

# FINDING A REMEDY FOR THE WRONG: THE POTENTIAL FOR A MONETARY REMEDY IN JUDICIAL REVIEW

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## INTRODUCTION

The inability to award pecuniary relief where a loss has been suffered because of an invalid administrative action has long been considered a deficiency in administrative law.<sup>1</sup> In a widely noted dissent in *F Hoffmann-La Roche v Secretary of State for Trade and Industry*, Lord Wilberforce perceived in English law ‘an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action’ that other ‘more developed legal systems’ had been able to address.<sup>2</sup> This unwillingness has not faded with the passage of time nor has the occasional judicial lamenting on the issue. Lord Scott in *Somerville v Scottish Ministers* in 2007, for instance, said that:<sup>3</sup>

A chapter of public law still, however, largely unwritten relates to the ability of courts, in actions where public law challenges to administrative action have succeeded, to award compensation to those who have sustained loss as a consequence of the administrative action in question.

The courts, however, have not been eager to contribute to that chapter other than pointing out where current remedies ‘fail to afford a remedy matching the wrong.’<sup>4</sup>

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<sup>1</sup> See, eg, Council of Justice, *Administration Under Law: A Report by JUSTICE* (Stevens & Sons, 1971) 30-31; Law Commission (UK), *Remedies in Administrative Law*, Working Paper No 40 (1971) 108-113; Committee of the JUSTICE-All Souls Review of Administrative Law in the United Kingdom, *Administrative Justice: Some Necessary Reforms* (Clarendon Press, 1988) ch 11. See generally Maurice Sunkin, ‘Remedies Available in Judicial Review Proceedings’ in David Feldman (ed.), *English Public Law* (Oxford University Press, 2<sup>nd</sup> Edition, 2009) 819-20 [18.71]-[18.72]; Law Commission (UK), *Administrative Redress: Public Bodies and Citizens*, Consultation Paper No 187 (2008) 58-60.

<sup>2</sup> [1975] AC 295, 359B-C (Lord Wilberforce) (*‘Hoffmann’*).

<sup>3</sup> [2007] 1 WLR 2734, 2761D-E (Lord Scott).

<sup>4</sup> *Stovin v Wise* [1996] AC 923, 933 (Lord Nicholls of Birkenhead).

Some form of monetary remedy in judicial review has been floated as a possible solution.<sup>5</sup> While the usual armory of remedies available at a court's disposal in judicial review is often sufficient, when a court is incapable of crafting a remedy that can address the wrong that has been committed, then the court is arguably not in a position to afford meaningful justice to the person who has suffered. A loss suffered by a person is sometimes not amenable to the sort of relief that quashing a decision or an order that the decision be remade can provide. Occasionally, the most logical remedy would seem to be some form of pecuniary relief. The argument for a monetary remedy in judicial review in its most condensed form rests on that basic belief. Attempts, however, to offer something concrete to address these concerns have been notably unsuccessful.<sup>6</sup> The uniformly negative reaction to the recommendations of the Law Commission (UK) is only the latest testament to the conceptual, practical and essentially political difficulties that plague any reform of this area of law.<sup>7</sup>

The debate over a monetary remedy in judicial review has never been as extensive or as heated in Australia as it is in the United Kingdom. No law reform body in Australia, for instance, has ever considered the possibility of such a remedy in depth.<sup>8</sup> The most considered academic treatments of the issue often make no effort to separate the issue from the tort of misfeasance in public office.<sup>9</sup> This is understandable to an extent. The

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<sup>5</sup> See Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' [2003] *Judicial Review* 104; Law Commission (UK), *Administrative Redress: Public Bodies and Citizens*, Report No 322 (2010).

<sup>6</sup> See Carol Harlow, 'Rationalising Administrative Compensation' [2010] *Public Law* 321, 323-4.

<sup>7</sup> See Law Commission (UK), above n 5; *Mohammed v Home Office* [2011] 1 WLR 2862.

<sup>8</sup> The Administrative Review Council (ARC) appears to have momentarily considered looking at the idea in a possible report but nothing came out of it: Administrative Review Council, *Annual Report 1982-3* (Australian Government Publication Service, 1983) 22 [74]. The ARC did briefly mention the idea of damages as a remedy in their recent report on the federal judicial review system in Australia but believed it raised issues that were beyond the scope of the inquiry: Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012) 178-81 [10.9]-[10.22].

<sup>9</sup> See, eg, G.P. Barton, 'Damages in Administrative Law' in Michael Taggart (ed.), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1987) 123; Lachlan Roots, 'Damages for Wrongful Administrative Action: A Future Remedy Needed Now' (1995) 2 *Australian Journal of Administrative Law* 129; Rossana Panetta, 'Damages for

reality that some form of compensation is already available under the *Human Rights Act 1998* (UK) and European Union law does make the absence of such a remedy when the domestic law of the United Kingdom is concerned much more glaring.<sup>10</sup> Nevertheless, the argument for a monetary remedy is rooted in something more fundamental than this: the concern that an injustice is being perpetuated because no effective means is yet available to address the totality of the wrong that can result from an invalid administrative action in some circumstances. Unless some consideration is given to why the remedies under judicial review cannot expand to rectify that wrong, the inability to award some form of pecuniary relief will continue to be identified as an unjustifiable lacuna in administrative law remedies.

The essay will address these concerns in the following manner. Part II will examine the current state of the law regarding when a person who has suffered a loss from an invalid administrative action can receive pecuniary relief. It will be made clear that existing private law causes of action cannot be satisfied for certain classes of cases where there has been an identifiable loss and the common law has refused to develop in a way that will address these issues. Part III will examine the argument why providing such a remedy in judicial review is an appropriate means of addressing this issue. Part IV builds on what Part III has argued by examining how such a remedy would work and its ability to rectify the deficiencies in the current law identified in Part II. At its heart this essay works on the premise that a monetary remedy in judicial review can only be justified if it is congruent with the purpose of judicial review and the nature of how remedies traditionally operate in judicial review. The essay seeks to normalise what would seem at first blush to be a novelty, perhaps even a heresy.

Before proceeding, however, a small note on terminology. It has been argued elsewhere that terms like 'damages' or 'compensation' are appropriate when speaking of a remedy that would allow for some form of pecuniary relief in judicial review.<sup>11</sup> While hoping to avoid needless hairsplitting, it is felt that those terms are far too closely associated with private law remedies. The case for a monetary remedy in judicial

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Wrongful Administrative Decisions' (1999) 6 *Australian Journal of Administrative Law* 163.

<sup>10</sup> See generally Lord Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 7<sup>th</sup> ed, 2013) ch 19.

<sup>11</sup> See Peter Cane, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489, 491-2.

review may take cues from other areas of the law. This does not mean, however, that pecuniary relief in judicial review will (or should, or even can) mimic how damages in private law work. However much it lacks in felicity, the term 'monetary remedy' will be used consistently throughout this essay.

The concern over excessive or unreasonable delay is closely connected with the idea of providing compensation for an invalid administrative action.<sup>12</sup> While acknowledging the significance of this issue, it is beyond the scope of this essay to address.

## WHERE THE CURRENT LAW FALLS SHORT

### A Compensation Schemes

It is a recognised part of the prerogative powers of the Crown to make *ex gratia* payments to persons who have suffered because of defective administrative action.<sup>13</sup> Since payments out of consolidated revenue are illegal without the authority of parliament,<sup>14</sup> the *Financial Management and Accountability Act 1997* (Cth) provides the basis for a number of compensation schemes to address the various circumstances where a loss has been suffered unfairly because of an administrative action.<sup>15</sup>

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<sup>12</sup> The JUSTICE-All Souls Review recommended a monetary remedy with two limbs: one that dealt with losses caused by actions that were 'wrongful or contrary to law' and the second where there had been 'unreasonable or excessive delay': JUSTICE-All Souls Review, above n 1, 362. See *Revesz v Commonwealth* (1951) 51 SR(NSW) 63; *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470; *AB v Home Office* [2012] EWHC 266.

<sup>13</sup> *Australian Constitution* s 61; *R v Secretary of State for Work and Pensions, ex p Hooper* [2005] UKHL 29. See Carol Harlow, *Compensation and Government Torts* (Sweet & Maxwell, 1982), pt 4.

<sup>14</sup> *Auckland Harbour Board v The King* [1924] AC 318, 327 (Viscount Haldane).

<sup>15</sup> The schemes that exist, according to *Finance Circular 2009/09*, include act of grace payments, debt waivers, *ex gratia* payments and payments under the *Scheme for Compensation for Detriment caused by Defective Administration* ('The CDDA Scheme'). Some of these schemes depend solely on *Australian Constitution* s 61 and would be subject to the considerations stated by the High Court in *Williams v Commonwealth* (2012) 248 CLR 156.

The most prominent of these schemes is the CDDA Scheme, which provides a discretionary mechanism to compensate a person who has suffered a loss as a consequence of defective administration.<sup>16</sup> For the purposes of the CDDA Scheme, defective administration is defined to mean unreasonableness when it comes administrative procedures, unreasonable failure to give advice or to give incorrect or ambiguous advice. Under the CDDA Scheme, any individual, company or organisation may submit a compensation claim directly to the relevant agency or a third party. In determining whether the claim for compensation should be accepted, the CDDA Scheme provides a detailed framework of factors for agencies to consider. Finally, the CDDA Scheme also provides guidance as to how to approach claimants, setting out requirements for procedural fairness and the provision of reasons.

The CDDA Scheme has been commended as providing a model for a clearer and more certain pathway for a person to redress a loss suffered because of a defective administrative action.<sup>17</sup> Nevertheless, it has been noted that the administration of the CDDA Scheme suffers from ‘unhelpful legalism by agencies, a compensation minimisation approach, unsupportive conduct by agencies, delay in deciding claims, and poorly reasoned decisions.’<sup>18</sup> Many of these issues, however, can be remedied by a recommendation by the Ombudsman that a payment should be made. Administrative issues aside, there are fundamental difficulties with the CDDA Scheme that make it less than comprehensive. It is a fault-based scheme and makes no provision for cases where conduct has been neither defective nor unreasonable. Moreover, there is nothing to compel a government agency to make a payment and any decision made under the scheme is not subject to judicial review, a state of affairs which has been described as inadequate.<sup>19</sup>

It is to be hoped that an effective scheme would address any case worthy of compensation. This can never be guaranteed, however. Something like the CDDA Scheme should always be relied upon first when compensation is sought. It is certainly one of the great strengths of the CDDA Scheme that it

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<sup>16</sup> The features of the CDDA Scheme are set out more fully in Attachment A of *Finance Circular 2009/09*.

<sup>17</sup> See Harlow, above n 6; Commonwealth Ombudsman, *Putting things right: compensating for defective administration*, Report No 11 (2009).

<sup>18</sup> John McMillan, ‘Future Directions 2009—The Ombudsman’ (2010) 63 *AIAL Forum* 13, 17.

<sup>19</sup> Commonwealth Ombudsman, above n 17, 19 [2.51].

is not court-based. Nevertheless, no compensation scheme—however comprehensive—will ever be able to resolve all problems. There will sometimes be circumstances where it is necessary to rely on the courts.<sup>20</sup>

## **B No Damages under the ADJR Act**

In respect of the remedies available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('The ADJR Act'), the courts have been clear that damages are not included. Section 16(d) of the ADJR Act does provide that an order may be made if it is 'necessary to do justice between the parties.' The wide ambit of those words, however, has not been interpreted to allow for the award of damages.<sup>21</sup> If a claimant has suffered a loss that cannot be remedied except by some form of monetary compensation, they will have to seek damages under a cause of action in private law.

## **C Fitting Public Law Wrongs into Private Law Actions**

In both English and Australian law, where a loss has been suffered as a result of an invalid administrative action, one of the only means available to a claimant to obtain damages for the loss is to try to slot their case within an existing tort—whether it be negligence, a breach of statutory duty, misfeasance in public office, nuisance, false imprisonment or trespass.<sup>22</sup> Sometimes the invalidity of the decision will be a crucial precondition to prove one of those recognised causes of action—but invalidity is never sufficient alone. Where invalidity is practically important in making out a cause of action in tort,<sup>23</sup> the claimant will also need to identify how the

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<sup>20</sup> See Harlow, above n 6, 338.

<sup>21</sup> *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 104, 114 (Sweeney J), 126-7 (Morling J), 134 (Foster J); *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637, 644-5 (The Court) ('*Park Oh Ho*'). See Suzanne Sheridan and David Thomas, 'Limitations on the Public Use of Administrative Law: Remedies and Damages' in John McMillan (ed.), *Administrative Law: Does the Public Benefit?* (Canberra, 1992) 181, 190-3.

<sup>22</sup> See generally Paul Craig, 'Compensation in Public Law' (1980) 96 *Law Quarterly Review* 413; Woolf et al, above n 10, ch 19; Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4<sup>th</sup> ed, 2009), ch 14.

<sup>23</sup> A public officer or authority can be found negligent even though the act was done within power, see *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 36 [82] (McHugh J).

impugned decision constitutes an existing cause of action for any form of damages to be provided.

This can present some procedural difficulties for a claimant. Aside from South Australia, no other Australian jurisdiction provides for the ability to combine a direct judicial review application with a claim for damages.<sup>24</sup> This will often mean that a claimant will have to go through judicial review proceedings, relying on a finding of invalidity in those proceedings when pursuing a tort action,<sup>25</sup> although pursuing a collateral challenge is possible.<sup>26</sup>

These procedural difficulties are real but they are clearly surmountable—provided that a recognised tort can be made out. If this condition precedent is not satisfied there is no other recourse for a claimant to rectify their loss. What makes a decision invalid can correspond with a recognised tort but the class of errors that may make a decision invalid is wider than what existing torts hold warrant compensation. The following categories of cases gives a sense of the scope of the difficulties that the current law presents to a claimant:

1. A failure to accord procedural fairness can result in a loss being suffered in a variety of circumstances, including the refusal of licences,<sup>27</sup> termination of employment,<sup>28</sup> and the enforcement of environmental regulations.<sup>29</sup> However, without more, that alone will not satisfy the requirements of any existing tort.<sup>30</sup> In *Dunlop v*

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<sup>24</sup> *Supreme Court Civil Rules 2006* (SA) r 200(7). This state of affairs is similar to what exists in the United Kingdom under *Civil Procedure Rules 1998* (UK) r 54.3(2). On the operation of r 54.3(2), see Woolf et al, above n 10, 988-9.

<sup>25</sup> See *Park Oh Ho* (1989) 167 CLR 637.

<sup>26</sup> On the nature of collateral challenges, see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5<sup>th</sup> ed, 2013) 700-6.

<sup>27</sup> *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 (refusal of licence, although no attempt to plead damages).

<sup>28</sup> *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155; *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708.

<sup>29</sup> *Precision Products (NSW) Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102 ('*Precision Products*').

<sup>30</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 45 (Deane J) ('*Quin*').

*Woollahra Municipal Council*,<sup>31</sup> resolutions passed by the defendant council restricted the capacity of the plaintiff to build on his property, making it unprofitable to sell. Those resolutions were ultimately found invalid because the defendant council had failed to provide notice and the opportunity for a fair hearing to the plaintiff. Nevertheless, the loss suffered by the plaintiff could not be remedied because nothing the council did established an existing tort. The actions were not negligent, having been made reasonably and with legal advice. Misfeasance was pleaded but the resolutions were not passed with malice or with knowledge that they were invalid.

2. A decision-maker misconstrues a statutory provision, exercising his or her powers *ultra vires*. Simply because a decision-maker was mistaken about the scope of their authority does not mean they were negligent. As Lord Keith said in *Rowling v Takaro Properties Ltd*, the fact that 'anybody, even a judge, is capable of misconstruing a statute' would make it doubtful that such an error would be found negligent.<sup>32</sup> A pertinent example of this is *R v Knowsley BC, ex p Maguire*,<sup>33</sup> where a council believed on the basis of a misconstruction of a statute that it could refuse applications for licences to taxi drivers. This error was not found to amount to negligence. This finding was reached even though in judicial review proceedings the council was unable to provide evidence to support its construction of the statute.<sup>34</sup>
3. The failure to comply with procedures that are necessary for the validity of a decision or taking into account an irrelevant consideration does not alone mean a relevant tort has been satisfied.
4. It does not necessarily follow that a decision that is *Wednesbury* unreasonable, even if it has caused a loss, is necessarily unreasonable in the sense that no reasonable care was taken (therefore, negligent) or was motivated by malice (misfeasance in public office).<sup>35</sup>

#### D The Failure to 'Find' an Administrative Tort

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<sup>31</sup> [1982] AC 158 (*'Dunlop'*).

<sup>32</sup> [1988] 1 AC 473, 502A-C (Lord Keith) (*'Takaro'*).

<sup>33</sup> (1992) 142 NLJ 1375, 1375-6 (Schiemann J).

<sup>34</sup> *Ibid.*

<sup>35</sup> Woolf et al, above n 10, 1003.



Tort has historically been an effective means of ensuring government accountability.<sup>36</sup> It still is when a case arises that satisfies the elements of a relevant tort. Nevertheless, as the above cases illustrate, it has been woefully inadequate when addressing some of the losses that can routinely be caused by an invalid administrative action. While this is obvious now, it had been hoped that some sort of solution could come from the common law to address these problems.<sup>37</sup>

Those hopes were largely latched on two things: the potential for the tort of misfeasance in public office to expand and the principle established by the High Court of Australia in *Beautesert Shire Council v Smith*.<sup>38</sup> Even though it had received widespread criticism from its inception,<sup>39</sup> the *Beautesert* principle that ‘an unlawful, intentional and positive act’ could result in liability independently of other torts at least showed an attempt to grapple with the issue, however imperfect. Moreover, the operation of misfeasance

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<sup>36</sup> See, eg, *Entick v Carrington* (1765) 19 St Tr 1030 (action in trespass against King’s messengers who had acted without lawful authority); *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; 143 ER 414 (a decision to demolish a home constituted trespass because the action was made without complying with procedural fairness). On the potential for tort’s continuing role, see Carol Harlow, ‘A Punitive Role for Tort Law?’ in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 347.

<sup>37</sup> For example, the recommendation of the New Zealand Public and Administrative Law Reform Committee that there should not be a general statute dealing with the issue of damages because of the potential of the common law to develop: New Zealand Public and Administrative Law Reform Committee, *Damages in Administrative Law*, Report No 14 (1980).

<sup>38</sup> (1966) 120 CLR 145 (*Beautesert*).

<sup>39</sup> The leading examples of criticism in the academic literature include Gerald Dworkin and Abraham Harari, ‘The Beautesert Decision—Raising the Ghost of the Action upon the Case—Part I’ (1967) 40 *Australian Law Journal* 296; Gerald Dworkin and Abraham Harari, ‘The Beautesert Decision—Raising the Ghost of the Action upon the Case—Part II’ (1967) 40 *Australian Law Journal* 347; Gerald Dworkin, ‘Intentionally Causing Economic Loss—*Beautesert Shire Council v Smith* Revisited’ (1974) 1 *Monash University Law Review* 4. Expressions of judicial disquiet to outright rejection of the *Beautesert* principle can be found in *Kitano v Commonwealth* (1973) 129 CLR 151; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314; *Dunlop* [1982] AC 158; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. For an attempt to defend *Beautesert*, see Robert Sadler, ‘Whither *Beautesert Shire Council v. Smith?*’ (1984) 58 *Australian Law Journal* 38.

in public office was for a long time uncertain, and many saw the potential for the tort to impose less onerous requirements regarding intention.<sup>40</sup> These hopes were always forlorn. The High Court of Australia in *Mengel* finally removed any doubt of that by limiting the applicability of misfeasance in public office to only the narrow circumstances where its stringent intention requirements could be satisfied as well as overturning *Beaudesert*.

Whether the refusal to formulate a broad 'administrative tort' is correct is not the concern of this essay.<sup>41</sup> The reasons for failing to formulate such an 'administrative tort', nevertheless, have some bearing on the ultimate issue of this essay. The reasons offered against establishing an 'administrative tort' can be usefully divided into two categories: cost and the coherence of the law. Put at its most basic, the argument regarding cost is the danger of what Lord Keith in *Takaro* called 'overkill'.<sup>42</sup> The concerns that fall within this argument sometimes relate to good administration and the fear that extending liability will result in increased administrative caution and unnecessary delay by public authorities.<sup>43</sup> There is also evident a clear (and understandable) discomfort that invalidity as the only limb for liability would unfairly encompass many actions that are made in good faith, and sometimes with great care.<sup>44</sup>

The cost argument is ubiquitous when any suggestion of extending government liability arises. The issue of the coherence of the law, however, speaks less to the practical concern of a hamstrung administration than to the fear that allowing liability to expand would undermine judicial review.<sup>45</sup> Allsop P in *Precision Products*,<sup>46</sup> when addressing whether a duty

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<sup>40</sup> See, eg, B.C. Gould, 'Damages as a Remedy in Administrative Law' (1972) 5 *New Zealand Universities Law Review* 105; Enid Campbell, 'Liability to Compensate for Denial of a Right to a Fair Hearing' (1989) 15 *Monash University Law Review* 383, 430.

<sup>41</sup> See Margaret Allars, 'Tort and Equity Claims Against the State' in P.D. Finn (ed.), *Essays on Law and Government: Volume 2: The Citizen and the State in the Courts* (LBC Information Services, 1996) 49, 75-83.

<sup>42</sup> *Takaro* [1988] 1 AC 473, 502C-D (Lord Keith).

<sup>43</sup> *Ibid*; *Chan Yee Kin v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 103 ALR 499, 501, 511 (Einfield J).

<sup>44</sup> Allars, above n 41, 82-3.

<sup>45</sup> See *New South Wales v Paige* (2002) 60 NSWLR 371, 404 [177] (Spigelman CJ) ('*Paige*').

<sup>46</sup> (2008) 74 NSWLR 102.

of care should arise for an invalid notice causing pure economic loss, expressed this concern concisely by saying that finding such a duty would:

...open public authorities to the spectre of compensation for flawed decision-making, in circumstances where the validity of the exercise of power can be tested and resolved by judicial review, and where standards of competence and skill are well able to be dealt with by an appropriate regime of governmental administration.<sup>47</sup>

Anything that deals with the liability of public authorities is inevitably an amalgam of public and private law issues. The courts are very much alive to this as the statement from *Allsop P* revealed. What underlines the concern expressed above is the belief that there is a series of issues that arise in expanding government liability that are by their nature irreducibly public and can only be adequately addressed through judicial review. The nature of a tort like negligence, for instance, is said to be inappropriate to address issues relating to flawed decision-making because the nature of the tort demands a form of evaluation of the alleged tortfeasor's actions that if applied to a public authority would resemble merits review.<sup>48</sup> Developing such a tort would intrude—and ultimately undermine—what is seen as the proper province of judicial review, an area of law uniquely designed to address the issue of flawed decision-making and administrative irregularities. The preservation of the public/private divide demands no less than to guard against further developments that would expand liability into areas that (it is felt) can be appropriately addressed in judicial review. It is, however, an argument that evades engaging with the limitations that now exist in judicial review to address the full consequences of the flawed decision in question.

### IS A MONETARY REMEDY APPROPRIATE IN JUDICIAL REVIEW?

Part II makes clear that the current law has been inadequate in providing redress to many of the losses that arise when there has been an invalid administrative action. The burden which Part III has to satisfy then is to prove that judicial review is the appropriate forum to resolve these issues if a monetary remedy were available. The argument that a monetary remedy in judicial review is appropriate broadly rests on three fundamental bases:

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<sup>47</sup> Ibid 129 [120] (*Allsop P*).

<sup>48</sup> *Paige* (2002) 60 NSWLR 371, 404 (Spigelman CJ); Ibid 128-9 [119]-[120] (*Allsop P*).

- The first is that a monetary remedy in judicial review would encourage greater coherence in the law;
- The second is that a monetary remedy is consistent with the objects of judicial review, including its remedies; and
- The third is that treating a monetary remedy as a judicial review remedy is a principled way of addressing the deficiencies of the current law.

### **A      The Coherence of the Law**

Providing some form of monetary remedy in judicial review accepts the argument examined in Part II that it is inappropriate for private law to address many of the problems relating to the consequences of an invalid administrative action. What a monetary remedy essentially is trying to achieve is to make judicial review a more effective means of addressing the totality of the consequences of invalid administrative action. The effect of this reform would be to reinforce the public/private divide, making clear that the resolution of what are essentially public law problems should be resolved by mechanisms that are designed to deal with such concerns. The salutary effect of this would mean reducing the incoherence that comes about when the different concepts and rationales that inform public law as opposed to private law intermix.

Is there a danger that this monetary remedy could undermine the coherence of private law? The problem potentially arises because a monetary remedy will not depend on fault but rather what is necessary, in the circumstances, to address the totality of the wrong. At first blush, this would mean there are two tracks when it comes to liability, with public officials (and, by extension, public authorities) being more vulnerable than their private counterparts. The result would be inconsistent with the equality principle. This argument, however, loses its sting if a monetary remedy is to operate on a discretionary basis rather than as a right. Simply put, a monetary remedy is not damages as conventionally understood. It is doubtful that a claimant who can satisfy an existing tort would forfeit the possibility of gaining relief as a right. Furthermore, a court may decline to grant a monetary remedy in judicial review on the basis that there exists a tort capable of satisfying the alleged wrong. Moreover, because a monetary remedy is a discretionary remedy and will not always be able to address what is the ultimate concern of the claimant, it will not undermine the

other procedural remedies available in judicial review even though it is a substantive remedy.<sup>49</sup>

The introduction of a monetary remedy is not intended to completely subvert the role tort can play in ensuring government accountability.<sup>50</sup> It will sometimes be more appropriate to rely on a tort because the relevant issue at hand is the type of acts or omissions that particular torts are intended to remedy. What this reform is trying to achieve is to rectify the current situation where a claimant has suffered a loss because of an invalid administration action and is forced to go through a tortured exercise to fit what are essentially public law problems within the framework of private law. Public law should be able to provide an answer to those problems rather than leaving private law to deal with them.

## **B The Nature and Purpose of Judicial Review and its Remedies**

It is trite to say that the purpose of judicial review is not compensatory. Judicial review is rather concerned with legality and the need to ensure government administration operates within the boundaries set by the law. As Brennan J said in *Quin*, the scope of judicial review is not defined in terms of the protection of individual interests but rather 'the extent of power and the legality of its exercise.'<sup>51</sup> In what way is a monetary remedy consistent with this conception of judicial review?

The principal difficulty that a monetary remedy faces is that it is intended to operate as a substantive remedy alongside the suite of entirely procedural remedies that currently exist in judicial review. The concern that underpins a monetary remedy appears to be more focused on curing individual injustices than it is about maintaining the limits of a decision-maker's power. For some this is fatal to the viability of a monetary remedy on the basis that what is being vindicating in judicial review is the public

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<sup>49</sup> See *ibid* 404 [173] (Spigelman CJ).

<sup>50</sup> One caveat to all of this is misfeasance, which is unlikely to be relied on if a monetary remedy were adopted in judicial review. Even though no relief will come as of right, it is far more likely that a claimant will be able to satisfy a court to exercise its discretion in granting a monetary remedy than it will be to establish the intention requirements of misfeasance. See Law Commission (UK), *above* n 5, 35-7.

<sup>51</sup> *Quin* (1990) 170 CLR 1, 36 (Brennan J).

interest.<sup>52</sup> This argument arguably has more force in Australia than it does in the United Kingdom since a hallmark of judicial review in Australia is its focus on process and procedure.<sup>53</sup> Concerns about outcome and a growing embrace of theories of substantive due process may mean judicial review in the United Kingdom is far better placed to incorporate a monetary remedy.<sup>54</sup> The nature of the *Australian Constitution* makes many of the arguments to embrace a more substantive approach to judicial review complete non-starters.<sup>55</sup> A monetary remedy that can ultimately operate harmoniously with this conception of judicial review may still employ a language markedly different from that commonly used by the courts in judicial review.

Notwithstanding these concerns, a monetary remedy does not necessarily detract from the principal focus of ensuring that administration operates within the boundaries of the law, even if it is a substantive remedy. Some have argued that the existence of something like a monetary remedy may further enhance the ability of judicial review to ensure the proper exercise of power on the basis that it provides an incentive to comply with procedure.<sup>56</sup> Nevertheless, the most compelling argument for the inclusion of a monetary remedy is that it would further enhance legitimacy.

The effect of judicial review is to ensure legitimacy by enforcing the limits that are said to govern the exercise of power. It is when those limits have

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<sup>52</sup> See the comments of Professor Robert Stevens and Beachcroft LLP in their submissions to the Law Commission (UK): Law Commission (UK), *Administrative Redress: Public Bodies and the Citizen*, Analysis of Consultation Responses (2010) 36.

<sup>53</sup> See Aronson and Groves, above n 26, 19.

<sup>54</sup> See John Basten, 'Judicial Review, Statutory Interpretation and Compensation' (Speech at Australian Government Solicitor/Sydney Law School, Excellence in Government Decision-Making Course, Canberra, 31 March 2009) <<http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/basten310309.pdf>>.

On the differences between administrative law in the United Kingdom and Australia, see Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 15.

<sup>55</sup> See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 11 [28] (Gleeson CJ).

<sup>56</sup> See Roots, above n 9, 134-5.

been exceeded or breached that permit for judicial intervention. What the inclusion of a monetary remedy recognises is that judicial review proceedings are concerned with rectifying alleged wrongs as much as they are about preserving the rule of law. Where a decision is held to be invalid, a claimant may ask why the loss they have suffered is not a relevant concern. It introduces an air of unreality to suggest that applicants are purely motivated by a desire to vindicate the public interest. Judicial review should be able to acknowledge that the principal motivation of many applicants is to rectify a loss that they have unnecessarily suffered. A means of doing that is providing for some form of pecuniary relief. While it is a substantive remedy, so long as a monetary remedy is appropriately framed it does not require the focus to impermissibly go from process to the outcome of the decision.

Where a monetary remedy does face a real difficulty with the purpose of judicial review is the danger that it may shade into merits review. Where there exists the possibility that the claimant may have still suffered a loss if the decision was remade validly, granting compensation for the full loss suffered would be tantamount to saying the decision-maker made the wrong decision rather than merely an 'invalid' one. One way around this issue of causation and merits review would simply be to hold the original decision invalid, require the decision to be remade legally and see if the outcome is different. This solution has been noted elsewhere.<sup>57</sup> It is, however, not very satisfactory since it provides a perverse incentive to the original decision-maker to simply find a valid ground on which the original decision can be upheld. At most what could be provided to the claimant is compensation for the delay in having the original decision remade. The need to avoid merits review means that the scope of a monetary remedy will be circumscribed in some cases. Only when it can be said that the invalid administrative action in question *directly* caused the loss suffered by the claimant can a monetary remedy be considered. This is necessary if a monetary remedy is to operate consistently with the nature and purpose of judicial review.

## **C The Discretionary Nature of Remedies in Judicial Review**

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<sup>57</sup> Woolf et al, above n 10, 1005; Peter Cane, *Administrative Law* (Oxford University Press, 5<sup>th</sup> ed, 2011) 311.

There is no right to a remedy in judicial review.<sup>58</sup> Even if an applicant has made out a ground of review, it is still in the discretion of the court whether a remedy will be provided. This places the role of remedies in judicial review on a similar footing to equitable remedies. Most supporters have accepted that a monetary remedy would operate on a discretionary basis; the debate is whether it should be fully or partially discretionary.<sup>59</sup>

It is submitted that a monetary remedy should operate on a fully discretionary basis. This would be consistent with how other judicial review remedies operate. Furthermore, there is much to be gained from allowing such a remedy to function on such a basis. It will allow for a monetary remedy to operate flexibly in light of the diverse circumstances that it will inevitably have to consider. A monetary remedy if it came as a right would be blunt tool. Operating on a discretionary basis, a monetary remedy allows for a more tailored approach, balancing the different concerns that naturally arise when government liability is considered. Where there are concerns that such a monetary remedy would impose too great a burden on public administration, this will be taken into account—as will the conduct of the claimant or whether another remedy in the suite of available judicial review remedies can address the injustice. The point is that the focus will still be on the nature of the wrong committed and what is the most effective remedy that can be crafted for that wrong. This will sometimes point decisively to a monetary remedy; sometimes it will not.

Moreover, attempts to fetter the discretion to grant a monetary remedy too greatly is likely to lead to a definitional and conceptual muddle. There is a clear fear that allowing for a monetary remedy to operate on a fully discretionary basis would become an exercise of judicial intuition groping in the dark for the right answer—with great inconvenience and cost to effective administration being the inevitable result. The fear of a monetary remedy not working in an principled manner prompted the Law Commission (UK) to recommend that the discretion to grant a monetary

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<sup>58</sup> See JL Caldwell, 'Discretionary Remedies in Administrative Law' (1986) 6 *Otago Law Review* 245; Tom Bingham, 'Should Public Law Remedies be Discretionary?' [1991] *Public Law* 64; J Beatson, 'The Discretionary Nature of Public Law Remedies' [1991] *New Zealand Recent Law Review* 81; Lord Cooke of Thorndon, 'The Discretionary Heart of Administrative Law' in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and The Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, 1998) 203. See generally Lewis, above n 22, ch 11.

<sup>59</sup> See Law Commission (UK), above n 5, 18; Fordham, above n 5, 104.



remedy only be considered once an applicant had satisfied that the activity was ‘truly public’, was intended to confer a benefit, there was ‘serious fault’ and it could be established that the activity ‘caused’ the loss.<sup>60</sup> The attendant difficulties that arise in defining ‘truly public’ and ‘conferral of benefit’ have effectively killed those recommendations.<sup>61</sup> It would be a stretch to say these difficulties would always arise when mandatory conditions are considered. Nevertheless, the bias should be towards more discretion unless there is a compelling need for a mandatory condition.

In many ways this proposal rests on a fundamentally optimistic assumption that courts will exercise their discretion in a principled manner. The reluctance to push existing sources of liability however suggests courts are not all that eager to deal with these concerns. It is likely that the power, if it were conferred, would be applied circumspectly. Certainly the type of considerations that have made the courts so reluctant—such as cost and inconvenience—will still arise but they would serve only as obstacles to a monetary remedy in certain circumstances. As Part IV will illustrate, a discretionary monetary remedy—with a set of clear relevant factors that go to whether such a remedy should be granted—will allow for a principled monetary remedy to develop: a remedy that is able to operate within the confines of judicial review and to effectively balance the various concerns that arise when such a remedy is considered.

## THE OPERATION OF THE MONETARY REMEDY

If the argument in Part III is accepted, there are no hurdles to providing a monetary remedy in judicial review and on a fully discretionary basis in theory. If reform were to occur on the federal level, both the ADJR Act and the *Judiciary Act 1903* (Cth) would need to be amended to provide federal courts the most effective power to issue a monetary remedy. This would avoid the obvious unfairness of having one remedy available where the requirements of the ADJR Act are satisfied but denied to a claimant who cannot satisfy the threshold requirements of the ADJR Act. What such reform would look like (both in form and in practice) is the principal concern of Part IV.

### A The Proposed Features of a Monetary Remedy

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<sup>60</sup> Law Commission (UK), above n 5, 7.

<sup>61</sup> Ibid 16-21 [2.57]-[2.90]; Tom Cornford, ‘Administrative redress: the Law Commission’s consultation paper’ [2009] *Public Law* 70.

## 1 *Relevant Factors in Exercising Discretion*

While the monetary remedy is to operate on a fully discretionary basis, if any reform is considered the legislation conferring the power should provide a list of non-exhaustive factors. Many of these factors will necessarily arise in any application for a monetary remedy. Nevertheless, by expressly stating those factors, the concern that a monetary remedy would operate purely in an unstructured manner can be laid to rest. It is submitted that the following factors (many of which are common to granting any equitable or judicial review remedy) provide a principled framework for the proper exercise of determining when a monetary remedy should be granted:

- **Causation**—Whether the invalid administrative action actually caused the loss directly will always be a pertinent question. In some circumstances, there will be little doubt that had it not been for the invalid administrative action no loss would have occurred. However, where the claimant may have suffered the loss regardless of whether the administrative action was valid, this should inform whether pecuniary relief is going to be granted and on what terms.
- **Futility of other remedies**— A threshold question should be whether other remedies available in judicial review would serve no practical use before a monetary remedy is granted. It is not necessarily fatal, however, to granting a monetary remedy that another remedy is available.
- **Impact on public administration**—It will be necessary to consider the effect not only of the monetary remedy on public administration but the potential effect of other remedies available in judicial review in comparison with a monetary remedy.
- **Conduct of the claimant (including delay)**—It will certainly be relevant to consider whether the conduct of the claimant exacerbated the loss suffered or could have mitigated the loss in some way. Pointedly, this will not include the possibility that the claimant could have ignored the invalid administrative action.<sup>62</sup> Also, delay of the claimant in applying for the remedy will always be significant. If a claimant has suffered a loss, delay in some

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<sup>62</sup> This works on the premise that most administrative decisions should be treated as valid until they are established as invalid: see *Hoffmann* [1975] AC 295, 365-6 (Lord Diplock). Cf *Dunlop* [1982] AC 158, 172.

circumstances may exacerbate the loss suffered and this should be taken into account. Furthermore, delay in making an application for judicial review may enliven concerns over the impact on public administration or cause any prejudice or significant hardship to other parties.

- **Class of claimants**—It will be necessary to consider whether the invalid administrative action in question affected only the claimant or a wider class of persons of whom only the claimant may have sought judicial review. Many of the losses alleged will undoubtedly arise where there has been a failure to properly exercise a power that is in the public benefit. It may be necessary to limit the monetary remedy where the class of claimants is simply too wide.<sup>63</sup>

The factors listed are open-textured and are intended to operate in a variety of different circumstances. Causation will always have to be considered as a necessary preliminary to the operation of a monetary remedy; to do otherwise is to potentially allow a form of merits review to occur. Nevertheless, the other factors listed will be enlivened when the circumstances of a case demand that they be considered. Where concerns arise as to whether a monetary remedy is too costly, factors like delay, the class and conduct of the claimant and the impact the remedy will have on public administration gives a court the grounds in which to deny the remedy as inappropriate.

Furthermore, a monetary remedy will often be inappropriate because another procedural remedy will be effective. There may, however, be circumstances where a monetary remedy might be the mildest remedy available that can achieve the most justice.<sup>64</sup> It is certainly possible to conceive of circumstances where other judicial review remedies may be far more costly and inconvenient while doing little for the person who has suffered. There will be occasions where all other remedies are simply futile or of little practical use. A monetary remedy may play a useful role in those circumstances.

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<sup>63</sup> In the negligence context, McHugh J in *Perre v Apand* (1999) 198 CLR 180, 220 argued that the number and size of claimants is not relevant to indeterminacy but rather whether the class can be realistically calculated. Nevertheless, in this context, considering the public dimension of many administrative actions, a large class of possible claimants will always dictate against granting a monetary remedy.

<sup>64</sup> Similar suggestion was made in Harry Woolf, *Protection of the Public—A New Challenge* (Stevens & Sons, 1990) 61-2.

## 2 *An Ancillary Remedy?*

The Law Commission (UK) recommended that if a monetary remedy could only be granted as an ancillary remedy.<sup>65</sup> There is no compelling justification for treating a monetary remedy as purely an ancillary remedy, especially when the argument for the inclusion of such a remedy is because the other possible remedies are sometimes ineffective. It may well be highly suspect for a claimant to seek only a monetary remedy. Nevertheless, a monetary remedy should not be denied simply because no other remedies in judicial review are available or appropriate.

## 3 *Quantification*

Issues of quantification will also be informed by the same factors that will determine the granting of a monetary remedy. An inquiry into causation will always be an essential preliminary to determining whether a monetary remedy should be granted and will play a role in how the monetary remedy will be quantified. The amount of compensation (if any) will be determined by whether the claimant would have suffered the loss in question at all. In some circumstances, it will be clear that the loss suffered is completely the product of the invalid administrative action in question. Nevertheless, where the conduct of the claimant plays a role in exacerbating the loss, this may effectively bar a monetary remedy being granted or diminish the amount provided. More significantly, if it is an open question whether the administrative action that caused the loss would have been made validly anyhow, this may prove to be a complete bar to a monetary remedy or the only basis for such a remedy is the delay suffered by the claimant in having the decision validly remade.

### **B Would this Remedy Make up for where the Current Law Falls Short?**

The ultimate value of such a monetary remedy is determined to what extent it can address the deficiencies that exist in the current law. This can be demonstrated by considering the examples detailed in Part II. Where the loss has clearly been caused by the invalid administrative action it should be able to be compensated by a monetary remedy unless there are

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<sup>65</sup> Law Commission (UK), above n 5, 3 [1.21].

countervailing considerations. For example, where there has been an error of law or fact, absence of which would not have led to the decision being made, a monetary remedy may be available. Furthermore, there will be circumstances where other judicial review remedies will simply be futile. For example, the denial of a licence whose validity is challenged may have expired before a remedy could be granted. Provided a claimant has not exacerbated their loss by delay or other conduct, and the court is satisfied that the class of the claimant is not too wide, the monetary remedy argued for here could address these types of losses.

The monetary remedy, however, should not be available when it cannot be said with certainty that the invalid administrative action caused the loss. To guard against the possibility of the monetary remedy pushing judicial review towards merit review means that a monetary remedy will either be denied or limited where causation is in doubt. The result is that where an error leading to invalidity occurred where there was an exercise of a discretionary power it is highly unlikely that the loss will be able to be compensated fully. Many of the most notable injustices under the current law have arisen where there has been a failure to accord procedural fairness. Simply identifying a breach of procedural fairness is unlikely to make out the case that the loss would not have occurred but for the invalid administrative action. This would also apply when an irrelevant consideration is taken into account. At most a monetary remedy may be granted for the loss incurred from the delay suffered in waiting for the decision to be remade. Anything more than that risks the monetary remedy operating outside the legitimate confines of judicial review.

If this is all a monetary remedy is able to do, it begs the question: is this worth pursuing? The monetary remedy conceived here is likely as far as such a remedy can go while still being consistent with the nature of judicial review. This means any reform that seeks to address the problem outlined in Part II will have to be more comprehensive than judicial review. By necessity the nature of compensation schemes would have to be considered, which is beyond the scope of this essay.

What is provided in practice can effectively address what at law cannot be done. Further developing compensation schemes has the potential of addressing all the deficiencies of the current law without facing the conceptual difficulties that arise when trying to include a monetary remedy in judicial review. Nevertheless, there will always be cases where it is appropriate (sometimes necessary) for the courts to be involved. When that

need arises a court should not be left ill equipped to deal with the challenges that may arise. A monetary remedy on its own is only a step towards addressing the deficiencies that exist in the law; reform without a monetary remedy, however, will necessarily be incomplete.

## CONCLUSION

The debate over how to address when a loss has been suffered by an invalid administrative action has a pedigree of close to half-a-century. No answer has yet been offered that has proven adequate to filling what is acknowledged by many to be an unjustified lacuna in administrative law. The argument of this essay is that a solution should come from public law by providing a means in judicial review to award pecuniary relief where it is appropriate to do so. It will never be a complete answer to the problem. It nevertheless represents a step towards a more satisfactory state of affairs. A loss suffered by a claimant because of an invalid administrative action should be a legitimate concern in judicial review proceedings—and a concern that judicial review has some means of addressing.