All of this tells us that, from the perspective of the wronged individual, restoration via judicial review is largely a matter of coincidence rather than design.[49] By contrast, tribunals usually can provide clients with the substantive outcomes they actually want.

Despite its many limitations, judicial review plays a pivotal role in ensuring that governments are held to account for their actions. It ensures, at the very least, that governments do not exceed the legal limits of their powers, and the principles and presumptions that courts apply to the exercise of government powers reflect important values including fairness and rationality.[50] The constitutional entrenchment of judicial review also means that judicial review and its principles play a symbolic role in defining the relationships between the three branches of Australian government.[51] In the words of the High Court, the constitutional entrenchment of judicial review ensures that there cannot be 'islands of [government] power immune from judicial supervision and restraint'.[52]

40 See generally Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79; Matthew Groves, 'Should We Follow the Gospel of the ADJR Act?' (2010) 34 *Melbourne University Law Review* 452; Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (September 2012) 72–7.

41 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Griffith University v Tang* (2005) 221 CLR 99.

42 (2018) 92 ALJR 248.

43 (2018) 92 ALJR 780.

44 (2017) 326 FLR 122.

45 See Lisa Burton Crawford and Janina Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30 *Public Law Review* 18.

46 Adrian Vermeule has discussed administrative law's 'black' and 'grey' holes in the US context: 'Our Schmittian Administrative Law' (2008–2009) 122 *Harvard Law Review* 1095.

47 See Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016).

48 See Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *UNSW Law Journal* 316.

49 Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24 *Australian Journal of Administrative Law* 189, 198–9.

50 Chief Justice RS French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 25.

51 See generally Stephen Gageler, 'The Constitutional Dimension' in Groves (ed), above n 50, 166.

52 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581.

Remedies under human rights statutes

Over the past two decades, three Australian jurisdictions have enacted human rights statutes. The Australian Capital Territory (ACT) was first in 2004,[53] followed by Victoria in 2006,[54] and most recently Queensland in 2019.[55] These are different from the bills of rights in the United States and Canada in that the Australian human rights statutes do not give courts the power to strike down legislation that disproportionately infringes individual rights. What the Australian statutes do, however, is provide for human rights based legal limits on administrative powers. Specifically, the statutes provide that public authorities are required to give due consideration to human rights when making decisions and to act in a way that is compatible with human rights when exercising their powers.[56]

These are legal limits on administrative power like any other imposed by statute. Accordingly, the remedies for a public authority breaching their human rights obligations will be the same as if they breach any other legal limit on their power. Judicial review remedies will be available with respect to unlawful actions, and other remedies may be available should the breach of rights fulfil the requirements of the relevant cause of action. However, private law remedies are somewhat different, since all the statutes prohibit courts from awarding damages where a public authority has breached an individual's rights.[57]

The Victorian and Queensland human rights statutes expressly 'piggy-back' human rights claims onto other, existing legal remedies, while the ACT statute has a little more remedial flexibility. The new Queensland legislation confers a conciliation function on the Queensland Human Rights Commissioner.[58] Thus, determining what remedies might be available where the ACT, Victorian or Queensland government has breached a client's rights requires an understanding of the human rights statutes as well as other common law and statutory remedies available to remedy unlawful government actions.

Government liability in 'private law'

Relief under various 'public law' doctrines for 'private law' matters can be difficult to obtain. A prominent example is that judicial review has generally shied away from coverage of 'decisions to make or not to make a contract, or decisions under a contract',[59] either at common law[60] or under the ADJR Act.[61] Broadly speaking, there is a good reason for such a division: contractual power, while much used by government,[62] is not a 'governmental' power but one that governments share with natural persons. For that reason it fits ill with a remedial system hinged on the presence of an excess of power.

53 *Human Rights Act 2004* (ACT).
54 *Charter of Human Rights and Responsibilities Act* 2006 (Vic).
55 *Human Rights Act 2019* (Qld). The Commonwealth Parliament has enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), but it does not seem to have any remedial consequences. See generally Lisa Burton Crawford, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019).
56 *Human Rights Act 2004* (ACT) s 40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2019* (Qld) s 58.
57 *Human Rights Act 2004* (ACT) s 40C(4); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3); *Human Rights Act 2019* (Qld) s 59(3).
58 *Human Rights Act 2019* (Qld) Pt 4.
59 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [2.560].
60 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164.
61 *Griffith University v Tang* (2005) 221 CLR 99. See generally Aronson, Groves and Weeks, above n 59, [3.150].
62 Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 6th ed, 2018).

Another example is that Australian courts have all but totally rejected the possibility of obtaining an estoppel against a public entity,[63] except where a private individual would be treated in the same way.[64] It has done so not because it is a private law doctrine but because it fits poorly with other aspects of public law doctrine.[65]

While it is often impossible to force private law remedies onto public law doctrines, it does not follow that private law cannot operate in a public space. Four examples follow of private law remedies that operate in respect of government.

Equitable relief

While equity texts say much about equitable relief,[66] judicial review texts tend to focus only on injunctive and declaratory relief.[67] In its acquisitive way, judicial review has grasped both the injunction and the declaration and decided that they fit within the standard suite of judicial review remedies.[68] It has been aided in this by two circumstances. The first is that injunctive relief is available within the High Court's original jurisdiction under s 75(v) of the *Constitution*. The second is the more recent acceptance that grants of declaratory relief lie within the inherent competence of superior courts.[69] Much has been written about both of these remedies within the scope of public law and we do not intend to rehearse that commentary.

Less has been written about a remedy which, 'once moribund',[70] has subsequently been 'recognised ... as an important component of the judiciary's remedial armoury'.[71] Equitable compensation is a remedy which courts of equitable jurisdiction have an inherent power to grant. While it was historically assumed that equity had very little interest in providing compensation for loss, given that it already provided a 'panoply of remedies',[72] Viscount Haldane's speech in *Nocton v Lord Ashburton*[73] in 1914 is considered to have first 'exposed the error of thinking that equity lacked power to award compensation' for the infringement of an equitable right.[74]

Although complex, the scope of this remedial doctrine can be set out briefly. It attaches to breach of one or more equitable duties. In practice, this has often meant those owed by trustees or fiduciaries[75] but more recently 'modern equity has recognised an increased range of equitable duties'.[76] The defendant's liability to pay equitable compensation extends to all loss suffered as a result of the defendant's breach of duty.[77]

63 See *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 210 (Gummow J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 17 (Mason CJ).
64 See eg *Commonwealth v Verwayen* (1990) 170 CLR 394.
65 See Weeks, above n 47, Ch 7.
66 See, eg, JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2014) 605–996; Wayne Covell, Keith Lupton and Louise Parsons, *Covell and Lupton's Principles of Remedies* (LexisNexis Butterworths, 7th ed, 2019) 217–518.
67 See, eg, Aronson, Groves and Weeks, above n 59, Chs 15 and 16; Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 5th ed, 2014) 237–302.
68 Although many books categorise declaratory relief as an equitable remedy (see eg Heydon et al, above n 66, [19-010]), we prefer the view that declarations are a statutory remedy, having been made under statute as long ago as 1850. See Aronson, Groves and Weeks, above n 59, [15.20].
69 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581 (Mason CJ, Dawson, Toohey and Gaudron JJ).
70 Lee Aitken, 'Developments in Equitable Compensation: Opportunity or Danger?' (1993) 67 *Australian Law Journal* 596, 596.
71 Charles EF Rickett, 'Equitable Compensation: Towards a Blueprint?' (2003) 25 *Sydney Law Review* 31, 31.
72 Charles EF Rickett and Tim Gardner, 'Compensating for Loss in Equity: The Evolution of a Remedy' (1994) 24 *Victoria University of Wellington Law Review* 19, 19.
73 [1914] AC 932.
74 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 323 [124] (Mason P).
75 See, eg, the lists included in Heydon et al, above n 66, Ch 23; Covell, Lupton and Parsons, above n 66, Ch 11.
76 Rickett, above n 71, 32.
77 Heydon et al, above n 66, 801 and 869. The authors also consider how a defendant might reduce his or her liability: ibid.

Restitution

While restitutionary doctrine includes both equitable and common law principles,[78] Gummow J has observed that the 'notions derived from equity have been worked into and in that sense have become part of the fabric of the common law'.[79] It applies generally to private law matters, but the English House of Lords (as it was) developed an application of the standard restitution doctrine which applies particularly to the ultra vires exaction of taxation.[80] The *Woolwich* doctrine, as it is called, has not been adopted expressly in Australia. That development may take some time, given that legislation displaces any possibility of applying *Woolwich* in the vast bulk of revenue matters.[81] It is in any case worthwhile to understand that restitution does apply to both private and public bodies generally and to be aware of its specific taxonomy.

Tortious remedies

Government liability in tort has a venerable history. In fact, a claim in damages was historically the primary remedy available to an individual who wished to challenge the legality of government activity.[82] For example, the plaintiff in *Fawcett v Fowlis*,[83] who wished to test the validity of a conviction for failure to contribute to the upkeep of roads, brought proceedings in trespass against the two magistrates responsible for the conviction.[84] The private law cause of action operated as a vehicle to challenge the legality of the exercise of public power and, in this respect, we can regard the private law of tort as a precursor to modern public law of judicial review. The High Court has acknowledged this legacy on a number of occasions[85] and, as Gummow J has urged, this history 'demonstrates the need to avoid a narrow classification of what is involved in "administrative law" litigation'.[86]

The subjection of the government to liability in tort is relatively straightforward in cases where the government stands in an analogous position to that of a private party. So, for example, it is generally uncontroversial that the government can be held liable in negligence where an employee suffers injury in an unsafe government workplace or where a legal entrant suffers injury on government-owned land. Even in those seemingly straightforward cases, however, it is necessary to bear in mind that the government does not stand in precisely the same position as a private individual. Its damages payments are made out of public funds rather than privately amassed resources, it may have responsibilities that are more wide-ranging than those of private individuals,[87] and its motives may be constrained in ways that those of private parties are not.[88] The position becomes even more complex in circumstances where government activities lack a private sphere analogue; the government crafts policy, designs and implements regulatory regimes, and exercises coercive powers in ways that are generally beyond the reach of private individuals. These realities justify a move

78 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 3, citing Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1966). See also Justice Keith Mason, 'What Has Equity To Do With Restitution? Does It Matter?' (Speech delivered at the Chancery Bar Association, Inner Temple London, 27 November 2006).

79 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 554.

80 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (Woolwich).

81 *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509, 538 [87] (Gageler J).

82 Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41(4) *University of New South Wales Law Journal* 1159, 1168–69.

83 (1827) 7 B & C 394; 108 ER 770.

84 The real purpose of the proceeding was 'to try the question of liability': ibid 771 (Lord Tenterden CJ).

85 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 143–44 [17] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *New South Wales v Ibbett* (2006) 229 CLR 638, 648 [38] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *A v New South Wales* (2007) 230 CLR 500, 532 [94] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

86 *Commissioner of Australian Federal Police v Propend Finance Pty* Ltd (1997) 188 CLR 501, 558 (Gummow J).

87 *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 459 [116] (Hayne J).

88 Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 80.

away from Dicey's equality principle,[89] allowing the modification of the ordinary principles of tort to take into account the unique position of government defendants.

There are a number of torts that are particularly well adapted to provide a remedy against government officials. Though rarely fruitful, it is convenient to begin with the tort of misfeasance in public office, which stands alone amongst private law causes of action in applying *only* to public officials.[90] The reason for the rarity of success pursuant to this tort is its high-grade fault elements, which limit its application to cases where a public official intentionally (or recklessly) abuses their powers while intending to (or being reckless as to whether they would) cause harm to the plaintiff. Despite its low rates of success in practice, this cause of action remains symbolically important from the perspective of maintaining government accountability.[91] Other torts that perform particularly well in connection with the misdirected exercise of public power include the intentional torts of battery, assault, false imprisonment and malicious prosecution, which provide remedies in response to threats, physical contact, detention and unwarranted subjection to legal process. While private individuals may equally engage in conduct that engages these torts, the coercive powers and responsibilities afforded to government officials means that we readily see a role for use of these private law causes of action against government.

Liability for these categories of torts generally turns on the legality of a government official's acts, meaning that excess of public power plays a key role in defining the scope of liability in private law. A key example is the tort of false imprisonment, which provides a remedy in cases where the defendant detains the plaintiff without legal authority, with the result that the legality of the detention provides a complete answer to liability. For example, in *Ruddock v Taylor*, the High Court found that immigration officers' power to detain Mr Taylor on the basis of 'reasonable suspicion' that he was an unlawful non-citizen was to be read separately from the invalidity of the underlying visa cancellation decisions; the suspicion informed by the cancellation decisions could be reasonable even though it was subsequently discovered that this basis was legally unsound.[92]

The law of negligence offers a further example of the utility of private law in controlling government power. Unlike the foregoing categories of torts, however, it is capable of imposing liability independently of concepts of public law illegality. As confirmed by McHugh J in *Crimmins v Stevedoring Industry Finance Committee*, 'the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires'.[93] But this does not mean that the public status of a government defendant is irrelevant to the negligence inquiry. Rather than adopting threshold rules or distinctions to limit liability, the Australian courts prefer to take into account a defendant's public status within the scope of the ordinary principles of negligence. So, for example, in favour of imposing a duty of care on a public authority, the courts may take into account a range of factors referable to the power dynamic between government and citizen.[94] The defendant's public status is also relevant in the factors that

89 JWF Allison (ed) and AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Oxford University Press, Oxford, 2013) 100.

90 See eg Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1; Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427; Ellen Rock, 'Misfeasance in Public Office: A Tort in Tension' (2019) 43(1) *Melbourne University Law Review* (forthcoming).

91 Rock, above n 90.

92 *Ruddock v Taylor* (2005) 222 CLR 612, 626 [40] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

93 *Crimmins v Stevedoring Industry Finance Committee* (2000) 200 CLR 1, 35 [82] (McHugh J). Statutory reform may also have muddied the waters in some Australian states: see eg *Civil Liability Act 2002* (NSW) s 43A.

94 See eg *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 254 [114] (Gummow, Hayne and Heydon JJ), 261 [136] (Crennan and Kiefel JJ) (degree of control over the risk); *Crimmins v Stevedoring Industry Finance Committee* (2000) 200 CLR 1, 39 [93] (McHugh J), 85 [233] (Kirby J) (knowledge of the risk); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 597 [149] (Gummow and Hayne JJ) (vulnerability of the plaintiff); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 421 [247] (Kirby J) (plaintiff's reliance on the defendant to prevent the harm).

may tend against the imposition of a duty of care.[95] Again, determining whether liability arises at private law requires attention to the factors which justify treating government defendants differently from private individuals.

Against this background, it is also necessary to consider the impact of statute, which operates to limit government liability in a number of ways. First, we can point to civil liability statutes enacted in the early 2000s, with government liability standing as a key target.[96] Secondly, there are various statutory provisions enacted for the purpose of protecting government bodies and officials from liability. Some operate to protect an official from liability for acts done in good faith,[97] while others shift liability from the individual to the Crown.[98] The effect of such provisions is to confer a degree of immunity for conduct which might otherwise attract liability in tort. Thirdly, and perhaps most relevantly for present purposes, is the more pervasive influence of statute on liability which is said to arise in the context of the exercise of statutory powers. In such cases, statutory interpretation may play a key role in defining the nature of the obligations imposed on a public body or agency, and defining the circumstances in which it will be able to rely on 'legal authority' for its actions.[99]

Relief for breach of contract

The power to enter into contracts is not an area in which governments exercise special 'public' or 'governmental' powers; it is a power that governments share in common with private individuals and corporations. For this reason, the law has generally treated governments as no different from individuals and private companies when it comes to the law of contract. However, there are several important ways in which governments are different from other contracting parties, some of which Australian law has only relatively recently begun to acknowledge.

The first is that the *Constitution* limits the powers of the Commonwealth government to enter into contracts,[100] something which *might* also have implications for the states and territories.[101] The High Court held in the School Chaplains Cases that Commonwealth contracts must be authorised either by legislation or by non-statutory executive power and that legislation purporting to authorise contracting must be within the Commonwealth Parliament's authority. As Nick Seddon has argued, the cases have created considerable uncertainty about when legislation is required to authorise government contracts and what type of legislation will suffice.[102]

Secondly, the officials negotiating contracts on behalf of government are in a different position from private individuals because they are not spending their own money but that of taxpayers. Therefore, the inherent incentives to negotiate the best possible terms do not necessarily apply to government officials. There is also a risk of corruption, which recent

95 See eg *Sullivan v Moody* (2001) 207 CLR 562, 582 [62] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Crimmins v Stevedoring Industry Finance Committee* (2000) 200 CLR 1, 37 [87] (McHugh J), 62 [170] (Gummow J).

96 As per the Terms of Reference, one of the tasks of the Panel of Eminent Persons headed by the Hon Justice David Ipp was to 'address the principles applied in negligence to limit the liability of public authorities': Panel of Eminent Persons, *Review of the Law of Negligence* (Final Report, 2002) Terms of Reference 3(a), ix. For a useful overview, see Mark Leeming, *Statutory Foundations of Negligence*, (Federation Press, 2019).

97 See eg *Imported Food Control Act 1992* (Cth) s 38.

98 See eg *Law Reform (Vicarious Liability) Act 1983* (NSW) s 9B.

99 See eg *Ruddock v Taylor* (2005) 222 CLR 612.

100 *Williams v Commonwealth [No 1]* (2012) 248 CLR 156 (Williams No 1); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 (Williams No 2); known together as the 'School Chaplains Cases'.

101 See Selena Bateman, 'Constitutional Dimensions of State Executive Power: An Analysis of the Power to Contract and Spend' (2015) 26 *Public Law Review* 255.

102 See Nick Seddon, 'Commonwealth Government Contracts, the "Common Assumption" and Statutory Backing' (2018) 25 *Australian Journal of Administrative Law* 157; Nick Seddon, 'Statutory Backing of Commonwealth Government Contracts' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2019) (forthcoming).

experience in New South Wales has highlighted.[103] Australian governments have responded by making procurement rules setting our principles and practices which government officials are required to follow in contract negotiations. At the Commonwealth level these are contained in a legislative instrument,[104] while in the states and territories they are largely contained in policy documents.[105] The source of the rules is significant because it will determine whether a breach has legally remediable consequences. Courts have also found that, where governments invite tenders, this can constitute an offer for a process contract, a term of which may be that the government undertakes to deal fairly and reasonably with tenderers.[106] Breach of these obligations can give rise to damages.[107]

The third way in which governments differ from private contractors is in their greater capacity to terminate, breach or void contracts as a result of the rules against fettering future legislative and executive action.[108] The general principle is that governments and legislatures must be free to govern for the public good and so a government cannot confine its ability to carry out future policies or impede the legislature's powers to enact whatever legislation it wishes. The result is that, in certain circumstances, the government and legislature are, in effect, empowered to break a contractual obligation.[109]

A final issue that arises in relation to some government contracts is their potential to have wide-ranging and significant impacts on the rights, interests and obligations of members of the public who are not party to the contract. For example, where government outsources the provision of public services, such as visa processing or social security decision-making, there is a contract between government and the provider but generally not between the provider and the citizens affected by the service. Both the government and the service provider can sue one another in contract if either breaches the terms of the contract.[110] But can an asylum seeker or social security recipient challenge the actions of the private provider directly? Despite having been the subject of considerable commentary and numerous government reports since the 1980s,[111] the question of when administrative law remedies can and should apply to contractors has not been resolved in Australia.[112] In a few circumstances, parliaments have provided for merits review or ombudsman oversight

103 See *Obeid v R* (2015) 334 ALR 161; *Obeid v R* (2017) 96 NSWLR 155.

104 The Commonwealth Procurement Rules made under the *Public Governance Performance and Accountability Act 2013* (Cth) s 105B.

105 See eg NSW Procurement Policy Framework for NSW Government Agencies, Issued by the NSW Procurement Board, July 2015; Victorian Government Purchasing Board policies <http://www.procurement.vic.gov.au/Buyers/Policies-Guides-and-Tools>; Department of Housing and Public Works, Queensland Procurement Policy 2018.

106 See *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; Ipex ITG Ltd (in liq) v Victoria [2010] VSC 480.

107 See Seddon (2018), above n 102, 388–90.

108 Government contracts which fetter future action are generally said in law to be 'void', and not breached, but there are strong arguments that this may lead to unfair results and that doctrines of severance, frustration or breach might be better approaches: see Seddon (2018), above n 102, 284–6.

109 See eg *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 74 (Mason J); *A v Hayden (No 2)* (1984) 156 CLR 532, 543 (Gibbs CJ), 587–8 (Brennan J); *Northern Territory v Skywest Airlines Pty Ltd* (1987) 90 FLR 270, 294; *NSW Rifle Association v Commonwealth* (2012) 266 FLR 13, 35–6 [96]–[97] (executive necessity); *McGrath v Commonwealth* (1944) 69 CLR 156, 169–70 (Rich J); *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1, 16–19 (Latham CJ) (legislative supremacy).

110 Though it may be difficult to assess damages suffered by a government as a result of a contractor's breach where the damage is to a third party.

111 See eg Administrative Review Council, *The Contracting Out of Government Services*, Report No 42 (1998); Senate Standing Committee on Finance and Public Administration, *Contracting Out of Government Services*, Second Report (1998); Margaret Allars, 'Administrative Law, Government Contracts and the Level Playing Field' (1989) 12 *UNSW Law Journal* 114; Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (Hart, 1997); Mark R Freedland, 'Government by Contract and Public Law' [1994] *Public Law* 86; Michael Taggart, 'The Nature and Functions of the State' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP, 2005) 101.

112 See generally, Aronson, Groves and Weeks, above n 59, 51; Matthew Groves, 'Outsourcing and Non-Delegable Duties' (2005) 16 *Public Law Review* 265; Boughey and Weeks, above n 48, 316.

of outsourced decisions.[113] However, these are ad hoc and far from a systemic or uniform approach to the issue, the significance of which is only likely to increase.

Remedies beyond public and private law

Determining the best remedy for a client who has been adversely affected by some government action may require a practitioner to draw on knowledge from virtually every 'subject' they studied at law school, as well as several topics that many lawyers will not have studied. For instance, in some circumstances, the most effective 'remedy' for a client will not be a strictly legal one delivered by a court or tribunal.

Ombudsman-recommended relief

For an individual who suffers harm at the hands of the government, one of the most powerful practical remedies that may be available is to complain to an ombudsman. The Ombudsman for the Commonwealth commenced operation in 1977,[114] following the Kerr and Bland Committee reports.[115] But this was not the first ombudsman in Australia: Western Australia,[116] South Australia,[117] Victoria,[118] Queensland[119] and New South Wales[120] created ombudsmen's offices before the office of the Commonwealth Ombudsman was established. The remaining states and territories followed quickly,[121] with the result that, a mere 12 years after no Australian jurisdiction had had an ombudsman, all of them did.[122] Harlow and Rawlings described the equivalent phenomenon in the United Kingdom as 'ombudsmania'.[123]

Ombudsmen are 'non-judicial accountability bodies'[124] which have an extremely limited capacity to *require* anything of entities within their statutory jurisdiction, relating either to their complaint-handling or systemic investigation functions. They are nonetheless remarkably effective at dealing with maladministration by such entities. They have the capacity to recommend outcomes that lie beyond the jurisdiction of courts and can therefore frame responses to a broad range of problems to which judicial remedies are ill adapted.[125] More subtly, the processes of ombudsmen and their capacity to investigate and influence administrative behaviour encourage greater cooperation from public officers than judicial remedies, which can even 'encourage parties to adopt an adversarial approach'.[126] The power to compel adherence to determinations cannot be exercised alongside influence, but the latter is not be undervalued. Indeed, government officials may be more inclined to cooperate with investigations and to respond to feedback about areas for improvement where there is no possibility of coercive sanctions being imposed.[127]

113 See eg *Ombudsman Act* 1976 (Cth) ss 3BA, 3(4B), 8, 9, 14.
114 Under the *Ombudsman Act 1976* (Cth).
115 Kerr Committee Report (1971) Parliamentary Paper No 144 of 1971; Sir Henry Bland, H Whitmore and PH Bailey, *Interim Report of the Committee on Administrative Discretions*, Parliamentary Paper No 53 (1973) (Bland Committee Interim Report) 26 [109].
116 *Parliamentary Commissioner Act 1971* (WA).
117 *Ombudsman Act 1972* (SA).
118 *Ombudsman Act 1973* (Vic).
119 *Parliamentary Commissioner Act 1974* (Qld). The office now uses the name of Ombudsman: *Ombudsman Act 2001* (Qld).
120 *Ombudsman Act 1974* (NSW).
121 The Northern Territory passed the Ombudsman Act in 1977, followed by Tasmania's *Ombudsman Act 1978* (Tas).
122 The position of Ombudsman for the ACT was created in 1983 and is performed by the Commonwealth Ombudsman: see *Ombudsman Act 1989* (ACT).
123 Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009), 480–1.
124 John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423, 423.
125 John McMillan, 'Future Directions 2009 — The Ombudsman' (2010) 63 *AIAL Forum* 13, 17.
126 Matthew Groves, 'Ombudsmen's Jurisdiction in Prisons' (2002) 28 *Monash University Law Review* 181, 202.
127 See eg Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 97; Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) 122; Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13(4) *European Law Journal* 542, 555.

The recommendatory powers of ombudsmen are manifested in a number of ways, but one of their foremost remedial strengths is to recommend payments of compensation under discretionary schemes.[128] It is counterintuitive but nonetheless true that ombudsmen recommend the payment of monetary compensation far more often than courts, and they do so in circumstances in which courts could not prescribe a damages remedy.[129] As with most recommendations by ombudsmen,[130] recommendations to pay an amount in compensation are usually complied with.[131] This sometimes includes payments of very large amounts[132] and in circumstances where legal liability is either difficult to prove and/or expressly denied by the government.[133] While the detail of ombudsmen's recommendations for compensation is sometimes reported,[134] the specific figures recommended and agreed upon are often not cited.

Investigative agencies

Another non-legal mechanism that may offer recourse to a wronged individual is the investigative agencies that perform important accountability roles in all Australian jurisdictions. These agencies take one of two forms — standing and ad hoc commissions of inquiry. Ad hoc commissions, most commonly Royal Commissions, are established by government to investigate matters of public controversy. After an ad hoc commission has performed its function, it is disbanded. Standing commissions, in contrast, perform an ongoing role in monitoring public sector failings. Such bodies have a long history in Australia, with one of the most longstanding being the NSW Independent Commission Against Corruption. All Australian states have followed suit in establishing generalist anti-corruption agencies,[135] although many also have specialist agencies that target law enforcement or public service employees.[136] The position at the Commonwealth level is less straightforward. Its anti-corruption detection activities are presently confined to the Australian Commission for Law Enforcement Integrity and Australian Public Service Commission, although discussions about the introduction of a generalist anti-corruption agency have been underway for some time.[137]

The remit of investigative agencies differs widely. Royal Commissions can be established into almost any subject matter[138] and, while such matters may encompass private sector or social issues, Royal Commissions have played important roles in connection with failings in the public sector, such as the 2013 Royal Commission into the Home Insulation Program and the 2017 Royal Commission into the Detention and Protection of Children in the Northern Territory. Standing commissions have an ongoing investigative brief which differs

128 See Weeks, above n 47, Ch 12.

129 Peter Cane, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489, 514; citing Paul Brown, 'The Ombudsmen: Remedies for Misinformation' in Genevra Richardson and Hazel Genn (eds), *Administrative Law and Government Action: the Courts and Alternative Mechanisms of Review* (Clarendon Press, 1994) 309.

130 Annual reports by the Commonwealth Ombudsman routinely indicate that executive bodies are responsive to the Ombudsman's recommendations.

131 See Rock and Weeks, above n 82.

132 Groves, above n 126, 201–2.

133 See Gavin Drewry and Roy Gregory, 'Barlow Clowes and the Ombudsman: Part 1' [1991] *Public Law* 192, 200; see also Gavin Drewry and Roy Gregory, 'Barlow Clowes and the Ombudsman: Part 2' [1991] *Public Law* 408.

134 See eg Commonwealth Ombudsman, *Investigation into the Circumstances of the Detention of Mr G*, Report No 2 (2018).

135 For example, the Victorian Independent Broad-Based Anti-Corruption Commission, Queensland Crime and Corruption Commission, South Australian Independent Commissioner Against Corruption, Western Australian Corruption and Crime Commission, Integrity Commission Tasmania, ACT Integrity Commission, and NT Independent Commissioner Against Corruption.

136 For example, New South Wales has the NSW Law Enforcement Conduct Commission and Public Service Commission.

137 Prior to the 2019 federal election, the coalition government released a consultation paper relating to the introduction of a Commonwealth Integrity Commission: Attorney-General's Department, 'A Commonwealth Integrity Commission — Proposed Reforms', December 2018.

138 An inquiry must be tied to a government purpose as opposed to matters of 'idle curiosity' (*Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 156). Constitutional limitations may also arise at the Commonwealth level (eg *Lockwood v Commonwealth* (1954) 90 CLR 177).

as between jurisdictions in terms of the individuals and entities that may be investigated,[139] the circumstances in which an investigation may be commenced,[140] and the conduct that may be investigated.[141]

Both standing and ad hoc commissions of inquiry have wide-ranging investigative powers, including coercive powers to apply for search warrants, summon witnesses to give evidence and produce documents, take evidence on oath or affirmation at a hearing and cross-examine witnesses.[142] For present purposes, the most relevant point of interest is the outcomes that can be achieved by investigative agencies, with the primary outcome being the production of a report. For Royal Commissions, the content of a report is dictated by the relevant terms of reference and may include findings in relation to the matter investigated and recommendations for reform or restoration of harm.[143] Anti-corruption commissions are also empowered to report on their findings, although there are restrictions as to the nature of the findings that can be made.[144]

Discretionary compensation schemes

Non-statutory compensation schemes may offer a particularly valuable non-legal remedy to individuals who have suffered harm at the hands of government. Such schemes exist across Australian jurisdictions both in the context of specific types of harm[145] and in cases of government maladministration.[146] These schemes exist alongside more general powers to make ex gratia or act of grace payments.[147]

All such schemes are crafted in inherently discretionary terms. So, for example, the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) allows a decision-maker to make a payment to an individual who suffers harm as a consequence of 'defective administration', which includes failure to comply with or institute applicable administrative procedures and the provision of incorrect or ambiguous advice.[148] Even more broad is the power to make an act of grace payment in 'special circumstances',[149] which is described in applicable guidelines as a 'permissive' power that may be deployed where the government activity results in 'an unintended and inequitable result' or where a government policy has 'an unintended, anomalous,

139 For example, some agencies can investigate conduct by private individuals as well as public officials (eg *Independent Commission Against Corruption Act 1988* (NSW) s 8) and some can investigate conduct by public agencies (*Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 4).

140 For example, complaints-based and own-motion investigative functions (*Independent Commission Against Corruption Act 1988* (NSW) ss 10, 20(1)).

141 See eg *Independent Commission Against Corruption Act 1988* (NSW) ss 8, 9(1). In contrast, in South Australia, the definition of 'corrupt conduct' is confined to criminal offences and 'serious and systemic misconduct' (*Independent Commissioner Against Corruption Act 2012* (SA) ss 4(2), 5(1), 5(3), 7(1)(a), 7(1)(ca)).

142 *Royal Commissions Act 1902* (Cth) ss 2, 4, 5, 6FA (without such legislation Royal Commissions cannot enjoy coercive powers: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 98–9 (Dixon J)). For standing commissions, see eg *Independent Commission Against Corruption Act 1988* (NSW) Pt 4, Divs 2–4. As to the power to conduct public hearings, compare *Independent Commission Against Corruption Act 1988* (NSW) s 31(2); *Crime and Corruption Act 2001* (Qld) s 177; *Independent Commissioner Against Corruption Act 2012* (SA) Sch 2, cl 3.

143 For example, Ian Hanger AM QC, *Report of the Royal Commission into the Home Insulation Program* (August 2014) [13.6.4].

144 See eg *Independent Commission Against Corruption Act 1988* (NSW) s 74A and 74BA.

145 See eg schemes established to compensate victims of crime (see eg *Victims' Rights and Support Act 2013* (NSW)) and institutional sexual abuse (the establishment of such a scheme was recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse).

146 The relevant scheme at the Commonwealth level is the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme).

147 At the Commonwealth level, the *Public Governance, Performance and Accountability Act 2013* (Cth) permits the payment of act of grace payments (s 65), the waiver and set-off of debts owing to the Commonwealth (ss 63 ad 64).

148 Department of Finance (Cth), *Scheme for Compensation for Detriment Caused by Defective Administration*, Resource Management Guide No 409 (November 2018) [17].

149 *Public Governance, Performance and Accountability Act 2013* (Cth) s 65(1).

inequitable or otherwise unacceptable impact'.[150] There are also significant limits on the ability to challenge decisions made pursuant to these schemes.[151]

The various discretionary schemes which provide a remedy against government are generally intended to operate as remedies of 'last resort', in the grey areas where legal liability is unable to provide an adequate remedy to a wronged individual.[152] Notwithstanding their limitations, it is important to note that these 'non-legal' remedies may fill critical gaps in the legal remedial system, and should therefore be considered a relevant part of the remedial armoury that might be deployed where an individual seeks legal advice about government-caused loss.

Conclusion

Remedies against government arise from a variety of sources, running the gamut of the public–private law divide and into areas that we might not traditionally conceive of as 'legal' at all. Acknowledging this breadth is essential from the practical perspective of practitioners and litigants, who must identify the most appropriate forum and remedy to target in a particular case. However, there is also benefit in moving away from an approach to the law which groups doctrines somewhat artificially into 'silos'. As demonstrated in this article, we can better understand the scope of government liability if we adopt a wholesale view of the various means by which the government can be held to account, rather than looking at public and private law causes of action in isolation. When viewed from above, rather than from within, it is easier to observe recurring themes (such as the courts' reluctance to second-guess political decisions) and to identify connections between areas of law (such as the interplay between concepts of legality and liability in the context of tort claims against government defendants). The tendency to treat government liability as a specialist topic within the sphere of private law denies us the opportunity to better understand these connections. Government liability should not be seen as an island,[153] an area of inquiry entire of itself and separate from 'private law'. Instead, the liability of public authorities must be understood on the basis that it involves the law as a whole.[154]

150 Department of Finance (Cth), *Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act 2013*, Resource Management Guide No 401 (April 2018) [10].

151 See Weeks, above n 47, Ch 12.

152 Department of Finance (Cth), above n 148 [23]; Department of Finance (Cth), above n 150 [6].

153 The High Court has expressed its distaste for the distorted positions which follow the creation of 'islands of power immune from supervision and restraint': *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99].

154 See John Donne, 'Meditation XVII', *Devotions upon Emergent Occasions* (1623).