

SOFT LAW AND PUBLIC LIABILITY: BEYOND THE SEPARATION OF POWERS?

I INTRODUCTION

Soft law is a general term for various types of non-statutory regulation.¹ The nature of soft law is inherently debatable in a way that the nature of law is not. Despite this fact, or perhaps because of it, only relatively few legal academics have written about soft law.² The judiciary has also had little to say.³ Each of these

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¹ See generally Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016).

² A reasonably comprehensive collection of academic publications on domestic soft law is nonetheless still fairly short. It includes: Sas Ansari and Lorne Sossin, 'Legitimate Expectations in Canada: Soft Law and Tax Administration' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 293; Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1; Robin Creyke and John McMillan, 'Soft Law Versus Hard 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) 377; Richard Rawlings, 'Soft Law Never Dies' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 215; Jessika van der Sluijs, 'The Infrastructure of Normative Legitimacy in Domestic Soft Law — Sketching the Field' (2017) 62 *Scandinavian Studies in Law* 245; Lorne Sossin and Charles W Smith, 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867; Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42 *Federal Law Review* 181.

³ There have been two fleeting mentions to domestic soft law in the Federal Court: *Dallas Buyers Club LLC v iiNet Ltd* (2015) 245 FCR 129, 150 [90] (Perram J); *Luck v Chief Executive Officer of Centrelink* [2015] FCA 1234 (20 November 2015) [37] (Tracey J). The concept and term have also been referred to in State Supreme Courts:

points is understandable. It is far from surprising that judges have had little cause to consider soft law, because legal remedies do not apply perfectly to extra-legal modes of regulation. Academic consideration of soft law is dominated by writing on its application in international law, but in which its role, meaning and very existence are all still contested.⁴ It frequently focuses on the suitability of soft law to attracting political consensus in international relations where harder forms of regulation would likely have been resisted.⁵ Academic consideration of the operation of soft law in domestic legal systems is dominated by analysis of its regulatory functions. Far less attention is paid to what remedies might be appropriate where those subject to soft law regulation have suffered as a result of their reliance on it.

This introduction to soft law should not, however, lead anyone to conclude that soft law is itself ineffective or insignificant. To the contrary, I accept without further discussion the regulatory effectiveness of soft law and that it is unlikely to disappear from the regulatory landscape.⁶ It is nonetheless worth drawing a distinction between formality and informality of *consequences*. Legislation passed through both houses of Parliament has formal consequences, as does its breach. The same is true of delegated legislation made by statutory delegation to the executive. Soft law (such as rules, guidelines, policy documents and statements, procedure manuals and codes) also has consequences and, like legislation, those consequences are related to the identity of the entity that issued them. However, without the stamp of parliamentary procedure (or delegation by statute), the consequences of these examples of soft law are effective but informal.

Much of what causes soft law to be problematic is intrinsically linked to its effectiveness as a regulatory tool. It does not rely on formal consequences of breach for its effectiveness but on the general belief that soft law represents an officially-sanctioned norm. A useful hypothetical example is to ask people to imagine someone standing in the middle of a road directing the traffic to turn off and enter a one-way street from the wrong end. Would you obey? Does your answer change if we suppose that

Summersford v Commissioner of Police [2017] NSWSC 1341 (4 October 2017) [54] (Adamson J); *Boyce v Allianz Australia Insurance Ltd* (2018) 83 MVA 403, 410 [26] (Basten JA); *Gould v DPP (Cth)* [2018] NSWCCA 109 (4 June 2018) [62] (Basten JA); *Naik v Monash University* [2018] VSC 60, [51] (Richards J). Other cases have considered aspects of soft law without using that term, for example where the legal status of a policy is at issue; see, eg, *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 206 (French and Drummond JJ); *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 289–90 (Gleeson CJ).

⁴ László Blutman, 'In the Trap of a Legal Metaphor: International Soft Law' (2010) 59 *International and Comparative Law Quarterly* 605, 606–7.

⁵ Soft law relies on influence for its effect rather than the capacity to determine legal outcomes conclusively. This probably explains its suitability to international law, which functions in a similar way.

⁶ See Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 203–22.

the person is wearing the uniform of a police officer?⁷ The fact is that, just like the person wearing the police uniform, soft law tends to come cloaked in the ostensible authority of the state and owes much of its effectiveness to that fact.⁸

Two worrying points flow from that conclusion. The first is that people are apt to treat certain instruments as ‘law’, in reliance on the authority with which those instruments are issued, whether or not they have formal consequences. The second is that, because soft law instruments have no formal consequences, their effect is asymmetrical. An aggrieved individual who has suffered loss by relying on the continued operation of soft law has far fewer remedial options with which to address its breach, alteration or withdrawal by its issuing authority. The authority, by contrast, generally has the benefit of its soft law being obeyed. Soft law therefore remains remedially ‘soft’. Another way of making this point is by reference to Australia’s strict separation of powers doctrine, particularly as it applies to judicial functions. Soft law is at best an imperfect fit to that doctrine. It represents a reality that is not reflected in ‘legal reality’.

This article looks at the place of soft law in the legislative and regulatory sphere and at why various remedial responses (in both private and public law) are ineffective at dealing with it. It then considers the role of soft law as a regulatory tool and, in Part IV, a number of examples of soft law currently being used in Australia. In doing so, this article aims to make a broader point than merely to illustrate the effectiveness (for regulators) and potential dangers (to those regulated) of regulation through soft law. It uses these examples as a platform to consider in Part V whether and how the separation of powers doctrine remains fit for purpose in Australia. The inadequacy of the current tripartite separation of powers model has been noted before with regard to various ‘integrity bodies’ which are nominally, but not functionally, part of the executive branch.⁹ Soft law provides an excellent basis for such an inquiry, since at base it amounts to a method of governing the general public that falls wholly outside the tripartite separation of powers: it does not require legislation, is not accountable in the usual manner of executive acts and it is generally irrelevant to considerations of courts exercising judicial review functions. Viewed as a method of accountability, the separation of powers is all but impotent to deal with soft law. This point is illustrated in Part VI by a consideration of the various methods by which loss caused by reliance on soft law might be remedied. The fact that only the ‘soft’ remedies — such as compensation following a recommendation from an Ombudsman — are likely to be effective demonstrates this article’s thesis that soft law has become a regulatory norm which operates without the oversight of the accountability mechanisms in the separation of powers doctrine.

⁷ This example was used in Weeks, *Soft Law and Public Authorities*, above n 1, 224.

⁸ Ostensible authority has a particular meaning which is rarely examined, but see Enid Campbell, ‘Ostensible Authority in Public Law’ (1999) 27 *Federal Law Review* 1.

⁹ John McMillan, ‘Re-Thinking the Separation of Powers’ (2010) 38 *Federal Law Review* 423.

II THE CHANGING NATURE OF REGULATION AND LEGISLATION

Regulation comes from a range of sources, including: Acts; delegated legislation; guidance documents directed to members of the executive; publicly available guidelines or policy statements; and private sector regulations (such as Industry Codes and co-regulatory instruments, and contracts used for regulatory purposes). One method by which these very different types of instrument might be distinguished from one another is according to their legal effect. In other words, we might distinguish ‘hard law’ from ‘soft law’ by looking at whether and how an instrument is legally binding. However, it is important to remember that the ‘hardness’ and ‘softness’ of legal instruments is relative; some soft law instruments are ‘softer’ than others. The difference between hard and soft law is nonetheless easier to discern on other bases.

First, soft law is not conclusively determinative of legal outcomes but relies on its influence to be effective. This is to say that, by treating soft law as though it were hard, people frequently (and usually unwittingly) expose themselves to potentially significant risks. The greatest of these is that reliance on soft law differs fundamentally from reliance on a statutory instrument because the public authority which has issued soft law can usually change its effect without warning or legal consequence. The fact that Australia lacks a doctrine of either public law estoppel¹⁰ or substantive enforcement of legitimate expectations¹¹ will generally leave a person who has relied on soft law, and suffered detriment due to its alteration or removal, without legal recourse.¹²

Secondly, it follows that, because Acts are conclusively determinative of legal outcomes, they are hard law. The same is true of delegated legislation, which has been authoritatively defined as comprising instruments of legislative effect made pursuant

¹⁰ *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 196 (Neaves J), 218 (Gummow J); *A-G (NSW) v Quin* (1990) 170 CLR 1, 17–8 (Mason CJ), 40–1 (Brennan J).

¹¹ This doctrine has been rejected by the High Court with increasing vehemence in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ), 16 [47] (McHugh and Gummow JJ), 45 [140] (Callinan J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 334–5 [28]–[30] (Kiefel, Bell and Keane JJ). Justice Basten characterised the latter case as having completed ‘the process of exorcising the concept of “legitimate expectations” from this aspect of administrative law’: *Hunter’s Hill Council v Minister for Local Government* (2017) 224 LGERA 1 [191]. Cf the English acceptance of legitimate expectations set out in Alexander Brown, *A Theory of Legitimate Expectations for Public Administration* (Oxford University Press, 2017).

¹² This thesis is developed in considerably greater detail in Weeks, *Soft Law and Public Authorities*, above n 1.

to the authority of Parliament.¹³ Acts and delegated legislation can be respectively described as primary and secondary legislation.¹⁴ Soft law, or ‘tertiary legislation’, can be made without an express power to legislate conferred by an Act of Parliament, without which there is no, or at best unclear,¹⁵ statutory authorisation to make rules which are directly enforceable.

Sir Robert Megarry lamented in 1944 that ‘[n]ot long ago, practitioners could live with reasonable comfort and safety in a world bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions’ but that the previously confined world of legal certainty had become an ‘expanding universe’ due to the influence of what we now call soft law.¹⁶ While Megarry’s complaint was new, its target was not: Paul Craig has traced the use of the term ‘quasi-legislation’ (Megarry’s synonym for soft law) to the nineteenth century.¹⁷ Harry Arthurs cited examples of soft law being employed in Victorian England, including by emigration officers whose superior understanding of maritime engineering made them better placed than Parliament to decide whether ships were ‘seaworthy’.¹⁸ Indeed, even the Roman Senate in the first century BC issued decrees ‘which were, in practice, usually obeyed — though, as these did not have the force of law, there was always the awkward question of what would happen if a decree of the senate was flouted or simply ignored’.¹⁹ It is obvious that such decrees were a form of soft law and just as obvious that they would never be ignored.

This raises an important initial point about soft law, which is that it is inherently neither beneficial nor harmful as a category of instrument. Megarry conceded that some explanatory notes issued by government entities were ‘shining examples of

¹³ D C Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 1–2; approved in *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209, 228–29 (French J).

¹⁴ Robert Baldwin, *Rules and Government* (Clarendon Press, 1995) 80.

¹⁵ The blurring of boundaries between law and unenforceable guidance is a constant theme in the analysis of soft law. There is of course a certain amount of statutory recognition of the existence of soft law instruments: see Harlow and Rawlings, above n 6, 193–94. Some statutes expressly confer the power or duty to create soft law. It is best to view such instruments as soft law which exists at the ‘harder’ end of the spectrum.

¹⁶ R E Megarry, ‘Administrative Quasi-Legislation’ (1944) 60 *Law Quarterly Review* 125, 125–6.

¹⁷ Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th ed, 2016) 469.

¹⁸ H W Arthurs, *‘Without the Law’: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985) 137.

¹⁹ Mary Beard, *SPQR: A History of Ancient Rome* (Profile Books, 2015), 32–33. See also Nicholas Barry, *An Introduction to Roman Law* (Oxford University Press, 1962) 16–7: ‘the Senate had in form no legislative power. Its resolutions (*senatus consulta*) were merely advice to magistrates, and though this advice was unlikely to be ignored, it had no legal effect until it had been embodied in either a resolution of the assembly or in a magisterial edict.’

official helpfulness'.²⁰ Soft law can provide important guidance to those who read it and can be used by courts and tribunals to advance their understanding of established practices or to determine the appropriate duty of care where a standard exists. Sometimes, official advice will not be entirely welcome where there is scope to take advantage of uncertainty, but that is a question which relates to the reaction to soft law rather than its nature. We can characterise soft law as a tool, such as a sharp knife.²¹ Its sharpness might indicate that it is well-made, but that fact alone tells us nothing about the 'good' or 'bad' uses to which it might be put. Its *potential* for misuse is what causes concern. This potential comes from the fact that soft law is frequently treated by those to whom it is directed as though it were hard law.

Soft law instruments might mislead or confuse particularly where they have not been published.²² The requirement that law must be promulgated before it can be applied adversely to an individual is often given the status of a principle of the rule of law.²³ The importance attached by courts to publishing policies and other forms of soft law varies. For example, the United Kingdom Supreme Court held in *Lumba* that the Home Office had acted ultra vires, in part by adopting and acting upon a secret policy,²⁴ even though, while its application affected them, that policy was one with which the claimants were not actively able to comply. By contrast, there is no indication that an Australian court would hold an unpublished policy to be ultra vires on the same facts,²⁵ although such a policy would not necessarily be enforceable against parties unaware of its existence.²⁶

²⁰ Megarry, above n 16, 126.

²¹ This metaphor was borrowed from Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (Oxford University Press, 1979) 210, 226; cited in Weeks, *Soft Law and Public Authorities*, above n 1, 74.

²² Megarry demonstrated sensitivity on this point to students' 'dismay at the prospect of being examined not merely on the law *stricto sensu* but also on its modifications' through soft law: Megarry, above n 16, 127–8.

²³ Most prominently by L L Fuller, *The Morality of Law* (Yale University Press, 1st ed, 1964) 50. See also H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 752.

²⁴ *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 266–9 (Lord Dyson) ('*Lumba*').

²⁵ A High Court majority went no further than reserving this question for future discussion in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 665 [91] (Gummow, Hayne, Crennan and Bell JJ).

²⁶ Commonwealth legislation requires that a 'person must not be subjected to any prejudice only because of the application to that conduct of any rule, guideline or practice in the unpublished information, if the person could lawfully have avoided that prejudice had he or she been aware of the unpublished information': *Freedom of Information Act 1982* (Cth) s 10(2). States and territories have similar legislative provisions: see, eg, *Freedom of Information Act 2016* (ACT) s 27; *Government Information (Public Access) Act 2009* (NSW) s 24(1); *Right to Information Act 2009* (Qld) s 20(3)(c); *Freedom of Information Act 1982* (Vic) s 9.

Some essential propositions about soft law have been set out above, including that: it can be made without legislative oversight; it is effective (in the sense that people nonetheless tend to comply with its directions); and it can be removed or altered at will. Taken together, these points represent a conundrum for the application of the separation of powers. This is because, while they are premised on the continued relevance of the traditional (and, in Australia, constitutionally mandated) tripartite model of that doctrine, it seems to follow from soft law's greater capacity for the executive to 'govern without Parliament' that the separation of powers as we know it is ripe for review. Before considering that point further, however, this article will look in more detail at categories of soft law and some specific soft law instruments.

III WHAT KINDS OF INSTRUMENT CAN BE CATEGORISED AS SOFT LAW?

It is convenient to consider what falls under the soft law label by first excluding what does not.²⁷ Not every non-statutory instrument is soft law. For example, contracts are not soft law²⁸ because they derive their binding effect from the consent of the parties.²⁹ Contracts do not rely on influence for their effectiveness, as soft law does, but are directly enforceable as between the parties. This does not change the fact that they are also frequently employed for regulatory ends:

The classic image of a contract is as an instrument of exchange, whilst the classic image of judicial review is the enforcement of express or implied legal rules, where 'rules' are seen as commands. However classical imagery can sometimes be misleading. Some government contracts are in reality rules, and the same is true of some non-contractual relationships adopting a seemingly consensual form.³⁰

Treaties also serve a regulatory function but are not soft law because they operate between states, without the intention that they should regulate the behaviour of individuals within countries unless and until such time as they are adopted into domestic law. Treaties and soft law are, however, broadly analogous in as much as there are

²⁷ A more detailed discussion of this point can be found in Weeks, *Soft Law and Public Authorities*, above n 1, ch 2.

²⁸ See Aronson, 'Private Bodies, Public Power and Soft Law in the High Court', above n 2, 3.

²⁹ See *R v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan* [1993] 2 All ER 853, 873 (Hoffmann LJ); *Griffith University v Tang* (2005) 221 CLR 99, 129 [82] (Gummow, Callinan and Heydon JJ).

³⁰ Aronson, 'Private Bodies, Public Power and Soft Law in the High Court', above n 2, 23 (citations omitted). On the regulatory function of governmental contracts, see also *Williams v Commonwealth* (2012) 248 CLR 156, 193 [38] (French CJ), 352 [521] (Crennan J).

ways in which the law and judicial review in particular is able to recognise that they have meaning, even if it cannot be directly enforced.³¹

Soft law is a concept that can best be illustrated through examples, since it includes a range of different categories of instrument, which can best be observed along a spectrum rather than as a collection of like objects. In other words, soft law has variable degrees of ‘softness’. A rigid, taxonomic approach to determining what is included under the canopy of the term soft law would ignore that fact. The softness of law may differ between, for example, mere guidance or statements about an agency’s general practices on one hand and, on the other, soft law which is all but compulsory to follow because, for example, it sets out the process to be followed if you wish to obtain a benefit from government. Describing a particular instrument as ‘soft’ or ‘hard’ is meaningless if those adjectives purport only to divide things which are ‘law’ from those which are not. The truth of the matter is more complex: between law which is ‘hard’ (as in enforceable by and against government), and edicts which are so ‘soft’ as not to be considered law at all, there is a range of instruments in which softness and legality are mixed in varying concentrations. On the other hand, classifying instruments does not alone lead to a workable definition of soft law since instruments like codes of practice, guidance notes, circulars,³² policy notes, development briefs, planning instruments,³³ practice statements, taxation rulings³⁴ and concessions, codes of conduct, codes of ethics and conventions might either be

³¹ See, eg, the series of cases in which the NSW Court of Appeal has treated the *United Nations Convention on the Rights of the Child* as a mandatory consideration in child welfare cases, including: *Re Tracey* (2011) 80 NSWLR 261; *JL v Secretary, Department of Family and Community Services* [2015] NSWCA 88 (13 April 2015); *Re Henry*; *JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 (13 April 2015).

³² John Houghton and Robert Baldwin, ‘Circular Arguments: The Status and Legitimacy of Administrative Rules’ [1986] *Public Law* 239.

³³ One example of this point is the development control plan (‘DCP’) which arises in New South Wales planning law under the *Environmental Planning and Assessment Act 1979* (NSW) pt 3 div 3.6. Although DCPs are principally ‘to provide guidance’ under s 3.42(1) of the Act, they are nonetheless explained at length by legislation. As a result, DCPs are ‘harder’ than most varieties of soft law, but still fit within the latter appellation because they are designed to provide guidance rather than to bind; see *Elachi v Council of the City of Shoalhaven* (2016) 212 LGERA 446, 453 [18] (Basten JA). Local environmental plans, by contrast, are delegated legislation made by the Minister or his/her delegate in accordance with a delegation of power from Parliament and an exhaustively specified procedure. See Greg Weeks and Linda Pearson, ‘Planning and Soft Law’ (2018) 24 *Australian Journal of Administrative Law* 252, 260–2.

³⁴ See Benjamin Alarie et al, ‘Advance Tax Rulings in Perspective: A Theoretical and Comparative Analysis’ (2014) 20 *New Zealand Journal of Taxation Law and Policy* 362. Taxation rulings are designed to influence behaviour and, like most soft law, they affect government and individual parties differently. However, they are unusual in the sense that the benefit of this asymmetry goes to the taxpayer because rulings are legislatively binding only on the revenue authority.

delegated legislation or soft law, depending on whether Parliament had expressly authorised their creation.³⁵ It is useful, therefore, to look briefly at two common categories of soft law in order to see what that term *includes* rather than to engage in the more difficult task of defining what it *is*.

The first are policy statements. ‘Policy’, a word with a very broad scope in law, can be seen as a subset of soft law where it is developed to modify or direct behaviour. Given that much government policy is now generally available regardless of whether or not it is directed to the public, there is no reason to exclude ministerial or departmental policy directed to delegates and public servants from the definition of soft law.³⁶ A written policy has greater power than an oral promise to create expectations, a point which reiterates what has long been recognised by the law relating to negligent misrepresentations: while not every representation is equally capable of creating reasonable reliance, a written and apparently official policy is at the end of the range where reliance is most likely to be reasonable. It follows that, if soft law of this type is capable of securing both the trust and compliance of reasonable people exposed to it, there is a functionally effective method of governing which owes nothing to the legislative process. There is a tension between governing in this way and the traditional conception of the separation of powers doctrine, since the mechanism through which government is performed escapes the accountability structures inherent to that doctrine.

The second is self-regulation, which shares a long history with business activity and is frequently undertaken in the shadow of an implicit threat that its failure (in the government’s terms) will increase the likelihood that it will be replaced with a legislative scheme. Self-regulation can achieve some outcomes that externally imposed regulation cannot. A voluntary, self-regulatory industry code can take on some of the aspects of soft law where there is government involvement, either through consultation during the formulation stage or as a consequence of accepting government funding. For example, the General Insurance Code of Practice was developed by the general insurance industry after the government

stated its intention to have a mandatory code for the general insurance industry. The industry reacted to that announcement by initially regulating itself. The industry, in effect, self-regulated, but the Government was involved in drafting the Code, informally monitored its operation and expected to be involved in its review.³⁷

³⁵ See Pearce and Argument, above n 13, 4–5. One of the immediate benefits of the *Legislation Act 2003* (Cth) was that it eliminated the need to guess whether an instrument was delegated legislation or not based on what it was called (eg regulation, circular etc).

³⁶ See the discussion of ‘secret’ policies in *Lumba* [2012] 1 AC 245.

³⁷ Commonwealth Interdepartmental Committee on Quasi-Regulation, *Grey-Letter Law: Report of the Commonwealth Interdepartmental Committee on Quasi-Regulation* (1997) 21.

Therefore, what had been a purely voluntary soft law scheme took on a hard law practical effect because of the broader involvement of government. The potential for such a result is implicit in treating self-regulation as delegating public powers to private bodies.

IV SPECIFIC EXAMPLES OF SOFT LAW INSTRUMENTS

Several compelling issues are raised by soft law instruments arising within the subject matter covered by state workplace health and safety, corrective services and health legislation, leaving aside the many interesting Commonwealth instruments that this article lacks the space to consider.

A Work Health and Safety Codes

Soft law codes are frequently issued to add detail to legislative schemes.³⁸ A good example of this is the Code of Practice on asbestos removal reissued in September 2016 by SafeWork NSW.³⁹ The *Work Health and Safety Regulation 2017* (NSW) requires (in summary) that a person conducting a business or undertaking ensure that health monitoring is provided to a worker if they are carrying out licensed asbestos removal work, other ongoing asbestos removal work or asbestos-related work and is at risk of exposure to asbestos when carrying out the work.⁴⁰ It imposes a number of duties and sets out monetary penalties for their breach. The *NSW Asbestos Code* adds detail to these legislative requirements in the *NSW WHS Regulation* by setting out what a health monitoring report must include, when monitoring should occur, who carries it out, who pays for it and what information the doctor must be given.

The *NSW WHS Regulation* requires that an asbestos removalist must ensure there are signs to alert people to the presence of asbestos and barricades to delineate the

³⁸ See, eg, the Victorian position on OHS Codes of Practice explained in *Victorian WorkCover Authority v Stoddart (Vic) Pty Ltd* [2015] VSC 149, [32]–[57], [81]–[93] (J Forrest J).

³⁹ SafeWork NSW, ‘How to Safely Remove Asbestos’ (Code of Practice, September 2016) <http://www.safework.nsw.gov.au/__data/assets/pdf_file/0015/50082/safely-remove-asbestos-code-of-practice-0916-2.pdf> (*‘NSW Asbestos Code’*). WorkSafe Victoria has an equivalent code: WorkSafe Victoria, ‘Removing Asbestos in Workplaces’ (Compliance Code, September 2008) <https://prod.wsvdigital.com.au/sites/default/files/2018-07/ISBN-Removing-asbestos-in-workplaces-compliance-code-2008-09_0.pdf> (*‘Victorian Asbestos Code’*). The *Victorian Asbestos Code* predates the revised *Occupational Health and Safety Regulations 2017* (Vic) (*‘OHS Regulations’*), meaning that compliance with the Code might not equate to compliance with the regulations.

⁴⁰ *Work Health and Safety Regulation 2017* (NSW) pt 8.5 div 1 (*‘NSW WHS Regulation’*). The Victorian OHS Regulations impose similar requirements on employers, including that they arrange for medical examinations for employees exposed to asbestos (reg 311) and that they share the results of asbestos paraoccupational air monitoring (reg 293).

asbestos removal area, and provides monetary penalties for breach of those requirements.⁴¹ The *NSW Asbestos Code* provides practical detail that assists asbestos removalists to do what the regulation merely says they ‘must ensure’ that they do. This includes specifying the placement of signs, the requirement that they be ‘weatherproof, constructed of light-weight material and adequately secured so they remain in prominent locations’.⁴² It refers to the relevant Australian Standard⁴³ — itself a soft law instrument — with regard to the necessary size, illumination, location and maintenance of warning signs. The material on barricades is even more detailed.

The *NSW Asbestos Code* also provides detailed advice on the steps that should in fact be taken to remove asbestos safely, rather than simply requiring that it must be removed safely. It divides this advice in a practical way, covering what to wear,⁴⁴ how to launder clothing,⁴⁵ what safety equipment is necessary,⁴⁶ how to remove asbestos from specific locations, who must be informed of the asbestos removal work,⁴⁷ and so forth. This is a level of detail that is generally inappropriate to legislative instruments since they are harder to update than soft law like the *NSW Asbestos Code* in order to reflect the most current approach to the task of removing asbestos.

On the other hand, the *NSW Asbestos Code* is clearly at the ‘hard’ end of soft law. It is prescriptive and rule-like. It has the potential to lead to direct penalties; for example, an inspector may refer to breaches of the *NSW Asbestos Code* when issuing improvement or prohibition notices.⁴⁸ In other words, the purpose of this soft law is not to guide the exercise of discretion so much as to add helpful detail to legislative demands.

B *Corrective Services Manuals and Regulations*

There are Standard Guidelines for Corrections in Australia,⁴⁹ which all state and territory governments apply and which ‘constitute outcomes or goals to be achieved by correctional services rather than a set of absolute standards or laws to be enforced’.⁵⁰ Each state and territory must still develop its own standards which operate less at the

⁴¹ *NSW WHS Regulation* reg 469.

⁴² SafeWork NSW, above n 39, 21.

⁴³ Standards Australia, ‘Safety Signs for the Occupational Environment’ (Australian Standard No 1319–1994, 18 April 1994).

⁴⁴ SafeWork NSW, above n 39, 25–8.

⁴⁵ *Ibid* 34.

⁴⁶ *Ibid* 23–5.

⁴⁷ *Ibid* 13.

⁴⁸ *Ibid* 3.

⁴⁹ Corrective Services Ministers’ Conference, ‘Standard Guidelines for Corrections in Australia’ (Guideline, 2012) <<http://assets.justice.vic.gov.au/corrections/resources/d16d61ab-ea20-4277-9cfe-adc2ee5162d8/standardguidelines%2b2012.pdf>>. These guidelines were scheduled for review in 2018.

⁵⁰ *Ibid* 3.

level of principle and more as sources of practical advice. Corrective Services NSW has an extensive suite of soft law contained in a comprehensive Operations Manual,⁵¹ most of which is directed internally to its own employees but which also has a significant effect on prisoners.⁵² Two particular instruments within the Manual, which relate respectively to the release of inmates and their classification, are noteworthy.

1 *Release of Inmates*

The part of the *Crimes (Administration of Sentences) Regulation 2014* (NSW) (*'NSW Regulation'*) which deals with the release of inmates from correctional centres is brief, comprising only two regulations.⁵³ The section of the Operations Manual which addresses the same topic is much more detailed and practically oriented. For example, it deals with making arrangements with local Centrelink offices on behalf of released inmates, specific responsibilities with regard to carrying out exit screenings, the circumstances in which gratuities are payable to inmates upon their release, and so forth.⁵⁴ Similar provisions can be found in the Victorian *Correctional Management Standards for Men's Prisons*.⁵⁵

⁵¹ Government of New South Wales, 'Custodial Operations Policy and Procedures (COPP)' (Policy, 16 December 2017) <<https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/custodial-corrections/custodial-corrections-COPP/custodial-operations-policy-and-procedures-home-page.aspx>> ('Operations Manual').

⁵² See, eg, the *Level of Service Inventory — Revised* ('LSI-R'), a comprehensive risk assessment instrument designed to obtain: offenders' social and offending history; a rating for their risk of re-offending upon release; factors related to that risk; and a listing of strengths, assets and positive opportunities which will mitigate against that risk: Corrective Services NSW, 'Offender Classification and Case Management Policy and Procedures Manual: 3.1 Corrective Services NSW (CSNSW) Case Management Policy' (January 2016) <<http://www.correctiveservices.justice.nsw.gov.au/Documents/Related%20Links/open-access-information/offender-classification/3.1-csnew-case-management-policy.pdf>> [3.1.11]. It is Corrective Services' policy to administer LSI-R to all sentenced offenders in custody with sentences of over six months, offenders who are subject to a full pre-sentence or pre-release report for a sentencing or releasing authority and all offenders subject to a supervision order in the community.

⁵³ These are reg 172 (Inmates to check personal property and records) and reg 173 (Pre-release interviews). Specific provisions with respect to the information to be given to a person who is being released on parole are provided in reg 217.

⁵⁴ Operations Manual, above n 51, 23.2.

⁵⁵ Corrections Victoria, 'Correctional Management Standards for Men's Prisons in Victoria' (Standards, 4 July 2014) standards 29, 30 <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/correctional+management+standards+for+mens+prisons+in+victoria>> (*'Victorian Standards'*). See also the equivalent parts for women prisoners: Corrections Victoria, 'Standards for the Management of Women Prisoners in Victoria' (Standards, 4 July 2014) <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/standards+for+the+management+of+women+prisoners+in+victoria>>.

The Operations Manual contains details of previous amendments, giving it a more legislative appearance. Although penalties for failure to adhere to this instrument are not made explicit, the mention of internal checklists, reporting requirements and regular audits makes it likely that disciplinary action would follow breach of this instrument by Corrective Services employees.⁵⁶ The same sorts of disciplinary action against non-compliant staff members are implicit in the *Victorian Standards*.⁵⁷

2 *Classification, Placement and Case Plan Reviews*

At the other end of the process, the Operations Manual provides detail to Corrective Services employees about what they must do to classify new inmates for security purposes.⁵⁸ Regulation 12 of the *NSW Regulation* specifies that inmates must be classified into one of seven categories, including:

- AA (special risk to national security);
- B (confined by secure physical barrier); and
- C2 (need not be confined by physical barrier but requires some level of supervision).⁵⁹

The Manual includes practical advice as to how such classifications are to be determined, for example specifying that having been refused bail or parole is not in itself an indication that the inmate is a security risk of the highest classification.⁶⁰

⁵⁶ The instrument also has the role of assisting detection and resolution of issues where inmates allege that their property has been damaged or stolen while held by Corrective Services employees.

⁵⁷ Corrections Victoria, 'Correctional Management Standards for Men's Prisons in Victoria', above n 55, 88–9. Cf *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, where the appellant police officers failed to adhere to the relevant terms of the Victoria Police Manual. This point was not pressed before the High Court, but might nonetheless have resulted in some type of professional sanction.

⁵⁸ A different classification system is used in the Tasmania Prison Service, 'Director's Standing Order — Classification and Placement' (Standing Order No 2.04, December 2016) app A — Tier One Offence Severity Scale <http://www.justice.tas.gov.au/___data/assets/pdf_file/0008/336581/2_04_Classification_DSO.pdf>.

⁵⁹ These categories apply specifically to male inmates. Female inmates are classified under a different system: *Crimes (Administration of Sentences) Regulation 2014* (NSW) reg 13. In Victoria, there are separate *Correctional Management Standards* for men's prisons and women prisoners (both standards have a similar structure, making the gender-based distinction between 'prisons' and 'prisoners' interesting but unexplained).

⁶⁰ Correctional Services NSW, 'Offender Classification and Case Management Policy and Procedures Manual: 14.1 — Classification, Placement and Case Plan Reviews' (July 2015) <<https://www.correctiveservices.justice.nsw.gov.au/Documents/Related%20Links/open-access-information/offender-classification/14.1-Classification-Placement-and-Case-Plan-Reviews.pdf>> 5.

Likewise, while consideration is given to an inmate's custodial history, a poor custodial history does not per se restrict classification progression.⁶¹

One interesting aspect of this instrument is that it raises questions as to whether and how an inmate might seek to have his or her security classification reviewed. For example, the Manual requires that inmates be present during their classification other than in exceptional circumstances.⁶² Does this indicate the practical content of procedural fairness and leave a classification conducted in an inmate's absence open to challenge? Is it, on the other hand, no more than a soft law aspiration aimed at employees of Corrective Services which therefore creates no ground of challenge? Holding that procedural fairness might give meaning to soft law like this would not sit comfortably with recent cases which hold that transfer decisions are not subject to procedural fairness.⁶³ If procedural fairness is now apparently limited in some aspects of prison administration, it seems unlikely that soft law instruments issued by corrective services officials can be seen as a source of fairness obligations.

C *Healthy Eating and Drinking*

Of a very different nature is the *Healthy Food and Drink in NSW Health Facilities for Staff and Visitors Framework*,⁶⁴ which is sub-headed 'healthy choices in health facilities' and speaks of 'support[ing] ... healthy diets and lifestyles' in staff and visitors and 'identify[ing] ways to make it easy to be healthy in NSW'.⁶⁵ It is almost immediately apparent, however, that the 'choices' in question have already been made within NSW Health and that the constant references to 'support' (25 of them in a 14 page document, with a further 20 references to 'choice' or 'choose') are directed to supporting people who comply with the choice of a healthy lifestyle identified by NSW Health. The ACT has a similarly prescriptive policy which is also set out in terms of 'choice', requiring that

healthy food and drink choices must be provided and promoted to staff, volunteers and visitors at: ACT Health facilities[; and] ACT Health activities including meetings, functions, events, education sessions and fundraising activities.⁶⁶

⁶¹ Ibid 6.

⁶² Ibid 5.

⁶³ See, eg, *Moran v Secretary, Department of Justice and Regulation* (2015) 48 VR 119.

⁶⁴ See NSW Ministry of Health, 'Healthy Food and Drink in NSW Health Facilities for Staff and Visitors Framework' (Framework, 2017) <<http://www.health.nsw.gov.au/heal/Publications/hfd-framework.pdf>>.

⁶⁵ Ibid 3.

⁶⁶ ACT Health, 'Healthy Food and Drink Choices' (Policy Statement No DGD18-003, 14 February 2018) <<https://health.act.gov.au/sites/default/files/2018-09/Healthy%20Food%20and%20Drink%20Choices.pdf>> 1.

It is, of course, neither here nor there that a department of health has settled on a policy and publishes a framework communicating that policy.⁶⁷ In short, they mean that you cannot buy a Coke from a hospital vending machine or any of the cafeterias, newsagents or retail premises connected with NSW Health or ACT Health. Further, in NSW, ‘everyday’ foods and drinks comprise 75 per cent of the products for sale with ‘occasional’ products making up the remaining 25 per cent.⁶⁸ ACT Health categorises foods to similar effect by basing its nutrition standard on a ‘traffic light system’.⁶⁹ While one assumes that these health departments have at least indirect (but probably contractual)⁷⁰ means of ensuring compliance with their policies by third parties who lease retail space in hospitals, there are no explicit penalties in either policy document.⁷¹ They are ‘soft’ in that respect but, as a policy with the clear support of the respective health departments, they are probably treated and operate as though they express ‘hard’ legal obligations. Perhaps a neutral description of these policy frameworks is as aspirational but with a hard edge.

This prevention of otherwise lawful activity has an interesting analogue with university campuses which have declared themselves to be entirely ‘non-smoking areas’. Presumably, universities could effect such a policy through amending their by-laws but it seems that they are using policy rather than more formal means to effect the goal of smoke-free campuses. The Australian National University (‘ANU’) has a smoke-free policy⁷² which prohibits all smoking and advertising of tobacco products anywhere on the University campus, with minor exceptions. The University of New South Wales (‘UNSW’) has a similar policy,⁷³ although it is framed less

⁶⁷ By contrast, Victoria has no uniform or mandatory policy, but simply provides templates which individual health facilities, sports clubs and the like *may* adopt should they so choose.

⁶⁸ NSW Health, ‘Healthy Food and Drink in NSW Health Facilities for Staff and Visitors Framework’ (Guideline GL2017_012, 8 June 2017) <https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/GL2017_012.pdf> 9.

⁶⁹ ACT Health, ‘Why and How We Developed ACT Health’s Healthy Food and Drink Choices Policy’ (Factsheet, December 2015) <https://www.health.act.gov.au/sites/default/files/2018-09/Healthy_Choices_Background_FINAL.pdf>.

⁷⁰ ACT Health requires that the nutrition standard be incorporated into ‘all tenders, contracts, leases and management arrangements that relate to the supply of food and drinks via food outlets and vending machines’ and suggests that food outlets and vending machines covered by existing contracts, leases and management arrangements should be encouraged to ‘lead by example’ and adopt the Nutrition Standard voluntarily: ACT Health, above n 66, 2.

⁷¹ Staff bear responsibility for implementing these policies and one assumes that disciplinary measures would follow any failure to adhere to these policies; see also the comment in footnote 57.

⁷² Australian National University, ‘Smoke-Free’ (Policy, Document No ANUP_011807, 28 May 2015) <https://policies.anu.edu.au/ppl/document/ANUP_011807>.

⁷³ University of New South Wales, ‘Smoke-Free Environment Policy’ (Policy, Version 5.0, 21 June 2017) <<https://www.gs.unsw.edu.au/policy/documents/smokefreepolicy.pdf>>.

as a prohibition and more in terms of a duty to observe the rights of others to a smoke-free environment. The policy draws support from relevant legislation,⁷⁴ but has no legislative force itself. The ANU policy states that voluntary compliance will be encouraged but it is apparent from the terms of both policies that the universities intend to enforce them strictly. For example, both policies indicate that compliance is a condition of employment for staff and of continuing enrolment for students. One can observe that almost nobody smokes within these university campuses anymore, it having been sufficient that they put up signs telling people that they may not smoke on university grounds. Smoking was common at universities not so long ago and one suspects that the signs, as emanations of policy choices, have made a difference. The declaration by state health departments in NSW and the ACT that sugary drinks and the like are now forbidden will also be effective because people will believe that their effective ban under soft law is in fact a ban with hard lawful effect.

V SOFT LAW AND THE SEPARATION OF POWERS

Although the tripartite separation of powers model has been justified in the past on the basis that each branch imposes accountability on the other two,⁷⁵ and vice versa, the possibility that conduct with a quasi-legislative effect might operate outside this structure invites the question whether and how it is made accountable. The separation of powers is, after all, a political arrangement whose purpose is to set boundaries for certain organs of the state. There are presently three broadly defined groups of such organs — the legislature, executive government and the judiciary — but the terms upon which these groups are defined and their functions made accountable are ultimately the subject of a political process which can theoretically be renegotiated.

This conclusion is demonstrated by the way that the separation of powers operates in three democracies with broadly similar aims and values.⁷⁶ In the United Kingdom, Parliament has been sovereign and the dominant branch of government since 1688 and, until recently,⁷⁷ there was the capacity for people to serve simultaneously in

⁷⁴ See, eg, '[t]he University has a duty under the *Work Health and Safety Act 2011* and its Regulations to ensure, so far as is reasonably practicable, the health and safety of staff, students and visitors': *Ibid* 1.

⁷⁵ Accountability has been described as a core public law value which is closely connected to the separation of powers doctrine: Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24 *Australian Journal of Administrative Law* 189. It has also been seen as a constitutional value: Janina Boughey and Greg Weeks, 'Government Accountability as a "Constitutional Value"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99.

⁷⁶ The operation of the separation of powers in Australia, the United Kingdom and the USA is considered at length in Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016).

⁷⁷ *Constitutional Reform Act 2005* (UK) c 4 pt 2.

both the judiciary and in a political role in either or both of the other branches.⁷⁸ The constitutional role of English judges allows them to be more interventionist than Australian judges.⁷⁹ In the United States, there is a strict separation between each of the branches of government,⁸⁰ a point most easily demonstrated by the fact that the President has no legislative role. Australia's system is a blend of the English and American models, in which the Constitution requires that members of the Commonwealth ministry must serve in either the House of Representatives or the Senate. There is only a strict separation of judicial power,⁸¹ and the doctrine underlying it looks 'unassailable' despite being neither constitutionally required nor popular with prominent judges.⁸² In short, the separation of powers is not a constant but the reflection in specific jurisdictions of a political compact which is now centuries old. As John McMillan has pointed out, there is a need to 'update our constitutional thinking';⁸³ if we were to draft a constitution from scratch now, it would not look much like the one we have for the simple reason that the one we have represents 19th rather than 21st century thinking about the role of government and its various organs.⁸⁴

Students are frequently warned that 'judicial review is not the answer to everything'; in fact, its influence is relatively limited in some regards.⁸⁵ What is troubling in regard to soft law is that almost none of the law's existing remedial doctrines are effective to remedy loss caused by reliance on soft law.⁸⁶ To the extent that such remedies are dependent on first establishing an instrument's lack of legal validity, they miss the mark because soft law never relies on legal validity to be effective.⁸⁷ Furthermore, there is no point to judicial supervision of the interpretation of soft law when it can be changed without legal formality, since '[t]he further a regulatory

⁷⁸ For example, the Lord Chancellor held a Cabinet post in addition to presiding over the House of Lords and being the head of the judiciary in England and Wales.

⁷⁹ The separation of judicial power is viewed in Australia as placing stringent jurisdictional limitations on the judicial review function; see Brennan J's canonical analysis in *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6.

⁸⁰ Peter L Strauss, *Administrative Justice in the United States* (Carolina Academic Press, 3rd ed, 2016) 28–57.

⁸¹ This is due to the widely unloved, but unalterably entrenched, principle from *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See John McMillan, above n 9, 424.

⁸² See Matthew Groves and Greg Weeks, 'The Legitimate Expectation as an Instrument and Illustration of Common Law Change' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 5.

⁸³ John McMillan, above n 9, 423, 438.

⁸⁴ See the discussion in Peter Cane, above n 76, 191–201.

⁸⁵ John McMillan, above n 9, 427.

⁸⁶ A point discussed in Part VI below.

⁸⁷ This recalls Sir William Wade's query about quashing an instrument with no legal effect: 'How can it be *ultra vires* if it has no *vires* to be *ultra*?': H W R Wade, 'Beyond the Law: A British Innovation in Judicial Review' (1991) 43 *Administrative Law Review* 559, 561.

regime travels from the legal paradigm, the less relevant is judicial review as an accountability device'.⁸⁸

The temptation to increase the range of judicial remedies, for example to include damages for maladministration, must be yielded to only after accepting that any such change would alter the existing suite of judicial review remedies.⁸⁹ While this point is true in other jurisdictions, those without a constitutionally embedded (at Commonwealth level) separation of powers doctrine have a greater number of other options available to them.

Practically speaking, the separation of powers model is stable in Australia, especially at the Commonwealth level, and neither it nor other associated doctrines is likely to change in the foreseeable future.⁹⁰ On the other hand, there has been a marked increase in recent years in people (just as likely to be judges⁹¹ as academics⁹²) addressing the need for a notional fourth 'branch of government' comprising bodies with a dedicated 'integrity' function. Whether one views this as a metaphor designed to stimulate greater discussion or as a call for actual constitutional reform of the separation of powers doctrine, there is greater consensus that the separation of powers does not reflect the complexity of modern government. This is an example of how the obligation to 'update our constitutional thinking' is a prerequisite to designing a functional separation of powers doctrine from scratch.

Much of soft law's power in this regard comes as a result of it being a concept that falls betwixt the established categories of the separation of powers doctrine, which is the 'most important doctrine in analysing government legal accountability'.⁹³ It is a tool for governing, but it is not legislative. It emanates from the executive without the accountability mechanisms which accompany delegated legislation. It is a form

⁸⁸ Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 40, 47. Aronson refers specifically to the regulatory scheme considered in *R v Panel on Take-Overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815.

⁸⁹ See the analysis of Spigelman CJ in *New South Wales v Paige* (2002) 60 NSWLR 371.

⁹⁰ For example, jurisdictional error, whose 'centrality' to judicial review is undoubtable after *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; see J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.

⁹¹ See, eg, Justice W M C Gummow, 'The 2012 National Lecture on Administrative Law: A Fourth Branch of Government?' (2012) 70 *AIAL Forum* 19; J J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724; cf Justice Stephen Gageler, 'Three is Plenty' in Greg Weeks and Matthew Groves (eds), *Administrative Redress Inside and Outside the Courts: Essays in Honour of Robyn Creyke and John McMillan* (Federation Press, 2019) (forthcoming).

⁹² See, eg, A J Brown, 'The Integrity Branch: A "System", an "Industry", or a Sensible Emerging Fourth Arm of Government?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 301; Robin Creyke, 'An "Integrity" Branch' (2012) 70 *AIAL Forum* 33.

⁹³ John McMillan, above n 9, 423.

of administrative action which is all but immune to judicial review. The thinking that was used to draft the *Australian Constitution* never contemplated anything like soft law, with the result that its ‘softness’ is simply another way of describing the fact that its legal effect is not matched by mechanisms for holding its use accountable. There is a strong case against the possibility that the application of the existing constitutional separation of powers doctrine might be adapted to take account of soft law. This is an issue not faced by countries without such a hard-edged version of that doctrine, with the result that the United Kingdom’s courts have fashioned some responses, of greater or lesser effectiveness, to the use of soft law by public authorities.⁹⁴

It is an additional point of difficulty that soft law comprises instruments which require the imposition of accountability, whereas most challenges to the separation of powers come from statutory bodies which are *themselves* designed to bring accountability. John McMillan has noted that the ‘growth of non-judicial accountability bodies has not been constrained by the doctrine of the separation of powers, but equally this new system of government accountability does not fit easily within that doctrine.’⁹⁵ It is every bit as true that soft law does not fit within the separation of powers doctrine as that the separation of powers doctrine has not constrained soft law’s growth. However, where statutory bodies like the Ombudsman have continued to thrive despite fitting comfortably within none of the constitutional branches of government,⁹⁶ the satisfaction that accompanies such achievements is tempered by the fact that soft law is neither organised nor wholly benign.

If regulation imposes, by its nature, a certain order, soft law is more likely to emerge opportunistically, simply because it operates effectively in the absence of structure or even official approbation. Soft law does not require a place within the separation of powers doctrine for validation or the better to reflect reality. It needs neither of these things to be effective. We, however, need accountability mechanisms, like those inherent to the separation of powers doctrine, to control the use of soft law as a tool of government. As things stand, the effectiveness of soft law means that governments can use legislation in such a spartan fashion that the accountability measures to which it is subject are rendered all but otiose.⁹⁷ However, as with anything connected with the *Australian Constitution*, formal change is hard to achieve and will happen slowly if it happens at all.

⁹⁴ One aspect of this approach is addressed in greater detail in Part VI below.

⁹⁵ John McMillan, above n 9, 423.

⁹⁶ See eg Rick Snell, ‘Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma’ in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (Australian Institute of Administrative Law, 2000) 188.

⁹⁷ See Mark Aronson, ‘The Great Depression, This Depression and Administrative Law’ (2009) 37 *Federal Law Review* 165.

VI THE REMEDIAL APPROACH TO SOFT LAW

Soft law is a bigger subject than it at first appears. Indeed, it initially seems to have virtually no content at all, particularly in Australia where public law remedies, and private law remedies as they relate to public law issues, are connected so fundamentally to breaches of law.⁹⁸ In soft law cases, the source of power is virtually never relevant. A detailed examination of Australia's public law remedies offers few promising approaches to dealing with soft law, although remedies which are also 'soft' can and do resolve some problems created by soft law. An antecedent issue is to try to determine just what soft law includes. A survey of various soft law instruments, like that undertaken above, demonstrates much of the reason why attempts to define it tend not to be wholly successful; they are varied in form and purpose and need to be considered on their own merits to discern what they mean, where they fit into a regulatory scheme and on what bases they might be challenged.

This is perhaps the most salutary point to be made about soft law. Much of this article's attention has been on how soft law can be identified and challenged but few people, even those with some legal knowledge or commercial sophistication, think to differentiate between law and instruments which merely look like law. There are legislative protections in place, for example under the *Legislation Act 2003* (Cth), which distinguish legislative instruments from mere soft law. However, a registry of statutory instruments seems understandably insufficient to inform most people. The nett result is that, while some soft law will continue to be a model of helpfulness to those to whom it is aimed, there will always be an undercurrent of danger caused by the fact that soft law's power to convince people that it is 'law' makes it dangerous and leaves it open to abuse.

While there are few methods by which the misuse of soft law can be remedied,⁹⁹ there are some issues worth noting. Soft law's legal status is important where it is issued in order to bring consistency to the conduct or decision-making of numerous people, for example delegates of a Minister who have been given the task of exercising a discretion. Before discretion became the defining characteristic of administrative decision-making, it was once considered the central *problem* of administrative law. Dicey and those who followed him regarded exercises of executive discretion as arbitrary,¹⁰⁰ with Lord Hewart CJ decrying it as leading to 'despotism [and] ...

⁹⁸ See, eg, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3, which restricts the jurisdiction of courts to issue relief to decisions of an administrative character made under an enactment ('decision to which this Act applies'). See also *Griffith University v Tang* (2005) 221 CLR 99 and the discussion in Greg Weeks, 'The Use and Enforcement of Soft Law', above n 2, 186–8.

⁹⁹ Writing on soft law often dedicates significant space to producing a list of the things that *cannot* be done in response to soft law; see eg Greg Weeks, *Soft Law and Public Authorities*, above n 1.

¹⁰⁰ On Dicey's elision of 'discretionary' with 'arbitrary', see H W Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1, 23–5; Carol Harlow and Richard Rawlings, above n 6, 17.

the loss of those hardly won liberties which it has taken centuries to establish¹⁰¹ Discretionary decision-making, including by delegates, is now broadly accepted as a fact of administrative life, made more palatable where soft law exists to bring decisions into line with each other and dispel the perception that they are being made on an arbitrary basis.¹⁰² Inconsistency in like cases is not unlawful,¹⁰³ but it is better avoided.

A Remedies Based on Invalidity

There are few judicial remedies suited to dealing with soft law. As I have noted already,¹⁰⁴ it is difficult to rationalise remedying the misuse of soft law on the same basis as for invalid decision-making. Judicial review attaches consequences to the invalidity of decisions which are required to be legally correct and this is the basis on which Australia's axiomatically procedural judicial review remedies are granted.¹⁰⁵ Soft law, by contrast, does not by its nature carry formal legal consequences. While it follows that one cannot speak of soft law being legally invalid per se, there are nonetheless some ways in which judicial review is able to deal with the unlawful consequences of soft law which contains legal errors.¹⁰⁶ A declaration of invalidity might be the first step towards seeking remedies where an invalid application of soft law is an element of a private cause of action, such as for false imprisonment¹⁰⁷ or resti-

¹⁰¹ See Baron Gordon Hewart, *The New Despotism* (Ernest Benn, 1929) 52. Lord Hewart's luridly expressed fear of administrative 'lawlessness' still resonates nearly 90 years later, even if it is no longer taken seriously; see eg Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Hart Publishing, 2017) 3–4.

¹⁰² *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 24 ALR 577, 639 (Brennan J).

¹⁰³ *Segal v Waverley Council* (2005) 64 NSWLR 177.

¹⁰⁴ See my discussion of judicial review in Part V.

¹⁰⁵ More properly, judicial review remedies respond to nullity consequent upon the presence of jurisdictional error; see Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) ch 10.

¹⁰⁶ See, eg, *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 358–60, in which the High Court declared that soft law manuals supplied by the Minister contained legal errors for which the Minister was responsible. The errors of law made by the contractors would have been jurisdictional errors had the Minister adopted them: Mark Aronson, Matthew Groves and Greg Weeks, above n 105, [15.110]–[15.120]. However, the High Court's declaratory relief was, in Perram J's term, 'proleptic': *Minister for Immigration and Border Protection v SZSNW* (2014) 229 FCR 197, 219 [106].

¹⁰⁷ See the discussion in *Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637.

tution for unjust enrichment using a reason for restitution directed only at public authorities.¹⁰⁸

A decision-maker who applies soft law rules or policies inflexibly, without listening to submissions that an exception be made, will generally have committed a jurisdictional error.¹⁰⁹ Calls to develop ‘inconsistency’ as a free-standing ground of review on this basis encounter some difficulty since the result would be two grounds of review taking opposed positions on a single issue.¹¹⁰ An inconsistency ground which hardens the application of soft law would have particular effect on soft law with a ‘promissory’ outlook, and would therefore raise many of the same objections as the substantive enforcement of legitimate expectations.¹¹¹ For now, at least, inconsistency is more likely to remain an aspect of *Wednesbury* unreasonableness.¹¹² The rule against fettering, on the other hand, recognises the existence of soft law and places some limits on its application.

Soft law is capable of generating limited procedural fairness obligations on the part of bodies which use it as a regulatory tool, although remedies for breach of those obligations will only ever be procedural and never substantive in Australian courts.¹¹³

¹⁰⁸ See, eg, *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70. Australia’s acceptance of this case depends on the right case reaching the High Court. See Simone Degeling, ‘Restitution of Overpaid Tax in Australia: The *Woolwich* Principle’ in Steven Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 313; Greg Weeks, ‘The Public Law of Restitution’ (2014) 38 *Melbourne University Law Review* 198.

¹⁰⁹ See *British Oxygen Co Ltd v Ministry of Technology* [1971] AC 610, 625 (Lord Reid). His Lordship did not use the term jurisdictional error, which is how the relevant conduct would be described in an Australian court today.

¹¹⁰ Mark Aronson, Matthew Groves and Greg Weeks, above n 105, [3.280]. As Deane J pointed out in *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 334, ‘while consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it’. See also Carol Harlow and Richard Rawlings, above n 6, 207–8.

¹¹¹ See, eg, Matthew Groves, ‘Legitimate Expectations in Australia: Overtaken by Formalism and Pragmatism’ in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 319. The High Court’s disdain for legitimate expectations (see above n 11) is sufficient reason to conclude that it will not give its blessing to a ground promising similar substantive results.

¹¹² See, eg, *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121, 131–2 (Pincus J). The doctrine of ‘*Wednesbury* unreasonableness’ takes its name from the case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹¹³ In contrast to the United Kingdom, Australian courts have not established (nor seem likely to do so) a fairness-based requirement for officials to consult about the formation or revision of soft law instruments; see Mark Aronson, Matthew Groves and Greg Weeks, above n 105, [7.220]–[7.230].

They operate most notably where the soft law amounts to a direct representation.¹¹⁴ Judicial review will respond to material breaches of soft law which cause ‘unfairness, not merely departure from a representation’.¹¹⁵ Procedural fairness might be guided by soft law but does very little to ‘harden’ its application. The extent to which soft law can remove or alter common law requirements of fairness is quite limited.

The failure to consider soft law by a decision-maker can amount to reviewable error if consideration of that soft law is mandatory, either under the terms of statute or as an inference from those terms.¹¹⁶ The failure to consider soft law might sometimes be the basis of reviewable error¹¹⁷ but there is a high barrier for soft law to exceed in order for judicial review to enforce its consideration. One could argue that the consideration of, or failure to consider, soft law is unreasonable, but this remains a very difficult ground to make out.¹¹⁸

B *Private Law Remedies*

Remedies which are not dependent on proving invalidity are generally no more effective than judicial review remedies for individuals who wish to enforce the terms of a soft law instrument against a public authority. Australian law accepts that public authorities *may* sometimes owe a greater duty than would be owed by a private actor due to a superior capacity to prevent harm,¹¹⁹ but it is less certain whether a public authority’s common law duty of care when it exercises a statutory power *or* performs

¹¹⁴ Public authorities are sometimes held to their own soft law guidelines, as in *Applicants M16 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 148 FCR 46; Cf *SZTGV v Minister for Immigration and Border Protection* (2015) 229 FCR 90, 112–13. However, there are representations and *representations*; those which are specific to a particular case are not soft law. See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

¹¹⁵ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 12 (Gleeson CJ).

¹¹⁶ See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J). The view that applicable policy is ‘always a relevant consideration’ and that soft law must therefore be considered was proposed in *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65, 81. Such an approach is broader than allowed by the usual test for jurisdictional error on the ground of failing to consider a mandatory consideration.

¹¹⁷ *Craig v South Australia* (1995) 184 CLR 163, 177.

¹¹⁸ See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377–8 (Gageler J). Notwithstanding the approach of a High Court majority in *Li*, subsequent cases examining unreasonableness in the Full Federal Court appear to have adhered to the ‘conservative’ view of Gageler J that unreasonableness is applied rarely and only after the application of a stringent test.

¹¹⁹ Scott Wotherspoon, ‘Translating the Public Law “May” into the Common Law “Ought”’: The Case for a Unique Common Law Cause of Action for Statutory Negligence’ (2009) 83 *Australian Law Journal* 331, 334–5.

a statutory duty can be extended further to cover soft law obligations.¹²⁰ What is certain is that soft law, for example in the form of standards, can have a significant impact on private law litigation by setting the required measure of fitness for purpose, or reasonableness of conduct, in contract or tort claims respectively.¹²¹

A misrepresentation by a public authority which has a ‘special relationship’ with the party who acts in reliance on soft law¹²² is more likely than nonfeasance to lead to a finding that a public authority has negligently acted inconsistently with its soft law. Some types of communication from public bodies are designed to encourage reliance by the public at large. Others, for example ad hoc approvals of proposed courses of action, necessarily come with the unspoken warning that reliance is at one’s own risk. One way to determine reasonable reliance is therefore to ask whether the representation upon which a plaintiff has relied was intended to communicate that the public authority making the representation would bear the risk of that representation being incorrect.¹²³ Not every statement of future intention which does in fact induce another party to act in reliance on the statement’s accuracy is sufficient to ground a duty of care. Cases in which reasonable reliance has been established tend to feature a direct and personal communication of the relevant representation to the reliant party. This is not the usual mode of soft law.

C *Non-Judicial Remedies*

The most effective remedies for misuse of soft law are likely also to be ‘soft’. In particular, the fact that courts have few current tools for dealing with soft law means that the Ombudsman¹²⁴ bears a practical responsibility in that regard. The Ombudsman’s office investigates many thousands of complaints every year and endeavours to obtain a suitable remedy for each complainant. While the separation of powers dictates that the Ombudsman’s office cannot impose binding declarations of right on the public authorities which it investigates, it can recommend an appropriate course of action to the relevant public authority. It is this adaptability that makes the Ombudsman of such potential importance where individuals are adversely affected by applications or failures to apply soft law.

¹²⁰ See *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 458, 467–8 (Mason J).

¹²¹ This point is developed in greater detail in Greg Weeks, *Soft Law and Public Authorities*, above n 1, 52–3.

¹²² See *Mutual Life & Citizens’ Assurance Co Ltd v Evatt* (1968) 122 CLR 556.

¹²³ This point was alluded to by Lockhart J in *Unilan Holdings Pty Ltd v Kerin* (Unreported, Federal Court of Australia, Lockhart J, 5 September 1993).

¹²⁴ Along with other ‘integrity branch’ authorities; see discussion in Part V.

The influence of the Ombudsman can be used to good effect by recommending that a public authority provide financial compensation under an ex gratia payment scheme¹²⁵ to an individual who has suffered loss as a result of defective administrative action. This might be because the authority failed to adhere to the terms of its soft law, in circumstances where the individual has no enforceable legal right to damages for that loss in judicial proceedings. A ministerial discretion to make an ex gratia payment is more likely to be engaged if the Ombudsman is involved. Providing financial compensation is not always sufficient to assist people who have relied on soft law to their detriment, but it remains one of few effective remedies.

D *The United Kingdom Approach to Review of Soft Law*

While it is trite to point out that the United Kingdom's approach to administrative law is now very different to that of Australian courts, it is worth making a couple of observations about the way in which the United Kingdom has recently approached instruments and mechanisms which are not legally binding in order to draw a contrast to Australian law and practice. The most obvious example of a difference between the two jurisdictions is that British courts are prepared to give substantive effect to promises and other forms of legitimate expectation.¹²⁶ Although the High Court views all productive discussion of legitimate expectations to be at an end in this country,¹²⁷ they are highly analogous to soft law.¹²⁸ In the United Kingdom,¹²⁹ there is a long history of mere promises (which Australian courts would see as having no legal content) being given significant legal consequences. This is a history that

¹²⁵ These are made available in Australian jurisdictions under a variety of statutory and executive schemes; see Commonwealth Department of Finance and Deregulation, *Scheme for Compensation for Detriment caused by Defective Administration*, Resource Management Guide No 409, May 2017; Commonwealth Department of Finance and Deregulation, *Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act*, Resource Management Guide No 401, April 2018; *Public Governance, Performance and Accountability Act 2013* (Cth) s 65; New South Wales Treasury, *Treasury Circular: Ex Gratia Payments*, NSW TC 11/02, 1 February 2011; *Financial Accountability Act 2009* (Qld) s 65; South Australia Department of Treasury and Finance, *Treasurer's Instruction: Ex Gratia Payments*, TI 14, 2015; Victoria State Government, *Disclosure of Ex Gratia Expenses*, FRD 11A, 2013; *Financial Management Act 1996* (ACT) s 130; *Financial Management Act* (NT) s 37; *Financial Management Act 2006* (WA) s 80.

¹²⁶ See Mark Elliott, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in the United Kingdom' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 217.

¹²⁷ See the cases cited above n 11.

¹²⁸ Not all soft law makes a promise, but both depend on the creation of belief which causes a person to act on the faith of what they have been told. Neither is explicitly legal in its operation. There is a similar connection to promissory estoppel; see Greg Weeks, *Soft Law and Public Authorities*, above n 1, 231.

¹²⁹ See a summary of the legal doctrine as it applies in the United Kingdom in Alexander Brown, *A Theory of Legitimate Expectations for Public Administration* (Oxford University Press, 2017) 7–31.

reaches back past *Coughlan*'s case.¹³⁰ English courts were first intrigued by the possibility of enforcing estoppels in public law cases just after the Second World War.¹³¹ Australia, by contrast, has not deviated from the orthodox view that prevents a court from enforcing an estoppel which would result in a breach of the law or would fetter a statutory discretion.¹³²

The approach by which British courts have come to affix legal consequences to non-binding instruments has now reached beyond the enforcement of legitimate expectations to the recommendations of public Ombudsmen. The role of Ombudsmen in the public sector is also somewhat analogous to soft law in as much as they achieve results through influence rather than any direct decision-making power.¹³³ However, although they lack express constitutional recognition in most jurisdictions,¹³⁴ Ombudsmen would not generally be tempted to trade their influence, built upon goodwill accumulated throughout the public sector, to obtain it. In other words, Ombudsmen are effective *because of* (as opposed to *despite*) their lack of determinative powers, the use of which would likely see Ombudsmen become heavily involved in defending judicial review actions. Currently, this is something that Australian Ombudsmen rarely do.¹³⁵ Strengthening the legal standing of Ombudsmen's findings would be entirely counter-productive if it were to lead to increased pressure on their time and budgets.

The move to make the decisions of Ombudsmen binding in the United Kingdom came, interestingly, in litigation which sought not to challenge a discretionary decision of the Parliamentary Commissioner for Administration ('PCA') but to have

¹³⁰ In *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] 3 QB 213, the Court of Appeal substantively enforced a promise made to the claimant that she would have 'a home for life' in a certain health care facility. See Kirsty Hughes, 'Coughlan and the Development of Public Law' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart Publishing, 2017) 181.

¹³¹ See the history in Greg Weeks, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 230–8.

¹³² The most recent Australian cases (above n 10) followed the previous British orthodoxy: *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610; *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416.

¹³³ Operating to resolve disputes within an adversarial system, Ombudsmen have often been (wrongly) dismissed as 'toothless tigers'. See Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 4th ed, 2015) 263.

¹³⁴ Cf the Victorian Ombudsman: *Constitution Act 1975* (Vic) s 94E.

¹³⁵ John McMillan, above n 9, 427. They do however have a history of involvement in legal proceedings; see Mark Aronson, 'Ombudsmen and Crime Busters: Ships Passing in the Night' in Greg Weeks and Matthew Groves (eds), *Administrative Redress Inside and Outside the Courts: Essays in Honour of Robyn Creyke and John McMillan* (Federation Press, 2018) (forthcoming).

her findings enforced.¹³⁶ *R (Bradley) v Secretary of State for Work and Pensions*¹³⁷ ('*Bradley*') considered a finding by the PCA that government maladministration had caused certain pension schemes to be underfunded. Both Bean J at trial and the Court of Appeal held that the respondent Secretary of State could not reject that finding if he lacked 'cogent reasons' to do so. Justice Bean in fact went further and held that 'no reasonable Secretary of State could rationally disagree with' the finding made by the PCA.¹³⁸ This reasoning goes beyond the reality that findings and recommendations of Ombudsmen are usually accepted. It further goes beyond the notional existence (currently formally unsupported) of a convention that such findings and recommendations be accepted, despite the fact that they lack binding force. What they decide in effect is that a Minister who is under no legal obligation to accept an Ombudsman's findings must have, on the Court of Appeal's reading, objectively cogent reasons for choosing not to accept them. The view of Bean J at trial was even more demanding; having found that the PCA's findings were 'reasonably open', his Honour moved headlong to the subsequent finding that the Secretary of State had breached the *Wednesbury* standard. It is easily understandable that some in the United Kingdom have viewed the results of the approach taken in *Bradley* askance.¹³⁹

While it is unlikely that a finding similar to *Bradley* would ever be made in Australia, not least for separation of powers reasons, such a development would be unsupported in any case.¹⁴⁰ First, as discussed above, whether or not Ombudsmen can or should be invested with power that they can use to bind elected officials, it is unlikely that Ombudsmen would in fact wish to 'strengthen' their powers in this way. More importantly, the conclusion that public bodies cannot simply choose to agree to disagree with the Ombudsman begs the question why the elected and politically responsible Work and Pensions Secretary ought not to be allowed to read the PCA's report, disagree with it and choose to follow another path.¹⁴¹ The Secretary of State would of course be exposed to questions as to why he had rejected the PCA's findings, and properly so, since the consequences of the Secretary of State's chosen course of action should be decided in the political realm, rather than in the courts based upon

¹³⁶ See Carol Harlow and Richard Rawlings, above n 6, 564. The PCA has a closer relationship with the House of Commons than is the case for other Ombudsmen, a circumstance enshrined in the *Parliamentary Commissioner Act 1967* (UK) c 13: Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 65 [5.78].

¹³⁷ [2009] 1 QB 114.

¹³⁸ *Bradley* [2009] 1 QB 114, 138–9 [66]. This finding is clearly based on the dictum of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The meaning of Bean J's addition of the word 'rationally' is unclear.

¹³⁹ See, eg, Carol Harlow and Richard Rawlings, above n 6, 564–5.

¹⁴⁰ See Greg Weeks, *Soft Law and Public Authorities*, above n 1, 241; Jason N E Varuhas, 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?' (2009) 72 *Modern Law Review* 102, 112–4.

¹⁴¹ Cf Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, 2011) 216.

a judicial determination of the cogency of his reasons. It is hard to imagine on what basis any contention to the contrary might be justified, particularly in Australia.

Bradley is an isolated example of the more invasive approach that British courts take to bodies and instruments that do their work by the exercise of influence. There is also a lengthy body of precedent in which British courts have substantively enforced promissory statements of government, including soft law, which have caused damage.¹⁴² While it is worth noting this contrasting approach for its own sake, the important point for this article is that British courts have significantly greater freedom to fashion their responses to such issues than their Australian counterparts. This is in part due to the limitations imposed on Australian courts in the name of the separation of judicial power. It is also due to the fact that a constitutional, and stringently observed, separation of powers is hard to change, either legally or in the minds of those who operate within its confines. Whether the British courts' approach to these issues is right or wrong, it displays a level of innovation that Australian courts simply cannot deploy.

VII CONCLUSION

Soft law does not fit within the separation of powers doctrine in Australia. This is not to say that there would not be significant benefits from exposing its use to the kind of accountability mechanisms that are inherent to that doctrine. However, it is a forlorn hope that the constitutional separation of powers will be altered to recognise more accurately the various integrity agencies that are already fixtures within our political and legal thinking. There is almost no chance of a referendum succeeding, by obtaining a majority of votes in a majority of states, to alter the constitutional separation of powers such that it would recognise and control government conducted through soft law. This is a pity, to say the least, since soft law is presently used with a bare minimum of judicial oversight, the acquiescence of the legislature and the active encouragement of the executive government. If bringing the use of soft law within the constitutional fold is practically impossible, more thought must be given to how it might otherwise be made subject to new or existing accountability measures.

¹⁴² Of particular note is a series of cases decided by Lord Denning: *Robertson v Minister of Pensions* [1949] 1 KB 227; *Wells v Minister of Housing and Local Government* [1967] 2 All ER 1041; *Lever (Finance) Ltd v Westminster Corp* [1971] 1 QB 222; *HTV Ltd v Price Commission* [1976] ICR 170. It was only following his Lordship's retirement that the House of Lords first accepted public law estoppel in *R v Inland Revenue Commissioners; Ex parte Preston* [1985] AC 835 and subsequently placed its principles within a public law context in *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58. See also Weeks, above n 131, 230–8.