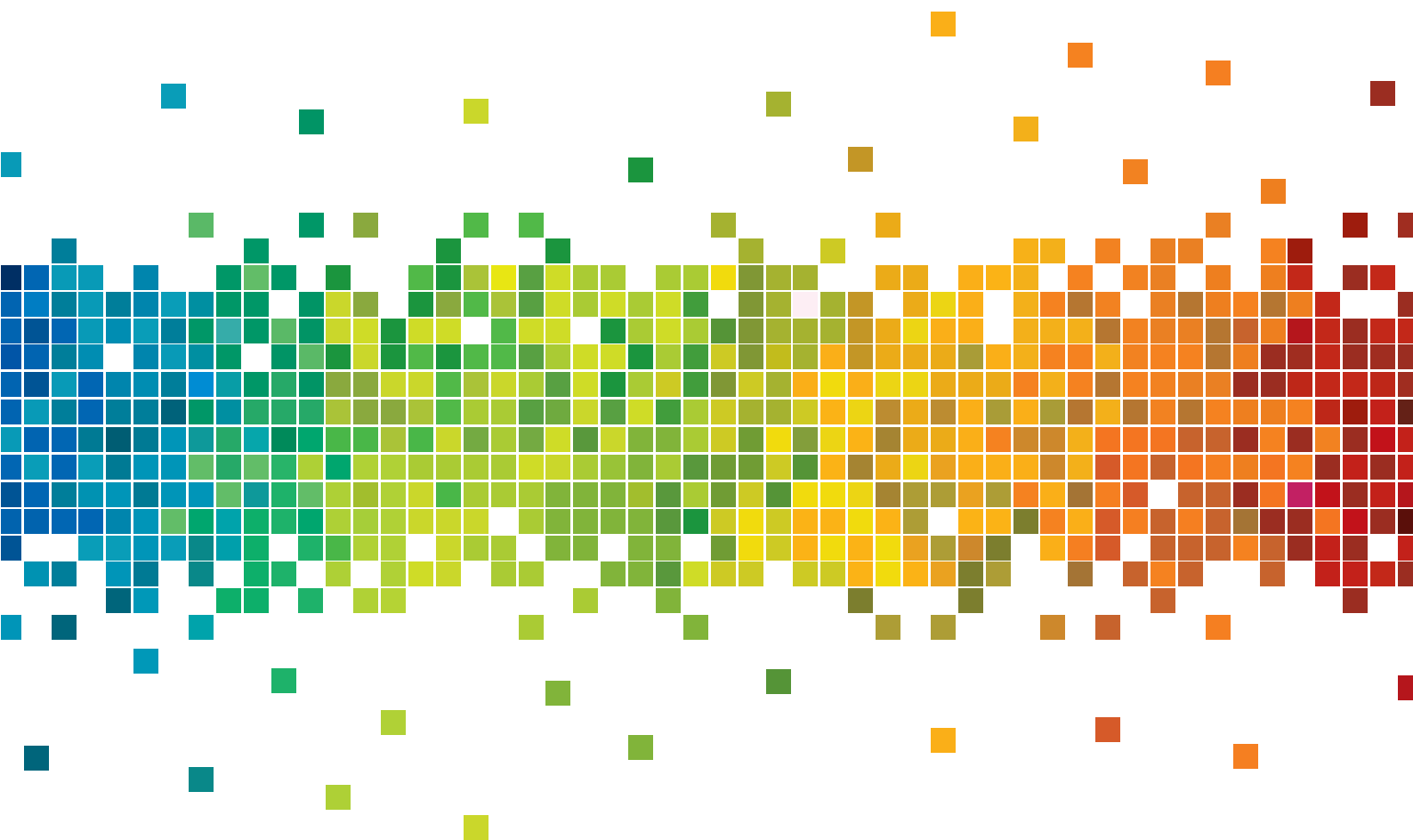


issues paper

Mistakes and unintended consequences —a safety net approach



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Foreword

Complaints to my office have highlighted a problem in how some legislation operates. Instances arise in which government agencies acknowledge that a mistake occurred in making a decision, but the error cannot be corrected. The legislation prevents this happening, usually because it is tightly drafted and leaves no room to change the outcome.

A similar problem is that legislation that is tightly drafted can have an unforeseen and harsh consequence for an individual. Once again, an agency may have no discretion to cater for unexpected and deserving cases.

The purpose of this issues paper is to draw attention to these difficulties, and question whether there is a need for more flexibility to be built into legislation. The paper discusses numerous ways this could be done. The shorthand term 'safety net mechanism' is used to describe these options.

This issue is a complex one. Rigidity in legislation will usually be a deliberate policy choice by government, and endorsed by Parliament. There can be a downside in allowing an administrator, tribunal or court to depart, from one case to the next, from the principles or requirements laid down in a statute.

But those considerations must be tempered by fairness. It is often impossible for policy makers to foresee and provide expressly for all the combinations of circumstances that can arise in applying a statute. Government officials may be as concerned as others to learn of the unforeseen and unfair results that legislation has produced.

A safety net mechanism that is applied in special circumstances can provide an effective and cautious means of balancing those public interest considerations. The need to consider this avenue is more important as legislation becomes more complex and detailed and contains less discretion to depart from standard requirements.

I believe these issues warrant closer examination across government. We seek comments on the problems discussed in this paper and whether safety net mechanisms are a sensible and effective response. We are also interested to learn of other strategies adopted by agencies to prevent unfairness in the administration of legislation.

I invite written comments by 29 January 2010 (details of where to send the comments are at the end of this paper). My office will also be conducting targeted discussions with agencies about these issues. We will then decide how best to take these issues forward, either in a public report or in some other format.

I welcome your input to these important issues.

Prof. John McMillan
Commonwealth Ombudsman



Introduction

Legislation governs many aspects of peoples' lives. Across a broad range of government activity, peoples' rights, obligations, liabilities, benefits and entitlements depend on detailed statutory provisions.

Unexpected incidents arise in which legislation affects individuals harshly and at odds with the intent of the legislative regime. This paper deals with two situations where unfairness can occur:

- where legislation is tightly drafted and there is an unexpected consequence in applying it
- where an agency acknowledges it made a mistake in making a decision, but has no explicit power to reconsider and remake the decision.

A fairer result could be achieved in both situations if the agency had a safety net discretion to intervene in exceptional circumstances. That is not to suggest that anyone who falls outside a set of statutory criteria should be able to seek reconsideration on the grounds of unfairness. All criteria are to some extent arbitrary and reflect the government's decision as to where the boundaries should lie. Rather, concern arises where the adverse consequences of a decision are unforeseen and unjust.

The issue arises in different forms in many complaints to the Ombudsman. Tightly written legislation may leave an agency with no discretion to extend a deadline, even though its wrong advice has resulted in a potentially eligible claimant missing out. Detailed criteria for a new benefit may not allow payment in some circumstances when it would be appropriate. The way new legislation interacts with existing laws may not have been fully thought through, resulting in an individual's entitlements or benefits being reduced or cancelled. A decision maker may have overlooked a document in making a decision, or a debt may have been raised against a person because of an agency's mistake.

A striking example which illustrates both situations where unfairness arises was the case of Mr A.

Case study—detained through legislative complications

Mr A had been a permanent resident of Australia since 1989 and had a resident return visa (RRV) which allowed him to travel to and from Australia within a specified time frame. In 1995 when he returned to Australia, he produced his current travel document but not the travel document that evidenced the RRV. Mr A had left that document in Vietnam because it had expired. The RRV, however, remained in effect.

The Migration Act obliged Mr A to provide evidence of his identity and a current visa to enter Australia. Information held by the Department of Immigration and Citizenship (DIAC) indicated Mr A was a RRV holder, but the DIAC officer at the airport failed to access the appropriate records.

Believing Mr A to be without a visa but noting his eligibility for a RRV, the officer issued him a one month border visa to allow him to enter Australia. The effect of the decision under the regulations at the time was to cause Mr A's permanent resident status to cease. If the officer had identified that Mr A was a RRV holder, the officer could simply have re-evidenced the RRV in Mr A's travel document (in accordance with usual practice). Instead, Mr A was recorded as an unlawful non-citizen on DIAC's system after the border visa expired, leading to his detention in 2002.

The Ombudsman's office commenced an investigation into Mr A's situation in June 2005. DIAC had recognised at the time Mr A was detained that his predicament was caused by the grant of the border visa. The Migration Regulations had been amended by then so that the issue of



a border visa would no longer cause a more beneficial visa to cease. At least one DIAC officer expressed the view that when faced with such situations the agency would ordinarily set aside the grant of the border visa. Unfortunately, there were differing views within DIAC on whether Mr A could be released from detention and the legal basis for doing so. There was no express power in the *Migration Act 1958* to allow the decision to issue him a border visa to be reviewed and set aside.

In February 2006, Mr A was finally released from detention after DIAC decided that the decision to issue him the border visa was flawed and should be set aside, on the basis that there was no evidence that Mr A had lodged an application for a border visa. This had the result of reviving Mr A's RRV, and his lawful resident status.

This paper briefly outlines the competing principles and legal complexities which prevent decision makers from revisiting or altering their decisions. It outlines some options that are currently available to all agencies to fix mistakes or ameliorate the unfair or unforeseen results of applying legislation. The paper then discusses a range of legislative safety nets that some agencies have, and suggests other options for consideration. The paper concludes with questions that agencies and the public are invited to address.

Legal complexities

The uniqueness of legislative schemes

Every statute is different and will lead to different answers as to whether a decision can be altered, a mistake corrected or an anomaly rectified.

A statute may provide, expressly or implicitly, that a decision is final once made and cannot be altered. The only recourse may be an action for judicial review to have the decision set aside as unlawful, paving the way for a fresh decision to be made.

Some statutes lay down a procedure for reviewing a decision, either within the agency, or externally by a tribunal or court. If there is a right to appeal a decision to a tribunal that can undertake merit review, the tribunal can correct any factual mistake in the decision (but could not rectify a legislative anomaly).

Another possibility is that a statute will expressly give an agency discretion either to vary an existing decision or to modify the way the legislative scheme operates. Examples are given in this paper of special provisions that authorise a minister or agency head to vary a decision to correct a mistake, exempt a person from compliance with standard requirements, or modify a statutory scheme to deal with exceptional circumstances.

The terms of legislation may not provide a conclusive answer, nor exhaustively define the pathways for varying a decision. Consequently it is important to consider how courts have dealt with this issue.

Judicial consideration

Courts have grappled many times with the issue of when a decision maker can reconsider and remake an administrative decision. No clear principle has emerged. Not surprisingly, courts have tended to define each problem narrowly and have avoided spelling out a comprehensive theory about remaking or correcting decisions. The various answers that have been given reflect two competing principles.

Courts recognise, on the one hand, that certainty and finality in administration are important goals, particularly when a decision grants a benefit or entitlement to a person, or they rely on



the decision in some other way. Individuals could be unfairly disadvantaged if decision makers were free to reconsider and substitute new decisions, either through a change of mind or new information becoming available.¹ This could also shake public confidence in the administrative process. The principle that a decision is final and the decision maker has no power to remake it is sometimes referred to as the doctrine of *functus officio*—a Latin expression indicating that a public official, court or similar body no longer has legal authority because the relevant duties or functions have been finalised or spent.

On the other hand, courts recognise that in the interests of sound administration there should be room to reconsider a decision in exceptional circumstances. Instances include when there has been a mistake of fact or law, new information that would benefit a person becomes known, or the decision has unanticipated and unjust consequences and enforcement would not be in the public interest.

Where the line is drawn between those competing policy interests can be unclear.² The following (and limited) selection of issues illustrates how those competing considerations have been applied:

- A decision maker can usually revoke or vary a decision that has not been ‘perfected’. A decision is normally perfected when it is communicated to the parties who are affected by it. So, for example, a decision maker who is still preparing the formal reasons for a decision may be able to revisit or vary the decision, or conduct a fresh hearing, upon discovering a problem in the process.³ Legislation may lay down a formal process that must be followed in order for a decision to be perfected, such as formal notification in writing to the parties of the decision, or the decision to be entered in a register or published in a government gazette.
- A principle applied by the Full Federal Court in *Comptroller-General of Customs v Kawasaki*⁴ was that a decision affected by error of law can be set aside as invalid if the decision maker and the affected person agree. The decision in question was a decision by the Comptroller-General to revoke an earlier order that set the rate of tariff payable on an imported good. To require the parties to approach a court to have the decision set aside would, it was said, force them ‘into pointless and wasteful litigation’.⁵
- In *Minister for Immigration and Multicultural Affairs v Bhardwaj*⁶ a majority of the High Court proceeded on the basis that a tribunal can remake a decision that is affected by jurisdictional error. The Immigration Review Tribunal, when earlier making a decision to confirm the cancellation of a student visa, was unaware that the student had sent a fax seeking an adjournment on the ground of illness. The Tribunal’s failure to perform its statutory duty to allow the student to appear before it to give evidence was a jurisdictional error, and as such the decision had ‘no legal foundation and is properly to be

1 For example, in *Kabourakis v Medical Practitioners Board of Victoria* [2006] VSCA 301 the Victorian Court of Appeal held that a panel of the Board could not, upon receipt of new evidence, re-open an earlier finding that a doctor had not engaged in professional misconduct. The doctor ‘was entitled to believe, quite properly, that once the finding of the panel was published, together with comprehensive reasons, the matter had reached certainty and finality’: at [5] per Warren CJ.

2 See ‘Don’t think twice—can administrative decision makers change their mind’, Australian Government Solicitor *Legal Briefing*, No 67, August 2003; M Plunkett, ‘Administrative decision-makers self-correcting their decisions: the use of s 24AA of the *Acts Interpretation Act 1954* (Qld) and s 33(3) of the *Acts Interpretation Act 1901* (Cth)’, unpublished paper to Australian Institute of Administrative Law seminar, Brisbane, 17 June 2009; E Campbell, ‘Revocation and variation of administrative decisions’ (1996) 22 *Monash University Law Review* 30.

3 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.

4 *Comptroller-General of Customs v Kawasaki* (1991) 103 ALR 661.

5 *ibid* at 671 per Hill & Heerey JJ.

6 *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

regarded, in law, as no decision at all'.⁷ Later cases have noted that there may be limits on applying this principle, at least to tribunals: for example, the principle may apply only in 'simple, and perhaps obvious case[s]' where it is possible to quickly reconstitute the same tribunal to correct an obvious error.⁸

- A procedural flaw in a decision can sometimes be corrected by a remaking of the decision. An example is that a breach of natural justice that could cause a decision to be invalid can be 'cured' by an effective re-exercise of the power in which a party is given a proper hearing.⁹ More commonly, however, this option would be used by a decision maker to confirm a decision that is adverse to a party, rather than remake a decision that benefits a party.

Those competing considerations were at play in Mr A's case, outlined above. The agency officials were aware of the problem that had been caused when Mr A was issued with a border visa that was of short duration and which cancelled his more beneficial permanent resident visa. There was no express power in the Migration Act that could be used to resolve this problem. The Act did not, for example, authorise the department to reconsider the decision to grant Mr A a border visa.

Some officials were of the view that they could rely on the principle derived from *Kawasaki*, discussed above, that a decision affected by an error of law can be set aside as invalid if the decision maker and the affected person agree. Other officials doubted if that principle still applied, following amendment of the Migration Act in 2001 to add a privative clause (s 474) that purported to restrict judicial review, even of decisions that were defective.¹⁰ A complicating factor was the High Court's ruling in 2003 that the privative clause did not prevent judicial review of a decision that was affected by jurisdictional error.¹¹ This led to another line of inquiry within the department as to whether that principle could be invoked to resolve Mr A's situation. The path finally taken was to set aside the decision to grant Mr A a border visa because he did not in fact apply for such a visa as the Act required.

Mr A's case illustrates the complex, time consuming and at times fruitless inquiry that officials can face in deciding whether and how to fix a mistake or to overcome an unforeseen legislative outcome. The following discussion points to some of the available mechanisms, and the obstacles and gaps in the present legislative framework for Australian Government decision making.

Existing safety net mechanisms

All agencies, regardless of limitations in the legislation they administer, have at least three options available to overcome a defective decision or unwelcome outcome:

- administrative self-correction and workarounds
- discretionary compensation payments
- debt waiver and write off powers.

Each is discussed below.

7 *ibid* at 616 per Gaudron & Gummow JJ.

8 *Re Michael and Secretary, Department of Employment, Science and Training* (2006) 90 ALD 457.

9 *Ridge v Baldwin* [1940] AC 40.

10 For example, *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 held that a privative clause would stop a decision being set aside if it was made in good faith, related to the subject matter of the power and did not exceed constitutional limits.

11 *Plaintiff S157 of 2002 v Commonwealth of Australia* (2003) 211 CLR 476.



Administrative self-correction and workarounds

An agency may be able, at an administrative level, to correct a defective decision or find another way around an outcome that is unjust. One method, discussed above, is to vary or revoke a decision that has not been ‘perfected’.

Another common approach is for an agency to correct an error at the request of a client—if necessary, to ‘turn a blind eye’ to any legal obstacle to varying the earlier decision. This may be appropriate, for example, where a social security client has pointed to an error in their rate or date of payment. The administrative reality is that a decision varying or made in substitution for an earlier decision will, in law, be presumed to be regular and effective until set aside by a court. If the decision’s validity is unlikely ever to be challenged (because, for example, the only person with a relevant legal interest in the decision obtains a benefit from it), the decision will be effective for all purposes.¹²

A variation of this approach, where a person has been refused a benefit or entitlement, is to leave the adverse decision undisturbed but invite the person to make a fresh application that may lead to a favourable decision. Much will depend on whether this is possible under the legislation. For example, a time limit on applications can be a barrier to giving the full benefit that a person might otherwise have received.

As discussed above, a decision maker may also be free to make a fresh decision if the decision is affected by jurisdictional error, since it will be considered to be no decision at all.¹³ However, there are real practical difficulties with this approach—not least the need to determine if the earlier decision was affected by jurisdictional error. Unless there is a court ruling on that issue it can be unsafe for a decision maker to reach that conclusion. Other matters that will need to be considered are the lapse of time between the decision being made and queried, and whether there are other parties who have an interest in or are affected by the decision.

Discretionary payment of compensation

Another way an agency can address the impact of an error or inequitable outcome is to provide a financial remedy to the affected person. Agencies have access to a range of discretionary payment mechanisms to allow for payments in appropriate circumstances.¹⁴

The scheme for Compensation for Detriment caused by Defective Administration (CDDA) allows for payments to people who have suffered loss because of an agency error. A common example is where, through agency error such as incorrect advice, a person missed an opportunity to apply for a benefit to which they were entitled. This situation is illustrated by the following case study, *CDDA to compensate for a mistake*. Another example is where an agency has wrongly recovered money from a person, and the CDDA payment acts as a reimbursement.

The CDDA scheme is a valuable mechanism for addressing the adverse financial consequences of defective administrative action. Nonetheless, a recent Ombudsman report noted that administration of the scheme needed to be improved.¹⁵ The report found there was a need for agencies to increase the scheme’s visibility, provide better assistance to claimants in accessing the scheme and making a claim, improve their communication with claimants and adopt less defensive and legalistic approaches to CDDA decision-making. Another limitation is that the CDDA Scheme applies only to agencies covered by the *Financial Management and Accountability Act 1997*.

12 This is a variant of the *Kawasaki* principle discussed earlier, and reflects the role played by practical judgement in administrative decision making.

13 See *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

14 See Finance Circular No. 2006/05, *Discretionary compensation mechanisms*.

15 Commonwealth Ombudsman, *Putting things right: compensating for defective administration—Administration of decision-making under the scheme for Compensation for Detriment caused by Defective Administration*, Report No. 11/2009.



A second compensation option is an act of grace payment. Act of grace payments are authorised under s 33 of the *Financial Management and Accountability Act 1997* (FMA Act) by the Minister for Finance and Deregulation, on the advice of the responsible agency. Amongst other grounds, a payment can be made where the application of legislation had an unintended, inequitable or anomalous effect on a person.¹⁶

A third discretionary payment mechanism that can apply when all other options have been exhausted is where the Prime Minister and/or Cabinet approve an ex gratia payment. While ex gratia payments are very flexible and can be used at short notice to give financial relief, often to groups of people in particular circumstances, they are unlikely to be granted where the problem has arisen because of restrictive legislative criteria governing a government payment.¹⁷

Case study—CDDA to compensate for a mistake

Ms B received a child support overpayment of \$796.78 in 2000 because of an error by the Child Support Agency (CSA). The agency had placed money received from her former partner's employer into the wrong account. The CSA advised Ms B of the error, and she agreed to repay the amount as a lump sum. She did not do so, and seven years passed before the CSA intercepted Ms B's tax refund for the amount owing. While the CSA considered that the amount was a valid debt to the Commonwealth, we asked whether Ms B would have been entitled to an increased amount of family tax benefit in 2000–01 if the mistake had not been made. Centrelink confirmed that she would have received an extra \$174.20 in family tax benefit but that no payment was now possible because of a statutory time limit. CSA agreed to consider whether it could pay Ms B compensation of that amount under the CDDA scheme.

Debt waiver and write off powers

Many of the disputed decisions that the Ombudsman's office sees are ones where an agency has raised a debt against a person but has not yet recovered the money. In appropriate circumstances a debt may be waived by the Minister for Finance and Deregulation (or delegate) or written off by the agency under the FMA Act.¹⁸ There are also specific waiver and write off powers in some legislation, such as the *Social Security Act 1991* (Part 5.4).

Waiver permanently extinguishes a debt, whereas a debt that is written off (usually because it is uneconomic to pursue at a particular time) may be recovered at a later date. That distinction is not always well understood by the public, as reported in two Ombudsman reports on debt waiver and write off in immigration and taxation.¹⁹ A person can experience distress and financial hardship if they are not aware that a written off debt can be revived at a later date if their financial circumstances change. The two Ombudsman reports noted that agencies should process debt waiver requests in a timely fashion, inform people adequately about the effect of a debt waiver or write off, and give adequate notice if a debt is revived.

While waiver and write off powers are valuable mechanisms for addressing unjust or inappropriate results, they are not always applied well. The process can also be cumbersome as a general administrative remedy, because more than one officer or agency can be involved—the Minister for Finance and Deregulation, the Department of Finance and Deregulation, and the agency that raised the debt. As with all financial remedies, there is a risk that the individual's interests in receiving a fair outcome will be overshadowed by an undue emphasis on protecting government revenue.

¹⁶ Finance Circular No. 2006/05 *Discretionary compensation mechanisms*, p. 4.

¹⁷ Finance Circular No. 2006/05, *Discretionary compensation mechanisms*, p. 47.

¹⁸ Debts may be waived, deferred or postponed under s 34 of the FMA Act.

¹⁹ Commonwealth Ombudsman, *Department of Immigration and Citizenship: Administration of detention debt waiver and write-off*, Report No. 02/2008; *Australian Taxation Office: re-raising written-off tax debts*, Report No. 04/2009.



The following case study illustrates circumstances where a waiver power can be a useful remedy, but one that an agency can be reluctant to apply.

Case study—waiving overpayments under the Child Support scheme

In 1998 the Ombudsman reported on an own motion investigation into child support overpayments.²⁰ An illustrative complaint discussed in the report arose from a wrong decision by the CSA to accept an application for an administrative assessment of child support; the legislation required a court order because the parties had separated before 1989.

Once this error was detected, the CSA reimbursed the payer and sought recovery of the amount from the payee, Ms C. Most of the debt was recovered from Ms C's tax refund. She was financially disadvantaged by this action, as she could have sought a court order for child support but did not do so when the CSA wrongly accepted her application, and could not do so now. Following an Ombudsman investigation, the CSA obtained approval from the Department of Finance for an act of grace payment equal to the amount already recovered from Ms C. This remedy, while appropriate and fair, took significant time and effort to achieve.

The Ombudsman recommended that the CSA consider seeking a legislative amendment to authorise the CSA Registrar to waive recovery of a payee's debt where the debt arose from the agency's error and recovery would leave the payee in a worse financial situation than if the error had not occurred. The CSA did not act on that recommendation, noting that the Minister for Finance could instead be requested to waive a debt.

The issue arose again in 2008, when the CSA started recovery of about 20,000 old overpayments to payees. After we investigated several complaints where recovery was inequitable, the CSA suspended recovery of all debts more than five years old and initiated a 'bulk waiver' process with the Department of Finance and Deregulation.

Legislative safety nets

Modern legislation tends to be more detailed and tightly drafted than in the past. There has been a deliberate move towards specifying in legislation the criteria that govern decisions affecting people's rights and obligations, and there is limited scope for a decision maker to depart from those criteria. This can lead to unexpected consequences, anomalous outcomes and unfairness.

In recognition of that danger, a safety net provision is sometimes inserted in the legislation. This can take three forms:

- a discretion that can be used in individual cases to modify the result or depart from the standard requirements
- a special power to make a legislative or administrative instrument exempting people from a statutory scheme or extending the operation of the scheme
- a specific power to vary an existing decision.

Before those mechanisms are explored below, some key policy and practical considerations should be briefly noted.

It is likely that the legislature will be cautious about allowing a safety net power or discretion to be included in a statutory scheme. Such a power, when exercised, can facilitate a departure from the standard rules set out in the legislation, and this may be seen as contrary to the policy or coherence of the scheme. The statutory criteria may, for example, reflect a desire to improve

²⁰ Commonwealth Ombudsman, *Child support overpayments: a case of give and take?* Report No. 03/1998.

the targeting of benefits by specifying the circumstances in which benefits will be granted.²¹ That reasoning may also apply to legislative rules that authorise a government agency to grant a permission or licence, impose a detriment or penalty or decide applications that are lodged by a deadline.

Another possible concern is that a discretion that is subject to court or tribunal review can be affected by other pressures. It has been suggested that external review bodies are inclined to press for a more liberal exercise of discretionary powers in favour of the individual. An example given in the next section is judicial review of a discretion formerly contained in the Migration Act to grant a person a visa on 'compassionate or humanitarian grounds'. Over time, judicial and tribunal review of decisions declining to exercise a safety net discretion power can alter the operation of a legislative scheme and depart from its original policy. It is suggested that this trend is partly responsible for the disappearance of such statutory powers.²²

The countervailing policy consideration is that there are disadvantages to minimising or completely avoiding the use of discretionary powers. When a new statutory scheme is being developed, it is impossible for policy makers to foresee all the precise circumstances that might arise for decision. Even if they could do so, it will often not be feasible to draft legislation that clearly addresses all the combinations of circumstances that may arise. This unknown can be countered by enabling decision makers to substitute more appropriate decisions or ones that avoid a harsh and unforeseen consequence.

A statutory discretion to modify the result or depart from the standard requirements

Some Acts include a safety net discretion that allows the minister or a senior agency officer in exceptional cases to exempt a person from other provisions or to make a favourable decision that differs from the standard requirements.

An example is s 24 of the *Social Security Act 1991*, which allows the Secretary to determine that a person is not to be treated as a member of a couple for the purposes of the Act if there is a 'special reason'. Agency policy guidelines state that the discretion exists to deal with unfair or unjust anomalies and is intended to be the option of last resort, applying in circumstances that are 'unusual, uncommon, abnormal or exceptional'.

Similarly, regulation 42ZR of the Civil Aviation Regulations 1988 allows an application to be made to the Civil Aviation Safety Authority or an authorised person for exemption from or variation of certain prescribed aircraft maintenance requirements.

Another example was the former s 6A(1)(e) of the Migration Act. This provision allowed an entry permit to be granted where there were 'strong compassionate or humanitarian grounds'. Under this provision, a person who did not meet other more specific criteria for migrant entry could be granted entry to Australia. It was expected that only a small number of cases would be eligible under s 6A(1)(e) (fewer than 100 each year), but many more applications were received. When the provision was repealed in December 1989 as part of the codification of migration law and policy, 8,000 applications were on hand.²³ As decisions were judicially reviewable, there was concern that the Federal Court's broad interpretation of the discretion had led to unintended consequences for immigration policy and transformed an exceptional provision into a more routine provision.²⁴

21 See D O'Connor, 'Merits review in the new millennium' in C Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium*, Australian Institute of Administrative Law, 2000, pp 13–27, at p. 20.

22 A S Blunn, 'The impact of the AAT on social security administration' in J McMillan (ed), *The AAT—Twenty Years Forward*, 1998, pp 99–107, at p. 103.

23 E Arthur, 'The impact of administrative law on humanitarian decision-making' (1991) 66 *Canberra Bulletin of Public Administration* 90, p 90.

24 As Arthur noted (p 95), the courts in applying administrative law principles are not concerned with practical policy implications such as the number of visas granted and the effect on Australia's overall migration program.



The current approach in the Migration Act is to confer those exceptional discretions on the minister personally, and to circumscribe more tightly the situations in which the discretion can be exercised. They include the following:

- Sections 351, 417 and 501J enable the minister to grant a visa to a person who does not meet the relevant statutory criteria, if doing so is in the public interest and a review tribunal has made a less favourable decision in the matter. The minister has issued guidelines on the types of unique or special circumstances that will be considered. They include: a real risk of torture, cruel or inhuman or degrading treatment or a significant threat to the person's human rights or personal security if the person returns to their country of origin; strong compassionate circumstances where irreparable harm would result if those circumstances were not recognised; and clearly unintended consequences of the legislation, or unfair or unreasonable results if the legislation were applied. For example, s 417 is often used to grant a visa where a person is entitled to protection under the Convention Against Torture or the International Covenant on Civil and Political Rights (ICCPR) but does not fall within the terms of the Refugee Convention.
- Section 195A allows the minister to grant a visa to a person who is in detention. This allows for resolution of longstanding cases and cases where there has been unfairness but the person is not otherwise eligible for a visa. Sections 197AA-AG also give the minister power to determine that a person in detention is to reside at a specified place.
- Section 48B enables the minister to allow a non-citizen to lodge a subsequent application for a protection visa—for instance, if their circumstances have changed or some unusual consideration warrants giving them a further opportunity to apply.

Those powers may not be delegated and there is no duty on the minister to exercise them. If he or she does so, the minister must lay a statement before Parliament, setting out the decision and the reasons.

Exceptional powers of this kind are an important means of tempering the rigidity of the statutory rules, but they are not without difficulty or controversy. The Migration Act powers are hedged with restrictions—for example, a person must have received a less favourable decision from a tribunal before seeking ministerial intervention under ss 351, 417 and 501J. This requirement can encourage people to make use of the tribunal review process when it is clear their application will not succeed, purely as a means of being able to seek ministerial intervention. There has also been criticism of the extent of ministerial involvement in deciding on individual immigration cases. A Senate committee in 2004 called for greater transparency and accountability in the use of the minister's discretionary powers and improved agency processes.²⁵ An independent report to the minister in 2008 recommended that the use of ministerial discretions be significantly reduced, with those powers given to the department or a tribunal.²⁶

Inflexible time limits

The issue of inflexible time limits is another area that frequently arises in discussion about the appropriate role of statutory discretion powers. It is a common feature of modern legislation that a particular action must be taken within a time limit which cannot be extended. For example, a person's eligibility for a social service benefit can depend on whether an application is lodged by a particular date. Payment of a benefit may only be able to be backdated for a set period after receipt of a person's application. A higher fee or penalty may apply if a document

²⁵ Senate Select Committee on Ministerial Discretion in Migration Matters, *Inquiry into ministerial discretion in migration matters*, 2004.

²⁶ E Proust, *Report to the Minister for Immigration and Citizenship on the appropriate use of ministerial powers under the Migration and Citizenship Acts and Migration Regulations*, January 2008. A possible exception would be revocation of citizenship, decisions on which should remain with the minister.



such as an annual return or corporate report is not lodged by a specified date. An application to a tribunal for review of a decision may need to be lodged within a prescribed period that cannot be extended by the tribunal.²⁷

The criticism that is often made of rigid time limits is that a person's failure to comply may be due to circumstances beyond their control, and may stem from an agency's advice, or their lawyer's failure to observe the time limit. Rigid time limits can also disadvantage people who are less informed or vulnerable.

On the other hand, many statutory time limits can be extended by a decision maker, tribunal or court if a special reason exists;²⁸ and there is often a discretion to waive a late return penalty. In short, it is a matter of legislative policy whether a discretion exists to extend a statutory time limit, and the policy differs from one area to another.

Other mechanisms discussed in this paper can also be used to overcome an inflexible time limit. A CDDA payment can be made to a person who is ineligible to receive a benefit because the time limit for lodging an application has expired. A penalty applying to a late application can be waived or written off. If the time for lodging an appeal has expired, the decision to be appealed against may still be set aside because of a jurisdictional error.

The following case study, *visa applicants needed to go offshore*, illustrates a different way of addressing the situation. After the Ombudsman drew attention to the problems caused by a rigid time limit on visa renewal applications, the time limit was amended to provide more flexibility.

Case study—visa applicants needed to go offshore

In December 2003, the Ombudsman wrote to the Secretary of the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA), recommending action to address the problem that a visa holder who had appealed successfully to the Migration Review Tribunal (MRT) against DIMIA's decision to cancel their student visa could still end up disadvantaged. If the MRT set aside DIMIA's decision, the student might be unable to meet the requirements for a permanent visa because the student visa had expired before the appeal was finalised. Under the Migration Act a student might have to leave Australia in order to lodge a new application overseas. In addition, where the student visa had expired before the MRT's decision, the person's bridging visa would lapse when the MRT made its decision, meaning that the person would be exposed to detention as an unlawful non-citizen.

DIMIA acknowledged that this issue affected not only student visas and that legislative reform was required. New regulations were made in December 2004 to allow the period during which a renewal application must be made to run from the later of when the visa expired or when the applicant was deemed to have been notified of the MRT's decision. The legislation was also changed to ensure that a bridging visa remained valid for a specified period after the MRT's decision.

A power to modify or extend a statutory scheme by legislative or administrative instrument

Another approach is where legislation authorises the making of a legislative or administrative instrument that modifies the application of a statutory regime to a person or class of people. This can be done in various ways—by modifying the rules of the scheme as they apply to a person

²⁷ For example, an application for review of a decision by the Refugee Review Tribunal must be given to the Tribunal within 28 days of notification of the decision: *Migration Act 1958* s 412.

²⁸ For example, if satisfied 'that it is necessary in the interests of the administration of justice', the Federal Magistrates Court or Federal Court can extend the period of 35 days for lodging an application for judicial review of a migration decision: *Migration Act 1958* ss 477(2)(b), 477A(2)(b).



or class; by exempting an individual or class from some or all of the requirements of a scheme; or by extending the scheme's benefits to people who otherwise fall outside the provisions.

An advantage of this approach is that an instrument is easier and quicker to make and amend than legislation. This provides a prompt means of relief from unforeseen problems. The countervailing argument is that powers of this kind have a tendency to weaken the rule of law—they allow a government official to modify the law enacted by Parliament. Perceptions of unfairness may also arise if some individuals or groups are given a benefit or relieved of an obligation that applies to others.

An important mechanism for accountability still applies through the *Legislative Instruments Act 2003*. The Act requires a legislative instrument (with very limited exceptions) to be tabled in the Parliament and be subject to disallowance. Specific legislation often imposes similar tabling and disallowance requirements upon important administrative instruments.

Examples of statutory schemes that permit modification

Some legislation allows the Governor-General to make regulations under which the effect of an Act may be modified in its application. An example is s 150(2) of the *Superannuation Act 1922*, which states that regulations may modify specified provisions of the Act, such as the payment rate, in their application to a person or class of people who receive pensions under the Act.

Other statutory schemes allow a minister to provide an exemption through the issue of a legislative instrument.²⁹ A recent example of legislation that allows exemptions by way of both legislative and administrative instruments is the Northern Territory income management (IM) scheme, introduced in August 2007 as part of the Northern Territory Emergency Response (NTER).

Example—exemption by instrument: the Northern Territory income management scheme

Under the IM scheme, a percentage of a person's social security, ABSTUDY and Family Assistance payments are credited to an IM account in their name rather than paid directly to them. Centrelink directs the IM funds to the person's priority needs, which include buying essential items in a registered store or paying a landlord or other third party. The proportion subject to IM varies from 50% of most income support and family assistance payments to 100% of most advances, lump sum payments and the Baby Bonus. The part of the payment not subject to IM is paid to the person in the normal way. IM generally applies to welfare payment recipients who have stayed overnight in one of 73 prescribed areas and associated outstations in the Northern Territory since 21 June 2007.

Section 123UG of the *Social Security (Administration) Act 1999* allows for exemptions of individuals or classes of people from the scheme. The Secretary or delegate may determine a person to be exempt from IM, having regard to specified matters such as the person's family and kinship relationships, the area where the person usually stays overnight and the usual location of their assets.

Agency policy spells out three broad categories where an exemption may be granted to an individual who requests it:

- where the person has little connection to a community that is subject to IM (a possible instance, that arose in a complaint to the Ombudsman, concerned a woman who had resided for over four years in a suburb on the outskirts of Adelaide, but came under the IM scheme after visiting her son who lives in a prescribed community with his father)
- the person has moved permanently or indefinitely away from a community that is subject to IM

²⁹ While regulations are a type of legislative instrument for the purposes of the *Legislative Instruments Act 2003*, they are treated separately in this discussion because they are created in a different way.

- the person has little connection to a community despite residing there (for example, a volunteer with a non-government organisation who moved to the community to deliver a program).

A delegate may also exempt an individual on other grounds, taking into account the prescribed factors. One example set out in the policy is where a person is living in an aged care facility and more than half of their income payments are already directed to that facility.

In addition, the legislation provides that the Minister may make a legislative instrument exempting a specified person or class of people. The Minister has done so in relation to four classes of people: those who moved to a community to assist in implementing the NTER, and students in one of three specific situations.³⁰

There are other models for modifying statutory schemes by instrument, particularly in the area of financial regulation. Part 29 of the *Superannuation Industry (Supervision) Act 1993* allows a regulator (the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission (ASIC) or the Commissioner of Taxation) to exempt an individual or class of people, including groups of individual trustees, from compliance with modifiable provisions of the Act, or to modify the effect of such provisions by a written declaration.³¹ Under s 741 of the *Corporations Act 2001*, ASIC may by written declaration exempt a person or class of people from the Act's fundraising provisions (including disclosure to investors), or modify the effect of those provisions.

Conversely, legislation may allow an instrument to extend the application of a scheme to new classes. An administrative scheme of this type was established in 2004 to address inappropriate outcomes relating to the one-off \$600 family tax benefit bonus paid to families.³² Under that Act, only family tax benefit recipients already assessed and current as at 11 May 2004 were able to receive the bonus. Through the additional administrative scheme that was set up, 268,000 people who later established through the Australian Taxation Office that they had been entitled to family tax benefit at some time during 2003–04 also received the bonus.³³

Such schemes can be very useful if used appropriately to supplement the main statutory provisions. However, the power to establish an additional scheme or to otherwise modify the statutory scheme is not necessarily invoked when it might be. The Ombudsman's recent own motion investigation into the administration of the Economic Security Strategy Payment (ESSP) illustrates some of the issues that may arise.

Example—an available but unused statutory mechanism

In October 2008, in response to the global financial crisis, the Australian Government implemented a one-off cash payment to over seven million Australians. The ESSP was paid to people who were receiving various allowances and benefits as at 14 October 2008.

Schedule 4 of the *Social Security and Other Legislation Amendment (Economic Security Strategy) Act 2008* allows the relevant minister by legislative instrument to determine a scheme under which the ESSP may be made to people in particular circumstances where the

30 Social Security (FaCSIA) (Exempt Northern Territory Persons) Determination 2007.

31 Modifiable provisions include those relating to licensing of trustees, registration of funds, equal representation requirements in employer-sponsored funds, and payment of benefits to eligible rollover funds.

32 Under the *Family Assistance Legislation Amendment (More Help for Families One-off Payments) Act 2004*.

33 A further 5,140 customers were paid the bonus because of their eligibility for ABSTUDY or the Veterans' Children Education Scheme, or because they were in families where each child qualified under different provisions.



minister does not consider that the legislation produces ‘appropriate results’.³⁴ Schedule 4 states that such a scheme may deal with a range of matters including the circumstances in which payments may be made, the amount of the payment, debt recovery and administrative matters.

The Explanatory Memorandum for the bill stated that the primary legislative provisions were intended to cover all the known situations in which the ESSP should be made. A scheme would be established under Schedule 4 only to cover unusual and unforeseen situations that are within the spirit of the ESSP measures but where it would be impractical to include them in the legislation. The Explanatory Memorandum referred to ‘the very slight use’ of similar provisions in the past and stated that ‘any future use is unlikely and would be small in scale’.

No Schedule 4 scheme was established. After receiving numerous complaints from people who missed out on the ESSP, the Ombudsman’s office sought clarification from FaHCSIA as to when a Schedule 4 arrangement might be considered appropriate. FaHCSIA advised its view that Schedule 4 was not intended to address outcomes in individual cases, suggesting these would be more properly dealt with under act of grace provisions.³⁵ FaHCSIA considered that Schedule 4 was a safety net provision to be used, for instance, if a particular qualifying payment had been inadvertently omitted from the legislation.

An Ombudsman report in November 2009 concluded that FaHCSIA could have done more to inform ministers of complaints received about the ESSP eligibility criteria, so that a decision could be made about whether to implement a Schedule 4 arrangement.

A 2009 Treasury Discussion Paper³⁶ also asked whether the Commissioner of Taxation should be given an ‘extra statutory concession power’ to alter taxation legislation by varying the way it applies to a taxpayer or class of taxpayers. The proposed purpose of such a power would be to correct an anomaly or defect in the law. The Discussion Paper arose from a recommendation of the Tax Design Review Panel in 2008, following concerns about the length of time required to enact legislation to correct minor anomalies and unintended outcomes. The Panel considered that such a power if granted should only be able to be used for the benefit of taxpayers, not to their detriment. The Panel’s report noted that s 29-25 of the *A New Tax System (Goods and Services Tax) Act 1999* allows the Commissioner to make a written determination on particular attribution rules if satisfied that certain provisions would operate in a way that is inappropriate in the circumstances. A written determination overrides the provisions of the Act where they are inconsistent.³⁷

A specific power to vary an existing decision

Many statutes contain a specific power that can be used internally by an agency to review and vary an existing decision. Some such powers are defined broadly, while others can only be used in specific circumstances to correct a mistake or vary a decision upon receipt of fresh information from a person. Following are three examples from social security, migration and child support legislation.

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- 34 Three Ministers are authorised to develop a scheme under Schedule 4: the Minister for Education, Employment and Workplace Relations, the Minister for Families, Housing, Community Services and Indigenous Affairs, and the Minister for Veterans’ Affairs. Each is responsible for administering allowances and benefits that are covered in the ESSP eligibility criteria.
- 35 The act of grace provisions allow the Minister for Finance and Deregulation (or delegate) to approve discretionary payments to individuals or bodies in appropriate cases. The act of grace mechanism is discussed below.
- 36 The Treasury, *An ‘extra statutory concession’ power for the Commissioner of Taxation?*, Discussion Paper, May 2009.
- 37 These powers differ from the general administrative power that allows the Commissioner discretion in administering taxation laws, in that such provisions allow the Commissioner to alter the content of the law.



Section 126 of the *Social Security (Administration) Act 1999* (SSA Act) provides that the Secretary (or a delegate) may review a decision of an agency officer if ‘satisfied there is sufficient reason to review the decision’.³⁸ This power, dubbed a ‘Secretary initiated review’, applies whether or not the person has applied for review. The Secretary can affirm the earlier decision, vary it, or set it aside and substitute a new decision.

This mechanism can be used to correct a mistake in a decision, but with limited effect. For example, a favourable decision under s 126 of the SSA Act could not override the statutory limitation on backdating a decision to award a benefit.

The Migration Act contains specific powers to alter earlier decisions. For example, where a decision is made under s 128 of the Act to cancel a person’s visa, the person is to be given particulars of the ground on which cancellation occurred, and invited to provide a submission to the contrary. The Minister (or delegate) is required by s 131 to consider the person’s submission, and to revoke the cancellation ‘if not satisfied that there was a ground for cancellation or if satisfied that there is another reason why the cancellation should be revoked’. There is a similar power in s 137J of the Act to revoke the cancellation of a visa if the Minister is satisfied upon receipt of a submission from a person that they did not in fact breach a visa condition, or that a breach was due to exceptional circumstances beyond the person’s control. Other examples of Migration Act powers are referred to above at page 9 in the discussion of statutory discretions to modify the result.

Section 75 of the *Child Support (Assessment) Act 1989* confers a specific power on the Registrar to amend an administrative assessment for a variety of purposes so as to give effect to the Act. Circumstances include correcting an error or mistake, or correcting the effect of a false or misleading statement (s 75(4)).³⁹ CSA policy notes that the agency will use that section only to correct errors ‘that are clear and obvious and can be fixed simply and easily’, and where the facts are not in dispute.⁴⁰ Examples where it may be appropriate are: an incorrect date of birth for a child; CSA errors in recording a decision about the level of care for a child; and CSA errors in transcribing the details of a court order, change of assessment decision or agreement. The authorised officer must first ensure that both parties do not dispute what the correct details should be.

The CSA example underlines the need to ensure that where a statutory power is made available to decision makers, the circumstances of its use are clearly outlined in policy. Before a statutory objections process was instituted, CSA staff were using the s 75 power broadly, in some cases reconsidering quite complex decisions on the basis of a complaint from a customer. The current policy dissuades them from doing so.

Other options to consider

This section considers two safety net options that would apply generally to all agencies. The power to alter a decision would not be granted in specific legislation but in a statute that applies to all government agencies. The two options are a general power in interpretation legislation to vary an existing decision in appropriate circumstances, or a provision in the *Ombudsman Act 1976* facilitating an Ombudsman initiated review and alteration.

A general power to vary existing decisions

A common feature of interpretation legislation is a general provision authorising decision makers to reconsider and vary a decision they have made. This general power can be overridden by a contrary indication in a specific Act.

³⁸ There is a similar power in s 85.4 of the *Aged Care Act 1997*.

³⁹ Section 42 of the *Child Support (Registration and Collection) Act 1989* also allows the Registrar to vary the Register to correct a clerical error or other mistake.

⁴⁰ Child Support Agency, *Policy paper: changing CSA decisions*, Legal and Quality Assurance, 1 January 2007.



There is a limited provision in the Commonwealth's *Acts Interpretation Act 1901*, although there are doubts about its scope. Section 33(1) states that where an Act confers a power or imposes a duty, the power may be exercised and the duty is to be performed 'from time to time as the occasion requires', unless the contrary intention appears. The provision is usually interpreted narrowly, as reversing the principle that a power once exercised is necessarily spent, rather than as authorising a final decision to be reconsidered.⁴¹ Put another way, the effect of s 33(1) is that a power may be exercised as often as is necessary to fulfil the purpose for which the power was conferred, not to widen the grant of the power.⁴²

Interpretation provisions in Queensland and Western Australia follow the same approach but are more specifically designed (especially the Western Australian provision) to enable mistakes to be corrected.

Section 24AA of the *Acts Interpretation Act 1954* (Qld) states that if an Act authorises or requires the making of an instrument or decision, the power includes power to amend or repeal the instrument or decision, and the power to amend or repeal is exercisable in the same way as the power to make the instrument or decision. While this provision can be relied on as a source of authority to revoke or vary an administrative decision, it is subject to any contrary indication in the relevant legislation that grants the power.⁴³ Such an indication can be express or implied by the nature of the power—for example, a power to grant a licence or funding to one individual over others is of a type that could be exercised once, as the successful party would be disadvantaged if a decision maker could reconsider the decision at the request of others.

The *Interpretation Act 1984* (WA) provides an express power to correct errors in administrative decisions. Section 55 states that where a written law confers a power or imposes a duty to do any act or thing of an administrative or executive character, the power or duty may be exercised or performed as often as necessary to correct any error or omission, notwithstanding that the power or duty is not generally capable of being performed from time to time.⁴⁴

One option may be to amend the Commonwealth provision along the lines of either the Queensland or Western Australian provisions, so as to remove any doubt about the capacity for agencies to remake decisions in appropriate cases. This could be done either generally as in Queensland, or where the decision maker has made an error, as in Western Australia.

Ombudsman initiated review

Another alternative is to give the Ombudsman a special power to initiate an agency review. The Ombudsman receives and investigates complaints and is well-placed to see the problems and unfairness that can arise from mistakes and legislative anomalies.

Section 15 of the *Ombudsman Act 1976* provides that a report by the Ombudsman to an agency can recommend action that should be taken by the agency to address deficient administrative action. It may be thought appropriate to extend this s 15 power, to provide that an agency shall be taken to have the power to cancel or vary a decision if the Ombudsman has made a recommendation to that effect.

41 *Minister for Immigration and Multicultural and Indigenous Affairs v Watson* [2005] FCAFC 181. Section 33(3) also provides that where an Act confers a power to make, grant or issue any instrument, the power shall be construed as including a power to repeal, revoke or vary the instrument. While not expressly stated, this provision applies only to legislative instruments rather than administrative instruments: *Australian Capital Equity Pty Ltd v Beale* (1993) 41 FCR 242.

42 *Minister for Immigration and Multicultural and Indigenous Affairs v Watson* [2005] FCAFC 181, per Lander J at [117].

43 *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2008] QSC 305. See also *Firearm Distributors Pty Ltd v Carson & Ors* [2000] QSC 159.

44 See E Campbell, 'Revocation and variation of administrative decisions' (1996) 22 *Monash University Law Review* 30, pp 63–64.



There are some precedents for this approach:

- Section 22(2) of the *Public Interest Disclosure Act 1994* (ACT) provides that where the Ombudsman has reported that a public interest disclosure has revealed public wastage, unlawful reprisal, conduct that is a substantial and specific danger to public health and safety or ‘disclosable conduct’, the relevant authority must take any necessary and reasonable action to prevent the conduct continuing or recurring, and to discipline any responsible person.
- The Finance Circular on the CDDA Scheme states that it is a sufficient basis for a payment to be made that the Ombudsman has made a finding of administrative deficiency and recommended a financial remedy.⁴⁵ In effect, an Ombudsman recommendation supplements the other criteria in the Finance Circular for payment of administrative compensation.
- Section 10 of the Ombudsman Act authorises the Ombudsman to issue a certificate enabling a person to appeal against a deemed decision to the Administrative Appeals Tribunal, if the Ombudsman is of the opinion that there is unreasonable delay in making that decision.

There are considerations against providing that an agency can act on an Ombudsman recommendation to correct a decision that is otherwise final. Variation of decisions in this way may interfere with legislative certainty and allow a departure from Parliament’s intention, in the same way as giving an officer an extra statutory concession power. The range of circumstances to which this mechanism would apply would be extensive, given the range of government activities that fall within the Ombudsman’s jurisdiction. There is also a risk of imposing an added burden on the Ombudsman, if there was an increase in complaints from people who had, for example, failed to meet a statutory time limit or not qualified for a benefit or concession.

On the other hand, the Ombudsman has a wide discretion under the Ombudsman Act to decide which complaints to investigate, and how to conclude an investigation. The Ombudsman is restricted to making a recommendation: it would still be for an agency to decide whether to cancel or vary an earlier decision in response to an Ombudsman recommendation. This would minimise any risk that Ombudsman recommendations would threaten the coherency of a legislative scheme or thwart Parliament’s intention.

Promoting the use of safety net provisions

Other measures may assist in prompting agencies to consider whether safety net provisions would be desirable in new or existing legislation. Two matters for consideration are whether there should be some specific reference to safety net provisions in the drafting directions for new legislation and in the criteria applied during parliamentary scrutiny of bills.

Drafting directions

The Office of Parliamentary Counsel drafts all bills for the Australian Government to introduce into Parliament. Instructions have been issued to drafters on a wide range of issues in the form of Drafting Directions. The directions promote a consistent approach to legislation as all drafters are required to comply with them.

There are currently no drafting directions on safety net provisions or the circumstances in which they should be considered by drafters (and as a result, by policy makers who provide instructions). As this paper has outlined, there are a number of different models for safety net provisions. Each may have advantages and disadvantages which need to be closely considered.

⁴⁵ Finance Circular No. 2006/05, *Discretionary compensation mechanisms*, pp 22–23.



Parliamentary scrutiny of bills

The Senate Standing Committee on the Scrutiny of Bills plays an important role in scrutinising and reporting to the Senate on all bills that come before it. The committee assesses each bill against a set of accountability standards that focus on the effect of the proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

The committee reports on whether a bill:

- trespasses unduly on personal rights and liberties
- makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers
- makes rights, liberties or obligations unduly dependent upon non-reviewable decisions
- inappropriately delegates legislative powers, or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.⁴⁶

It is not clear if the existing criteria ensure that the committee considers the appropriateness of including or not providing for safety net provisions in a statutory scheme, and whether that is a matter that the committee should take into account.

Encouraging agencies to use existing safety net provisions

A final issue that some of the case studies in this paper have illustrated is that even when agencies have appropriate mechanisms to fix errors or ameliorate the harsh results of applying statutory criteria, they may not always make appropriate use of those mechanisms. This may be particularly the case where money is concerned and agencies have a responsibility to conserve government revenue. Alternatively, agencies may rely on precedents to narrow the circumstances in which remedies will be offered. One aim of this issues paper is to highlight the need for safety net provisions and the circumstances in which they can and should be used, so as to facilitate discussion amongst agencies.

Issues for consideration

We are interested to hear from agencies and other interested parties about how they address the consequences of agency errors and the unintended impact of legislation. We also invite comments on the effectiveness or drawbacks of the mechanisms outlined in this paper as well as other avenues that agencies use to resolve problems.

⁴⁶ Senate Standing Order 24.

Questions

1. Is the lack of legislative safety net provisions a problem in government administration?
2. Does the problem arise in areas this paper has not canvassed?
3. What measures do agencies use when an error has been made or the application of legislation has harsh and unforeseen consequences? How well do these measures work? Do agencies use any other measures not discussed in this paper?
4. Do decision makers need better guidance on how the CDDA scheme, act of grace payments and debt waiver and write off powers can be used to address these problems?
5. Do agencies monitor the administration of legislation to assess whether a safety net power in the legislation should be used?
6. Should the inclusion of safety net provisions in legislation be encouraged where appropriate? What form should they take?
7. What limitations or safeguards should be placed on the exercise of power under a safety net provision? For example, should the power:
 - be exercisable only by a Minister?
 - be exercisable by legislative instrument?
 - be exercisable only in exceptional circumstances?
 - be subject to independent review where there is a decision not to exercise the power?
8. Should the *Acts Interpretation Act 1901* be amended to allow for revocation or variation of administrative decisions? If so, how?
 - Should s 33 be amended in line with the Queensland provision that allows for amendment or repeal of a decision or instrument (subject to contrary indication in the specific legislation that grants the power)?
 - Should s 33 be amended in line with the Western Australian legislation to allow for correction of any error or omission in the exercise of a power or duty?
 - Should the Act be amended to allow an agency head to review the decision of an officer if satisfied there is sufficient reason?
9. Should there be a provision in the *Ombudsman Act 1976* empowering agencies to vary a decision or action they have taken so as to comply with a recommendation of the Ombudsman?
10. Should legislative policy makers be expressly encouraged to consider whether safety net provisions may be appropriate?
 - Would a drafting direction be useful on the need to consider legislative safety net provisions and model provisions that minimise the opportunity for such provisions to become another avenue of judicial review?
 - Does the Senate Standing Committee on the Scrutiny of Bills consider under its current assessment criteria whether a bill should contain a safety net provision? Should those criteria be amended in any way?
11. Do agencies take adequate steps to make the public aware of relevant safety net discretions?



Commenting on this issues paper

The Ombudsman invites your comments on the matters raised in this issues paper. There is no set format, although it would assist us if you addressed the questions at the end of this paper. Agency comments on how well existing safety net mechanisms work in practice are particularly sought.

Submissions can be made to:

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Where possible, comments in electronic format are preferred. The closing date for comments is 29 January 2010.

