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Government Liability: Principles and Remedies: Chapter 1

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Chapter 1

Introduction

[1.1] Government liability: introductory issues

The law is not a monolith. It includes various specialised fields, a fact that has long been recognised in Australian legal education.[1] Hence, every student leaves law school knowing the ways in which tort law is different from administrative law and equity from criminal law.[2] It is a shame that more do not graduate understanding the ways in which these subjects are the same, or more to the point, the ways in which they intersect and overlap. Students who go on to a career in legal practice quickly learn that there is very rarely such a thing as a case which is solely about property law, or which contains only questions of evidence law. Importantly for this book, we start with the proposition there has never been a case that is *only* about judicial review, nor will there ever be such a case.

Further, we accept that putting faith in labels is of limited utility where the ideas they contain are both much older than, and full of complexity that is apt to be hidden by, a new appellation.[3] While administrative law[4] and the law of torts,[5] for example, are relatively recent 'silo' headings within which writs and forms of action might be classified, collecting doctrines and remedies under the even broader headings of 'public law' and 'private law' is an even more recent development.[6] Not only do these more recently devised 'silos' of legal subject matter tend to intersect in their content, they are frequently themselves merely amalgamations of smaller topics. The reality of legal practice is that the legal silos, familiar to young lawyers from their time at law school, inevitably and rapidly collapse into one another. The law is not a monolith, but it does resemble a mountain range seen from afar: one cannot always tell where one peak ends and the next begins.

This book's main concern is government liability but, although its central focus is on obtaining remedies from public authorities, it is not an administrative law text.[7] Such a statement contains no paradox, since we have started from the proposition that government liability comes in a number of forms. The remedies to address government liability are also various. Each is a tool, designed to perform a specific and specialised task. Judicial review's remedies, considered in **Chapter 5**,

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[1] The Law Admissions Consultative Committee, chaired by Justice LJ Priestley of the NSW Court of Appeal, reported in 1992 on the minimum academic study requirements for a student to be admitted to legal practice; see now Legal Profession Uniform Admission Rules 2015, Sch 1. These minimum requirements took the form of essential law school subjects and have universally been known as the 'Priestley 11', despite such an appellation sounding like it is describing a cricket team.

[2] It has been said that the tendency of law school curricula to teach the subjects with which we are familiar initially developed for the benefit of only one category of people: the authors of textbooks. 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.

[3] Aronson described 'administrative law', 'judicial review' and 'public law' as 'unifying concepts': M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179 at 181. We take this to mean that they are labels which collect concepts together for convenience. There is no harm in that, provided we do not forget what the labels obscure.

[4] M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179 at 183–84.

[5] Prior to the middle of the 20th century, 'tort law was conceived of and practiced as a collection of unrelated writs': DW Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769 at 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.

[6] See JNE Varuhas, 'Taxonomy and Public Law' in M Elliott, JNE Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Hart Publishing, Oxford, 2018, 39 at 41. This is not altered by the fact that public law is becoming increasingly 'theorised'; see for example M Loughlin, *The Idea of Public Law*, Oxford University Press, Oxford, 2003; M Loughlin, *Foundations of Public Law*, Oxford University Press, Oxford, 2010; K Syrett, *The Foundations of Public Law: Principles and Problems of Power in the British Constitution*, Palgrave Macmillan, Basingstoke, 2011. We make no comment on the success of such attempts.

[7] At least not in the narrow traditional sense. In this regard, we adopt Allsop CJ's observation that speaking 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 (*House v R* (1936) 55 CLR 499) was a sentencing appeal to appreciate this proposition.

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.

are one such set of tools and they are adapted to perform a certain set of tasks.[8] They are extremely effective in specific circumstances but 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 beyond that. Further, they have developed from highly technical writs (whose legacy can still be observed to some extent today) but not from any foundation of principles or norms.[9]

Although administrative law is a relatively new invention,[10] the former 'prerogative writs' of certiorari, prohibition and mandamus[11] have a venerable history,[12] which was invested in the state Supreme Courts by analogy to the jurisdiction exercised by the Court of King's (or Queen's) Bench in England.[13] Gageler J has noted that the 'scope and incidents of that historical, inherited, supervisory jurisdiction were defined by the common law' but the 'statutory perpetuation of that former jurisdiction', for example in s 69 of the Supreme Court Act 1970 (NSW), 'does not alter its common law character'.[14] Seeking prohibition or mandamus against an officer of the Commonwealth subsequently became part of the basis for the High Court's jurisdiction to engage in judicial review under s 75(v) of the Constitution. The entrenchment of these remedies in both state[15] and Commonwealth[16] courts creates the illusion that they are not only important (which they are) but ubiquitous. A large part of that illusion is down to the fact that the entrenchment of these remedies took place prior to the development of the administrative state, the expansion of which showed up their limitations. Consequently, as we consider at length, there are many ways to challenge exercises of public power that are better for not being linked to that power's validity.

Judicial review remedies also include injunctions and declarations, which are considered in **Chapters 13 and 5** of this text, respectively. These remedies have links to equity and require only that there has been a breach of legality rather than a jurisdictional error.[17] Like the remedies of certiorari, prohibition and mandamus, they are essentially procedural in their operation but have a greater flexibility to their application.[18] By contrast, the three remedies which originated from writs operate to quash decisions made in excess of power (certiorari), to prevent continuing or threatened future excesses of power (prohibition) and to compel the performance of a public duty as yet unperformed (mandamus).[19] As any 'successful' applicant for judicial review either knows

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[8] The principles of judicial review liability are considered in **Chapter 4**, separately from judicial review's remedies in **Chapter 5**.

[9] M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179 at 185; S Gageler SC, 'Administrative Law Judicial Remedies' in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines*, Cambridge University Press, Victoria, 2007, 368 at 368.

[10] JNE Varuhas, 'Taxonomy and Public Law' M Elliott, JNE Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Hart Publishing, Oxford, 2018, 39 at 42–3.

[11] We omit the equally impressive history of habeas corpus, which is considered in detail elsewhere; see for example PD Halliday, *Habeas Corpus: from England to Empire*, Belknap Press of Harvard University Press, Cambridge, 2010; CC Crawford, 'The Writ of Habeas Corpus' (1909) 6 *Commonwealth Law Review* 23; M Groves, 'Habeas Corpus, Justiciability and Foreign Affairs' (2014) *New Zealand Journal of Public and International Law* 587.

[12] While the 'modern uses [of several writs] started to become reasonably recognisable' during the 17th century, certiorari's usage has evolved over the centuries: M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179 at 184.

[13] In relation to the Supreme Court of NSW, see Australian Courts Act 1828 (Imp) (9 Geo IV c 83), s 3.

[14] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 277 at [56].

[15] See especially the reasoning of the majority in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 578–81 [90]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[16] The joint judgment in the seminal case of *S157* stated that 's 75(v) introduces into the Constitution of the Commonwealth *an entrenched minimum provision of judicial review*': *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

[17] The practical difference can be observed in *Project Blue Sky v Australian Broadcast Authority* (1998) 194 CLR 355.

[18] See for example *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

[19] The operative focus of these remedies has changed over time, but their broad goal remains 'to regulate public power so that it is actually exercised as it ought to be in the public interest': JNE Varuhas, 'Taxonomy and Public Law' in M Elliott, JNE Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Hart Publishing, Oxford, 2018, 39 at 66.

or soon finds out,[20] obtaining judicial review remedies does not generally result in any better outcome than for the (usually statutory) decision-making process to start afresh and according to law. The 'successful' applicant does not get the substantive result from the court — say, having a licence or visa either granted or reinstated — that they *actually* want.[21] In that sense, judicial review needs to be understood as a remedial process of last resort.[22] An applicant's 'success', to maintain the sporting metaphor usual for adversarial processes, is in fact nothing more than judicial confirmation that they remain in the game and have not yet lost.

A further consideration is that obtaining judicial review remedies is far from simple, especially when compared to seeking review of the same issues before a tribunal. A quick look at the sheer physical size of the leading judicial review textbooks in countries whose law can be traced back to English roots establishes this point.[23] We note also the frequency with which these and similar texts are updated as an indication of a complex and constantly developing judicial review doctrine in each country, not to mention as prima facie evidence of the immense judicial review case load in (at least) Australian courts.[24] In Australia, part of the reason for the complexity of modern judicial review is that it has become almost entirely a question of whether a jurisdictional error has been made.[25] This is not the place to explore why the High Court is committed to jurisdictional error's continued importance in Australia decades after the concept was consigned to history in the UK and other jurisdictions.[26] The salient issue is that Australian judicial review is both detailed and highly structured. It is forbidding to applicants in a way that review on the merits is not.

It follows from the points raised above, and the content of **Chapters 4 and 5**, that remedies based on establishing invalidity are neither the only, nor the best, tools that one might use when seeking a remedy from a public authority. The greater part of this book is therefore dedicated to examining remedies for government liability that exist outside the context of judicial review.

[1.2] Remedies available against public authorities

We have deliberately given this book a broad scope but have resisted creating a list of remedial schemes and doctrines without conceptualising how they fit together. The following sets out the

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[20] See for example E Dunlop, J McAdam and G Weeks, 'A Search for Rights: Judicial and Administrative Responses to Migration and Refugee Cases' in M Groves, J Boughey and D Meagher (eds), *The Legal Protection of Human Rights in Australia*, Hart Publishing, Oxford, 2019 335, 348 (n 128).

[21] A landmark study, which is now getting old but has not been contradicted in the years since it was published, indicated that a surprisingly high number of applicants did in fact get the substantive result they wanted upon reconsideration following judicial review: R Creyke and J McMillan, 'Judicial Review Outcomes — an Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82.

[22] 'Regardless of whether one includes "public law" declarations and injunctions within a definition of "judicial review", it is clear that the principles underlying these remedies have often been vindicated in claims for other relief': M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed, Thomson Reuters, Sydney, 2017, [3.210]. In this sense, judicial review is not a last resort but could be either a condition precedent to obtaining other remedies (for example, damages for false imprisonment or restitution where a public authority has been enriched ultra vires) which depend on proof of invalidity or the lack of legal authority, or a method of counteracting a defence of acting with lawful authority by showing that the act was ultra vires the defendant; see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 144 [17]; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558.

[23] See for example PA Joseph, *Constitutional and Administrative Law in New Zealand*, 4th ed, Thomson Reuters, Wellington 2014; M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed, Thomson Reuters, Sydney, 2017; H Woolf et al, *De Smith's Judicial Review*, 8th ed, Sweet and Maxwell, London, 2018. The outlier is C Hoexter, *Administrative Law in South Africa,* 2nd ed, Juta Law, Cape Town, 2012, although the relative brevity of that book more probably relates to the skill of its author than to any lack of complexity in its subject matter.

[24] We would not go as far as Aronson to say that judicial review's 'existence might be taken for granted': M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179 at 179. However, we agree with his view of judicial review's dynamism, as opposed to being a slave to precedent: ibid at 180.

[25] It is true that certiorari also operates to correct non-jurisdictional errors of law on the face of the record: *Craig v South Australia* (1995) 184 CLR 163. However, the continued utility of that remedy has been doubted (persuasively) by Gageler J: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 277 at [55]–[83]. Given that this is not an issue that we expect to see resolved quickly, we will set it aside for the moment.

[26] For such a discussion, see J Boughey and L Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in M Elliott, JNE Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Hart Publishing, Oxford, 2018, 39 at 395.

remedies that will be considered in the remaining chapters and briefly sketches the ways that they relate to each other.

Many of this book's themes are introduced in **Chapter 2**, which discusses specifically the nature of the Crown and immunities which attach to it, but considers more broadly themes underlying the liability of public authorities. Some of the doctrine on this point developed when the Crown referred to the monarch personally.[27] However, the great preponderance of the law on this point uses 'the Crown' as a metaphor for other kinds of public decision-making. As a concept, it is imprecise and better expressed in other terms, but there is an argument that the liability of public authorities has never been susceptible of meaning that can be expressed easily. That has not changed markedly with the expansion of the administrative state in the 20th century. 'The Crown', understood as 'the state' rather than the person of the monarch, is involved in a vast number of interactions with the public, some in its broadly understood capacity as governor but others in an executive capacity. The latter is especially worthy of attention when it is remembered that, although it might be exercising powers broadly the same as those possessed by individuals, in doing so government exercises a degree of power far greater than any individual. This is a theme to which we return several times. Moreover, while there might once have been a sharply defined dichotomy separating public and private exercises of power, **Chapter 3** examines the extent to which government power is now exercised by private actors as a result of contracting out and privatisation. This raises policy concerns which this book will largely leave to one side in favour of dealing with the liability issues raised when government power is privately exercised. For one thing, this is an approach at odds with some of the Constitution's founding assumptions.[28]

[1.2.1] Statutory remedies

Schemes for providing remedies against public authorities appear in many statutes. This book generally considers those statutes in the context of other remedies.[29] There are, however, a number of chapters dedicated to remedies and remedial structures with specific application to public authorities. These include tribunals (**Chapter 6**), Ombudsmen (**Chapter 8**), and standing agencies and commissions set up to counter corruption and improper conduct by public officials (**Chapter 9**). We also look at the remedies available under human rights statutes in Victoria, Queensland and the ACT (**Chapter 7**) and under various discretionary compensation schemes throughout the country (**Chapter 10**). Each of these statutes makes arrangements for remedying administrative errors and failures in a defined form under statutory authority. Each also creates a body to administer the statute which exercises executive power,[30] a constitutional fact which carries the consequence that they are able to provide outcomes that go beyond the procedural remedies available in judicial review matters. Within the limits of their governing statutes, these bodies and schemes have the capacity to address the *substance* of the issues before them: to make the correct or preferable decision in place of the one challenged, to make findings that legislation or administrative action are contrary to human rights, to make specific recommendations about the maladministration of government departments, to investigate and remedy corrupt behaviour in public office, or to provide monetary compensation to deserving individuals without legal rights. Such remedies are diverse, flexible and powerful. It is a significant error to assume

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[27] The early development of public liability was not limited to the UK; see H Street, *Governmental Liability: A Comparative Study*, Cambridge University Press, Cambridge, 1953, pp 1–24.

[28] See for example J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316.

[29] For example, references in several chapters to the Competition and Consumer Act 2010 (Cth); see W Covell, K Lupton and L Parsons, *Covell and Lupton Principles of Remedies*, 7th ed, LexisNexis Butterworths, NSW, 7th ed, 2019, ch 17.

[30] We leave aside the question of whether these are truly 'executive branch' bodies or better understood as parts of a nascent 'integrity branch'. It is better to direct readers' attention to two learned, but diverging, opinions on the matter: J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423; Justice Stephen Gageler, 'Three is Plenty' in G Weeks and M Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robyn Creyke and John McMillan*, Federation Press, NSW, 2019, 12.

that remedies against public authorities begin and end with judicial review's venerable but considerably more limited suite of remedies.[31]

[1.2.2] Remedies undeveloped in Australia

The simultaneous existence of both judicial review remedies and those of a more flexible kind created by statute does not mean that the development of remedies against public authorities has reached an end. However, that development must proceed on a principled basis consistent with the wider body of the law. This is a requirement that has stymied several proposals which are at least somewhat 'appealing' on their face.[32] For example, the expansion of the exercise of government powers beyond the traditional scope of government, addressed in **Chapter 3**, has long called out for a remedy. It got one by analogy to judicial review in *Datafin*.[33] In that case, decided in the UK — where the effects of privatisation have been evident for many years[34] — the Court of Appeal stated that it was prepared to exercise a supervisory jurisdiction over a body 'without visible means of legal support'[35] but which nonetheless wielded 'a giant's strength'.[36] The body in question was the Panel on Take-overs and Mergers, which had the power of government behind it and performed a function that government would otherwise have needed to perform. Although it was not a body to which judicial review would ordinarily have extended, their Lordships considered that somebody had to keep an eye on a body such as the Panel and, in the absence of other volunteers, that the job should fall to the courts.

That was in 1987, and *Datafin* has exercised a strong fascination over Australian courts[37] and commentators[38] ever since. However, despite a single purported application of *Datafin* by one Australian court[39] and the continued assumption (sometimes only for the sake of argument) that *Datafin* applies in Australian state and territory courts,[40] it has no application at federal level[41] and its reception in state appellate courts has at least been controversial,[42] ranging in general between

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[31] As to these, see M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed, Thomson Reuters, Sydney, 2017, chs 12–17.

[32] *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456 at 466 [31]; referring to *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815 ('*Datafin*').

[33] See generally M Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in M Taggart (ed), *The Province of Administrative Law*, Bloomsbury Publishing, London, 1997, 40 at 45–51.

[34] See M Taggart, 'The Nature and Functions of the State' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2005, 101 at 108–10.

[35] *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815 ('*Datafin*') at 824 (Donaldson MR).

[36] *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815 ('*Datafin*') at 845 (Lloyd LJ).

[37] See for example *Norths Ltd v McCaughan Dyson Capel Cure Ltd* (1988) 12 ACLR 739 at 745–6; *State of Victoria v The Master Builders' Association of Victoria* [1995] 2 VR 121; *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 at 779–80 [81], at 790–91 [115]–[117]; *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 385 [7]; *Whitehead v Griffith University* [2003] 1 Qd R 220 at 223–25 [12]–[15]; *D'Souza v Royal Australian and New Zealand College of Psychiatrists* (2005) 12 VR 42; *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* (2000) 206 FLR 120 at 147 [220]; *CECA Institute Pty Ltd v Australian Council for Private Education & Training* (2010) 30 VR 555 at 570–71 [79]; *Mickovski v Financial Ombudsman Service Ltd* [2011] VSC 257; *Hinkley v Star City Pty Ltd* [2011] NSWCA 299 at [182]; *L v State of South Australia* (2017) 129 SASR 180. Gummow J cited *Datafin* in 1991 in support of the proposition that the 'authorities as to the scope for public law remedies in [cases where private rights and interests which do not have any statutory or public law source] are divided and, at least in Australia, indecisive': *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242 at 292.

[38] See for example P Latimer, 'Judicial Review of Stock Exchange Market Integrity Rules and Operating Rules' (2011) 26 *Australian Journal of Corporate Law* 127; Justice E Kyrou, 'Judicial Review of Decisions of Non-Governmental Bodies Exercising Governmental Powers: Is *Datafin* Part of Australian Law?' (2012) 86 *Australian Law Journal* 20.

[39] *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd (No 2)* (2004) 50 ACSR 554 at [6] (Shaw J); compare with *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 411 at [76] (Basten JA).

[40] *BFJ Capital Pty Ltd v Financial Ombudsman Service Limited (in Liq)* [2019] VSC 71 at [52] (Elliott J).

[41] This is because it is inconsistent with the 'officer of the Commonwealth' doctrine in s 75(v) of the Constitution, but see also *Australasian College of Cosmetic Surgery Limited v Australian Medical Council Limited* (2015) 232 FCR 225 at 240 [75] (Katzmann J).

[42] *Agricultural Societies Council of NSW v Christie* (2016) 340 ALR 560 at [89] (Leeming JA).

lukewarm[43] and strongly doubtful.[44] Even where courts have suggested that the *Datafin* principle contains elements which are appealing, there has been an acceptance that no decision should be made about its application to Australian law until it is necessary to do so.[45] In our opinion, if such an opportunity were to be expected, it is likely to have presented itself by now. For it to do so now is unlikely, if for no other reason than that *Datafin* is not even a helpful way to find 'a coherent method of delineating public from private power'.[46] That task remains difficult and Australian courts will need to address it, but are better to do so without placing any reliance on *Datafin*.

We consider two other proposed developments in the suite of remedies against public authorities. Neither has fared better than *Datafin*, but both offer useful insights into the problems that we want to see solved. The first is the creation of a public law damages remedy. Such a development has been considered in academic writing over many years[47] and has been the occasional subject of government inquiries.[48] The private law damages remedy against public officers for misfeasance in public office[49] has been mooted as having broader application to maladministration,[50] but the reality is that it is a tort that is wickedly hard to prove and as a result it rarely results in a damages payment.[51] This is no accident but a result of the fact that it has developed in order to address malicious abuses of collective power which are sufficient to create 'moral outrage'.[52] These are thankfully infrequent within the terms covered by the tort. Accountability[53] is a driver on which a public law damages remedy might be based,[54] but to this point it has been considered less compelling than concerns about the harm the inclusion of a monetary remedy would do to the

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[43] *Khuu & Lee v Corporation of the City of Adelaide* (2011) 110 SASR 235 at 242 [30] (Vanstone J).

[44] *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 411–13 (Basten JA).

[45] *Khuu & Lee Pty Ltd v Corporation of City of Adelaide* (2011) 110 SASR 235 at 242 (Vanstone J); *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 410–11 (Basten J); *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456 at 466.

[46] *Agricultural Societies Council of NSW v Christie* (2016) 340 ALR 560 at [92] (Leeming JA); citing J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316 at 333–34.

[47] See for example BC Gould, 'Damages as a Remedy in Administrative Law' (1972) 5 *New Zealand Universities Law Review* 105; CS Phegan, 'Damages for Improper Exercise of Statutory Powers' (1980) 9 *Sydney Law Review* 93; GP Barton, 'Damages in Administrative Law' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects*, Oxford University Press, Auckland, 1986, 123; P Cane, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489; C Brasted and J Potter, 'Damages in Judicial Review: the Commercial Context' (2009) 14 *Judicial Review* 53; 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.

[48] See New Zealand Public and Administrative Law Reform Committee, *Damages in Administrative Law*, Wellington, 1980; The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, The Stationery Office, London, 2010. The result of the latter inquiry in the UK can be gleaned from the very title of an editorial published after it reported: 'Damages for Maladministration: The Law Commission Debacle' [2012] 17 *Judicial Review* 211.

[49] See [11.2.2] and [14.7]. Aronson suggested that it is 'safer' to speak to misfeasance as 'a public law "damages remedy"' rather than in the usual terms of 'the common law's only truly public law tort': M Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 426 at 428. That conclusion was driven by the sheer oddity of the tort in the context of private law's taxonomy.

[50] See L Roots, 'Damages for Wrongful Administrative Action: a Future Remedy Needed Now' (1995) 2 *Australian Journal of Administrative Law* 129; G McCarthy, '*Mengel*: a Limited Remedy in Damages for Wrongful Administrative Action' (1996) 4 *Australian Journal of Administrative Law* 5; R Panetta, 'Damages for Wrongful Administrative Decisions' (1999) 6 *Australian Journal of Administrative Law* 163. These articles all responded to the unsuccessful claim for damages in *Northern Territory v Mengel* (1995) 185 CLR 307.

[51] See M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed, Thomson Reuters, Sydney, 2017, [19.6].

[52] M Aronson, 'Misfeasance in Public Office: a Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1 at 6.

[53] 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 at 1171.

[54] In this regard, we note in passing the Canadian Supreme Court's decision that a holder of political office who had abused his power was liable in damages to the person affected: *Roncarelli v Duplessis* [1959] SCR 121. See for example D Mullan, '*Roncarelli v Duplessis* and Damages for Abuse of Power: For What Did it Stand in 1959 and For What Does it Stand in 2009?' (2010) 55 *McGill Law Journal* 587.

structure of public law.[55] As Varuhas has pointed out, damages 'would be out of place' as a remedy for the breach of common law duties.[56]

The second development to the remedies available in proceedings against public authorities has been in the twin doctrines of estoppel (in private law) and substantive enforcement of legitimate expectations (in public law).[57] The point of both is essentially to tie public entities to their promises. While the High Court has not encouraged the further progress of either doctrine — effectively killing both off, with cold water in the case of the former[58] and increasingly hot disapproval in the case of the latter[59] — they remain interesting talking points, to the extent that they claim to meet a genuine need in dealings between individuals and government. The discussion of that need has taken in the feeling on one hand that government should not make promises it cannot keep, and the recognition on the other that the business of governing sometimes requires a level of flexibility inconsistent with being bound to a promise made to an individual. These are difficult problems whose solutions are more likely to be political than legal, but which nonetheless repay close, principled analysis. For example, the acceptance that government is not wholly analogous to any private enterprise need not come at the expense of recognising that government's capacity to compel action *without* legislating is virtually unmatched.

The use of soft law by public authorities as a regulatory tool is both frequent and effective.[60] It is often presented in the form of a promise regarding the public authority's intentions and proposed future conduct. Its attraction to a public authority is the almost unrivalled regulatory efficiency it offers; soft law can be made and changed much more quickly than any legislative instrument and is, in any case, generally obeyed as though it *were* a legislative instrument. However, because it is not, the legal consequences of breaching promises in the form of soft law are few. These facts add up to significant risks for the credulous and the unwary — a category that includes a broad range of people, including those assumed to possess some commercial sophistication.[61] Australia's judicial rejection of two proposed remedies that would address some of these concerns — one each in public law and private law — is supported by strong doctrinal analysis, and we take no issue with it. However, it would be a mistake to treat the position reached by the judiciary as dispositive of the broader problem of public authorities' capacity to secure willing cooperation from people who do not have recourse to legal remedies in the event that the public authority feels the need to alter its position.

[1.2.3] Private law remedies

As a label, 'private law' is a misnomer, to the extent that it suggests that it is a field of law which does not affect public authorities. To the contrary, doctrines which fall within private law not only apply to public authorities[62] but, in some cases, once performed the function of restraining

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[55] See *New South Wales v Paige* (2002) 60 NSWLR 371 at 404 (Spigelman CJ).

[56] JNE Varuhas, 'Taxonomy and Public Law' in M Elliott, JNE Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Hart Publishing, Oxford, 2018, 39 at 67.

[57] In the UK, the public law doctrine effectively absorbed the latter from the moment that Lord Hoffmann declared that 'public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet': *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2003] 1 WLR 348 at 358 [35]. See [12.XX].

[58] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 17–8 (Mason CJ). His Honour cited the judgment of Gummow J to similar effect delivered shortly before in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 210. See [12.XX].

[59] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 9–12 (Gleeson CJ), at 20–8 (McHugh and Gummow JJ), at 35–8 (Hayne J), at 45–9 (Callinan J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 658 (Gummow, Hayne, Crennan and Bell JJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 334–36 (Kiefel, Bell and Keane JJ), at 343 (Gageler and Gordon JJ). See [12.XX].

[60] See generally G Weeks, *Soft Law and Public Authorities: Remedies and Reform*, Hart Publishing, Oxford, 2016; G Weeks and L Pearson, 'Planning and Soft Law' (2018) 24 *Australian Journal of Administrative Law* 252; G Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers?' (2018) 39 *Adelaide Law Review* 303.

[61] See for example *R (Davies) v The Commissioners for Her Majesty's Revenue and Customs* [2011] 1 WLR 2625.

[62] Writing in 1982, Aronson and Whitmore regarded as 'trite law' (and therefore as unnecessary to consider further) 'that governments are as liable at common law for the "private law" torts they commit as are private individuals': M Aronson and H

excesses of public power which now fall to administrative law.[63] Claims against public authorities in trespass, battery and false imprisonment were used long before they were unified under the heading of 'torts' to restrain excesses of power by public officials, although their public status was 'irrelevant'.[64] A number of significant early public law cases[65] were in fact cases about causes of action in what would now be classified under private law, such as *Ashby v White*,[66] *Entick v Carrington*[67] *and Musgrove v Toy*.[68] Tort cases still play a valuable role in dealing with some excesses of public authorities, although now, as in the 18th century, this tends to be focused on officers of the law.[69]

This book considers special rules relating to public authorities in four areas of private law: equity (**Chapter 13**), torts (**Chapter 14**), contracts (**Chapter 15**) and restitution (**Chapter 16**). These chapters have a particular role to play in a book about government liability:

> The very nature of judicial review is that it concerns procedures applicable only against government parties, and substantive principles that are mostly confined to government parties. By contrast, however, the principles of tort, contract and equity aspire to accord neither preference nor disadvantage to government defendants simply by virtue of their public status.[70]

Despite not being areas of law which are specifically about government, they are nonetheless vital to a full understanding of the liability of public authorities.

Chapter 13, on equitable remedies, focuses on two main issues: injunctive relief against public authorities and officers; and monetary remedies in equity, namely compensation and statutory damages. It also spends some time discussing the links between equity and public law which, although counterintuitive to the uninitiated, are extensive. This is true both at a metaphorical level (for example, linking the responsibilities of government to the fiduciary duties owed by a trustee) and at the much more prosaic level of recognising that two of administrative law's most important remedies — injunctive and declaratory relief — are equitable in nature.[71]

The interaction, or 'affinity', between torts and public authorities is not new. A series of judgments in the High Court made that point in order to demonstrate several propositions:[72] that administrative law should not be understood narrowly; that private law concepts frequently inform our understanding of public law or constitutional powers; and that, despite their points of interaction, private law remedies might be available even where public law remedies are not. The analysis in

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Whitmore, *Public Torts and Contracts*, Law Book Co, Sydney, 1982, p 117. The same is true of equitable causes of action against governments; see for example *Commonwealth v Verwayen* (1990) 170 CLR 394.

[63] 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 at 1168–70.

[64] M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179 at 184.

[65] See the discussion of this point by Gummow J in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558.

[66] *Ashby v White* (1703) 92 ER 126; (1703) 2 Ld Raym 938.

[67] *Entick v Carrington* (1765) 2 Wils KB 275; 95 ER 807; 19 Howell's State Trials 1029. See also: T Endicott, 'Was *Entick v Carrington* a Landmark?' in A Tomkins and P Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law*, Hart Publishing, Oxford, 2015, 109; R Gordon, '*Entick v Carrington* [1765] Revisited: All the King's Horses' in S Juss and M Sunkin (eds), *Landmark Cases in Public Law*, Hart Publishing, Oxford, 2017, 1.

[68] *Musgrove v Toy* [1891] AC 272. See B Selway, 'Of Kings and Officers: the Judicial Development of Public Law' (2005) 33 *Federal Law Review* 1 at 11–2.

[69] See for example *State of New South Wales v Ibbett* (2006) 229 CLR 638.

[70] M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed, Thomson Reuters, Sydney, 2017, [1.05]. See also AM Gleeson, 'Suing Governments' in H Dillon (ed), *Advocacy and Judging: Selected Papers of Murray Gleeson*, Federation Press, NSW, 2017, 301 at 303–08.

[71] It is not strictly accurate to call the declaration an equitable remedy: M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed, Thomson Reuters, Sydney, 2017, [15.2]. However, to treat it as such is so common a convention that it is convenient for us to maintain it in this book.

[72] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 106–07 [53]; *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 153–54 [11]. The involvement of Gummow J was common to each of these judgments.

Chapter 14 of the place of torts in determining government liability is, unsurprisingly, extensively dedicated to government's liability in negligence and the strong statutory overlay that has accompanied it since just after the turn of the millennium. The chapter avoids the fallacy of believing that negligence has now swallowed the other torts and considers the application of several other tortious causes of action to public liability, including the only dedicated public law tort: misfeasance in public office.

Government powers to contract have experienced heavy scrutiny in the wake of the *School Chaplains Cases*,[73] but in fact government regulation through contracting is nothing new.[74] **Chapter 15** examines both the power of public authorities to enter into contracts and their liability under those contracts. Of particular interest is the fact that spending public money in turns imposes greater restrictions on government contracting than would be experienced by individuals in some regards and allows governments greater freedom in others. As any modern consideration of government contracting must, **Chapter 15** also looks at particular issues around outsourcing.

Chapter 16 examines restitution, which is a remedy that applies to public and private bodies alike in response to enrichment obtained contrary to equitable principles. The basis for its availability is set out and considered in the manner of the chapters above, but the focus of **Chapter 16** is on a restitutionary principle which has emerged specifically in response to enrichment of government. In this sense, the development of restitution since *Woolwich*[75] has resulted in a doctrine analogous to the tort of misfeasance in public office, which also applies exclusively to public authorities.

[1.3] The limits of legal remedies

Any teacher of administrative law would be remiss not to warn students 'that "judicial review is not the answer to everything"; in fact, its influence is relatively limited in some regards'.[76] A former Commonwealth Ombudsman noted that he ran that agency 'knowing that judicial review of the agency's actions was unlikely', whereas 'Auditor-General and parliamentary scrutiny was routine and constantly borne in mind'.[77] As a statutory creature, the Ombudsman's office had to resolve issues of statutory interpretation; it was also obliged to adhere to various legal standards, like the obligation to provide procedural fairness. However, little of the guidance the agency needed came from case law.[78] This example indicates that judicial review is unlikely to be the tool of choice for dealing with decisions of the Ombudsman.[79] Judicial review has its place; that place is finite.

This observation is made frequently with regard to judicial review in response to the tendency amongst some academic commentators to discount the effectiveness of other mechanisms for redress, such as review in tribunals, referral to an investigative agency or investigation by the Ombudsman's office itself.[80] However, 'choosing the right tool' is an approach to seeking redress against public authorities that goes beyond either the traditional 'public law' methods of determining liability or private law remedies which can be applied to public authorities. There are

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[73] *Williams v The Commonwealth* (2012) 248 CLR 156 ('*Williams (No 1)*'); *Williams v The Commonwealth* (2014) 252 CLR 416 ('*Williams (No 2)*').

[74] Nick Seddon's seminal work on government contracts has run to six editions, the first of which was published in 1995; see now N Seddon, *Government Contracts: Federal, State and Local*, 6th ed, Federation Press, NSW, 2018.

[75] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

[76] G Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers?' (2018) 39 *Adelaide Law Review* 303 at 319.

[77] J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423 at 427.

[78] J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423 at 427. The sole exception, which 'partially rested on a debatable and impractical distinction', was less than helpful: *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163 (Einfeld J).

[79] Another illustration is provided by the NSW Court of Appeal's decision in *Kaldas v Barbour* (2017) 326 FLR 122. That case is discussed in **Chapter 4**. With regard to the involvement of Ombudsmen in litigation, see A Stuhmcke, 'Ombudsman Litigation: The Relationship Between the Australian Ombudsman and the Courts' and M Aronson, 'Ombudsmen and Crime Busters: Ships Passing in the Night' in G Weeks and M Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robyn Creyke and John McMillan*, Federation Press, NSW, 2019, 155 and 178 (respectively).

[80] See **Part III**.

significant examples of issues deserving of a remedy not attaching easily to a known type of liability.[81]

[1.3.1] (Mostly) public decisions, restricted remedial options

The first example can be observed in *NEAT*,[82] a case which can be summarised as involving an applicant which wanted to export wheat but was denied the opportunity to do so by the incorporated respondent, who held a veto power under the statutory regulatory scheme relating to wheat exports. The applicant sought judicial review of the respondent's decision, but faced a dilemma: it assumed that it could not bring proceedings under s 75(v) of the Constitution[83] because the respondent was not an 'officer of the Commonwealth',[84] and therefore sought relief only under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ('ADJR Act'). The remedial provisions of that Act are available only in response to decisions of an administrative character made 'under an enactment'. The decision in *NEAT*, although much criticised as a 'wrong turning',[85] hinged upon an exercise of statutory interpretation[86] with regard to the term 'under an enactment'. This exercise led the majority to conclude that an exercise of power by an incorporated body did not fall within the ambit of the statute's jurisdictional limits.[87] While the majority's reasoning might be criticised as simplistic,[88] the approach of treating the application of the ADJR Act as an exercise in statutory interpretation was soon after confirmed by the High Court in *Griffith University v Tang*.[89] We endorse Professor Aronson's opinion that:

> Tang's result was entirely predictable because, if ADJR's restriction to statutory decision-making is to mean anything, then the odds are that it excludes coverage of government's commercial powers so far as these are truly consensual.[90]

In other words, review under the ADJR Act is limited by the terms of the statute, a point that is plain from the fact that it has for years been systematically excluded by subsequently enacted legislation.[91] The disappointment at the ways in which the ADJR Act has been limited which Kirby J expressed in his dissenting judgments in *NEAT* and *Tang* are, with respect, not to the point. The greater issue was the majority judgments' odd characterisation of the relevant power in both cases.

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[81] We are by no means the first to question the accuracy of Lord Bingham's view that 'the rule of public policy which has first claim on the loyalty of the law [is] that wrongs *should be* remedied': *X v Bedfordshire County Council* [1995] 2 AC 633 at 663 (emphasis added). At this point we need say only that not all wrongs *are* remedied, frequently because the plaintiff has pursued the 'wrong remedy' (a circumstance not limited to public law matters; see *Sullivan v Moody* (2001) 207 CLR 562). We leave to another time the question whether all wrongs are *remediable* at all.

[82] *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 ('*NEAT*'). This case is discussed in detail in **Chapter 3**.

[83] The point was considered only in the dissenting judgment of Kirby J: *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 ('*NEAT*') at 310–11.

[84] See J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316 at 317.

[85] *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 ('*NEAT*') at 300 [68] (Kirby J); and the articles cited by M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1 at 2 (n 6). Keane J's view of this literature is noteworthy: Justice PA Keane, 'Judicial Review: the Courts and the Academy' (2008) 82 *Australian Law Journal* 623, 625.

[86] '*ADJR's* jurisdictional requirement that there be an administrative decision under an enactment cannot be entirely morphed into the common law's public/private power inquiry. It must be taken seriously as an issue of statutory interpretation, albeit one that is inevitably influenced by normative considerations. That is an unfortunate consequence of *ADJR's* design …': Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 12 (n 52).

[87] *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 ('*NEAT*') at 298 [55] (McHugh, Hayne and Callinan JJ). This is not least because AWBI (the respondent) enjoyed protection from the usual penalties which attached to breach of the competition law statute.

[88] For reasons set out at [3.2] below, we prefer the reasoning of Gleeson CJ: *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 ('*NEAT*') at 290 [27].

[89] *Griffith University v Tang* (2005) 221 CLR 99 ('*Tang*'). See further [4.1.3].

[90] M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1 at 23.

[91] See S Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92 at 94; G Weeks, 'ADJR at 40: In its Prime or a Disappointment to its Parents?' (2018) 92 *AIAL Forum* 103 at 105.

They might not have been decisions made under an enactment, but it need not follow that *NEAT* considered a decision that might be made by *any other* incorporated body or that *Tang* was about a *wholly consensual* decision between a student and the university she attended.[92] There is much still to like about the ADJR Act[93] and, whatever faults it has, it cannot be blamed for the fact that the capacity to use it to engage in judicial review is limited by its statutory terms. A broader application for the ADJR Act lies within the hands of the legislature;[94] a broader reading of the Constitutional 'officer of the Commonwealth' provision is within the power of the High Court.[95] The courts cannot, however, give greater scope to ADJR Act review than the terms of the statute will allow.

[1.3.2] Extra-legal (but not ultra vires) regulation

There is a beguilingly simple view of the law in which legislatures legislate, courts interpret and administrators apply the law. Lord Reid long ago dismissed the idea that judges merely declare rather than make law as fit only for 'those with the taste for fairy tales … but we do not believe in fairy tales any more'.[96] The same view may be taken of any claim of a simple relationship between those with administrative functions and the courts and tribunals which review the exercise of those functions.[97]

We can now go further and dismiss the entirety of the 'beguiling' neat and clean version of the separation of powers described above. However, a broader recognition of the capacity to regulate and govern in an almost completely extra-legal fashion has taken longer to be understood than either of these points. 'Soft law' is easy to make and change; more importantly, it is generally followed by its intended audience as though it were legally binding.[98]

It follows that, if soft law is not legally binding but is followed as though it were, it is a potent method of regulation. Not only that, it is a form of regulation fraught with danger for the unwary (or merely compliant) individual, since the means of challenging decisions made subject to soft law are far from extensive. In particular, there can be no judicial review of a decision that lacks any legal basis. As Sir William Wade put it, 'how can it be *ultra vires* if it has no *vires* to be *ultra*?'.[99]

Consequently, attention must be paid to the category of decisions which are made without ever engaging the law-making functions of parliament or the judiciary. Those functions are not necessary to make soft law, although it is not true that *anyone* can make soft law and have it followed. The soft law needs to come cloaked in the garb of authority, meaning that executive bodies and other public authorities operate at a distinct advantage in their capacity to regulate extra-legally. The problem with this sort of regulation is not just that it leaves wrongs unremedied,

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[92] A characterisation that was 'nothing short of breath-taking': M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1 at 23.

[93] Administrative Review Council, *Judicial Review in Australia*, ACT, 2011; compare with R Wilkins and B McGee, 'Judicial Review: A Jurisdictional Limits Model' (2013) 72 *AIAL Forum* 20.

[94] Although there is little hope that much will be done: G Weeks, 'ADJR at 40: In its Prime or a Disappointment to its Parents?' (2018) 92 *AIAL Forum* 103 at 108.

[95] Action in the short term is similarly unlikely: J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316 at 317.

[96] Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22 at 22. See also Sir Anthony Mason, 'The Judge as Law Maker' (1996) 3 *James Cook University Law Review* 1.

[97] S Halliday, *Judicial Review and Compliance with Administrative Law*, Hart Publishing, Oxford, 2004; J Boughey, 'Administrative Law's Impact on the Bureaucracy' in G Weeks and M Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robyn Creyke and John McMillan*, Federation Press, NSW, 2019, 93.

[98] See generally G Weeks, *Soft Law and Public Authorities: Remedies and Reform*, Hart Publishing, Oxford, 2016; G Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers?' (2018) 39 *Adelaide Law Review* 303.

[99] HWR Wade, 'Beyond the Law: A British Innovation in Judicial Review' (1991) 43 *Administrative Law Review* 559 at 561.

but that it does so essentially because soft law, exercised for good or ill,[100] is rarely even challenged.[101]

[1.4] Particular remedial schemes

While this book does not provide comprehensive coverage of procedural and evidential matters that may be relevant in government litigation, its final chapter considers the special rules that govern the process of litigation conducted by or on behalf of government — the 'model litigant' obligations. In a sense, this chapter is emblematic of all that precedes it, since it deals with evidence of the implicit understanding that government must sometimes be held to a higher standard that the citizens it represents, if for no other reason than that the government has enormous and incomparable power. Individuals, even large corporate entities, should not be expected to compete with the unrestrained power of the government in litigation, a truth that in no way implies that the government's servants would necessarily set out to abuse that power. Rather, by taking steps to remove its advantage, the government demonstrates that those litigating against it can be confident of a fair go.

Beyond the scope of **Chapter 17**, readers might be interested to consider particular procedural matters that arise in government litigation. One such procedural matter is the requirement to serve notices on the Attorneys-General of the Commonwealth, states and territories in all constitutional matters, being those arising under the Constitution or involving its interpretation.[102] The purpose of this notice is to facilitate intervention by Attorneys-General in constitutional cases.

The following 16 chapters contain significant detail about a wide range of remedial structures, schemes and doctrines. There are, however, some important mechanisms for obtaining redress from government that do not fit neatly into any of these chapters. Three of these are considered below.

[1.4.1] Compensation for compulsory acquisitions

There are dozens of statutes across every Australian jurisdiction which provide for the government to acquire property from another party by compulsory process.[103] Those in Commonwealth jurisdiction must operate subject to s 51(xxxi) of the Constitution, which gives the parliament 'power to make laws for the peace, order and good government of the Commonwealth with respect to … the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.[104] Consequently, any acquisition of property by the Commonwealth from any 'State or person' other than 'on just terms' will be invalid.[105] Professor Stellios recorded that there have been 'many more decisions relating to section 51(xxxi) over the years than has been the case with the other express rights'.[106] However, perhaps because the

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[100] It is important to realise that soft law is no more 'good' or 'bad' than a knife is, although its use might take on one of those adjectives: G Weeks, *Soft Law and Public Authorities: Remedies and Reform*, Hart Publishing, Oxford, 2016, p 74.

[101] This is illustrated by the dearth of judicial authority on the subject: G Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers?' (2018) 39 *Adelaide Law Review* 303 at 303 (n 3).

[102] Judiciary Act 1093 (Cth), s 78B.

[103] Commonwealth statutes in this category include: Lands Acquisition Act 1989 (Cth), s 41; Navigation Act 2012 (Cth), s 189.

[104] This is perhaps the constitutional provision which is most widely known by Australians because it was the central plot point in a celebrated (and oft quoted) film: R Sitch (dir.), *The Castle*, Village Roadshow Pictures, 1997. More detailed consideration of s 51(xxxi) can be found, inter alia, in: J Stellios, *Zines's The High Court and the Constitution*, 6th ed, Federation Press, NSW, 2015, pp 620–25; J Richardson and M Stubbs, *Australia's Constitutional Government*, LexisNexis Butterworths, NSW, 2016, pp 498–502; D Meagher et al, *Hanks' Australian Constitutional Law*, 10th ed, LexisNexis Butterworths, NSW, 2016, pp 1084–123.

[105] See *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 169 (Mason CJ), at 177 (Brennan J), at 185 (Deane and Gaudron JJ), at 200 (Dawson and Toohey JJ), at 219 (McHugh J); cited in C Winnett, '"Just Terms" or Just Money? Section 51 (xxxi), Native Title and Non-Monetary Terms of Acquisition' (2010) 33 *University of New South Wales Law Journal* 776 at 777.

[106] J Stellios, *Zines's The High Court and the Constitution*, 6th ed, Federation Press, NSW, 2015, p 620. The count is increased once account is taken of the fact that the 'constitutional guarantee' in s 51(xxxi) constrains the use of every other power in s 51: ibid, pp 35–6; J Richardson and M Stubbs, *Australia's Constitutional Government*, LexisNexis Butterworths, NSW, 2016, p 161.

extent of its operation has been expansively understood,[107] it is a provision which has lacked a 'precise definition'.[108]

Section 51(xxxi) simultaneously expresses a *power* to acquire property under statute limited by a *right* that it be acquired only 'on just terms'.[109] It should be understood as a right on the basis that, in its absence, while other powers in s 51 'would have been interpreted as extending to legislation for the acquisition of land or other property for use in carrying out or giving effect to legislation enacted under such powers',[110] they would not have required that such acquisitions be made on just terms. Latham CJ noted that 'State Parliaments are not bound by any similar constitutional limitation' and consequently, 'if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust'.[111] Accordingly, entitlement to compensation presently provided for under state compulsory acquisition legislation is not absolute.[112]

The right contained in s 51(xxxi) is not 'an enforceable right … in respect of an acquisition of property',[113] since it falls to parliament to determine what is 'appropriate compensation' and to the court to say whether that compensation reflects 'just terms'.[114] One author has noted the High Court's general assumption 'that "just terms" equates to pecuniary compensation, without explaining why this is so',[115] although we think that the assumption[116] will frequently be fair where the property in question has a commercial value.[117] However, it might not always be appropriate to read the requirement for 'just terms' in such a manner:

> Given the background of sustained governmental intrusion into the lives of Aboriginal people intended and envisaged by [Commonwealth] legislation, 'just terms' in this context could well require consultation before action; special care in the execution of the laws; and active participation in performance in order to satisfy the constitutional obligation in these special factual circumstances.[118]

There is some support for this in the view of Professor Stellios that the 'general principle now is that a constitutional guarantee should be given a generous interpretation and … a number of

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[107] The High Court was certain that it did not dictate the interpretation of the territories power in s 122 of the Constitution to the extent that the latter might be construed as 'conferring a power to make laws for the acquisition of property': *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 570.

[108] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*') at 289 (Deane J).

[109] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*') at 349–50 (Dixon J).

[110] *Re Döhnert Müller Schmidt & Co; Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371 (Dixon CJ).

[111] *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 397–98; compare with S Brennan, 'Section 50(xxxi) and the Acquisition of Property under Commonwealth State Arrangements: The Relevance to Native Title Extinguishment on Just Terms' (2011) 15(2) *Australian Indigenous Law Review* 74 at 75.

[112] For an example of one such regime, see Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

[113] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*') at 289 (Deane J). It is at best a 'limited right', one of few express rights in the terms of the Constitution, all of which are quite limited; see J Richardson and M Stubbs, *Australia's Constitutional Government*, LexisNexis Butterworths, NSW, 2016, pp 489–90.

[114] 'This constitutional provision requires the terms actually to be just and not merely to be terms which the Parliament may consider to be just': *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 397 (Latham CJ).

[115] C Winnett, '"Just Terms" or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition' (2010) 33 *University of New South Wales Law Journal* 776 at 780 (see especially the cases cited at nn 32–4).

[116] There are some exceptions to this assumption, including for the reasons set out by Dixon J in *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495 at 567. A series of cases has also 'implied that compensation paid under section 51(xxxi) can attract procedural fairness obligations': C Winnett, '"Just Terms" or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition' (2010) 33 *University of New South Wales Law Journal* 776 at 781. See for example *Johnston Fear & Kingham & The Offset Printing Company Proprietary Limited v The Commonwealth* (1943) 67 CLR 314 at 322 (Latham CJ), at 324 (Rich J), at 332 (Williams J); *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495 at 547 (Starke J); *Commonwealth v Western Australia* (1999) 196 CLR 392 ('*Mining Act Case*') at 463 (Kirby J).

[117] Valuing compensation under the Native Title Act 1993 (Cth) proceeds on a different set of criteria; see section **[1.4.2]**.

[118] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 426 [309] (Kirby J). His Honour was in dissent, a fact which does nothing to lessen the force of his observation that '[a]t the least, the Commonwealth has failed to demonstrate that this view of the constitutional obligation in s 51(xxxi) is not reasonably arguable': ibid.

judges [in cases on this provision have] emphasised the importance of "substance" as against "form"'.[119]

[1.4.2] Compensation under the Native Title Act 1993 (Cth)

Native title is recognised and protected in accordance with, and cannot be extinguished contrary to, the Native Title Act 1993 (Cth) ('NT Act'). If native title is extinguished consistently with the terms of the NT Act, statutory compensation may be available.[120] The compensation scheme under the NT Act, which was considered by the High Court in *Griffiths*, had not previously been the subject of extensive judicial attention.[121]

Sections 51 and 51A of the NT Act are to be read as providing that the compensation payable to native title holders is to be measured by reference to, and capped at, the freehold value of the land together with compensation for cultural loss. The NT Act provides at s 51(1) for an entitlement on just terms to compensation to native title holders for 'any loss, diminution, impairment or other effect of the act on their native title rights and interests',[122] which is capped by s 51A, such that the total compensation payable for an act which extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.[123] Principles or criteria set out in a compulsory acquisition law for the Commonwealth, or for the state or territory to which the compensable act is attributable, may be of assistance, but the joint judgment in *Griffiths* held that they are not determinative of the issues arising under s 51(1).[124]

[1.4.2.1] Assessment of compensation

To assess the value of the affected native title rights and interests, it is necessary first to identify the date on which the value is to be assessed and then the nature of the affected native title rights and interests.[125] The first of these issues (the date for assessment of the compensation) is the date of the compensable 'act' referred to in s 51(1).[126] The second (the identification of native title rights and interests) is an objective inquiry through which the legal nature and content of the rights and interests that must be ascertained, rather than the way in which they have been exercised.[127]

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[119] J Stellios, *Zines's The High Court and the Constitution*, 6th ed, Federation Press, NSW, 2015, p 623.

[120] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [25] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

[121] The few exceptions to that proposition include the judgments appealed from in *Griffiths*, being that of the Full Court of the Federal Court of Australia in *Northern Territory v Griffiths* (2017) 256 FCR 478 (North ACJ, Barker and Mortimer JJ), which in turn partially allowed appeals from *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362 (Mansfield J). See also *Jango v Northern Territory* (2007) 159 FCR 531 (French, Finn and Mansfield JJ); *De Rose v State of South Australia* [2013] FCA 988 (Mansfield J).

[122] Sections 51(2)–(3) were briefly described by the joint judgment in *Griffiths* but not in any detail since neither of the relevant compensable acts were considered to fall under those subsections: *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [45].

[123] See *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [50]–[51].

[124] Specifically, their Honours described concepts like 'solatium' to be distracting in this context: *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [54]. See also Edelman J at [269].

[125] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [55].

[126] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [43]. The joint judgment specified that 'the validation provisions deem the extinguishing act to be valid and always to have been valid from the time of the act', citing ss 19 and 22F of the Native Title Act 1993 (Cth) and ss 4 and 4A of the Validation (Native Title) Act (NT).

[127] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [96]; citing *Western Australia v Brown* (2014) 253 CLR 507 at 521 [34]; compare with *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209 at 224–25 [21] (French CJ and Crennan J) at 241–42 [65]–[67] (Hayne, Kiefel and Bell JJ).

The assessment of just compensation for the infringement of native title rights and interests in land is undertaken according to a 'bifurcated approach', which first includes a component for the objective or economic effects of the infringement and then considers separately non-economic or cultural loss as an estimate of the additional losses occasioned by the diminution in the claimant's connection to country consequent on the infringement. The latter calculation is to be a fair and just assessment, in monetary terms, of the sense of loss of connection to country suffered by the claimant.[128] A holistic approach, without the division of value into economic and non-economic components, would mean that the determinations of the economic value of native title rights and interests would be largely dependent on idiosyncratic notions of what is fair and just. The joint judgment rejected this approach.[129]

[1.4.2.2] Economic valuation of rights and interests

The economic valuation of rights and interests is essentially an objective question of 'how much a willing but not anxious purchaser would be prepared to pay to a willing but not anxious vendor to obtain the latter's assent to their extinguishment'.[130] If the native title rights and interests amount to (or come close to amounting to) a full exclusive title:

> … it is naturally to be expected that the native title rights and interests will have an objective economic value similar to freehold value. By contrast, if the native title rights and interests are significantly less than a full exclusive title, it is only to be expected that they will have an objective economic value significantly less than freehold value.[131]

This approach unavoidably necessitates making 'a fairly broad-brush estimate of the percentage of rights and interests comprising freehold title which is considered to be proportionate to the native title rights and interests'.[132] The determination of the appropriate percentage calls for an evaluative judgment, about which reasonable minds may differ.[133] The joint judgment in *Griffiths* noted that the native title in that case was 'devoid of any rights of admission, exclusion and commercial exploitation' and that therefore 'a correct application of principle dictates on any reasonable view of the matter that those non-exclusive native title rights and interests, expressed as a percentage of freehold value, could certainly have been no more than 50 per cent'.[134] On this reasoning, the Full Court's estimate of 65 per cent was held to have been 'manifestly excessive'.[135]

Gageler and Edelman JJ each agreed generally with the reasoning of the joint judgment.[136] However, Gageler J expressed one reservation on the basis of which he said that he:

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[128] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [84].

[129] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [86].

[130] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [96]; see and compare with *Spencer v Commonwealth of Australia* (1907) 5 CLR 418 at 441 (Isaacs J); *Turner v Minister of Public Instruction* (1956) 95 CLR 245 at 264 (Dixon CJ); *Boland v Yates Property Corporation Pty Limited* (1999) 74 ALJR 209 at 265–66 [271]–[274] (Callinan J).

[131] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [74].

[132] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [87].

[133] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [106] and the cases cited there.

[134] Gageler J reached the same conclusion using different reasoning: *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [241]; compare with the comments of the National Native Title Tribunal on 'market value': *Western Australia v Thomas* (1996) 133 FLR 124 at 195–96 and 201–02.

[135] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [106].

[136] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [240] and [253] respectively.

> … would not attempt to determine the economic value of a non-exclusive native title right simply by discounting from the freehold value of the land in relation to which the right exists. Instead, I … recognis[e] that the economic value of a native title right has two components. The first component is the value, if any, of the commercial exploitation of the native title right in perpetuity. The second component is the value of the native title holder's capacity voluntarily to surrender that right in order to facilitate the grant to someone else of a form of ordinary title which would allow the land to be put to its highest and best commercial use.[137]

Edelman J noted the difficulties inherent in placing value on land subject to native title by analogies to 'Western concepts of title' in circumstances where 'the valuation of title which is of great value to the dispossessed party but of no particular significance to the party obtaining the benefit of the extinguishment'.[138]

Citing analogous dicta by Dixon CJ,[139] the joint judgment held that the 'value of the native title rights and interests is not ordinarily to be confined to the benefit of their past uses but should be extended to their highest and best use'.[140] Contrary to the view taken in the Full Court, their Honours held that the inalienability of native title rights and interests was not a relevant consideration in discounting the assessment of their economic value.[141] The joint judgment also denied the argument of the parties claiming compensation 'that equity dictated an award of compound interest', holding instead that interest awarded on economic claims should be calculated on a simple basis.[142] Such interest does not count as part of the 'total compensation' within the meaning of s 51A(1) of the NT Act.[143]

[1.4.2.3] Compensation for non-economic effects of compensable acts

The non-economic effects of compensable acts are compensated with reference to:

> … that aspect of the value of land to native title holders which is inherent in the thing that has been lost, diminished, impaired or otherwise affected by the compensable acts. It is not just about hurt feelings, although the strength of feeling may have evidentiary value in determining the extent of it. It is compensation for a particular effect of a compensable act — what is better described as 'cultural loss'.[144]

To assess cultural loss in order to award compensation, it is necessary first to identify the nature and extent of the native title holders' connection or relationship with the land and waters by their laws and customs and, second, consider the effect of the compensable acts on that connection.

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[137] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [242]–[243].

[138] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [251].

[139] *Turner v Minister of Public Instruction* (1956) 95 CLR 245 at 264 and 268.

[140] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [97].

[141] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [99] (joint judgment) and [245] (Gageler J).

[142] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [109]. Although his Honour agreed with this outcome (at [255]), note that while Edelman J accepted 'the methodology adopted throughout this litigation [in the absence of any challenge to it] by any other party and in the absence of any suggestion that the result in this case would have been different …, the methodology adopted in this case is plainly erroneous': ibid at [254].

[143] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [141]. The Commonwealth pushed for a ruling on that point to settle the meaning of s 51A(1), but the joint judgment noted that whether interest was awarded 'as *part of* compensation, as [the judges below in both the Full Court and at trial had held], or whether their Honours should rather have awarded the interest as interest *on* compensation [was for] present purposes … a matter of little consequence because, either way, the amount of interest payable will be the same' (original emphasis).

[144] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [154].

The joint judgment held that this was the appropriate approach to the assessment of both economic loss and cultural loss.[145]

Their Honours framed the calculation of cultural in terms of translating 'spiritual hurt' from the compensable acts into compensation.[146] An impairment of an Aboriginal person's spiritual connection to land is 'not to be understood in reference to what occurs on a particular lot or lots. It is to be understood more generally by reference to his or her feelings about loss of connection with country, which can be incremental.'[147]

[1.4.3] Freedom of information obligations

While not a 'remedial scheme' in and of itself, readers interested in government litigation will likely wish to be familiar with the operation of freedom of information regimes in addition to usual pre-trial evidentiary procedures.[148] Each of the Australian jurisdictions has enacted legislation that facilitates a right of access to documents held by the government.[149] The purpose of these regimes is to provide for an individual right of access to documents (broadly defined)[150] in the possession of government agencies, promptly and at a low cost.[151] The agency is entitled to refuse access only in limited circumstances, such as where the document is exempt from release under the Freedom of Information Act 1982 (Cth),[152] or where processing the request would cause an unreasonable diversion of the agency's resources.[153] Exemption categories allow for refusal of access in only a limited range of circumstances, some of which are concerned with protecting public and government interests,[154] and others of which are concerned with protecting third party interests.[155]

The courts have acknowledged the role that freedom of information can provide in government litigation. For example, in *Johnson Tiles Pty Ltd v Esso Australia Ltd (No 3)*, Merkel J rejected an argument by the Victorian State Government (a cross-defendant) that the use of freedom of information to obtain documents while litigation was on foot was an abuse of process:

> [T]he FOI Act involves the exercise of a right conferred upon all members of the public to have access to government documents, subject to the provisions and the exemptions provided for in the Act. … [T]he exemptions include documents whose disclosure might interfere with the due administration of justice. Thus, it is difficult to envisage how the exercise of a right to make a request under the FOI Act, which itself contains procedures to ensure there is no interference with the administration of justice, can constitute a contempt of court.[156]

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[145] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [159].

[146] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [155].

[147] *Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (2019) 93 ALJR 327 ('*Griffiths*') at [204]; citing Mansfield J in *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362.

[148] Readers interested in further detail on access to documents via freedom of information regimes should consult a dedicated text on the topic; see for example M Paterson, *Freedom of Information and Privacy in Australia: Information Access 2.0*, 2nd ed, LexisNexis Butterworths, NSW, 2015.

[149] Freedom of Information Act 1982 (Cth); Government Information (Public Access) Act 2009 (NSW); Freedom of Information Act 1982 (Vic); Right to Information Act 2009 (Qld); Freedom of Information Act 1991 (SA); Freedom of Information Act 1992 (WA); Right to Information Act 2009 (Tas); Freedom of Information Act 2016 (ACT); Information Act 2002 (NT).

[150] See for example Freedom of Information Act 1982 (Cth), s 3(1).

[151] See for example Freedom of Information Act 1982 (Cth), s 3(4).

[152] See for example Freedom of Information Act 1982 (Cth), s 31A.

[153] See for example Freedom of Information Act 1982 (Cth), s 24.

[154] For example, protection of cabinet documents: Freedom of Information Act 1982 (Cth), s 34.

[155] For example, protection of personal privacy: Freedom of Information Act 1982 (Cth), s 47F.

[156] *Johnson Tiles Pty Ltd v Esso Australia Ltd (No 3)* (2000) 98 FCR 311 at 319 [37].

The potential use of freedom of information as a precursor to litigation has also been acknowledged by the Information Commissioner, with FOI Guidelines noting that it may be appropriate to waive or reduce charges for access where 'the applicant needs the document for a pending court or tribunal hearing'.[157]

[1.4.4] Conclusion

Remedies can be sought against government under many more statutes and non-statutory schemes than we can cover in this book. However, we believe that you now have in your hands the first book in Australia to bring together the major public and private law remedies available against public authorities in a single volume. It is our aim that this will equip readers with an understanding of the range of ways in which public decision-making is susceptible to challenge.

[157] Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* ('FOI Guidelines'), January 2019, 19.