Government schemes for extrajudicial compensation: an assessment

*Sarah Lim, Nathalie Ng and Greg Weeks**

Providing redress where loss has been suffered is not the sole preserve of the judiciary. At least in part, this is because loss can be suffered by individuals in the absence of legal liability. While this is not the exclusive province of public entities, it is more commonly the case that 'moral liability' justifying the payment of compensation is borne by public entities.[1] For one thing, public entities generally have a much greater capacity to cause individuals — even relatively sophisticated or commercially adept parties[2] — to act in a way that they otherwise might not. Government and other public figures come cloaked in authority,[3] with the consequence that people are more likely to comply with requests or instructions. Such compliance will frequently not create a legal obligation if the individual suffers loss. Compensation schemes are premised on the belief that the action might nonetheless create *moral* obligations and that these can be a sufficient basis for compensation to issue.

This article considers the provision of compensation outside the legal system, usually paid on the basis of 'moral liability' rather than a claim founded in law. There are a number of different schemes in place which may achieve this end, across every Australian jurisdiction and they are both statutory and executive. Our consideration of those schemes forms part of the article, the rest being given over to the assessment of whether and to what extent they are successful in what they set out to do. Our conclusion on this point may be summarised by saying that extrajudicial compensation has become an essential part of seeing that justice is done in public law matters, particularly those which do not disclose a strong legal basis but in which a party has undoubtedly suffered loss as a result of a public entity's acts or decisions.

A brief history of discretionary compensation

Extrajudicial compensation schemes have a long history. Carol Harlow noted that, while law reform in England had once been directed against examples of Crown immunity which were seen 'as an affront to the rule of law', the focus of reform shifted after the passage of the *Crown Proceedings Act 1947* (UK) to the need better to compensate citizens who had suffered loss due to government action.[4] Awards of ex gratia compensation were often made

* Sarah Lim holds a Bachelor of Laws (Honours) / Bachelor of Information Technology from the ANU. Nathalie Ng is a lawyer with HWL Ebsworth Lawyers and Case Notes Editor for the *Australian Journal of Administrative Law*. Greg Weeks is Associate Professor at the ANU College of Law. The opinions expressed in this article are those of the authors and not necessarily their employers.

1 It is generally understood that government is obliged to adhere to a higher moral standard than that applicable to private entities: see eg N Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 6th ed, 2018) 15.

2 See eg the claimants in *R (Davies) v The Commissioners for Her Majesty's Revenue and Customs* [2011] 1 WLR 2625, who had taken advice in forming their view of a government publication, only to have the Supreme Court find against that view.

3 See the example of the police officer in G Weeks and L Pearson, 'Planning and Soft Law' (2018) 24 *Australian Journal of Administrative Law* 252, 253.

4 C Harlow, 'Rationalising Administrative Compensation' [2010] *Public Law* 321, 321.

before 1947 but were made by the Crown in its then customary role of ruthless litigant.[5] It followed that:

> [Such compensation at that time] was in principle an evil. It vested in officials an important discretionary power which allowed them to shelter their misdeeds behind the convenient screen of a secret settlement process. Perhaps it was assumed that, the [Crown's legal] immunity once ended [by the Crown Proceedings Act], ex gratia payments would dwindle into insignificance.[6]

They did not; instead, payments of compensation came to be used for a different purpose.[7]

The notion of making ex gratia payments for a purpose akin to paying 'hush money' is somewhat discordant to the modern ear, especially given that such payments respond to the existence of a moral obligation on the part of government where no legal liability to the applicant exists, either actually or potentially. We think it logical that Harlow considered the secrecy of compensation payments to be an 'evil' rather than the fact of those payments[8] and that view fits with the modern, moral motivation for making an ex gratia payment. The capacity of government to respond to moral triggers in providing compensation in the absence of a legal right is perhaps the most significant development in this area since the period described by Harlow.

Part of the utility and — we would argue — necessity of the state having the capacity to make ex gratia payments can be observed in two connected principles.

The first is that the Crown is held accountable in common law systems, such as those in England and Australia, primarily as a matter of judicial review, which is to say by the issue of writs and associated orders.[9] However, in the UK:

> the State has no tortious liability at common law for wrongs done by its servants, from ministers down. In England … either the Crown's servants are personally liable or there is no redress.[10]

This was the very point behind passing the English *Crown Proceedings Act 1947*. The suite of Australian statutes which had removed the protected position of the Crown in the colonies from 1853 and at Commonwealth level from just after Federation[11] did not work in the same

5 One 'whose legal advisers stood upon unmeritorious, technical defences and used the Crown's legal immunity to drive hard bargains': C Harlow, *Compensation and Government Torts* (Sweet and Maxwell, 1982) 117; cf *Legal Services Directions 2017* (Cth); J Boughey, E Rock and G Weeks, *Government Liability: Principles and Remedies* (LexisNexis Australia, 2019) Ch 17.

6 Harlow, above n 5, 117.

7 G Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 256.

8 To regard the operation of a compensation system or other government scheme as an 'evil' seems more likely than to regard the system or scheme as good or evil of *itself*. We leave the latter considerations to those more theologically inclined.

9 At Commonwealth level, this occurs because the jurisdiction to grant two writs (mandamus and prohibition) and injunctive relief are embedded in s 75(v) of the *Constitution* and certiorari can issue as an ancillary remedy to the constitutional writs. State supreme courts also have a constitutionally protected capacity to issue the remedies that were within their jurisdiction at federation: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

10 *Chagos Islanders v Attorney-General* [2004] EWCA Civ 997 [20] (Sedley LJ).

11 These generally sought to equate the position of the state 'as nearly as possible' with the other party to litigation: eg *Judiciary Act 1903* (Cth) s 64. See M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [19.70].

way as the subsequent English Act.[12] Rather, it made the Crown vicariously liable for the tortious acts of its servants.[13]

The second is that damages — or any monetary payment generally — is not a remedy recognised by courts exercising judicial review.[14] Lord Scott noted that '[t]here is no general right to recover damages for loss caused by *ultra vires* acts of public authorities. Some recognised tort claim is necessary', but has not so far been forthcoming.[15] The availability of non-judicial compensation payments has been a practical cure for the absence of a legally enforceable remedy. The enforced non-judicial nature of compensation payments in Australia[16] is, as we will discuss, an important aspect of their application. It is fair to say that even in the UK, where there has in modern times been a generally progressive approach to law reform, reform proposals in this area have been met with caution. More frankly, the Law Commission's proposed reforms in this area were rebuffed with indelicate vehemence and speed.[17] We would be surprised to see extensive reform of compensation payments in the short term.

Ex gratia compensation is a superior remedy to a judicially ordered damages payment, if only because it is more readily available since damages payments are tied to a private law cause of action. It is also better than receiving no compensation at all (and there is a real possibility that many claimants would otherwise receive exactly that) but its utility does not mean that it is an ideal system or that it should not be exposed to criticism. This point was made by Winter, writing in the context of 'relationships between the law and Australia's Indigenous communities':[18]

12 Weeks, above n 7, 184–5.

13 Sedley LJ pointed out that it was only 'with the enactment of the *Human Rights Act 1998* (UK) that the Crown, in the form of a "public authority", has acquired a primary liability for violating certain rights': *Chagos Islanders v Attorney-General* [2004] EWCA Civ 997 [20]. See Aronson, Groves and Weeks, above n 11, [19.60].

14 See E Rock and G Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41 *University of New South Wales Law Journal* 1159. An attempt to divide monetary awards on a 'public' and 'private' law basis is inaccurate due to the existence of a single 'public' tort — misfeasance in public office — in respect of which damages lie. See eg *Brett Cattle Company Pty Ltd v Minister for Agriculture* (No 2) [2020] FCA 916; M Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1.

15 His Lordship continued, however, that merely to 'have sustained loss as a consequence of the administrative action in question' was insufficient to establish liability: *Somerville v Scottish Ministers* [2007] 1 WLR 2734, 2761 [77]. In the context of considering a claim for damages arising under statute, his Lordship considered that this 'chapter of public law still [remains] … largely unwritten', thereby perhaps expressing hope that that situation will change. We harbour doubts that any change will come swiftly.

16 In the UK, non-statutory compensation schemes have been reviewable since *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] QB 864, in which Diplock LJ reasoned (at 888) that the decision of the Compensation Board to authorise a compensation payment was legally significant because it constituted the difference between a payment to an applicant being lawful or unlawful (approved by the High Court in *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 162). Some, but not all, Australian compensation schemes are statutory.

17 See Law Commission, UK, *Administrative Redress: Public Bodies and the Citizen* (Law Commission, 2010) [1.3]. While the Law Commission's response was restrained, others were not: see *Mohammed v Home Office* [2011] 1 WLR 2862, 2870 [22] (Sedley LJ); Editorial, 'Damages for Maladministration: The Law Commission Debacle' (2012) 17 *Judicial Review 211*.

18 S Winter, 'Australia's Ex Gratia Redress' (2009) 13 *Australian Indigenous Law Review* 49, 49.

> Corrective justice recognises remedial rights to full compensation. Ex gratia redress is a denial of liability associated with what may be less than full compensation. Since the relevant cost savings for claimants do not derive from the ex gratia nature of the redress programs, the ex gratia denial of right may constitute part of the States' resistance to paying full compensation. In support of this possibility, ex gratia redress offers both decreased payouts and the prospect of making the associated costs more predictable.[19]

As numerous members of the High Court noted in *Love v Commonwealth of Australia*,[20] the relationship between Australia's First Nations people and Australia as a polity more generally is complex. Furthermore, the wrongs that they have suffered are not always compensable by money, despite that fact that monetary compensation is the guiding light of the common law's private law compensatory doctrines.[21] Money only approximates placing a claimant in the position they would rather occupy — it cannot alter history.[22] Winter's point is good in as much as it expresses dissatisfaction with a remedial approach that admits nothing, fails to embrace corrective justice principles and yet still tends to drive down the value of any payment made.[23] Whether an ex gratia payment is better than nothing might, on this view, depend on the claimant's perspective.

One important point is that the perspective of a potential recipient of ex gratia compensation as to the preferable amount of such a payment is irrelevant. Payments are made on the basis that the public entity in question owes a moral obligation to a would-be claimant which it proposes to meet by the payment of monetary compensation, but the determination of the sum of compensation is determined by the public entity alone, although the claimant will often make a submission as to the amount the person thinks suitable. Such submissions might be presented more persuasively, for example, if they were made on the claimant's behalf by the Ombudsman,[24] but they do not bind the public entity as to the amount of the compensation it offers.[25]

The link between maladministration and discretionary schemes

Maladministration has sometimes been defined in statute as poor governance and mismanagement resulting in an 'irregular or unauthorised use of public money, [the] substantial mismanagement of public resources, or … the substantial mismanagement in

19 Ibid 53.

20 (2020) 94 ALJR 198.

21 Money is the tool by which courts approximate the loss suffered by the plaintiff to the extent that such a calculation is possible: see *Robinson v Harman* (1848) 1 Exch 850, 855 (contractual damages); *Todorovic v Waller* (1981) 150 CLR 402, 412 and 463 (tortious damages).

22 Sometimes, damages are no more than a 'consolation' to the successful claimant: H Luntz, 'The Purposes of Damages in Tort Law' in PD Finn (ed), *Essays on Torts* (Law Book Co, 1989) 243, 248. In England, compensation is calculated on the same basis as that used to calculate damages payable in tort, that is by placing complainants 'in the position they would have occupied if they had been correctly advised at the outset': see the citations in Weeks, above n 7, 256 (n 34).

23 A tendency noted elsewhere: see Weeks, ibid 258.

24 See Weeks, ibid 252–3. Courts might occasionally make similar recommendations to the same effect where they find that the claimant might have a 'moral' case but lacks legal grounds for a compensation claim: see *Croker v Department of Families, Housing, Community Services & Indigenous Affairs* [2010] FCA 1136 [11] (Rares J). Furthermore, it is 'not uncommon' for the AAT to perform this role: Boughey, Rock and Weeks, above n 5, 308–9.

25 J Davidson and S Stoddart, 'Judicial Review of Discretionary Payments' (2017) 24 *Australian Journal of Administrative Law* 74.

or in relation to, the performance of official functions'.[26] In practice, it constitutes actions of a public authority which are unlawful, unreasonable, unfair, improperly discriminatory, taken for an improper purpose or otherwise wrong.[27] Maladministration can also describe circumstances where, although the relevant administrative conduct is flawed, it is not necessarily illegal or corrupt. Maladministration covers such cases because it is primarily a concept that goes to justice rather than law.[28] There is a linguistic distinction between 'malfeasance'[29] and 'misfeasance',[30] terms which have more precise meanings in tort. Justice Gummow saw the distinction as one of intention, specifying that the misfeasance tort of 'concerns conscious maladministration rather than careless administration'.[31]

The question of how maladministration which causes harm should be addressed and resolved has long been debated. Ombudsmen offer a range of practical remedies at one end of the spectrum; at the other, judicial review is highly impractical.[32] While monetary compensation has been suggested as a solution,[33] courts remain unable to award monetary relief in public law matters.[34]

In the absence of a framework to compensate an individual for harm suffered due to an administrative action, non-judicial mechanisms which operate independently of public law wrongs play a prominent role. Where the Commonwealth has no legal liability but bears a moral obligation, two Commonwealth discretionary compensation schemes exist to compensate persons for losses suffered: first, the non-statutory Scheme for Compensation for Detriment Caused by Defective Administration (CDDA Scheme),[35] which is administered by the Commonwealth Department of Finance; and, secondly, discretionary financial assistance pursuant to ss 63 (waiver of debt or modification of payment terms), 64 (set-off of debts owed to or by the government) and 65 (act of grace payments) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act).[36]

26 *Independent Commissioner Against Corruption Act 2012* (SA) s 5(4).
27 *Public Interest Disclosure Act 2010* (Qld) Sch 4.
28 G Weeks, 'Maladministration: The Particular Jurisdiction of the Ombudsman' in M Groves and A Stuhmcke (eds), *Ombudsmen in the Modern State* (Hart Publishing, forthcoming). See n 36 below.
29 See eg *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 238 [49] per French CJ, citing FAR Bennion, *Bennion on Statutory Interpretation* (LexisNexis Butterworths, 5th ed, 2008) 82. His Honour was making a similar point about the negligent exercise of a statutory authority.
30 See eg *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732.
31 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 376 [124] (reference omitted).
32 See Boughey, Rock and Weeks, above n 5, 16–17.
33 M Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' (2003) 8 *Judicial Review* 104.
34 Rock and Weeks, above n 14, 1159. There is a relatively minor exception to this rule where a public entity is unjustly enriched as the result of an ultra vires demand for payment: ibid 505–13.
35 The CDDA Scheme was originally established by the Commonwealth Department of Finance Estimates Memorandum vol 1995/4 (1995) and was subject to further revised iterations in Finance Circulars in 2001, 2006, 2009 and 2014 prior to its current version: Commonwealth Department of Finance, *Resource Management Guide No 409: Scheme for Compensation for Detriment Caused by Defective Administration* (Australian Government, 2019) <https://www.finance.gov.au/publications/resource-management-guides/scheme-compensation-detriment-caused-defective-administration-rmg-409>.
36 See Commonwealth Department of Finance, *Resource Management Guide No 401: Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act 2013* (Australian Government, 2018) <https://www.finance.gov.au/publications/resource-management-guides-rmgs/requests-discretionary-financial-assistance-under-public-governance-performance-accountability-act-2013-rmg-401>.

Outside of these Commonwealth mechanisms, other specific discretionary compensation schemes have been established as a response to wrongs perpetrated by government. For example, the Salvation Army National Redress Scheme[37] is a private scheme created at the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse to enable persons who have experienced institutional child sexual abuse to seek redress. Similarly, following a review by the Victorian Equal Opportunity and Human Rights Commission, the Victoria Police Restorative Engagement and Redress Scheme[38] was developed for police personnel who had suffered from workplace sex discrimination and sexual harassment. Currently, at the behest of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, a Compensation Scheme of Last Resort[39] is in the process of being established to enable consumers who are so entitled to receive compensation, even though the licensed financial adviser who is liable to them has become insolvent or is otherwise unable to pay the necessary compensation.

The role of the Ombudsman

Judicial remedies are often — erroneously — considered the gold standard in obtaining justice. The reasons this contention can be challenged have been rehearsed elsewhere and often, but it is sufficient to note here that tribunals annually resolve many more matters than courts; bodies like ombudsmen resolve many more matters still. For good reason, these bodies have been described as 'the engine room of administrative law'.[40]

Ombudsmen should not be seen to operate wholly within an adversarial system but derive their success from effectively and judiciously exercising their *influence*, as opposed to wielding *power*. The belief that Ombudsmen are 'toothless tigers'[41] misunderstands this reality and ignores the fact that Ombudsmen have evolved specifically to address maladministration — a task for which they are perfectly adapted[42] Where maladministration is found, the Ombudsman can exert influence on the decision-maker by making recommendations for a remedy or other improvement, notwithstanding that the Ombudsman does not wield determinative power. The office has an aptitude for settling issues which extend beyond mere illegality to allegations of injustice more broadly that courts and tribunals lack, which explains why the judiciary is not generally apt to be involved in the matters those offices handle.

It is the central task of Ombudsmen to address maladministration, which denotes conduct capable of causing injustice and which could also be systemic in the sense that, if left unremedied, it might foreseeably continue to affect other parties. Allegations

37 See The Salvation Army, 'The National Redress Scheme' (online) <https://www.salvationarmy.org.au/about-us/governance-policy/the-national-redress-scheme/>.

38 See Victorian Government, 'Restorative Engagement and Redress Scheme' (online) <https://www.vic.gov.au/redress-police-employees>.

39 See The Treasury, 'Compensation Scheme of Last Resort' (online, 7 February 2020) <https://treasury.gov.au/consultation/c2019-43848>.

40 G Weeks, 'Attacks on Integrity Offices: A Separation of Powers Riddle' in G Weeks and M Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 25, 29.

41 Cf R Creyke, M Groves, J McMillan and M Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 5th ed, 2019) 244.

42 Weeks, above n 28.

of maladministration might indicate poor governance or corruption and yet disclose no 'wrongdoing' of the sort remediable in judicial proceedings. Maladministration is often a matter of degree[43] and the capacity to determine its seriousness cannot be determined in advance.[44] While it can, of course, occur on a large scale, maladministration is often mundane (in the sense that it is everyday, dull or routine) and might be caused by inattention as easily as malice.[45] This does not necessarily affect either the quantum of loss maladministration might impose on the unlucky individual who is on its receiving end or the need for it to be addressed.

Courts are suited to some tasks more than others. For example, various aspects of criminal procedure, such as cross-examination of witnesses, have been considered in the past to illustrate that courts have an institutional advantage in establishing criminal guilt. Other tasks are ill-suited to the judiciary due to the way that judicial decision-making is structured.[46] We submit that judicial proceedings are not the right mechanism for dealing with maladministration. They are relentlessly process driven in both their grounds of review and their remedies. A party affected by the maladministration of a public body must usually establish the presence of a jurisdictional error[47] to obtain writs which will either strike down an ultra vires decision and/or require an intra vires decision to be made in its place. Even if injunctive or declaratory relief is sought, the applicant must establish that they have been affected by an error of law, whether or not jurisdictional in nature. As we have stated above, maladministration can occur without the presence of a legal error and might cause no lesser loss or injury to the affected party for that. Lateness, misapplication of guidelines, poor communication with internal or external parties and deficiencies in staff training are but a few examples[48] of possible causes of injustice to those who deal with government or public bodies more generally. None is likely alone to amount to an error of law, but each is an example of how a public body might fall short of delivering 'good administration' to a greater or lesser extent. We think it likely that much maladministration is of this 'mundane' type rather than malicious in nature, but, given that proving malice where required in legal proceedings is far from easy, it suffices to say that maladministration is never addressed satisfactorily in judicial review proceedings.

It was commented nearly 50 years ago that the Ombudsman is 'perhaps the most striking feature in the search for more effective remedies for maladministration'.[49] It remains true

43 Similar observations have long been made about jurisdictional error, including Jordan CJ's observation that there are 'mistakes and mistakes': *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420.

44 See the analogous statement of Mason P in *Holt v Cox* (1997) 23 ACSR 590, 597.

45 The term 'mundane maladministration' was coined by Harlow and Rawlings to describe 'widespread delays, poor communication and inaccurate information to clients, badly trained staff, and failures of communication with other agencies': C Harlow and R Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 78.

46 Polycentric decision-making, for example, is not best achieved by a system in which two parties must bring a dispute before a court: see eg LL Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; E Campbell and M Groves, 'Polycentricity in Administrative Decision-Making' in Matthew Groves (ed), *Law and Government in Australia: Essays in Honour of Enid Campbell* (Federation Press, 2005) 213.

47 Usually on the basis of a procedural failure, such as a failure to offer procedural fairness, and rarely on the basis that the relevant decision or act was unreasonable to the necessary degree.

48 See Harlow and Rawlings, above n 45, 78.

49 KC Wheare, *Maladministration and its Remedies* (Stevens and Sons, 1973) 141.

that, while the involvement of the Ombudsman is not required to obtain compensation for maladministration, it places a claimant in a position of greater advantage if their application is supported by that office. As we will see, the publications which outline the availability of compensation are not published with potential claimants as their audience;[50] the Ombudsman is invaluable to most successful claimants as an experienced and knowledgeable guide.

Commonwealth schemes

There is a variety of subject specific schemes for compensation in Australia, in addition to which the Commonwealth and other Australian jurisdictions have compensation schemes which address maladministration generally. The difference between these schemes is that some aim to compensate individuals for losses specific to them and others recognise that a large number of people might have been affected by a single policy, entity (whether public or private) or policy.[51]

Compensation schemes addressing specific subjects

A number of schemes exist which do not focus on the effect of maladministration on an individual but address circumstances where a particular class of persons has experienced loss arising from a common cause. There are too many such schemes for us to consider them all, but we will point out three of the most significant.

A number of schemes exist to compensate Indigenous claimants for loss suffered by them collectively.[52] Perhaps the most noteworthy of these are the programs which aim to compensate members of the Stolen Generations of Indigenous children removed from their families by the state. Not every jurisdiction has such a scheme, which is perhaps the first issue to observe. Of those that do:

- Tasmania has a statutory scheme funded to a total of $5 million, of which no claimant was eligible to receive more than $5,000;[53]
- South Australia has a non-statutory Stolen Generations Reparations Scheme,[54] which was funded to $11 million, divided between ex gratia payments of up to $50,000 for individual claimants and community-wide reparations to a total of $5 million; and

50 Boughey, Rock and Weeks, above n 5, 298.

51 One type of scheme, developed over a century ago, stands apart from the others. Every jurisdiction in Australia has a statutory scheme for compensating victims of crime: *Victims' Rights and Support Act 2013* (NSW); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime (Financial Assistance) Act 2016* (ACT); *Victims of Crime Assistance Act 2006* (NT). These recognise that people who have suffered loss as the result of a criminal act are not compensated for that loss as a direct result of the process by which the state tries the perpetrator of the crime. They have a greater basis in policy than schemes aimed at correcting the effects of maladministration, which cannot usually be predicted to the same extent.

52 See Boughey, Rock and Weeks, above n 5, 324–5.

53 *Stolen Generations of Aboriginal Children Act 2006* (Tas) ss 10 and 11(1)(a) and (2).

54 Government of South Australia, 'Stolen Generations Reparations Scheme' (online) <https://www.dpc.sa.gov.au/responsibilities/aboriginal-affairs-and-reconciliation/reconciliation/stolen-generations-reparations-scheme>.

- New South Wales created a non-statutory scheme[55] which pays ex gratia compensation of $75,000 to eligible claimants for five years ending 30 June 2022. Payments of up to $7,000 payable under the Funeral Assistance Fund are capped at $7,000.

Each of these schemes defines with some precision who is to be considered a member of the 'Stolen Generations', has limits on funding and the amount each claimant may receive and, in the case of New South Wales, also allows claims only within a specific window. These limitations are perhaps understandable as matters of public policy, but one notes that they are not imposed in this fashion on claimants under, for example, the CDDA Scheme. This might indicate a difference in policy between the schemes, illustrated by the possibility that compensation is available to Stolen Generations survivors virtually as of right, thereby justifying tighter limitations on the time within which it can be claimed.

The Commonwealth government's long-running Royal Commission into Institutional Responses to Child Sexual Abuse heard from an enormous number of witnesses about sexual abuse committed by those working in a wide range of institutions. The Royal Commissioners made an interim recommendation that there be a $4 billion national redress scheme to compensate survivors of this abuse.[56] The statutory National Redress Scheme,[57] which commenced on 1 July 2018 and will run for 10 years, has an accountability function over the institutions responsible for the abuse suffered.[58] In this regard it differs from other schemes which compensate individuals for maladministration.

A third scheme was also the product of a Royal Commission. The Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended the creation of an industry-funded Compensation Scheme of Last Resort (CSLR) to cover future unpaid compensation in parts of the financial services sector where there is evidence of a significant problem of compensation not being paid.[59] There is some precedent for such

55 New South Wales Government Department of Aboriginal Affairs, 'Stolen Generations Reparations Scheme and Funeral Assistance Fund' (online) <https://www.aboriginalaffairs.nsw.gov.au/healing-and-reparations/stolen-generations/reparations-scheme>. This scheme was created in response to a parliamentary report: Legislative Council of NSW General Purpose Standing Committee, *Reparations for the Stolen Generations in New South Wales: Unfinished Business* (Report 34, June 2016).

56 Four states had in fact instituted schemes for compensating survivors of sexual abuse, but the other four state and territory jurisdictions had not. One of the issues that was always going to affect a Commonwealth-led compensation scheme was the extent to which some states had already led the way on this issue and funded the necessary compensation. See Boughey, Rock and Weeks, above n 5, 323–4.

57 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth). There are also several items of delegated legislation: *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* (Cth); *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018* (Cth); National *Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018* (Cth); *National Redress Scheme for Institutional Child Sexual Abuse Declaration 2018* (Cth). The government publishes a guide to assist claimants to use the scheme: Australian Government, *National Redress Guide* (online, 1 July 2019) <https://guides.dss.gov.au/national-redress-guide>.

58 National Redress Scheme, 'About the National Redress Scheme' (online) <https://www.nationalredress.gov.au/about/about-scheme>.

59 Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry, Final Report (Australian Government, 2019) recommendation 7.1. It adopted the details set out in the Review of the Financial System External Dispute Resolution and Complaints Framework, *Supplementary Final Report* (Australian Government, 2017) (Ramsay Review).

a scheme: in the UK, the Financial Services Compensation Scheme (FSCS) is a statutory[60] compensation scheme of last resort for customers of financial services firms. This scheme is not about accountability in the same sense as the National Redress Scheme, nor is it truly about maladministration in the sense that the CDDA Scheme is. Rather, it operates as a safety net in the event that loss is suffered[61] consequent on a 'financial advice failure' from a provider as defined by statute.

Maladministration schemes

CDDA Scheme

The CDDA Scheme is a discretionary mechanism designed to compensate a party which has suffered detriment as a result of a non-corporate Commonwealth entity's defective administration. It may be engaged only when there is no legal requirement to make a payment.[62] Applications are decided by individual portfolio ministers or an authorised official in a portfolio entity pursuant to the executive powers under ss 61 and 64 of the *Constitution*.[63] The constitutional validity of the CDDA Scheme was opened to doubt by the result of *Williams v Commonwealth*[64] (*Williams No 2*), in which the High Court struck down the government's attempt to give statutory authority to its capacity to spend money on placing chaplains in public schools. The government was responding to the High Court invalidating that scheme in *Williams v Commonwealth*[65] (*Williams No 1*), but its subsequent attempt to protect the chaplaincy scheme through legislation[66] encompassed many schemes, including the CDDA Scheme, which were not subject to the decision in *Williams No 2*, because the Court had granted standing only to challenge the chaplaincy scheme. Their constitutional validity was nonetheless subject to doubt.

However, we doubt that the constitutional validity of the CDDA Scheme will ever be challenged and, if it were, that such a challenge would succeed. First, it is unlikely that a purported challenger would have standing, since they would need to have received a payment for that to be the case (thereby reducing the motivation to challenge the validity of its grant).[67] Secondly, and connected to our first point, it is highly unlikely that there will ever be litigation which seeks to establish that the CDDA Scheme is constitutionally invalid.[68] It will in that sense be like the proverbial tree falling in the forest — if nobody challenges it, in what practical sense is it really unconstitutional? Thirdly, we agree that the better view in any case is that payments under the CDDA Scheme would be constitutionally valid, falling within

60 It is established under the *Financial Services and Markets Act 2000* (UK) and simultaneously independent from and accountable to UK regulators: see Ramsay Review, ibid, Appendix 1.

61 And remains unpaid notwithstanding a decision from the Australian Financial Complaints Authority, a court or a tribunal and 'after reasonable steps, as defined by a CSLR' have been taken: Ramsay Review, ibid 4.

62 Commonwealth Department of Finance, *Resource Management Guide No 409: Scheme for Compensation for Detriment caused by Defective Administration* (Australian Government, 2017), <https://www.finance.gov.au/sites/default/files/rmg-409-scheme-for-cdda.pdf>, hereafter 'CDDA Scheme Guide'.

63 Ibid [6] and [7].

64 *Williams v The Commonwealth* (2014) 252 CLR 416 *(Williams No 2)*.

65 *Williams v The Commonwealth* (2012) 248 CLR 156 (*Williams No 1*).

66 Through the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth).

67 Weeks, above n 7, 263.

68 See Boughey, Rock and Weeks, above n 5, 293–4.

s 61 and therefore s 51(xxxix) of the *Constitution*, and so 'within the incidental power of the departments or agencies to which they relate'.[69]

Notably, the CDDA Scheme provides, presumably for accountability purposes, that a decision-maker (other than the portfolio minister) is an agent and not a delegate of the minister.[70] The decision-maker must determine each case on its own merits and in accordance with procedural fairness.[71] Under the CDDA Scheme, a claimant must first identify the defective administration that has occurred. 'Defective administration' can refer to a decision vitiated by the element of unreasonableness in the exercise of an administrative power. This might be the unreasonable failure to give proper advice that is within the official's power and knowledge, or, the giving of advice that is incorrect or ambiguous.[72] It could also include delay by an agency, a failure to follow proper procedures, or IT systems issues and errors.[73] The CDDA Scheme Guide clarifies that an unreasonable failure is one where actions of the public officer are considered to be contrary to the standards of diligence one could expect from a reasonable officer with the same power and access to resources and in the same circumstances.[74] In certain cases, the collective impact of numerous individual administrative omissions or errors may constitute defective administration, even though each individual instance may not be regarded as unreasonable.[75]

If defective administration has occurred, the decision-maker must consider whether it has directly resulted in the detriment suffered.[76] If not, no compensation is payable. An offer of compensation must be fair and reasonable, having regard to the claimant's actions and specific set of circumstances,[77] with the overarching goal of restoring the claimant to the position they would have been in had defective administration not occurred.[78] The CDDA Scheme sets no financial limit on the amount of compensation payable.[79] It must, however, function as the remedial option of last resort, where there is no reasonable possibility of legal liability to the Commonwealth and a claimant has already exhausted all other avenues under existing Commonwealth legislation or schemes.[80] The CDDA Scheme Guide suggests that,

69 M Aronson, M Groves and G Weeks, above n 11, [6.640].
70 Commonwealth Department of Finance, above n 62, [9].
71 Ibid [39]–[41].
72 Ibid [17]. Providing incorrect or misleading information might be tortious: *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225. In that event, a claimant would be expected to pursue his or her legal options rather than seeking a CDDA payment.
73 R Cornall AO, *An Independent Review into the Compensation for Detriment Caused by Defective Administration Scheme in relation to the Australian Taxation Office and Small Business* (Australian Government, June 2019), 33.
74 Commonwealth Department of Finance, above n 62, [46]. The circularity of this definition is typical of attempts to define unreasonableness in administrative law: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
75 Commonwealth Department of Finance, above n 62, [47].
76 Detriment refers to the claimant's quantifiable financial loss, including opportunity costs, as well as any non-financial losses. As with claims for damages in contract or tort, a claimant is required to take reasonable steps to mitigate their loss: ibid [54]–[55].
77 Rather than what might regarded as normative: ibid [76].
78 Ibid [69]–[70].
79 Ibid [68].
80 Including the *Public Governance, Performance and Accountability Act 2013* (Cth): ibid [19], [23]. See Boughey, Rock and Weeks, above n 5, 295.

where concurrent applications are made under the CDDA Scheme and another scheme, it is for the entity to determine the most appropriate mechanism to address the claim.[81]

It is commendable that the CDDA Scheme Guide provides a clear framework for compensation which avoids mirroring the complexity of litigation. CDDA Scheme claims (usually accompanied by recommendations from the Ombudsman) have been helpful in alerting agencies to potential problem areas and opportunities for improvement.[82] However, concerns have previously been raised that the implementation of the CDDA Scheme is hindered by agencies through: unhelpful legalism; a compensation minimisation approach; unsupportive conduct; delay in deciding claims; and poorly reasoned decisions.[83]

As far back as 1999, the Ombudsman noted:

> the compensation mechanisms … can be interpreted broadly enough to enable agencies to pay compensation in all cases where they believe it is warranted, or narrowly enough to exclude any request, depending on the agency's approach to compensation generally or in individual cases.
>
> … [W]e believe agencies could provide compensation more often than they do, by adopting a more flexible, customer focused approach based on a broad interpretation of the powers available to them and by reference to standards they set themselves, for example, in their service charters.[84]

Those concerns continue to be relevant today. The public interest is arguably not served, due to a lack of visibility and transparency, where claimants must adhere to confidentiality requirements and waive their right to take legal action. Ultimately, the CDDA Scheme is limited by virtue of being treated as a de facto fault-based scheme, with the burden of demonstrating defective conduct and consequential detriment borne by the party least able to do so. Further, decisions under the CDDA Scheme are not amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, meaning that there are limited opportunities to seek to hold decision-makers accountable.[85]

Schemes under the PGPA Act

The PGPA Act is administered by the Finance Minister and provides for the provision of three distinct modes of discretionary financial assistance: waiver of debt or modification of payment terms;[86] set-off of debts owed to or by the government;[87] and act of grace payments.[88] Like the CDDA Scheme, these mechanisms are discretionary[89] and function as the remedial option of last resort.[90] That is to say the schemes are permissive; they enable,

81 Commonwealth Department of Finance, above n 62, [21]–[22].
82 Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration* (Report No 11, 2009).
83 J McMillan, 'Future Directions 2009 — The Ombudsman' (2010) 63 *AIAL Forum* 13.
84 Commonwealth Ombudsman, '*To Compensate or Not to Compensate?' Report under s 35A of the Ombudsman Act 1976* (1999).
85 Commonwealth Department of Finance, above n 62, [93].
86 *Public Governance, Performance and Accountability Act 2013* (Cth) s 63
87 Ibid s 64.
88 Ibid s 65.
89 Commonwealth Department of Finance, above n 36, [1].
90 Ibid [3], [28].

but do not oblige, decision-makers to approve a request made under the PGPA Act.[91] Each request to the Finance Minister for discretionary financial assistance is considered on its individual merits, is decided at the discretion of the decision-maker and, once decided, does not establish a precedent for other requests.[92]

Section 63 of the PGPA Act enables the Finance Minister to authorise, on behalf of the Commonwealth, the waiver of an amount owing to the Commonwealth or the modification of the terms and conditions on which an amount owing to the Commonwealth is to be paid to the Commonwealth.[93] The authorisation of a waiver by the Minister may be made either unconditionally or on the condition that the person agrees to pay an amount to the Commonwealth in specified circumstances.[94] The discretion conferred by s 63, although broad,[95] is 'not free of constraint'.[96] It is limited, to a certain degree, by the considerations provided in the Discretionary Payment Schemes Guide, including the circumstances in which a debt is unlikely to be waived.[97] These include:

- debts that have been established by a judicial decision of a court, which are separate from the decisions of the executive arm of the Australian Government;
- debts owed to the Commonwealth that will be paid on to third parties;
- debts that have arisen through deliberate fraudulent or other illegal actions;
- requests submitted by companies on the grounds of financial hardship; and
- where an amount owing to the Commonwealth is not certain or ascertainable.[98]

Exercise of the discretionary powers to waive or modify a debt owed to the Commonwealth is also subject to a requirement[99] that an accountable authority of a non-corporate Commonwealth entity must pursue recovery of each debt for which the accountable authority is responsible.[100] There may be some reluctance to waive a debt using powers under the PGPA Act, since doing so extinguishes the debt owed to the Commonwealth for all time and the matter cannot be reconsidered if the claimant's financial situation improves in the future.[101]

91 Ibid [8], [33]. See *Pearce v Minister for Finance* [2020] FCCA 1291.
92 Commonwealth Department of Finance, above n 36, [1]. This is comparable to the way in which tribunal decisions are made, although it has long been suspected that demands for consistent and predictable decision-making lead tribunals to impose to 'an informal de facto system of precedent': JA Farmer, *Tribunals and Government* (London, Weidenfeld and Nicolson, 1974) 174.
93 *Public Governance, Performance and Accountability Act 2013* (Cth) s 63(1). The Minister must consider the circumstances in which the debt arose and any adverse consequences which the claimant alleges will arise from enforcement of the repayment obligation: *Stirling v Minister for Finance* [2017] FCA 874 [46].
94 *Public Governance, Performance and Accountability Act 2013* (Cth) s 63(3).
95 See generally *'CF' and Department of Finance* [2014] AICmr 73 [21].
96 *Stirling v Minister for Finance* [2017] FCA 874 [45].
97 Commonwealth Department of Finance, above n 62, [36]. See generally *Stirling v Minister for Finance* [2017] FCA 874 [45].
98 Commonwealth Department of Finance, above n 36, [36].
99 *Public Governance, Performance and Accountability Act 2013* (Cth) s 63(2).
100 *Public Governance, Performance and Accountability Rule 2014* (Cth) r 11.
101 Boughey, Rock and Weeks, above n 5, 306.

Greater flexibility is offered under s 64 of the PGPA Act, which gives the Finance Minister the discretion to set off part or all of an amount owed to the Commonwealth by a person against an amount owed to that person by the Commonwealth.[102] This discretion is subject to any requirements in the Public Governance, Performance and Accountability Rules and the necessity that any payment owed by the Commonwealth be neither rendered inalienable by a law of the Commonwealth nor unable to be assigned.[103]

Section 65 of the PGPA Act gives the Finance Minister or their delegate power to authorise in writing one or more payments to a person if the Minister or delegate 'considers it appropriate to do so in special circumstances'.[104] While neither of the key terms in this provision — 'special circumstances' and 'appropriate' — is defined in the PGPA Act,[105] the Discretionary Payment Schemes Guide provides a number of examples of special circumstances sufficient to justify an act of grace payment, including:

- an act of a non-corporate Commonwealth Entity has caused an unintended or inequitable result to the individual seeking payment;
- Commonwealth legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on the claimant's circumstances, and those circumstances were:
    - specific to the claimant;
    - outside the parameters of events for which the claimant was responsible or had the capacity adequately to control; or
    - consistent with what could be considered to be the broad intention of the relevant legislation; and
- the matter is not covered by legislation or specific legislation or policy, but the Commonwealth intends to introduce such legislation or policy, and it is desirable in a particular case to apply the benefits of the relevant policy retrospectively.[106]

In addition, the Discretionary Schemes Payment Guide describes the circumstances in which act of grace payments will generally not be approved. These include circumstances where:

- the proposed payments would have the effect of supplementing capped payments set by other specific legislation, in circumstances where that legislation expresses the clear intention that particular payment levels cannot be exceeded in any circumstances;[107]

102 *Public Governance, Performance and Accountability Act 2013* (Cth) s 64(1).
103 Ibid ss 64(1A)–(2).
104 Ibid s 65(1).
105 But see *Toomer v Slipper* [2001] FCA 981 [22]–[32]; *Dennis v Minister for Finance* [2017] FCCA 45.
106 Commonwealth Department of Finance, above n 62, [10].
107 Ibid [12].

- the proposed payments would have the effect of establishing a payment scheme to apply to a group of individuals, without considering the merits of their requests on an individual basis;[108] and
- where the claimant's sole assertion is that it is unfair that they have been historically ineligible to receive a benefit for which a person in similar circumstances would not be eligible, or where the claimant was historically eligible for a payment but is now ineligible due to a change in the criteria.[109]

The Discretionary Payment Schemes Guide also specifies that act of grace payments will not, as a matter of practice, be made:

- when a request has arisen from private circumstances outside the sphere of Commonwealth administration, there has been no involvement of an agent or non-corporate Commonwealth entity of the Commonwealth and the matter is not related to the impact of Commonwealth legislation;
- in respect of a matter that relates solely to the involvement of corporate Commonwealth entities which have a separate legal identity to the Commonwealth;
- to compensate a person or body for a debt owed to the Commonwealth; or
- to compensate a person for a loss arising from a judicial decision not involving the executive arm of government.[110]

The reasoning behind these points is that act of grace payments must be made from money appropriated by the Parliament.[111]

It is almost impossible to anticipate the situations in which such payments will be warranted. In consequence, the discretion vested in the Minister to grant or refuse to grant relief under s 65 is 'obviously broad'.[112] Further, as there are no criteria prescribed by statute in relation to the assessment of a claim for an act of grace payment, the matters to be taken into account and the weight to be given to the evidence as to those matters are generally for the decision-maker to determine.[113]

If a claimant is dissatisfied with the decision, they may lodge a complaint with the Commonwealth Ombudsman, seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* or (if relevant new information or a serious factual error is identified) request a reconsideration of the decision.[114] Applicants inevitably face difficulties in seeking judicial review over decisions made under the PGPA Act. For example, the court cannot consider the circumstances which might have led to a benefit being denied where they are relevant only to the merits of the applicant's case. The narrowness of judicial review's application can lead to imperfect results. Justice Heffernan indicated in *Pearce*

108 Ibid.
109 Ibid [14].
110 Ibid [13].
111 Ibid [13]; *Public Governance, Performance and Accountability Act 2013* (Cth) s 65(1), note 2.
112 *Dennis v Minister for Finance* [2017] FCCA 45 [41].
113 *Collins v Department of Finance and Deregulation (No 3)* [2012] FMCA 860 [125].
114 Discretionary Payment Schemes Guide, above n 62, [15].

v Minister for Finance (*Pearce*) that judicial review will often be the wrong tool for the job of achieving fairness:

> The applicant has a deeply heartfelt grievance at the chain of circumstances that resulted in her not having received [a parental leave payment] after the birth of her first child. It is most unfortunate that she did not. Given the fact that the [payment] was readily available to parents all over the country in a similar position to the applicant and her husband, and given the vast amounts of money presumably expended by the Commonwealth under the scheme to benefit parents, her dissatisfaction is understandable. *That is not the test on judicial review* and it does not, given the unfettered discretion to approve act of grace payments, mean that the Delegate exercised her power improperly, made an error of law or made a decision that was otherwise contrary to law.[115]

While we take issue with the words 'unfettered discretion', a notion unknown to Australian law,[116] his Honour's point is understandable: the discretion granted to the Minister's delegate under s 65(1) of the PGPA Act is so broad that it is in most circumstances extremely difficult to find a ground of judicial review that will be breached.[117] Appeals to considerations of policy and fairness are doomed to fail. This fact does not make those arguments bad, but it may indicate that they are being made in the wrong forum.

Equivalent state and territory schemes

Australian jurisdictions have taken their own steps to establish discretionary compensation schemes providing redress for maladministration:[118]

- In New South Wales, ministers are empowered by soft law instruments to make ex gratia[119] and act of grace payments,[120] the former being non-statutory and non-delegable and the latter statutory and delegable. Ex gratia payments may not be made in respect of matters remediable through legal proceedings.
- In Queensland, legislative provisions with a similar effect to the waiver and act of grace sections in the PGPA Act allow a government entity's accountable officer[121] to 'write off losses' and 'authorise special payments' from departmental accounts.[122] The definition of special payments includes 'ex gratia expenditure and other expenditure that is not

115 *Pearce v Minister for Finance* [2020] FCCA 1291 [40] (emphasis added).
116 It has been suggested that 'the very thought of it will induce a rash in a traditional administrative lawyer': Aronson, Groves and Weeks, above n 11, 116.
117 But see M Groves, 'The Return of the (Almost) Absolute Statutory Discretion' in J Boughey and LB Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 129.
118 Greater detail on state and territory schemes can be found in Boughey, Rock and Weeks, above n 5, 313–21.
119 New South Wales Treasury, *Treasury Circular TC11-02: Ex Gratia Payments* (2011) <https://www.treasury.nsw.gov.au/sites/default/files/pdf/TC11-02_Ex_Gratia_Payments.pdf>. This document was reviewed in 2019.
120 New South Wales Treasury, *Treasury Circular TC19-10: Statutory Act of Grace Payments* (2019) <https://www.treasury.nsw.gov.au/sites/default/files/2019-12/TC19-10%20%20Statutory%20Acts%20of%20Grace%20Treasury%20Circular%202019.pdf>.
121 *Financial Accountability Act 2009* (Qld) s 65. A department's accountable officer is defined in *Public Service Act 2008* (Qld) s 14 and *Financial Accountability Act 2009* (Qld) s 65(2).
122 *Financial Accountability Act 2009* (Qld) s 72(1)(a) and (b).

under a contract'.[123] The discretion to make a 'special payment' can be exercised only 'with the approval of the Governor in Council'.[124]

- South Australia's Treasurer has powers under the *Public Finance & Audit Act 1987* (SA) s 41 to issue instructions about financial matters and has done so with relation both to ex gratia payments[125] and debt waivers.[126] The latter is a more detailed document, because it interacts with legislation to a greater degree than the program for ex gratia payments. Payments require ministerial authorisation, regardless of their amount, although payments over $10,000 must be approved by the Treasurer.[127] The instructions on waiver that public authorities must ensure that they 'aim to recover all amounts owing to the authority' as debts.[128] Such debts as are written off or waived must be recorded along with considerations such as the reason for not pursuing the debt in full and what recovery action was undertaken.[129]

- Although there are subject-specific examples of each discretion, Tasmania has no general statutory provisions for making ex gratia payments or waiving debts, the closest being ss 13 and 14 of the *Financial Management and Audit Act 1990* (Tas).[130]

- Victoria's policy on the disclosure of ex gratia expenses by public bodies[131] is broadly drafted to include expenses in the nature of compensation for damages, personal injury or injustice; write-offs and waivers of debts; and voluntary payments.[132] It supposes that the government has the legislative power to make such payments.[133]

- Western Australia's capacity to make payments appears to be broader than the equivalent power at Commonwealth level.[134] There have been indications from government that such payments are made under prerogative powers and are not intended to be wholly compensatory. Nonetheless, s 80(1) of the *Financial Management Act 2006* (WA) allows for the Treasurer to authorise payments in special

123 *Financial Accountability Act 2009* (Qld) sch 3. However, the statute is short on detail about the function of such payments and how they are to be made.

124 *Financial Accountability Act 2009* (Qld) s 72(2). See the equivalent Commonwealth provision: *Public Governance, Performance and Accountability Act 2013* (Cth) s 65(1).

125 Department of Treasury and Finance, South Australia, *Treasurer's Instruction 14: Ex Gratia Payments* (2015) <https://www.treasury.sa.gov.au/__data/assets/pdf_file/0020/232094/TI-14-Ex-gratia-payments.pdf>.

126 Department of Treasury and Finance, South Australia, *Treasurer's Instruction 5: Debt Recovery and Write Offs* (2015) <https://www.treasury.sa.gov.au/__data/assets/pdf_file/0018/36306/TI-05-Debt-Recovery-and-Write-Offs-Jan-2015.pdf>.

127 Department of Treasury and Finance, South Australia, above n 125, [14.4].

128 Department of Treasury and Finance, South Australia, above n 126, [5.7].

129 Ibid [5.25].

130 These sections allow the Treasurer to authorise expenditure from the Consolidated Fund and the Special Deposits and Trust Fund in accordance with an Appropriation Act.

131 Victorian Government, FRD 11A: Disclosure of Ex Gratia Expenses (2013) <http://www.dtf.vic.gov.au/Publications/Government-Financial-Management-publications/Financial-Reporting-Policy/Financial-reporting-directions-and-guidance>. Public bodies are defined in s 3 of the *Financial Management Act 1994* (Vic).

132 Ibid [6.6].

133 For writing off a debt, *Financial Management Act 1994* (Vic) s 55. Other Victorian legislation supports making ex gratia payments for a variety of specific reasons, although these payments do not seem to be the ones anticipated by the general terms of the disclosure policy.

134 Including that it has made at least one payment in relation to a matter in which the claimant retained legal rights: see Boughey, Rock and Weeks, above n 5, 317–18.

circumstances.[135] The legislation's strict approach to the matter of ex gratia payments is somewhat at odds with the state's history of approving payments: applications for ex gratia and act of grace payments are assessed by the State Solicitor; and payments may be recovered as a debt due to the state in a court of competent jurisdiction in the event of breach of any condition subject to which they were made.[136]

- The ACT has a legislative basis for making act of grace payments and waiving debts.[137] The Treasurer may, as in other jurisdictions, make an act of grace payment if it is 'appropriate to do so because of special circumstances' and the payment 'would not otherwise be authorised by law or required to meet a legal liability'.[138] The Territory's waiver powers also fall to the Treasurer and must be exercised in writing.[139]

- The Northern Territory has statutory grants of power to make ex gratia payments and waive or write off debts. The authority to make ex gratia payments comes with the standard features: the Treasurer may authorise a payment if satisfied that it is proper to do so by reason of special circumstances.[140] The Treasurer also has the discretion[141] to write off losses of money or property and to waive an amount owed or the recovery of property.

None of these approaches is identical to any other but they are all sufficiently similar to allow us to conclude that there is a broad national approach to the provision of compensation in the absence of legal rights.

Judicial review challenges

As we have noted, a claimant who is disappointed by the decision with regard to their application for a compensation payment may approach the Ombudsman,[142] having first sought internal review from the department or agency responsible for the decision. The Ombudsman's support for a claimant's case is not a certainty.[143] The judicial review options are more constrained. For example, only decisions made under the PGPA Act can be challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which is limited to reviewing statutory instruments.[144] A challenge to a decision

135 The authority to approve a payment under this section is limited by the regulations to claims below $250,000: *Financial Management Regulations 2007* (WA) r 8. Claims for amounts in excess of that sum must be approved by the Governor: *Financial Management Act 2006* (WA) s 80(2).

136 *Financial Management Act 2006* (WA) s 80(3).

137 Respectively, the *Financial Management Act 1996* (ACT) ss 130 and 131.

138 Ibid s 130(1).

139 Ibid s 131(1).

140 The special circumstances must have arisen in the course of the business of the government of the Territory and there must be money lawfully available to make the payment: *Financial Management A*ct (NT) s 37(1) and (2).

141 Under the *Financial Management Act* (NT) s 35.

142 For CDDA claims: Commonwealth Department of Finance, *Resource Management Guide No 409: Scheme for Compensation for Detriment caused by Defective Administration* (2019), [4]; and see [28], [91]–[92]; for act of grace payments: Commonwealth Department of Finance, above n 36, [15]; and requests for waiver of debt, ibid [37].

143 See *LRKR and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 750 [9].

144 There have been few cases in which the courts have been asked to review the decisions of the Minister of Finance in respect of the act of grace payments.

about a claim under the CDDA Scheme would probably be made under s 39B(1) of the *Judiciary Act 1903* (Cth).[145] In either event, these decisions are discretionary and the potential remedies are no more than procedural. An applicant for judicial review would in practice face a difficult task in convincing the court that the challenged decision was not only less than preferable but affected by either an error of law or a jurisdictional error.[146]

The success of discretionary compensation schemes

While there is evidence showing that the amounts paid out under compensation schemes by certain Commonwealth agencies (for example, the Department of Defence and the Australian Taxation Office) have generally trended upwards over the past five to 10 years, there are insufficient data to support a conclusion that discretionary compensation schemes have been an absolute success. There are certain facts we do not know. For example, in 2015, the Department of Human Services declined to provide key statistics of its administration of the CDDA Scheme over a 10-year period.[147]

On the data available, it is arguable that the numbers of approved claims, versus the number of claims received and the amounts paid, are for relatively small amounts when considered against the volume of business conducted by the various government agencies. For example, in 2018, the Department of Health paid the relatively small sum of $1,000 in act of grace payments.[148] An example of an agency which generally receives a large bulk of the CDDA Scheme claims is Services Australia through its Centrelink, Medicare and Child Support programs.[149] In 2018–19, Services Australia received 1,414 compensation claims and approved 417 customer compensation claims under the CDDA Scheme, which represented 34 per cent of all claims determined under the CDDA Scheme.[150] The data in the tables at the end of this article highlight some key statistics which are publicly available.

Compensation schemes have been viewed as a mechanism which promotes settlement of a dispute without the need for civil litigation, although the approval of a claim for compensation is not necessarily a settlement of a legal dispute.[151] The government agency responsible for approving a compensation payment often wields greater bargaining power than if it were not fearful of litigation. However, claimants may lack the financial capacity to pursue civil litigation against a government agency, even if they had legal grounds to do so (which the CDDA Scheme requires that they must not). As a result, while the amount of financial compensation under compensation schemes is generally less that could be achieved in

145 Commonwealth Department of Finance, above n 62, [93].
146 See Boughey, Rock and Weeks, above n 5, 308–9.
147 Relying on a practical refusal reason under the *Freedom of Information Act 1982* (Cth): *Bradley Bartlett and Department of Human Services* [2015] AICmr 8 [7]–[8].
148 Australian Government Department of Health, *Annual report 2018–19*, 206.
149 Cornall, above n 73, 31.
150 Services Australia, *Annual report 2018–19*, 305.
151 *Cf Badraie v Commonwealth of Australia* (2005) 195 FLR 119; and see G Weeks, above n 7, 258–9.

litigation, the two methods of obtaining redress should be understood as operating parallel to each other without ever actually touching.[152]

The CDDA Scheme has been reviewed on several occasions: by the Ombudsman's office in 1999, the Australian National Audit Office in 2003–04, the Department of Finance in 2004–05, and again by the Commonwealth Ombudsman in 2009.[153] However, with a sole exception,[154] it has not been reviewed for some time and a comprehensive review is arguably overdue.

Legal standing of compensation schemes

The constitutionality of statutory compensation schemes turns on whether there is Commonwealth legislation that authorises the making of compensation payments and whether such payments are supported by a constitutional head of power.[155] The analysis of the High Court in *Williams No 2* was limited to a single scheme for Commonwealth expenditure, which was held to be invalid. The fact that that case did not address the Commonwealth's legislative approach[156] to ensure the validity of other additional schemes left the validity of discretionary schemes in general open to doubt. *Williams No 2* did, however, provide some guidance regarding the validity of the other schemes by saying that the legislation 'should be read as providing power to the Commonwealth to make, vary or administer arrangements or grants *only where it is within the power of the Parliament to authorise* the making, variation or administration of those arrangements or grants'.[157]

Even if discretionary compensation schemes were found to be invalid, it is arguable that the government could have some capacity to make ex gratia payments,[158] through non-statutory mechanisms for compensation and remedies. In *R v Criminal Injuries Compensation Board, Ex parte Lain*, which established that a compensation payment mechanism 'makes lawful a payment to an applicant which would otherwise be unlawful',[159] the Board offered a victim of crime an ex gratia payment, on condition that the applicant did not have a right to sue for

152 We note two related issues. First, evidence requirements may differ between compensation schemes and general litigation. The assessment of a compensation claim lacks the rigour of an open fact-finding process inherent in litigation. Further, successful claimants are often subject to comprehensive non-disclosure and release deeds which shield government agencies from public accountability. Secondly, the availability of compensation under the CDDA Scheme is often subject to the existence of any statutory provisions protecting the Commonwealth (and its officers) from civil liability, and query whether executive schemes such as the CDDA Scheme are effective in counterbalancing the operative breadth of such provisions: see eg *Biosecurity Act 2015* (Cth) s 644.

153 Commonwealth Ombudsman, above n 82.

154 The independent review of the ATO and Small Business: Cornall, above n 73.

155 *Williams No 1* (2012) 248 CLR 156.

156 Financial Framework Legislation Amendment Bill (No 3) 2012 (Cth), which amended s 32B of the *Financial Management and Accountability Act 1997* (Cth). The provisions now appear in the *Financial Framework (Supplementary Powers) Act 1997* (Cth).

157 *Williams (No 2)* (2014) 252 CLR 416, 457. As outlined above, the constitutional validity of discretionary schemes is unlikely to be challenged and those schemes will probably remain legal de facto.

158 Weeks, above n 7, 264.

159 *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] QB 864, 888.

that sum.[160] It was held that the Board's exercise of prerogative power was not absolutely immune from judicial review.[161]

The Commonwealth Ombudsman concluded in 2009 that 'the survival of the CDDA Scheme probably depends upon it remaining an administrative scheme under which decisions are not routinely subject to court or tribunal review'.[162] However, discretionary compensation schemes involve rule-based decision-making which is amenable to judicial review[163] and may warrant judicial supervision. Nonetheless, judicial supervision of decisions whether or not to make discretionary compensation payments have been undertaken by Australian courts with notable reserve.

Given that the CDDA Scheme, PGPA Act schemes and other ex gratia payment mechanisms are all wholly discretionary, a disappointed claimant has limited review options. The CDDA Scheme specifically is revocable at will, creates neither legal rights nor obligations,[164] and has a history of being treated as soft law. These gaps show that, in the absence of a legislative program, compensation payments are not made on a stable and reliable basis of rights — something that claimants do not always expect, even when they have access to such schemes.

In contrast, the Defence Abuse Reparation Scheme[165] (DARS) provides a mechanism by which a reparation payment may be made by the Department of Defence to persons who may have suffered abuse while employed in Defence. Notably, the reparation payments under DARS are deemed not to be compensation payments but an acknowledgment by the Australian Government, Department of Defence and Australian Defence Force that abuse is wrong and the mismanagement by Defence is unacceptable.[166] The payment does not constitute an admission of liability by the Commonwealth and there is no requirement to meet a legal burden of proof.[167] The legal rights of the recipient are not affected,[168] including their right to access other entitlements.

What scope for improvement?

We consider that there is substantial scope for improvement to the way compensation is provided through statutory and executive schemes. These improvements broadly fall into the categories of better information provision and better record-keeping. As we have noted,

160 This precedent has survived the decline of the 'Ram doctrine', which previously held in England that the state had the power to spend money in whatever manner it deemed fit and that ministers could exercise residual power outside of statute or prerogative: Boughey, Rock and Weeks, above n 5, 291. Australia's constitutional arrangements meant the 'Ram doctrine' was never relevant here.

161 This was met with the High Court's qualified approval in *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

162 Commonwealth Ombudsman, above n 82, [2.54].

163 Administrative Review Council, *Federal Judicial Review in Australia* (2012) [2.40].

164 *Smith v Oakenfull* (2004) 134 FCR 413, 418.

165 Australian Government, *Defence Abuse Reparation Scheme Guidelines* (2017) (DARS). This scheme is administered by the Defence Abuse Response Taskforce established by the Australian Government in November 2012.

166 Ibid [1.5.2].

167 Ibid [1.6.1].

168 Ibid [1.6.2].

claimants (successful or otherwise) have limited options to challenge decisions made under compensation schemes. While this is so for several reasons, several should be addressed.

First, the amount of information available to the public about compensation schemes can vary wildly. As such, individuals who might fit within a compensation scheme may find it more difficult to obtain, or to challenge a decision about why it has been denied, when they have access only to incomplete information about how and why the relevant decision was made. Secondly, as agencies are generally responsible for their own formal internal review mechanisms,[169] there is considerable scope for agencies' fact-finding processes to be somewhat opaque and even for agencies to refuse to reconsider a claimant's case,[170] subject to the requirements of procedural fairness. Finally, the capacity for courts to review compensation decisions is narrow. This is, of course, a feature of judicial review generally,[171] but there is a distinction to be drawn between judicial review of a decision which has been exposed to rigorous merits review, such as in tribunal proceedings, and one which has faced only the variable rigour of internal review. This fact increases the importance of making initial decisions about compensation properly.

It is over a decade since the Commonwealth Ombudsman reported on the effectiveness of Australian discretionary compensation schemes and made recommendations for their improvement in *Putting Things Right: Compensating for Defective Administration.*[172] The report identified that:

> It is important that members of the public are aware of their options and the remedies available to them when they believe they have been adversely affected by government administrative action.[173]

The Ombudsman correctly pointed out that this is so because both the efficiency and quality of agency decision-making 'will be improved if agencies assist claimants by explaining the process that will be followed, the factors that will be considered, and the information required to decide a claim'.[174] As a corollary to the obvious disadvantage to claimants, the failure to publish sufficient information about a discretionary compensation scheme may result in disadvantage to the agency, since 'if a person is not made aware of unpublished material that affects them, the agency cannot apply that material in a way that prejudices the person'.[175]

As stated above, the comprehensiveness and accuracy of information provided about compensation schemes varies greatly between agencies. We consider that, as recommended in *Putting Things Right*, there should be greater consistency and completeness in the information that is provided to claimants by agencies. To that end, we endorse the Ombudsman's recommendation of a comprehensive claim form with supporting instructions (designed to elicit relevant information and minimise the submission of irrelevant information or claims), subject only to minimal and necessary amendment by each agency.

169 Cf the few examples where internal review mechanisms are stipulated by legislation: eg *Freedom of Information Act 1982* (Cth) Pt VI.
170 See eg *Smith v Oakenfull* [2004] FCA 4.
171 The classic statement of the limitations facing courts was made by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6
172 Commonwealth Ombudsman, above n 82.
173 Ibid [2.5]–[2.6].
174 Ibid [2.7].
175 Ibid [2.6]. See also *Freedom of Information Act 1982* (Cth) s 10.

The inadequacy of current data collection processes is another area of potential improvement. There are two main reasons why it is important to collect and (where appropriate) publish data on compensation schemes: to maintain the accountability and transparency of government agencies; and to facilitate the review of decisions to grant (or refuse to grant) a request for compensation by an internal reviewer or by an external body such as the Ombudsman.

The paramountcy of accountability and transparency in the administration of discretionary compensation schemes was considered by the UK Law Commission in its 2010 report *Administrative Redress: Public Bodies and the Citizen*. The Law Commission identified that:

> Clear and open governance is the cornerstone of any democratic system. This includes the requirement that the way in which public money is spent should be outlined openly and clearly.[176]

This recognised the importance of data collection in the interests of accounting to Parliament for the way its resources are distributed and being transparent to citizens,[177] and recommended that (subject to the completion of a pilot study) HM Treasury — the relevant government body — ensure the costs of compensation to central government bodies were regularly collated and published. In making its recommendation, the Law Commission noted that compensation data was 'already being generated'[178] and that collecting and reporting on this data would allow government and other public bodies to improve service delivery and act in the most economically efficient manner.[179] Relevantly, the availability of this data would allow for an assessment of repeat payments 'where changes to behaviour do not occur and instead a practice develops of paying compensation rather than changing service delivery'[180] and would show where timely changes to service delivery would have been the better practice in purely economic terms.[181] As we have noted,[182] the opposition to the Law Commission's project was both strong and unprecedented,[183] with the result that the Law Commission thereafter restricted its work to an analysis of Ombudsmen[184] rather than saying anything further about state liability.

We consider that similar issues arise in the Australian context. Although some statutory data collection and publication requirements exist, they are minimal and the amount of data that is collected and published in practice varies greatly from agency to agency. Where that data has been collected, it can be difficult to access by interested members of the public.[185] As such, it is not always possible to identify the deficiencies in, or to suggest improvements to, a particular agency's data collection practices and thereby hold that agency to account. This obviously limits the ability of agencies to improve service delivery and act economically efficiently by reducing any recurring errors. In addition, as the Ombudsman has pointed

176 Law Commission, *Administrative Redress: Public Bodies and the Citizen* (2010) [4.80].
177 Ibid [4.62].
178 Ibid [4.77]
179 Ibid [4.64], [4.67].
180 Ibid [4.68]
181 That is not to say that the Law Commission's recommendations were accepted by Parliament: Justin Leslie, 'A Response to the Law Commission "Debacle"' (2013) 18(1) *Judicial Review* 42, 42.
182 See n 17 above.
183 Law Commission, above n 176, [1.3].
184 See Law Commission, *Public Services Ombudsmen* (2011).
185 See eg *Bradley Bartlett and Department of Human Services* [2015] AICmr 8; *'LW' and Department of Human Services* [2017] AICmr 65.

out, poor record-keeping has an impact on agency decision-making and can easily lead to unjust outcomes:

> If recordkeeping is poor, it is not clear how a decision was reached. This makes reviews of the decisions more difficult, whether internally or by an external body such as the Ombudsman. Poor recordkeeping also makes it difficult for an agency to assess the consistency of decision-making on similar cases.[186]

By way of example, a member of the Administrative Appeals Tribunal considered the difficulty of reviewing a decision made under the CDDA Scheme by the Department of Families, Housing, Community Services and Indigenous Affairs, in which:

> The documents … that are before me contain errors and omissions [and] it is not clear whether Mr and Mrs Hall were provided with procedural fairness in the CDDA decision-making process. It appears that Mr Hall provided information to the CDDA decision maker by telephone on 8 November 2010, but it is not clear on the present evidence whether he and Mrs Hall were sufficiently informed about the issues and the decision-making process in advance, or whether they were given an adequate opportunity to present their case … I also note that the text of the CDDA decision does not reveal whether Mr Hall was invited to put additional evidence or to test evidence that was before the decision-maker.[187]

Noting that its review jurisdiction did not extend to the Department's decision to refuse to make a payment under the CDDA Scheme, the member nonetheless observed that 'circumstances such as those arising in this case highlight the desirability of providing a mechanism for redress within the legislative framework, with attendant rights of review *to enable relevant information to be obtained and evidence to be thoroughly tested'.*[188]

Despite the suggestion that decisions made under discretionary compensation schemes should be reviewable by an external body such as a court or tribunal,[189] for the reasons we have stated above, we do not consider it appropriate for courts or tribunals to take on a greater role in reviewing decisions to grant (or refuse to grant) compensation under an executive scheme. We recognise that discretionary compensation schemes, on the whole, are systems which function on goodwill and that there are some persuasive arguments in favour of greater supervision.[190] Nonetheless, as stated above, we consider it is more appropriate that government bodies improve their own decision-making processes (by way of greater information provision and information gathering). Further, the Ombudsman is highly effective, and its recommendations are more often than not adopted by agencies,[191] and there are fragmentation/resource management issues that arise with the addition of another statutory review body.

186 Commonwealth Ombudsman, *Executive Schemes* (2009) [2.29].
187 *Hall and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 111 [15]–[16].
188 Ibid [17] (emphasis added).
189 See eg *Hall and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 111.
190 See eg ibid [14]–[17].
191 This is a fact that has been observed over many years: see now Commonwealth Ombudsman, *Annual Report 2018–19* (2019) 30–2. It is not a universal principle: see eg J Boughey, 'Administrative Law's Impact on the Bureaucracy' in Weeks and Groves (eds), above n 40, 93.

Conclusions

Discretionary compensation undoubtedly occupies an important place in administrative law, as it draws on analogous principles to recognise where loss has been suffered as a result of maladministration; address elements of accountability, moral obligations and natural justice; and then award some monetary remedy. Theoretically, effective compensation achieves a win–win outcome for a private person and a public body by eliminating the need to establish liability and allowing parties to bypass the courts.

However, we consider the Australian approach to be underdeveloped. While the existing Commonwealth schemes have been in place for a number of years, they are arguably stagnant due to lack of comprehensive review and reform, and tend towards a low profile, excessive legalism, compensation minimisation, and limitation on judicial review. There is more flexibility in schemes that do not deal specifically with maladministration, but we consider that these 'safety nets' could be made more robust. There is evidence that recommendations of the Ombudsman can be very influential and the Ombudsman is uniquely suited[192] to address maladministration. Expanding the involvement of the Ombudsman could prove effective for claimants, but, even so, there is still substantial room for development and improvement.

192 Weeks, above n 28.

Table 1: Year-on-year snapshot of Australian Taxation Office total CDDA Scheme payments

	2013–14	2014–15	2014–16	2014–17	2014–18	2014–19
Number of claims received	216	192	160	190	171	182
Number of claims finalised	219	201	160	192	166	167
Number of approved claims	79	77	59	96*	76	79
Total amount paid	$841,754	$738,402	$317,502	$801,305	$409,035	$2,271,135
Average payment	$10,655	$9,590	$3,414	$8,435	$7,575	7,496
Median payment	$300	$484	$424	$500	$495	193

* Including additional payments made as a result of a streamline claim process.

Table 2: Year-on-year snapshot of Department of Defence total CDDA Scheme payments

2012	2013	2014	2015	2016	2017	2018	2019
$464,000	$296,000	$745,000	$762,000	$1,623,000	$2,623,000	$5,289,000	$1,118,000

Table 3: Summary of compensation statistics of various agencies, 2018–19

	Act of grace payments	CDDA Scheme payments
Australian Taxation Office	$613,000 on act of grace payments in 2019.	$745,000
Department of Defence	$1,235,000 on act of grace payments in 2018. $253,000 on act of grace payments in 2019.	$5,289,000 on CDDA Scheme payments in 2018. $1,118,000 on CDDA Scheme payments in 2019.
Department of Education	$5,249,000 on act of grace payments in 2018. $5,054,000 on act of grace payments in 2019.	N/A
Department of Finance	$2,747,000 on act of grace payments in 2018–19.	N/A
Department of Foreign Affairs and Trade		19 claims made under the CDDA Scheme with respect to Department of Foreign Affairs and Trade activities in 2018–19.
Department of Health	$1,000 on act of grace payments in 2018.	N/A
Department of Home Affairs	$452,000 on act of grace payments in 2018. $44,000 on act of grace payments in 2019.	N/A
Services Australia	N/A	417 compensation claims approved under the CDDA Scheme, of a total 1,414 compensation claims received in 2018–19.