Getting what you want from administrative law

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The objectives of the administrative law system frequently do not match the objectives of those who use it. While judicial review's purpose is to define and police the legal boundaries of public law,[1] the control of public power is not necessarily (and, we would submit, rarely) the ultimate goal a judicial review applicant has in mind. An applicant will seldom be aggrieved by the unfairness of a decision-making process which has ultimately gone their way and, to the extent that public law remedies do produce a tangible positive result for a particular applicant, this is generally no more than an unsought side-effect of the machinery of administrative law. The limits of administrative power interest administrative lawyers; by contrast, most people are interested only in outcomes. Applicants aggrieved by the exercise of public power might frequently be disappointed to find that their desired outcomes do not match administrative law's objectives.

In this article, we ask what applicants seek from administrative law and identify three objectives — transparency, redress and reform — which judicial review is often not well-adapted to deliver. The influence of judicial review on administrative law scholarship is inverse to its contribution to resolving administrative law disputes. At best, it is merely 'one of a number of mechanisms for establishing transparency and accountability of government action'.[2] Judicial review cases are important, but are easily outweighed every year by the number of disputes resolved through other mechanisms, such as tribunals, ombudsmen, freedom of information ('FOI') requests, commissions of inquiry and ex gratia compensation schemes. This broader machinery offers a fundamental contribution to the capacity of administrative law to meet applicants' objectives. However, that contribution is sometimes forgotten for the reason that it is less easy to observe than the results of judicial review proceedings. It is commonly the case that even administrative law scholars and practitioners do not know what happens to successful applicants *after* their win in court.[3]

A successful judicial review applicant generally wants more than the chance to go through an administrative process again 'according to law', but that is the best result that most judicial review applicants can hope for. Even assuming the final outcome does go their way, we know that the world continues to turn while flawed decisions are overturned and made afresh; it is possible that a successful judicial review applicant might suffer significant and irremediable loss that nullifies their personal objectives while still meeting the public-facing objective of 'control'. A classic example is a person successfully challenging the invalid cancellation of their business licence with effect only after their business has been forced to close.[4] The limits and functions of Australia's administrative law mechanisms are well-understood, and

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1 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36 (Brennan J) ('*Quin*').
2 John Basten, 'The courts and the executive: a judicial view' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts* (Federation Press, 2019) 44, 45.
3 See Robin Creyke and John McMillan, 'Judicial review outcomes: an empirical study' (2004) 11 *Australian Journal of Administrative Law* 82.
4 See Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Australia, 2019) 339.

do not need restating. This article assesses the operation and suitability of administrative law from the viewpoint of what applicants truly seek, demonstrating how the system works as a whole and where gaps remain.

Strategic objectives

An applicant who is aggrieved by an administrative decision can turn to the machinery of administrative law in order to address that grievance. As any legal adviser will explain, however, even a decision made unlawfully does not necessarily open the door to a legal remedy that will satisfy an applicant's wants or needs. In part, this reflects the inherently procedural character of judicial review, which casts a long shadow over the attempt to catalogue the values that underpin administrative law. In addition to legality, those values include openness, fairness, participation, accountability, consistency, rationality, accessibility, impartiality, integrity, honesty and dignity.[5] The values included in this list go beyond legality, but still place an undeniable emphasis on procedure at the expense of substance.[6]

The Australian system of judicial review is dominated by a conception of the separation of powers under which the *substance* of administrative justice is beyond the reach of judicial power. To the extent that a judicial review court's decision 'avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error'.[7] Emblematic of this position is Australia's rejection of substantive relief in public law, either as a response to promissory estoppel[8] or as a remedy for the disappointment of a legitimate expectation.[9] Judicial review can 'cure' unlawful decision-making by requiring that decisions be made (and re-made) according to law, but it is never a mechanism for applicants to obtain the thing that they want or expect. The crux of the problem explored in this article is that applicants frequently have objectives that go beyond the procedural focus of judicial review. An applicant might not be satisfied merely to be the instrument for 'enforcing … the law which determines the limits and governs the exercise of the repository's power'[10] when their objective is the 'cure' that courts emphatically place beyond the constitutional remit of judicial review.[11]

5 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, Thomson Reuters, 2022) [1.20]; Michael Taggart, 'The province of administrative law determined' in Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 1, 3; Robert S French, 'Administrative law in Australia: themes and values' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 23.

6 See Carol Harlow and Richard Rawlings, 'Proceduralism and automation: challenges to the values of administrative law', in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law* (Oxford University Press, 2020) ch 14, 279; and Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 4th ed, 2021) ch 2.

7 *Quin* (n 1) 35–6 (Brennan J).

8 See *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 219–22 (Gummow J); *Quin* (n 1) 17–19 (Mason CJ); cf *R v Inland Revenue Commissioners; Ex parte Preston* [1985] AC 835.

9 A detailed discussion appears in Matthew Groves, 'Legitimate expectations in Australia: overtaken by formalism and pragmatism' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 319. This doctrine has been emphatically rejected by the High Court on separation of powers grounds: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1, 12–13 [34] (Gleeson CJ), 22–7 [68]–[80], 35–7 [111]–[119] (Hayne J), 48 [148] (Callinan J).

10 *Quin* (n 1) 35–6 (Brennan J).

11 As we describe in under 'Redress' below, merits review serves an important complementary function which curtails that limitation.

In order to assess the functional capacity of administrative law to satisfy an applicant's strategic objectives, the starting point must be to identify them. This article explores three:

(a) **Transparency:** Many applicants who access administrative law are interested in achieving transparency, which may take a number of forms. In some cases, an applicant may desire transparency in respect of an obscure process, seeking notice or an opportunity of participation. In other cases, an applicant may seek an explanation of reasoning and, in yet others, they may want access to new or concealed information about government operations. These forms of transparency may in some cases serve a function in their own right, in the sense of achieving individual or public awareness. In other cases, transparency might be a means to another end, such as providing a footing for the pursuit of further administrative law objectives, including redress.

(b) **Redress:** Perhaps the most common desire of administrative law applicants is to achieve redress, which we define in two different ways. First, it might include obtaining a different decision to alter the negative impacts of the one that has been made. For example, an applicant might seek the reinstatement of their cancelled licence or the grant of an entitlement that has been denied to them. Second, a demand for redress may refer to the repair of consequential harm arising from an unlawful decision, such as compensation for invalid detention or for financial harm suffered following the invalid cancellation of a licence.

(c) **Systemic reform:** Perhaps less commonly, administrative law applicants may seek to correct underlying structural flaws which have enabled maladministration to take place. There are numerous examples of cases in which an individual challenge has produced broader legal consequences, though the individual applicant may have been concerned only with the resolution of their own grievance.[12] In some cases, however, an applicant's choice to bring proceedings may be in part (or even primarily) influenced by a desire for systemic reform, particularly for public interest and advocacy groups.[13] This may constitute applying direct pressure for immediate change, or take an indirect route, using administrative law tools to build momentum towards future reform.

These of course are not the only reasons that an applicant might seek to challenge an administrative decision. An applicant may have other goals in mind, such as stalling an undesired event[14] or having an outlet to vent their anger. There are procedures in place which limit the spurious or malicious use of administrative law mechanisms, including costs

12 Applicants in cases that have broad consequences for the law generally are usually seeking only an outcome tailored to their own circumstances; see, eg, *Kioa v West* (1985) 159 CLR 550; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

13 See the examples explored under 'Reform' below.

14 Consider two examples from opposite ends of the administrative law system. First, it has been suggested that tobacco companies used freedom of information requests to 'distract, delay and intimidate the government' in the context of reforms to tobacco marketing: Andrew D Mitchell and Tania Voon, 'Someone to watch over me: the use of FOI requests by the tobacco industry' (2014) 22(1) *Australian Journal of Administrative Law* 18, 42. Second, it is accepted that asylum seekers have no incentive to hurry the process which may see them returned to their country of origin; see, eg, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 506 [118] (Kirby J).

implications,[15] the discretion to decline relief[16] and exclusion from pursuing further actions.[17] However, an applicant can validly use administrative law proceedings for tactical reasons, such as to bolster an applicant's commercial position by reference to a competitor.[18] The above list is therefore not a comprehensive explanation of all possible reasons an applicant may access the mechanisms of administrative law. However, it provides a basis to explore some of the most important and common objectives of administrative law applicants, and serves to highlight the contribution that administrative law makes to those objectives.

Transparency

A desire for transparency often underpins challenges to administrative decisions. This has been explained on the basis that individuals who do not get what they expected from the government are less aggrieved if they understand why that outcome was reached. In many situations, transparency may be of value in its own right because 'democracy rests upon government transparency and accountability'.[19] However, transparency is also a means to an end, in the sense that it provides a footing for further steps to be taken in the pursuit of administrative justice, including redress.[20] In the sections below, we consider various aspects of transparency that applicants commonly seek.

Explanation

Access to a statement of reasons has long been recognised as critical to the meaningful capacity to challenge administrative decisions.[21] In addition to revealing the presence of reviewable errors, an improved understanding of the basis for government decision-making can be justified on dignitarian grounds as well as on the basis that it results in better-quality decision-making.[22] Reasons can lead to increased public confidence in administrative processes by fostering 'the values of transparency and accountability that permeate

15 For example, solicitors can be subjected to punitive costs orders for acting in a matter without reasonable prospects of success: *Legal Profession Uniform Law Application Act 2014* (NSW) s 62, sch 2.

16 For example, a court can refuse to award relief in judicial review proceedings to an applicant who has acted in bad faith (Aronson, Groves and Weeks (n 5) ch 12) and the Ombudsman can decline to investigate where a complaint is 'frivolous or vexatious or was not made in good faith': *Ombudsman Act 1976* (Cth) s 6(1)(b)(i) ('*Ombudsman Act*').

17 For example, an applicant who is deemed to be vexatious may be denied the ability to commence future legal claims (*Vexatious Proceedings Act 2008* (NSW)) or to pursue freedom of information requests (*Freedom of Information Act 1982* (Cth) ss 89K–89M ('*FOI Act*')).

18 In judicial review proceedings, the courts have sometimes allowed competitors to establish standing to challenge decisions made for the benefit of a commercial competitor: *Argos Pty Ltd v Corbell* (2014) 254 CLR 394.

19 Robin Creyke et al, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 6th ed, 2022) 1049. See further Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020) 40–1.

20 See the justifications for the obligation to provide reasons in Aronson, Groves and Weeks (n 5) [11.10]–[11.20].

21 JR Kerr et al, *Commonwealth Administrative Review Committee Report* (Parliamentary Paper No 144, 1971) pp 78–9 [266].

22 See Janina Boughey, 'The culture of justification in administrative law: rationales and consequences' (2021) 54 *University of British Columbia Law Review* 403, 417–18. See further *Osmond v Public Service Board* [1984] 3 NSWLR 447, 463 (Kirby P).

administrative law',[23] which can be described as a means of 'getting things right' (rather than only 'putting things right').[24] The lack of any right to reasons at common law[25] is in part made up for by the fact that a decision unsupported by reasons is more open to attack on the basis that it is unreasonable,[26] but in greater part by the range of entitlements provided for by statute.[27] The combined interaction of the common law approach and statutory entitlements has seen an 'increased culture of officials providing reasons even when not obliged to do so'.[28] An individual seeking an explanation from government takes the benefit of this culture in addition to these specific entitlements.

Courts and tribunals are not the only pathway towards the provision of reasons. The Commonwealth Ombudsman has an explicit power to report that an agency should have provided reasons in respect of a decision,[29] which may then be forthcoming in the context or aftermath of an ombudsman investigation. The Ombudsman's investigative powers to compel the production of written or oral information from witnesses[30] may also reveal the basis on which a decision was made (though this will not always be shared with the applicant). That same outcome may also arise through the operation of other investigatory mechanisms discussed in more detail in the following section. What all of this tells us, in a more practical sense, is that where an applicant seeks transparency in the form of an explanation or justification for government decision-making, there will often be a mechanism which directly or indirectly supports that goal. It is true that there will be cases that fall between the cracks of the legislative schemes that support the provision of reasons, but an applicant aggrieved by an administrative decision will often have access to a mechanism that can compel the government to explain itself.

Information

The second form of transparency that an applicant may have in mind is uncovering information, whether in the form of government documents or more general evidence about what has occurred in a matter of maladministration. Merits and judicial review processes offer some measure of support to this objective. Once an applicant has commenced a claim before a tribunal[31] or court[32] in respect of an administrative decision, the processes of each

23 Creyke et al (n 19) 1103.

24 Harlow and Rawlings, *Law and Administration* (n 6) 549.

25 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 669–70 (Gibbs CJ).

26 See, eg, *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353; *Klein v Domus Pty Ltd* (1963) 109 CLR 467; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. These cases can be traced back to the decision of the House of Lords in *Sharp v Wakefield* [1891] AC 173.

27 For an overview, see Creyke et al (n 19) 1107–8. The most important of these at the Commonwealth level are s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') and s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*'). See also *Uniform Civil Procedure Rules 2005* (NSW) r 59.9; *Acts Interpretation Act 1901* (Cth) s 25D. Many obligations are individualised to particular decision-making contexts: eg, *Corporations Act 2001* (Cth) s 915G.

28 Aronson, Groves and Weeks (n 5) [11.90]. The reasons provided may allow error to be inferred that would not have been obvious in the absence of a statement of reasons: *L&B Linings Pty Ltd v WorkCover Authority (NSW)* [2012] NSWCA 15, [57] (Basten JA).

29 *Ombudsman Act* (n 16) s 15(2)(e).

30 Ibid s 9.

31 A decision-maker was obliged, after an application for review was made, to lodge with the AAT the reasons for the decision and 'every other document … relevant to the review of the decision': *AAT Act* (n 27) s 37.

32 Compulsory procedures may be used to compel the production of relevant documents, although this right is generally more curtailed in public law cases: *Uniform Civil Procedure Rules 2005* (NSW) r 59.7(4).

institution provide a degree of transparency through the production of evidence relevant to the case. However, the most obvious mechanism for an applicant seeking access to documents is FOI legislation. The Commonwealth *Freedom of Information Act 1982* (‘*FOI Act*’) provides that ‘every person has a legally enforceable right to obtain access’ to government documents (broadly defined) held by Commonwealth government departments and agencies.[33] That ‘remarkable reform’[34] has at times struggled to fulfil this aspiration, in part due to frequent legislative and executive tinkering with the rules and practice of open government. In its current form, an agency can refuse to release documents that are conclusively exempt[35] or, alternatively, ‘conditionally exempt’[36] where release would be contrary to the public interest.[37] The agency bears the onus of justifying any refusal of access and cannot take a person’s reasons for seeking access into account in determining whether to release a document.[38] In practice, this means that an agency cannot refuse access on the basis that an applicant intends to use a document in legal proceedings as an alternative to discovery.[39] FOI applications have featured heavily in high-profile litigation against government,[40] demonstrating their utility as a supporting mechanism in pursuit of accountability as well as transparency.

However, the process of seeking information and then testing the legality of any refusal is time-consuming. For example, one applicant who was refused access to their health records in July 2018 waited nearly two years for the Information Commissioner to determine that the agency should have granted access.[41] Such delays are not uncommon,[42] as the Information Commissioner is well aware. After a lengthy period of vacancy following the Commonwealth Government’s attempt to abolish the Office of the Australian Information Commissioner in 2015,[43] the most recent Commissioner resigned in May 2023, citing ‘lengthy delays to information requests and his lack of power to fix a system that currently has people waiting up to five years for an appeal decision’.[44] The beneficial outcomes promised by the *FOI Act* are apt to lose their value where applicants are made to wait so long for the information they request.

33 *FOI Act* (n 17) s 11.

34 John McMillan, ‘Transparent government — are we travelling well?’ (2021) 28 *Australian Journal of Administrative Law* 259, 259.

35 The *FOI Act* (n 17) conclusively exempts documents, for example, because they are subject to legal professional privilege (s 42), or because their release would impact national security (s 33) or disclose trade secrets (s 47).

36 For example, because a document’s release would impact Commonwealth–State relations (ibid s 47B), the economy (s 47J) or personal privacy (s 47F).

37 Ibid s 11A(5). The ‘public interest’ is determined by reference to the factors in s 11B.

38 Ibid s 11(2). An applicant’s motives may be relevant in limited cases, such as where an applicant seeks access to third-party personal information for a valid private purpose rather than with a view to dissemination: see, eg, *‘FG’ and National Archives of Australia* [2015] AICmr 26 (13 April 2015), [38].

39 See, eg, *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 98 FCR 311.

40 See, eg, *JT International SA v Commonwealth* (2012) 250 CLR 1.

41 *‘SO’ and Services Australia (Freedom of Information)* [2020] AICmr 25.

42 A former senator has taken legal action against the Australian Information Commissioner over delays of more than three years in ruling on FOI applications: James Massola, ‘FOI Commissioner quits after less than a year in the job’, *Sydney Morning Herald* (online, 6 March 2023) <https://www.smh.com.au/politics/federal/foi-commissioner-quits-after-less-than-a-year-in-the-job-20230306-p5cptq.html>.

43 See Greg Weeks, ‘Attacks on integrity offices: a separation of powers riddle’ in Weeks and Groves (eds) (n 2) 25, 38. The previous FOI Commissioner had resigned in December 2014 and his functions were exercised by John McMillan as Australian Information Commissioner.

44 Massola (n 42).

Beyond FOI requests, many other mechanisms can perform investigative functions, not only to facilitate documentary transparency but also to uncover new information. One of the most important of these is the office of the Commonwealth Ombudsman. The jurisdiction of the Ombudsman extends beyond the legality of government action to capture action that is 'unreasonable, unjust, oppressive or improperly discriminatory'[45] or 'otherwise, in all the circumstances, wrong'.[46] To support this role, the Ombudsman enjoys a broad range of investigative powers, including to require the production of documents and written statements,[47] to require witnesses to attend and answer questions,[48] and to enter premises.[49] This investigatory role is formidable; there are few legitimate bases on which a person or agency may refuse to comply with an Ombudsman's investigatory request.[50] Other bodies with a standing remit to investigate government operations include anti-corruption commissions, which are empowered to investigate 'corrupt conduct' in various jurisdictions;[51] the Auditor-General, who can audit 'performance' in the public sector;[52] and Parliament, which has the power to call for information and documents from the government.[53] Investigatory bodies can also be set up specifically to inquire into an instance of government wrongdoing, including the establishment of royal commissions and parliamentary committee inquiries. Most of these various investigatory bodies enjoy coercive powers,[54] and there are numerous examples of high-profile investigations which have brought to light documents and evidence revealing government wrongdoing.[55]

For an aggrieved individual, the ability to engage with these types of investigatory bodies depends on the applicable rules governing their operation. For example, it is possible for an individual to play a direct role in kickstarting the relevant process by seeking merits or

45 *Ombudsman Act* (n 16) s 15(1)(a)(iii).

46 Ibid s 15(1)(a)(v). See Greg Weeks, 'Maladministration: the particular jurisdiction of the ombudsman' in Matthew Groves and Anita Stuhmcke (eds), *Ombudsmen in the Modern State* (Hart Publishing, 2022) 21, 24–5.

47 *Ombudsman Act* (n 16) s 9(1).

48 Ibid ss 9(2) and 13.

49 Ibid s 14.

50 For example, the privilege against self-incrimination and legal professional privilege do not apply, though information so obtained cannot later be used in evidence: ibid s 9(4). Non-compliance is punishable as an offence: s 36.

51 See, eg, *Independent Commission Against Corruption Act 1988* (NSW) ss 7–9 ('*ICAC Act*'); *National Anti-Corruption Commission Act 2022* (Cth) s 8 ('*NACC Act*').

52 *Auditor-General Act 1997* (Cth) ss 17–18.

53 See, eg, House of Representatives, *House of Representatives Practice,* DR Elder and PE Fowler (eds) (Parliament of Australia, 7th ed, 2018) 625.

54 For anti-corruption commissions see, eg, *ICAC Act* (n 51) ss 21–23; *NACC Act* (n 51) pt 7. Royal commissions have no coercive power at common law (*Clough v Leahy* (1904) 2 CLR 139, 153 (Griffith CJ)) but statutory authority is conferred by the *Royal Commissions Act 1902* (Cth). For the Auditor-General see *Auditor-General Act 1997* (Cth) pt 5. Parliamentary committee powers are backed by the force of orders of contempt, subject to a range of limitations including public interest immunity claims: see, eg, House of Representatives (n 53) 625.

55 Examples include the various investigations by the NSW Independent Commission Against Corruption ('ICAC') into former Minister Eddie Obeid; the 2022–23 Commonwealth Royal Commission into the Robodebt Scheme; the 2013 Commonwealth Royal Commission into the Home Insulation Program; the 2018 Victorian Royal Commission into Management of Police Informants, which investigated the use of a criminal barrister as a police informant; the Auditor-General's investigation and report into 'Sports Rorts' (Auditor-General, 'Award of Funding under the Community Sport Infrastructure Program' (Performance Audit, 15 January 2020); the investigation into the 'children overboard' scandal: Senate Select Committee on a Certain Maritime Incident, 'A Certain Maritime Incident' (October 2002).

judicial review of an administrative decision, or by making a complaint to the Ombudsman or to an anti-corruption commission.[56] Access to other bodies is less direct, with no formal provision being made for individual referrals. However, this does not mean that they are of no potential benefit to an individual. For example, while an individual cannot directly utilise parliamentary procedures to gain access to government documents, an individual may approach their local member to do so on their behalf. Taking a grievance to the media may also prompt a broader investigation, as has been the case in many high-profile instances of government maladministration.[57] An aggrieved individual may also have opportunities to play an active role in providing evidence or support to the investigator once an investigation is underway (eg, making a submission to a royal commission, or appearing as a witness at a parliamentary inquiry).

In short, the extent to which an individual will have access to documents and evidence uncovered by an investigatory body varies greatly according to the body in question. For some administrative law mechanisms, an individual has a leading role in the process that facilitates direct access to relevant documents and information (eg, an applicant will obtain direct access to material produced within the conduct of tribunal or court proceedings or pursuant to an FOI request). In contrast, for many other mechanisms, an individual who kickstarts or participates in an investigation will not be in much better position than any other member of the general public. That is the case for the Ombudsman, for example: an individual has no right of access to information obtained during the course of an Ombudsman investigation undertaken on their behalf because, as a general rule, investigations are undertaken in private[58] and information uncovered during an investigation is not publicly released. That position is even clearer in respect of broader systemic investigations — unless information is provided on a voluntary basis, an aggrieved individual is not entitled to greater information about anti-corruption, royal commission or parliamentary inquiries than other members of the public. These investigations are discussed in the following section.

Publicity

A final element of transparency is the extent to which the machinery of administrative law facilitates publicity of government operations. As noted in the foregoing section, some mechanisms provide an aggrieved individual with access to information as a by-product of their involvement with the relevant mechanism (eg, through making an FOI request). Otherwise, an individual must rely on the more general capacity of the relevant mechanism to facilitate publicity, which may arise both through the public nature of the investigative process, or through the publication of reports. For judicial processes, the default position is that hearings are to be held in public, because justice must not only be done, but be

56 See, eg, *Ombudsman Act* (n 16) s 7; *ICAC Act* (n 51) s 10; *NACC Act* (n 51) s 32.

57 For example, revelations of mistreatment of children held in youth detention systems in the Northern Territory in an investigative report ('Australia's Shame', *Four Corners,* 25 July 2016, <https://www.abc.net.au/news/2016-07-25/australias-shame-promo/7649462>) were subsequently the subject of the *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017).

58 *Ombudsman Act* (n 16) s 8(2).

seen to be done.[59] Other than in the most exceptional circumstances,[60] court and tribunal proceedings take place in public, allowing the public and the media to hear evidence and submissions that may provide insight into government decisions and conduct.[61] To similar effect, many royal commission hearings and parliamentary inquiries take place in public, with witness statements being recorded for posterity in publicly accessible transcripts.[62] However, not all investigatory mechanisms operate in the public eye. As noted above, investigations by the Ombudsman never occur in public[63] and, for some mechanisms, public hearings are discretionary. The comparative powers of the NSW Independent Commission Against Corruption ('ICAC') and the Commonwealth National Anti-Corruption Commission ('NACC') are a good example; the ICAC has the power to conduct a public inquiry if satisfied it is in the public interest,[64] whereas the NACC must hold hearings in private unless 'exceptional circumstances' justify publicity.[65] Private investigations clearly limit the extent to which an individual (and the public more generally) may be made aware of any information that is uncovered.

Concerns regarding limitations in the transparency of investigations may be allayed where a final report is published that reveals relevant evidence and findings of government maladministration. Again, for courts and tribunals, the publication of reasons is routine, and will often detail findings of fact underlying the dispute before determining the merits and/or the legal validity of government action.[66] The value of this transparency is illustrated in part by exceptions to the rule. For example, first-level social security decisions in the Administrative Appeals Tribunal ('AAT') are not published, which meant that important decisions regarding the legality of the Robodebt scheme were effectively suppressed. Similarly, many participants in the National Disability Insurance Scheme have been disadvantaged by the inability to access information about the AAT's approach to cases in which reasons have not been published or were settled before a final decision had been made.[67] For other mechanisms, publicity is generated through the publication of reports.

59 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259. See Rock, *Measuring Accountability* (n 19) 143–4, 168–9.

60 For example, where publication of proceedings would prejudice the fairness of a trial: *Scott v Scott* [1913] AC 417; or where confidential information is in issue before the AAT: *AAT Act* (n 27) s 35.

61 In some cases, public interest may extend to live broadcasting of proceedings: see, eg, *Matthews v SPI Electricity Pty Ltd* (2013) 39 VR 287; *Kamasaee v Commonwealth (No 9) (Live streaming ruling)* [2017] VSC 171.

62 See, eg, Parliament of Australia, *Select Committee for an inquiry into a certain maritime incident: Public hearings and transcripts* (Website) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/hearings/index>.

63 *Ombudsman Act* (n 16) s 8(2).

64 *ICAC Act* (n 51) s 31.

65 *NACC Act* (n 51) s 73.

66 Reasons for judicial decisions are generally seen to be a 'necessary incident of the judicial process': *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278–9 (McHugh JA); or 'an inherent aspect of the exercise of judicial power': *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329 [22] (Steward J).

67 Public Interest Advocacy Centre, Submission 33 to Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Inquiry into General Issues Around the Implementation and Performance of the NDIS* (13 July 2020).

Ombudsmen,[68] anti-corruption commissions,[69] royal commissions,[70] Auditors-General[71] and other parliamentary mechanisms publish reports on their findings, and there are numerous examples of such reports which expose maladministration.[72] The reach of these reporting powers is dependent on both the applicable legal framework and the practical approach taken by the body in question. For example, the NACC will be required to prepare a report in respect of all investigations, but to publish only where the Commissioner is satisfied that it is in the public interest to do so.[73] Further, the Ombudsman exercises the power to report in only a small minority of cases.[74] These mechanisms can make a significant contribution to publicising maladministration in the right circumstances, although they are not a clear pathway towards transparency in every case.

Redress

While transparency is a starting point in the pursuit of administrative justice, an applicant's strategic objectives will frequently take the form of a demand for redress. Given the breadth of executive power and the extent to which individuals must interact with bureaucratic regimes, it is of little surprise that maladministration is capable of generating significant economic and non-economic harm. Errors in the cancellation or grant of visas, licences, approvals, permits and so on have the capacity to cause significant hardship to the individuals who rely on them. The pursuit of redress might include both alteration of the impugned decision, and repair of consequential harm that the individual may have suffered while the unlawful decision was in place.

Altering outcomes

Many applicants aggrieved by an unlawful exercise of power are concerned with redress in the form of a different decision. The Nepalese refugee in *Minister for Immigration and Citizenship v SZGUR*[75] was not merely interested in testing the legality of the decision to refuse him a protection visa, but with obtaining permission to remain in Australia; the children in the *Sharma* litigation[76] were not merely seeking to ensure that the Minister for the Environment took their welfare into account, but with halting the approval of a new coal mine; and in *Green v Daniels*[77] Ms Green was less concerned with the Department's inflexible application of policy than with obtaining an unemployment benefit over the period of her summer

68 *Ombudsman Act* (n 16) s 15.
69 See, eg, *NACC Act* (n 51) ss 149, 156.
70 Subject to limitations, eg, *Royal Commissions Act 1902* (Cth) s 6OJ.
71 *Auditor-General Act 1997* (Cth) s 18(2).
72 A celebrated example is the inquiry into the 'children overboard' affair: Senate Select Committee on a Certain Maritime Incident, 'A Certain Maritime Incident' (October 2002).
73 *NACC Act* (n 51) ss 149, 156.
74 For example, in 2015 the Ombudsman investigated approximately 2,300 complaints and published only four reports in respect of those investigations: Rock, *Measuring Accountability* (n 19) 201.
75 (2011) 241 CLR 594 ('*SZGUR*').
76 In *Sharma v Minister for Environment* (2021) 391 ALR 1 (FCA), Bromberg J indicated that the relevant statute treated the safety of the children as a mandatory consideration: at 96 [404]. The claim was framed in negligence rather than judicial review, and was overturned on appeal: *Minister for Environment v Sharma* (2022) 291 FCR 311 (FCAFC).
77 (1977) 13 ALR 1.

vacation. A successful judicial review challenge does not necessarily lay the foundation for any of those substantive outcomes. The Nepalese refugee successfully challenged the legality of two consecutive visa refusal decisions before the High Court allowed the fatal refusal decision to stand;[78] the Minister for the Environment ultimately approved the mine expansion after taking into account the welfare of the children;[79] and Ms Green's welfare payment was refused even without the blind application of the unfavourable government policy.[80] Many judicial review applicants may well obtain the outcome they really wanted when a matter is reconsidered according to law;[81] the Kioa family, for instance, were able to remain in Australia following the determination of their celebrated procedural fairness case.[82] However, as the above examples attest, that is by no means certain and a great many judicial review victories may be Pyrrhic. To the extent that judicial review remedies set the stage for a favourable second exercise of administrative discretion on the merits, this is legally a matter of coincidence rather than a reflection of those merits.[83]

The fundamental truth that Australian judicial review doctrine is unconcerned with the practical benefits it might produce rarely requires further explanation. However, consider the positions of two applicants who are each aggrieved because, say, the decision-maker has irrelevantly taken into account each applicant's criminal history when making an adverse decision. The first applicant holds a current licence which the decision-maker has purported to cancel, while the second applicant sought to obtain a licence but has been refused. The operation of a writ of certiorari will produce entirely inconsistent practical results for each of these two applicants; the former will see their licence restored, but the latter will be left with nothing (apart from the possibility of re-applying). Remedies which compel the exercise of power are likewise of limited benefit to an applicant seeking to alter the outcome of an adverse decision. A writ of mandamus requires a decision-maker to re-exercise their power legally rather than to reach a specific outcome or to compel the exercise of discretion in a particular way.[84] Replacing an unlawful decision-making process with a lawful one will not always lead to a different result; as for Ms Green, the same adverse decision might be reached having validly exercised the relevant power. It follows that what the second applicant in the example above has 'won' through a successful judicial review application is the *chance* of a better outcome. Judicial review's remedies are not designed to achieve

78 A delegate of the Minister initially refused the visa application in 2005. The Refugee Review Tribunal's first decision to affirm that refusal was quashed by the Federal Court in 2006. A differently constituted Tribunal made a second decision to affirm the refusal, which was again quashed by the Federal Court in 2007. The third and final decision to affirm, made by a differently constituted Tribunal in 2008, was found valid by the High Court: *SZGUR* (n 75).

79 See Sussan Ley, 'Statement of reasons for approval under the *Environment Protection and Biodiversity Conservation Act 1999*' (EPBC No 2016/7649, 16 September 2021) [163].

80 See 'Statement by Senator Don Grimes' (27 May 1977). As we note at page 102 below, this negative outcome was later ameliorated through the operation of an ex gratia payment. See Robin Creyke, '*Green v Daniels*' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 309.

81 See Creyke and McMillan (n 3).

82 *Kioa v West* (n 12).

83 As a matter of both law and practice the government does not generally ignore tribunal decisions: see page 99 and nn 92 and 93 below.

84 The circumstances in which mandamus will lie to compel the only legal way to perform a duty are very limited: *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51; *SAS Trustee Corporation v Woollard* (2014) 86 NSWLR 367, 391 [108] (Basten JA). See Aronson, Groves and Weeks (n 5) [16.90], [16.110].

anything other than procedural redress, in which sense they are a time-consuming and expensive way for an applicant to win 'nothing more than judicial confirmation that they remain in the game and have not yet lost'.[85]

Merits review in tribunals is a much clearer means by which individuals can seek redress in the form of an altered outcome.[86] The regular injunctions against courts curing administrative injustice make more sense once account is taken of the existence of tribunals, and it is no coincidence that the seminal description of the legality–merits distinction in *Attorney General (NSW) v Quin* ('*Quin*') was written by Brennan J, who had been the inaugural President of the AAT and understood well how the various parts of the puzzle fit together.[87] The unspoken part[88] of his judgment in *Quin* is that a tribunal can do what is forbidden to courts and 'form its own judgment of what is the correct or preferable decision in the circumstances of the particular case as revealed in the material before [it]'.[89] The element of 'preferability' offers an applicant scope to seek redress in the form of a varied or substitute outcome[90] reached on the best and most current information.[91] Unlike a judicial review victory, which may only be temporary, a win on the merits is enduring; there are defined limits to the government's ability to 're-exercise' a power (or re-make an unfavourable decision) following determination by a merits review tribunal.[92] Additionally, convention and good practice mean that public administrators almost always comply with tribunal decisions.[93]

In practice, the percentage of cases in which the AAT disagrees with the decision under review varies according to subject area. In the most recently published statistics,[94] for example, the AAT found that the original decision was not 'correct or preferable' in only 10 % of refugee cases, in contrast to 75% of cases involving the National Disability Insurance Scheme. The overall statistic across practice areas reflects that the AAT found the original government

85 Boughey, Rock and Weeks (n 4) 7.

86 The most important of these bodies at the Commonwealth level is the Administrative Appeals Tribunal ('AAT'). On 16 December 2022, the Commonwealth Government announced that it would abolish the AAT and replace it with a new body. See M Groves and G Weeks, 'Tribunal justice and politics in Australia: the rise and fall of the Administrative Appeals Tribunal' (2023) 97 *Australian Law Journal* 278. An applicant may alternatively seek to alter a decision through internal review on the merits by a different decision-maker within the original agency. This may be provided for legislatively (see, eg, *Social Security (Administration) Act 1999* (Cth) pt 4) but need not have a statutory basis.

87 *Quin* (n 1) 35–6 (Brennan J).

88 See FG Brennan, 'The anatomy of an administrative decision' (1980) 9 *Sydney Law Review* 1.

89 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 636. See also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 327 [140].

90 *AAT Act* (n 27) s 43(1). The AAT could also affirm the decision on review or set it aside and remit the matter to the original decision-maker.

91 Subject to any contrary statutory indication; see, eg, *Freeman v Department of Social Security* (1988) 15 ALD 671.

92 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 [50]. This result was driven by the terms on which the tribunal's powers were conferred, which may differ as between legislative regimes.

93 Exceptions to this rule are most unusual, although they do sometimes occur; see, eg, the refusal of a Minister to give effect to an order of the AAT: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* (2020) 171 ALD 608; discussed in M Groves and G Weeks, 'Ministerial adherence to the law' (2020) 27 *Australian Journal of Administrative Law* 187; Aronson, Groves and Weeks (n 5) [12.60].

94 Administrative Appeals Tribunal, 'AAT caseload report for the period 1 July 2022 to 31 May 2023' (Whole of Tribunal Caseload Report, August 2023) <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2022-23.pdf>.

decision was not 'correct or preferable' in 35% of cases. While those statistics include cases that were remitted for reconsideration by the original government decision-maker in addition to those actually varied or remade by the tribunal, these statistics are telling of the capacity for merits review tribunals to alter the outcome of a decision for the benefit of an individual.

Other mechanisms within and beyond administrative law may also serve that goal. The Commonwealth Ombudsman, for example, is able to recommend that an authority should reconsider, vary or cancel a decision following an investigation.[95] Thus, the Ombudsman may urge an agency to grant a licence that has been refused, to confer a benefit that has been denied, or to cancel or reduce a debt that has been raised. The Ombudsman can also make more elastic recommendations to work around strictures that have produced an initially unfavourable decision, for example by recommending that an agency waive or flexibly apply criteria to accommodate an applicant's situation.[96] While unenforceable, agencies are generally inclined to comply with such recommendations:[97] between 2019 and 2021, government agencies accepted 73 of 77 recommendations made by the Ombudsman, with 92% of those having been at least partially implemented at the time of reporting.[98] Many of those recommendations are addressed at more general policy reform in addition to matters of individual grievance, but these statistics reveal that the Ombudsman has clear capacity to agitate for the revision of a government decision. Further opportunities to push for the alteration of an unfavourable decision exist outside the traditionally conceived 'fourth (or integrity) branch'.[99] For example, an individual may press for the alteration of a decision through political channels, such as by complaining to a local Member of Parliament, or calling for attention on the back of media publicity.[100] To summarise, an applicant who seeks a different outcome (as opposed to the nullification of a decision) may find assistance in various places in the broader system of administrative law and beyond.

Repair of harm

Not all harm can be addressed by setting aside or altering an unfavourable administrative decision.[101] To name but a few examples, an individual may be imprisoned pursuant to an invalid administrative order,[102] or be prevented from operating their otherwise profitable

95 *Ombudsman Act* (n 16) s 15(2).

96 For example, the Ombudsman might recommend the use of 'exceptional circumstances' provisions to waive requirements that make an applicant ineligible for a benefit: Commonwealth Ombudsman, *Making Things Right: Department of Education and Training, Compensation for Errors Made by Contracted Service Providers* (Report No 1, March 2015) 9.

97 See Rock, *Measuring Accountability* (n 19) 201–2.

98 Commonwealth Ombudsman, 'Did they do what they said they would? Volume 2' (Report No 4, October 2022) 2.

99 See, eg, Robin Creyke, 'An "integrity" branch' (2012) 70 *AIAL Forum* 33; James J Spigelman, 'The integrity branch of government' (2004) 78 *Australian Law Journal* 724.

100 There are many examples of success stories arising from these tools in the context of adverse decisions made by the National Disability Insurance Agency; see, eg, Michael Atkin, 'Bill Shorten intervenes in NDIS case after agency refuses to fund modifications for grandmother with a disability', *ABC News* (online 19 August 2022) <https://www.abc.net.au/news/2022-08-19/bill-shorten-intervenes-to-end-ndia-funding-dispute/101346254>.

101 See, eg, the hypothetical example in Boughey, Rock and Weeks (n 4) 339.

102 *Ruddock v Taylor* (2005) 222 CLR 612.

business if their licence is cancelled,[103] or have their commercial activities restricted.[104] In such cases, even if a decision is ultimately remade in the applicant's favour, that revised outcome cannot 'unring' some bells; the individual will still have been imprisoned, lost money or seen their business destroyed. What such applicants often want is repair of that consequential harm, and common law judicial review remedies are not fit for that purpose;[105] 'the mere invalidation of an administrative decision does not provide a cause of action or a basis for an award of damages'.[106] The shortfalls in public law's capacity to provide a remedy for harm suffered as a consequence of invalid government decision-making is an area that has attracted commentators over many decades.[107]

At its broadest, a public law damages remedy would provide compensation for losses arising as a result of government action taken in excess of power. In Australia, at least, there have been no serious indications that such a remedy should be developed. At one stage, a tortious remedy was developed to compensate 'a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another',[108] but it met with little favour from either academics[109] or judges.[110] Establishing the invalidity of an administrative decision does not entitle an applicant to a compensatory remedy, but there may nonetheless be strategic benefit in seeking judicial review if it provides a pathway towards other forms of relief. No tort targets invalidity per se, but in some cases establishing invalidity may be an essential component of liability (eg, misfeasance in public office) or may exclude the availability of a defence (eg, the intentional torts of false imprisonment and battery).[111] An applicant looking to repair harm may find that establishing invalidity is a first step towards their goal of obtaining compensation, either as a precursor to a claim in tort,[112] or in the form of a collateral attack.[113]

103 *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1.

104 *Northern Territory v Mengel* (1995) 185 CLR 307 ('*Mengel*'); *Jain v Trent Strategic Health Authority* [2009] AC 853.

105 An exception which demonstrates the general truth of this contention is that applicants who have only suffered damage to their reputation may want or need no more than a declaration that that damage was inflicted contrary to law; see, eg, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

106 *Chan v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 29, 41. The courts have likewise refused to interpret the statutory power to make an order 'to do justice between the parties' under the *ADJR Act* (n 27) to allow for the making of a compensation order: *Park v Minister for Immigration and Ethnic Affairs* (1988) 14 ALD 787, 789–90.

107 The sources are collected in Ellen Rock and Greg Weeks, 'Monetary awards for public law wrongs: Australia's resistant legal landscape' (2018) 41(4) *UNSW Law Journal* 1159.

108 *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 156. In this context, 'unlawful' meant forbidden by law rather than merely invalid in the public law sense: *Mengel* (n 104) 336.

109 See GP Barton, 'Damages in administrative law' in *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 123, 131.

110 *Kitano v Commonwealth* (1974) 129 CLR 151, 174–5; *Dunlop v Woollahra Municipal Council* [1982] AC 158, 170–1; *Lonrho Ltd v Shell Petroleum Co Ltd* [No 2] [1982] AC 173. It was finally terminated by the High Court in *Mengel* (n 104).

111 See our taxonomy in Rock and Weeks (n 107) 1161–7.

112 For example, Mr Taylor established the invalidity of the administrative decision that gave rise to his imprisonment in judicial review proceedings (*Re Patterson; Ex parte Taylor* (2001) 207 CLR 391) before seeking damages in a false imprisonment claim (*Ruddock v Taylor* (n 102)). Mr Taylor ultimately failed in that latter claim on a statutory construction point.

113 See Ellen Rock, 'Resolving conflicts at the interface of public and private law' (2020) 94 *Australian Law Journal* 381, 384–6.

Given the difficulty and expense of pursuing public and private law claims before the courts, in many cases it may be more realistic to seek repair of harm arising from government decision-making through alternative means. As discussed above, ombudsmen have significant influence to recommend that a government body take action that may be of direct or indirect benefit to an individual, including by recommending the alteration of a decision to one in the individual's favour. Not all harm can be corrected in that way, of course, and the ombudsmen's powers extend to recommending an agency take action to address such consequential harm. For example, on the back of the failed 'Robodebt' scheme, the government had undertaken to refund payments that had been unlawfully levied based on a flawed calculation method. For those individuals who had unsuccessfully challenged their debt before the AAT, Services Australia refused to provide refunds on the basis that it could not alter the effect of the Tribunal's decisions. Following an investigation, the Commonwealth Ombudsman recommended that Services Australia take steps to issue those refunds as soon as possible,[114] and almost all refunds were then processed in the following eight-month period.[115]

With or without a recommendation by the Ombudsman, the government can provide redress to parties who are unable to establish legal liability via ex gratia schemes that provide for the payment of compensation and waiver of debts.[116] Benefits provided under such schemes respond to a moral rather than a legal duty owed by the government in its dealings.[117] Given that maladministration can occur (and cause loss) in the absence of judicially reviewable legal error, there is significant benefit to providing a form of compensation which is not based on the existence of a legal right.[118] In fact, many such schemes are expressly a 'last resort' for those who suffer harm, being inapplicable where there are alternative means to address loss (including legal proceedings).[119] An individual can approach the government directly to request redress through ex gratia compensation schemes, but the Ombudsman may bring greater clout by recommending that the government take remedial action based on findings made during the course of an investigation. Leveraging such compensation schemes plays directly to the strengths of the ombudsman institution, which can *recommend* compensation to remedy maladministration even though it cannot *order* such a remedy. Where an individual suffers harm not remedied by the correction of an unlawful process, the alteration of an unfavourable decision, or the application of private law, ex gratia redress mechanisms perform an important gap-filling function. That important function is evident in the events which unfolded in the wake of the second, and this time lawful, refusal of Ms Green's unemployment entitlement;[120] Ms Green was one of a group of school-leavers to whom the then Prime Minister recommended that an ex gratia payment be made following a

114 Commonwealth Ombudsman, 'Services Australia's Income Compliance Program' (Report No 2, April 2021), recommendation 4.

115 Commonwealth Ombudsman, 'Did they do what they said they would? Volume 2' (n 98) [1.269].

116 See the detailed discussion of these schemes in Boughey, Rock and Weeks (n 4) ch 10.

117 See ibid 289; Sarah Lim, Nathalie Ng and Greg Weeks, 'Government schemes for extra-judicial compensation: an assessment' (2020) 100 *AIAL Forum* 79, 79.

118 An Australian executive scheme provides compensation specifically to remedy 'defective administration'; see Boughey, Rock and Weeks (n 4) 298–302.

119 See, eg, Department of Finance (Cth), 'Scheme for compensation for detriment caused by defective administration' (Resource Management Guide No 409, November 2018) [19]; Department of Finance (Cth), 'Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013' (Resource Management Guide No 401, April 2018) [5]–[6].

120 See n 80.

recommendation by the Ombudsman.[121] The discretionary nature of ex gratia compensation in this sense cuts both ways; without specified grounds of entitlement it is difficult to access, but that lack of rigidity allows it to travel beyond the strictures of the law.

Reform

Successful challenges to government action are capable of promoting improvements and reform. A finding of unlawfulness might end an unlawful practice, or increase the chance of changes in policy or legislation, or serve an educative function for government officials responsible for making future decisions.[122] The full extent of the consequent change may be unconnected to the purpose for which an applicant sought review of a decision.[123] However, not all administrative law applicants are solely concerned with the resolution of their own individual grievance. Some have a dual purpose in mind, seeking a result that travels beyond the boundaries of their own case,[124] and for some applicants, the choice to bring proceedings is chiefly motivated by the pursuit of a broader agenda, of which the instant case is only a component part. Public interest groups exist across a number of areas, notably including groups concerned with environmental and climate change concerns, human rights, racial discrimination and inequality. There are several ways in which the machinery of administrative law can be used to advance these types of reform-oriented objectives.

Strategic and public interest litigation has long been utilised for the purpose of furthering agendas such as these.[125] The United States has a lengthy history of recognising judicial adjudication of legal claims as a valid forum to push for social and political change[126] and the English legal system saw a similar rise in campaigning groups in the early 1990s.[127] There is little doubt that many individuals and groups in common law countries look to legal claims as a means of furthering a political agenda beyond the instant dispute. While various types of legal claims can further these purposes,[128] public law judicial and merits review claims

121 See Creyke, '*Green v Daniels*' (n 80).

122 See Creyke and McMillan (n 3).

123 See, eg, *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, in which the High Court issued declaratory relief that ended the practice of detaining asylum seekers on Christmas Island, although the applicants' purpose was only to challenge procedural unfairness in their own cases.

124 *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 is an example of a case involving mixed motives, with residents seeking to challenge a mine approval for a range of reasons, including concern for their own living conditions and property values, alongside concerns for the natural environment.

125 For a fuller analysis of these issues, see, eg, Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge, 1992); Carol Harlow, 'Public law and popular justice' (2002) 65 *Modern Law Review* 1; Michael Ramsden and Kris Gledhill, 'Defining strategic litigation' (2019) 38(4) *Civil Justice Quarterly* 407; Scott Calnan, 'Class actions and human rights litigation in Australia: realising the potential' (2022) 37 *Law In Context* 117.

126 See, eg, *Brown v Board of Education*, 347 US 483 (1954), in which the National Association for the Advancement of Colored People commenced a series of claims of constitutional violations against education authorities with the long-term objective of achieving desegregation. For an overview of this litigation and its aftermath see JT Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001).

127 Harlow and Rawlings, *Pressure Through Law* (n 125). Note however the disquiet about those developments expressed in Harlow, 'Public law and popular justice' (n 125) 2.

128 A prominent example is the use of claims in tort or equity for strategic purposes. These have been used by representative groups to challenge the unlawful or unreasonable use of powers in the context of detention by police and immigration officials (eg, *Konneh v New South Wales* [2013] NSWSC 1423; *Jenkings v Northern*

have featured in ongoing campaigns on issues such as protection of the environment,[129] climate change,[130] animal rights,[131] the protection of asylum seekers,[132] and, more recently, pushback against restrictions and mandates in the context of the COVID-19 pandemic.[133] One of the biggest legal barriers to exploiting judicial review for these types of purposes is standing rules. An aggrieved individual will not be prevented from seeking review simply because they have an eye to reform in addition to their own grievance, but interest and community groups occupy shakier ground. Australian courts will entertain judicial review claims commenced by such groups where they can establish more than a 'mere intellectual or emotional concern',[134] but there is no suggestion of either judicial or legislative willingness to move towards a regime of 'open standing'. Unless a campaign group can demonstrate an acceptable connection to the matter in hand, its functions will be limited to supporting individuals who do have standing, or to intervening in a matter in some other capacity.[135]

Those who seek to use judicial review and other legal mechanisms in these kinds of contexts may have different strategies in mind.[136] In many cases, an applicant may seek an immediate alteration of the legal status quo, which may then be of benefit as a binding precedent in future cases. Irrespective of the success of the instant claim, an applicant may have broader strategic objectives in mind, such as seeking to generate publicity and public awareness, to document existing problems and limitations in the law, to promote accountability by requiring the government to publicly recognise the impact of its policies, or to stimulate public or political dialogue. The use of legal challenges to build 'momentum' on other objectives, including systemic reform, does not necessarily depend on success in the case at hand.[137] In one celebrated example, an Australian citizen being held without charge by the USA sought to compel the respondent Attorney-General to obtain his release.[138] The legal merits

Territory [2017] FCA 1263; *Kamasaee v Commonwealth* [2017] VSC 537; *DBE17 v Commonwealth* (2018) 265 FCR 600); in the context of environmental matters (eg, *Minister for Environment v Sharma* (n 76)); and in the unlawful levying of taxes or debts (eg, *Prygodicz v Commonwealth* [2020] FCA 1516).

129 See examples in Andrew Macintosh, Heather Roberts and Amy Constable 'An empirical evaluation of environmental citizen suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (2017) 39(1) *Sydney Law Review* 85.

130 For example, there is a long history of claims premised on the argument that a decision-maker has not taken into account climate change implications: *Greenpeace Australia Ltd v Redbank Power Pty Ltd* (1994) 86 LGERA 143; *Environment Centre Northern Territory v Minister for Resources and Water* [2021] FCA 1635. For discussion see Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the next generation of climate change litigation in Australia' (2017) 41 *Melbourne University Law Review* 793.

131 See, eg, *Animals' Angels eV v Secretary, Department of Agriculture* (2014) 228 FCR 35.

132 See, eg, *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 (representative proceedings challenging the refusal to afford an oral hearing to a class of refugees); *ARJ17 v Minister for Immigration and Border Protection* (2017) 250 FCR 446 (representative proceedings challenging the validity of a government policy restricting access to mobile phones); *Ruddock v Vadarlis* (2001) 110 FCR 491 (claim brought by a refugee interest group seeking the release of 433 asylum seekers).

133 See, eg, *Loielo v Giles* (2020) 63 VR 1.

134 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 512–13.

135 For example, as a friend of the court: see, eg, *Levy v Victoria* (1997) 189 CLR 579, 604–5 (Brennan CJ).

136 For an overview see Ramsden and Gledhill (n 125) 414–16.

137 Ibid 415.

138 *Hicks v Ruddock* (2007) 156 FCR 574.

of that application were not strong and were never destined to survive the application of the Act of State doctrine. The applicant's victory in court was limited to the dismissal of the government's strike-out application. However, the decision increased pressure on the government to seek his release, which was the applicant's primary objective. The fact that he was repatriated soon afterwards demonstrates the success of pursuing that objective as he did.[139]

The use of the courts as tools of reform is not universally supported. Carol Harlow has noted the potential risks arising from increasing resort to judicial processes for such purposes:

> If we allow the campaigning style of politics to invade the legal process, we may end by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, thereby undercutting its legitimacy.[140]

Irrespective of what we think of the *desirability* of reform-driven litigation, we note that there are also clear limits to its *utility*. The courts' function is to resolve the dispute before it and — putting to one side concerns about judicial advocacy — it will not generally be appropriate (or permitted) for applicants to argue their case by reference to broader social implications. Judicial review proceedings are a very blunt tool for identifying systemic problems, far less resolving them. Like obtaining a beneficial outcome on the merits, such an outcome will only ever be coincidental. By comparison, there are other administrative law mechanisms that are specifically suited to that broader task.

One of the more important mechanisms for this purpose is the office of the Commonwealth Ombudsman. While originally envisaged to play the more granular role of handling individual complaints, the office has come to take a broader view[141] which extends to 'tackl[ing] the systemic issues within an agency which led to the complaints in the first place'.[142] This function is supported by the Ombudsman's ability to commence 'own motion' investigations[143] and its extremely broad powers to recommend things to the government.[144] While the secrecy of Ombudsman investigations and the office's lack of coercive powers are potential limits to the goals of transparency and redress, these features of the office are incredibly important from a reform perspective. Many have observed that the constructive approach employed by the Ombudsman is more likely to produce a co-operative response from government than an adversarial one.[145] The numerous examples of work undertaken by the Ombudsman which have focused on systemic issues with a view to improvement and reform include issues in

139 See Aronson, Groves and Weeks (n 5) [17.100].
140 Harlow, 'Public law and popular justice' (n 125) 2.
141 Harlow and Rawlings, *Law and Administration* (n 6) 561; Stephen Thomson, 'The enforceability of ombudsman remedies and competition with judicial review' in Groves and Stuhmcke (eds) (n 46) 41, 41.
142 R Glenn, 'Keynote address' (Speech delivered at the Tax Institute 2014 Tasmanian State Convention, Launceston, 16–17 October 2014).
143 *Ombudsman Act* (n 16) s 5(1)(b). We have highlighted above a range of the Ombudsman's investigatory powers which provide considerable latitude to uncover systemic issues.
144 Ibid s 15(2)(d) and (f). The Ombudsman may also include in a report any other recommendation 'he or she thinks fit to make': s 15(3)(b).
145 See, eg, Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 238–42; Harlow and Rawlings, *Law and Administration* (n 6) 555; Rock, *Measuring Accountability* (n 19) 201–2.

relation to the Robodebt debacle,[146] the detention of asylum seekers on Christmas Island,[147] and the deportation of Australian citizens and long-term residents.[148]

A range of other mechanisms within the broader administrative justice system share the task of investigating and recommending reform of the systems of government. For example, integrity commissions often have reform-oriented functions to reduce corruption through education strategies and recommending updates to laws, practices and procedures,[149] and information commissioners may investigate and make recommendations regarding the implementation of FOI regimes.[150] Perhaps the archetypal reform mechanism is a royal commission. These inquiry bodies provide a politically convenient vehicle for change, because their high profile is offset by the fact that the government is not inevitably bound to implement final recommendations. In the context of inquiries into government maladministration, commissioners have made important recommendations for improving systems relevant to preventing and reducing Aboriginal deaths in custody,[151] the ways in which government departments roll out projects and programs,[152] government preparedness and responses to natural disasters,[153] and government debt collection in the aftermath of the Robodebt affair.[154]

While broadly effective, there are clear limits to the capacity of these reform-oriented mechanisms to achieve meaningful change. First, their ability to effectively perform their functions frequently depends on government commitment to funding and resources.[155] There are numerous examples of these types of mechanisms being undercut by inadequate funding,[156] and many members of these bodies have expressed dissatisfaction with being forced to curtail their investigative functions in light of decreased resources.[157] There are also examples of resourcing decisions which have had the effect of entirely disabling mechanisms that would otherwise have contributed to reform-oriented objectives in the

146 Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System: A Report about the Department of Human Services' Online Compliance Intervention System for Debt Raising and Recovery* (Report, April 2017).

147 Commonwealth Ombudsman, *Christmas Island Immigration Detention Facilities: Report on the Commonwealth and Immigration Ombudsman's Oversight of Immigration Processes on Christmas Island October 2008 to September 2010* (Report, February 2011).

148 Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter: Report under the Ombudsman Act 1976* (Report, September 2005); Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs: Administration of s 501 of the* Migration Act 1958 *as it Applies to Long-Term Residents* (Report, February 2006).

149 See, eg, *ICAC Act* (n 51) s 13(1)(e)–(j).

150 *FOI Act* (n 17) ss 69, 88; *Government Information (Information Commissioner) Act 2009* (NSW) pt 3.

151 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991).

152 *Report of the Royal Commission into the Home Insulation Program* (Final Report, 2014) 299–319.

153 *2009 Victorian Bushfires Royal Commission* (Final Report, July 2010).

154 *Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023).

155 See, eg, Brogan Elliot, 'The hidden influences that limit governmental independence: controlling the Ombudsman's apparent independence' (2013) 21 *Australian Journal of Administrative Law* 27.

156 See Weeks, 'Attacks on integrity offices' (n 43) 38. A recent example is the threatened reduction of the Auditor-General's budget in the aftermath of the 'Sports Rorts' investigation: Paul Karp, 'Coalition accused of trying to avoid scrutiny after audit office budget cut', *The Guardian* (online, 8 October 2020) <https://www.theguardian.com/australia-news/2020/oct/08/coalition-accused-of-trying-to-avoid-scrutiny-after-audit-office-budget-cut>.

157 See, eg, comments in Independent Commission Against Corruption (NSW) ('NSW ICAC'), *Annual Report: 2016–17* (Report, October 2017) 25. In relation to the Commonwealth Ombudsman, see, eg, Elliot (n 155) 27.

administrative law space.[158] Second, the extent to which these types of mechanisms can achieve meaningful reform is dependent on the willingness of government to embrace and commit to recommendations that are made. There are examples of positive outcomes following reform-oriented recommendations made by these mechanisms.[159] However, in many cases, the government may directly or indirectly avoid taking steps to accept or implement recommendations made by integrity bodies. The reception of royal commission reports is a clear example of these limitations.[160] Governments often avoid a comprehensive response to royal commission recommendations by making small pre-emptive changes to avoid criticism, charging a task force with implementation without giving it the powers or resources needed to succeed, or challenging the validity of the report itself.[161] Without the backing of political commitment, administrative law mechanisms may contribute to transparency and publicity objectives[162] but may take much longer to build momentum towards meaningful reform.

From the perspective of an aggrieved individual, again there are clear differences in terms of the accessibility of these various pathways towards reform. Some can be directly driven by an applicant, either acting alone or in concert with others (eg, individual or group public interest litigation). For other mechanisms, an individual's role is less defined. An individual may be able to prompt action by making a report or complaint to relevant bodies.[163] However where an inquiry is targeted at systemic issues, aggrieved individuals are not generally offered a 'seat at the table' in the context of these reform activities beyond providing evidence or information about the issue of concern.

Conclusion

The imperatives that may motivate an applicant to engage with the administrative law system go beyond patrolling the boundaries that constrain the lawful exercise of government power, and will often extend to the pursuit of transparency, redress and, in some cases, reform. As we have demonstrated, there are a number of different directions from which an applicant might be inclined to pursue these objectives, and the best fit for particular objectives will vary from case to case. In some cases, a single mechanism might provide everything an applicant requires; for example, a person whose licence has been invalidly cancelled may achieve both

158 See, eg, the defunding of the Administrative Review Council ('ARC'): Australian Government, *Budget Measures: 2015–16* (Budget Paper No 2, 2015) 65. The ARC was established under the *AAT Act* (n 27) pt V, which was not repealed to give effect to the ARC's functional abolition. See the criticism of that approach in Ian David Francis Callinan QC AC, *Statutory Review of the Tribunals Amalgamation Act 2015* (Law Council of Australia, 2018) 25 [109]–[112].

159 For example, the NSW Parliamentary Code of Conduct was expanded to specifically cover improper influence of Members of Parliament based on recommendations made by the NSW ICAC: NSW ICAC, *Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources* (October 2013) 42–3; NSW Legislative Assembly, 'Code of Conduct for Members' (adopted 5 March 2020); NSW Legislative Council, 'Members' Code of Conduct' (adopted 24 March 2020). As to policy reform undertaken in response to recommendations by the Commonwealth Ombudsman, see Commonwealth Ombudsman, 'Did they do what they said they would? Volume 2' (n 98).

160 See, eg, Patrick Dodson, '25 years on from the Royal Commission into Aboriginal Deaths in Custody recommendations' (2016) 8 *Indigenous Law Bulletin* 24.

161 S Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis, 2006) 148. See also Boughey, Rock and Weeks (n 4) 282–3.

162 See discussion under 'Transparency' above.

163 See, eg, *Ombudsman Act* (n 16) s 7; *ICAC Act* (n 51) s 10; *FOI Act* (n 17) s 70.

transparency and redress through proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in which they may obtain reasons, have their grievance aired and validated in a public forum, and be restored to their previous position when the decision is set aside. Other applicants may face more complexity within the administrative law system because of the nature of their case, the scope of their objectives, or simply because in some cases strategy and objectives may evolve over time or as further information is revealed. For these more complex cases, it may be necessary to turn to a range of different mechanisms to pursue various aspects of an applicant's goals. Regular consideration of the ways that various elements of Australia's administrative law system contribute to giving applicants the outcomes they seek is essential, if only as a means to identifying where gaps remain.

Amongst the arguments we have drawn throughout this article, we highlight two points in conclusion. First, when considering the means by which an applicant might achieve their objectives, it is often necessary to look beyond the primary or stated function of a particular administrative law mechanism. For instance, the acknowledged purpose of judicial review is to patrol the legal boundaries of public power; its jurisdictional criteria, grounds of review and remedies are all adapted to that purpose. However, from a strategic perspective, judicial review can, and does, do a number of other things. In certain cases judicial review remedies may alter the negative practical impact of an invalid decision, such as by reinstating an entitlement, or may serve as an essential foundation for a claim of relief through another legal mechanism, such as liability in tort. Judicial review may also contribute to transparency despite the absence of a common law right to reasons; the prospect of a decision being found to lack legal justification may encourage a decision-maker to justify their decision with reasons,[164] which may be further tested during the airing of the dispute in the open court forum. Finally, by establishing precedents and fostering publicity, judicial review proceedings may build momentum towards reform in matters of public concern. We do not suggest that these transparency, redress and reform functions form part of the core rationale for judicial review. However, from a strategic perspective, an applicant may well consider these secondary functions to be relevant to their choice to bring proceedings. This same consideration applies to the other mechanisms we have discussed.

Our second key argument is that, when it comes to strategic objectives, we must observe the adage that administrative law operates as a system rather than as a collection of independent mechanisms. Adopting that perspective highlights the comparative practical differences between mechanisms, including how accessible they are in terms of standing, cost, efficiency, flexibility and so on.[165] More importantly, this allows applicants to appreciate the various connections and pathways between the mechanisms of administrative law.[166] For example documents obtained pursuant to FOI regimes may be used to bolster an applicant's position in merits and judicial review proceedings; ombudsmen may utilise their recommendatory powers to facilitate an applicant's access to redress in the form of ex gratia compensation; establishing illegality in judicial review proceedings may be a first step towards redress via other legal mechanisms; and a complaint to an ombudsman about an individual grievance might prompt a royal commission inquiry that leads to systemic reform. Being alive to these differences and connections between mechanisms allows an applicant to make conscious choices about which is the most appropriate strategic pathway to take in pursuit of what they really seek from administrative law.

164 See cases cited at n 26 above.
165 See Rock, *Measuring Accountability* (n 19) ch 9.
166 For further discussion of this concept, see ibid ch 10.