

The Use of Soft Law by Australian Public Authorities: Issues and Remedies

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Greg Weeks*

Soft law is a pervasive phenomenon which is highly effective as a means of regulation in Australia, as it is in many other jurisdictions. This paper will not focus on the regulatory aspects of soft law, but will examine the capacity of individuals to obtain remedies where public authorities fail to adhere to the terms of their published soft law. The available judicial remedies apply in very limited circumstances, both in private law actions (in tort or equity) and public law (judicial review) actions. Ultimately, the most effective ways to remedy breaches of soft law appear also to be 'soft', such as recommendations of the Ombudsman and discretionary schemes for ex gratia payments.

Table of Contents

INTRODUCTION	2
PART I: WHAT IS SOFT LAW?.....	2
<i>GRIFFITH UNIVERSITY V TANG</i>	5
PART II: JUDICIAL REVIEW REMEDIES	6
THE RULE AGAINST FETTERING	8
MANDATORY RELEVANT CONSIDERATIONS.....	10
SUBSTANTIVE ENFORCEMENT OF LEGITIMATE EXPECTATIONS ..	14
PART III: PRIVATE LAW REMEDIES	16
NEGLIGENCE	17
EQUITY	21
PART IV: NON-JUDICIAL REMEDIES	23
OMBUDSMAN.....	24
<i>EX GRATIA PAYMENTS</i>	26
CONCLUSION.....	27
BIBLIOGRAPHY	28

* Lecturer, Faculty of Law, University of New South Wales. My thanks are due to Mark Aronson and Theunis Roux for their comments on the ideas which form the basis of this paper. Any errors are mine alone.

Introduction

Soft law is immensely effective as a means of regulating conduct. This paper will feature no analysis of how and why that is the case – others have performed that task that better than I could.¹ Rather, this paper is written from the point of view of those who are subject to public soft law regulation. It is focused on the remedies available in Australia to individuals who have relied on soft law issued by a public authority which that authority then refuses to act upon.

I have divided the paper into four major parts. Part I looks at the phenomenon of soft law in Australia from the point of view of those being regulated and introduces the case of *Griffith University v Tang*.² Part II looks at public law judicial remedies and Part III at private law judicial remedies. Part IV then examines non-judicial remedies.

Part I: What is soft law?

Soft law means different things to different people. Professor Argument has noted that “one of the most difficult issues in dealing with quasi-legislation is to work out exactly what sort of creature quasi-legislation is”.³ Indeed, as a generic term, there is an argument that ‘soft law’ conceals as much as it reveals, making it at best unhelpful and at worst a “misleading simplification”.⁴

Many attempts to classify soft law have been compelled simply to list various types of soft law instruments.⁵ This approach, while instructive, does not lead to a definition since soft law instruments occupy a broad section of the spectrum between unstructured discretion and legislation.⁶ As time has gone by, the problem has been one of ascertaining which of this “wide variety of instruments”⁷ are included within the broad term ‘soft law’.

It is interesting to note that attempts to define soft law by listing its varieties serve mainly to nominate instruments which could be either delegated legislation on one hand or soft law on the other, depending on whether their creation has been expressly authorised by Parliament. Codes of practice, guidance, guidance notes, circulars, policy notes, development briefs, practice statements, tax concessions, codes of conduct, codes of ethics and conventions will all generally fall into the latter category.⁸ However, listing different soft law instruments is an unsatisfactory manner in which to define soft law, with such lists tending “to be over-inclusive, while not giving sufficient information to enable a

¹ See e.g. Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *Modern Law Review* 24; Julia Black, *Rules and Regulators* (1997).

² *Griffith University v Tang* (2005) 221 CLR 99, ('Tang').

³ Stephen Argument, 'Quasi-legislation: Greasy Pig, Trojan Horse or Unruly Child?' (1994) 1(3) *Australian Journal of Administrative Law* 144, 144 (emphasis in original).

⁴ Christine M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 850.

⁵ See e.g. John Houghton and Robert Baldwin, 'Circular Arguments: the Status and Legitimacy of Administrative Rules' [1986] *Public Law* 239, 240-5; Charles A. Breer and Scot W. Anderson, 'Regulation Without Rulemaking: The Force and Authority of Informal Agency Action' (Paper presented at the Rocky Mountain Mineral Law Foundation Annual Institute Proceedings, 2001) [5.5]-[5.13]; 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, 871; Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation* No 49 (2008) (*Complex Regulation Report*), 5.

⁶ Michelle Cini, 'From Soft Law to Hard Law?: Discretion and Rule-Making in the Commission's State Aid Regime' (Paper presented at the Robert Schuman Centre for Advanced Studies European Forum: "Between Europe and the Nation State: the Reshaping of Interests, Identities and Political Representation", January 2000) 4.

⁷ Argument, 'Quasi-legislation' (1994) 1 *Australian Journal of Administrative Law* 144, 144. See those listed in Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 3.

⁸ Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (3rd ed, 2005) 9. Writing from a British perspective, Aileen McHarg includes constitutional conventions which lack legislative force within the definition of soft law: Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853.

classification to be made”.⁹ Such lists must therefore be seen as providing examples of what soft law *includes* instead of being definitive of what soft law *is*. As Creyke and McMillan have warned, “it is what an instrument does, not what it is called, that is important”.¹⁰

The definition of soft law in Australia is generally better expressed negatively or, in other words, by what it *isn't*. It isn't primary legislation, which is enacted by Parliament. Nor is it delegated (or 'secondary') legislation,¹¹ which is made subject to the express authority of Parliament. These are forms of 'hard' law. Robert Baldwin has described what is left as 'tertiary' legislation, which he defines as “usually” being made without an express power to legislate conferred by an Act of Parliament, without which there is no, or at least unclear, statutory authorisation “to make directly enforceable rules”.¹² At Commonwealth level in Australia, this debate has been subsumed into the threshold issue under the *Legislative Instruments Act*¹³ of what constitutes a 'legislative instrument'. This inquiry is aimed at the function of an instrument, although in practice most statutes now specify whether the Act is to apply.¹⁴ It is clear that (at Commonwealth level in Australia) secondary legislation is any instrument “of a legislative character”¹⁵ or is within a list of nominated instruments.¹⁶

The delegation of decision-making to those better equipped than legislative draftsmen to exercise the discretion appropriate to the circumstances has a lengthy history.¹⁷ Arthurs gives the example that emigration officers, who understood maritime engineering, were better able to decide whether ships were 'seaworthy' than Parliament. Parliament, in turn, recognised the expertise of the officers and transferred its responsibility to these members of the administration, who then formulated technical manuals as a means of structuring their statutory discretion.¹⁸ Where Parliament has made an informed decision to delegate its legislative authority in this way, the exercise of that authority must be recognised as 'law'. Difficulties arise when manuals which are treated as 'law' remain 'soft', in the sense that they cannot be enforced against the will of the party to whom discretionary decision-making power has been granted. In other words, the central problem with soft law is its asymmetrical operation.

There is also a lengthy history to recognising the problems which can arise from soft law regulation. As long ago as 1944, R.E. Megarry (as his Lordship then was) noted that “administrative quasi-legislation” had invaded a legal world previously “bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions”.¹⁹ Megarry divided this phenomenon into two categories: “the State-and-subject type, consisting of announcements by administrative bodies of the course which it proposed to take in the administration of particular statutes” and “the subject-and-subject type, consisting of arrangements made by administrative bodies which affect the operation of the law

⁹ 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* (2008) 377, 380.

¹⁰ Creyke and McMillan, 'Soft Law versus Hard Law' in Pearson, Harlow and Taggart (eds), *Administrative Law in a Changing State*, 377, 380. This was also the guiding principle behind the *Legislative Instruments Act 2003* (Cth).

¹¹ Robert Baldwin, *Rules and Government* (1995) 60-80.

¹² Baldwin, *Rules and Government* (1995), 80. It must be said that this formulation rather begs the question of when legislation will fail to amount to delegated or secondary legislation as “usual”.

¹³ *LIA 2003* (Cth). This Act has been described as the “single most important development in delegated legislation for at least half a century”: Stephen Argument, 'Delegated Legislation' in Matthew Groves and H. P. Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 134, 135.

¹⁴ Pearce and Argument, *Delegated Legislation* (3rd ed, 2005), 21-2. This has the effect that much of the debate that previously surrounded the difference between secondary and tertiary legislation is now moot.

¹⁵ *LIA 2003* (Cth) s 5(2).

¹⁶ *LIA 2003* (Cth) s 6. Certain categories of instrument have also been expressly declared not to be legislative instruments under the Act: *LIA 2003* (Cth) s 7.

¹⁷ H.W. Arthurs, *“Without the Law”: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (1985) 137.

¹⁸ Arthurs, *“Without the Law”* (1985), 137.

¹⁹ R.E. Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125, 125-6.

between one subject and another”.²⁰ Megarry was understandably more concerned with the effect of soft law than its aims, and consequently was prepared to praise practice notes issued by the War Damage Commission as being “shining examples of official helpfulness” in so far they “deal with procedure or state the official view of a doubtful point that will be taken until the Courts rule otherwise”.²¹ In this respect, Megarry departed from the traditional Diceyan approach to the administrative state.²²

Megarry considered the phenomenon of soft law to be a “curate’s egg”,²³ which is to say that the negative aspects of soft law nullified the benefits of its positive aspects. He described similar official announcements as “regrettable” where they contradicted or were inconsistent with statutory provisions, with the effect that “the statute remains unaltered on the statute book but ceases to represent the effective law”, because “although no Court would enforce them, no official body would fail to honour them, and as they are not merely concessions in individual cases but are intended to apply generally to all who fall within their scope, the description of ‘quasi-legislation’ is perhaps not inept”.²⁴ Megarry’s complaint can therefore be understood to be that state entities were able to issue announcements which had the *practical* status of legislation, even in the absence of its *legal* status, without legislative scrutiny and which, while open to challenge in court, were unlikely to be so challenged. Megarry considered this quasi-legislative effect to be of greater import than the purpose for which the soft law might be employed,²⁵ and this remains a core concern with soft law regulation to this day.

Many soft law instruments which have an effect on businesses, particularly industry codes of conduct,²⁶ do bind organisations, but achieve this end as a matter either of contract or consent rather than due to the binding effect of the soft law instrument *per se*. In effect, adherence to an industry code of conduct is a condition of membership of the industry body which has issued the code. Governments are also able to set standards through the medium of placing certain requirements on parties with whom they enter contracts.²⁷ In its *Complex Regulation Report*, the Administrative Review Council noted that the effect of such soft law instruments is analogous to decisions of the Superannuation Complaints Tribunal (SCT), to which trustees of Australian superannuation funds bind their trusts by contract in order to allow the trusts to obtain certain tax concessions,²⁸ in making the point that, to the extent that the operation of these codes is subject to accountability, it is by methods outside the scope of administrative law.²⁹

²⁰ Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125, 126. See also Pearce and Argument, *Delegated Legislation* (3rd ed, 2005), 8-9. For examples of “codified discretion” from even earlier than this, see Arthurs, *Without the Law* (1985), 136; Edward Page, *Governing By Numbers: Delegated Legislation and Everyday Policy-Making* (2001) 13. For an account of the history of rule-making in the USA, see C.M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* (2nd ed, 1999) 7-22. For an account of the history of rule-making in the UK, see P.P. Craig, *Administrative Law* (6th ed, 2008) 716-19.

²¹ Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125, 126.

²² The traditional Diceyan approach to the administrative state was typified by Lord Hewart CJ, who considered the rise of the administrative state to be diametrically opposed to the imperatives of the rule of law: Baron Gordon Hewart, *The New Despotism* (1975 ed, 1929) 37. See also F.A. Hayek, *The Road to Serfdom* (1944). These followers of the theories of A.V. Dicey would not likely have been prepared to concede any positive aspects to guidelines being issued by executive agencies, regardless of their benign intention or positive effect.

²³ Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125, 127.

²⁴ Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125, 126.

²⁵ In this sense, Megarry did reflect a concern with the damage done to the ‘symmetry’ of the law that is reminiscent of Dicey, although no less valid for it. Dicey took the view that judges ‘are much more concerned than Parliament to maintain “the logic or the symmetry of the law”’: H.W. Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17(1) *Osgoode Hall Law Journal* 1, 15. Arthurs was quoting A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2nd ed, 1962) 364.

²⁶ Administrative Review Council, *Complex Regulation Report* (2008), 19-21.

²⁷ Kerwin, *Rulemaking* (2nd ed, 1999), 28.

²⁸ Administrative Review Council, *Complex Regulation Report* (2008), 14.

²⁹ This analogy is imperfect, mainly due to the fact that, although the SCT obtains jurisdiction by consent, this is at the option of the trustee of a superannuation fund rather than the beneficiary who will bring a complaint to the SCT; see Greg Weeks, 'Superannuation Complaints Tribunal and the Public / Private Distinction in Australian

It nonetheless remains true that most soft law does not *bind* individuals to a course of action, but is no less effective for all that. Recent Australian interest in soft law³⁰ has been driven by a case which illustrates this point effectively: *Griffith University v Tang*.³¹

Griffith University v Tang

Vivian Tang was a PhD student at Griffith University. She was found to have engaged in academic misconduct and was excluded from the degree programme in which she had been enrolled. Ms Tang argued that the University's soft law misconduct code (the 'Policy on Academic Misconduct and the Policy on Student Grievances and Appeals') had been breached by the University in making its decision to exclude her, on the basis that she had not been given procedural fairness. A majority of the High Court concluded that the appellant University not only had not exercised public power in removing Ms Tang from its PhD programme, but that it had not exercised power *at all* because its relationship with Ms Tang was entirely consensual.³²

There has been a palpable level of academic disappointment with the result in *Tang*,³³ despite the fact that the end result was "entirely predictable"³⁴ because Ms Tang had brought her action under the *Judicial Review Act 1991* (Qld), which allowed review only of decisions made "under an enactment". The decision of the University was certainly not "under" the *Griffith University Act*,³⁵ for the reasons given by the majority. However, if the purpose of judicial review is to curb power, rather than only *statutory* power,³⁶ then all that should matter is that 'law' is applied through an exercise of public power. This excludes exercises of power which gather their force from private arrangements,³⁷ most usually contractual,³⁸ and this is as it should be. Professor Aronson argued that the reason why consensual power should not be subject to judicial review is because it is not *public*, not because it is non-statutory.³⁹ There is significant overlap between the concepts of law and public power, but their similarities are not absolute. Their key

Administrative Law' (2006) 13(3) *Australian Journal of Administrative Law* 147; Gail Pearson, *Financial Services Law and Compliance in Australia* (2008) 490. Additionally, as a majority of the High Court noted in obiter dicta in *Breckler*, while the trustees of the relevant fund in that matter elected to submit to the jurisdiction of the SCT, they were left with no practical option to do otherwise and that "cases may be readily imagined where it would be a breach of trust not to exercise the election so as to obtain the revenue benefits which follow": *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, [44] ('*Breckler*').

³⁰ Soft law was the subject of a government report some 14 years ago: Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-letter law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation* (1997) (*Grey-letter Law Report*). It then remained largely unconsidered in Australia until the publication of Aronson, 'Private Bodies, Public Power' (2007) 35 *Fed LR* 1. This led to Professor Aronson being described as soft law's "Australian Prince Charming": Creyke and McMillan, 'Soft Law versus Hard Law' in Pearson, Harlow and Taggart (eds), *Administrative Law in a Changing State*, 377, 377.

³¹ *Tang* (2005) 221 CLR 99.

³² *Tang* (2005) 221 CLR 99, 131 [91] (Gummow, Callinan & Heydon JJ).

³³ See the sources cited in Aronson, 'Private Bodies, Public Power' (2007) 35 *Fed LR* 1, 2-3; P.A. Keane, 'Judicial Review: the Courts and the Academy' (2008) 82(9) *Australian Law Journal* 623, 625.

³⁴ Aronson, 'Private Bodies, Public Power' (2007) 35 *Fed LR* 1, 23.

³⁵ Griffith University was established under the *Griffith University Act 1998* (Qld).

³⁶ "In our system, a legal limit and its judicial supervision are an obvious package. The existence of a limit to public power is generally regarded as meaningless unless the superior courts can grant judicial review for its breach.": Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 102-4. This is subject to the power in question being justiciable.

³⁷ Such arrangements are said to be consensual, rather than resulting from an exercise of public power: *Tang* (2005) 221 CLR 99. However, the *Tang* majority's binary distinction between 'power' on one hand and 'consent' on the other is deeply unsatisfying. Their Honours failed to engage with the debate about whether public power can ever be exercised by a private body, which lent their ultimate reasoning a somewhat unreal air.

³⁸ See the discussion of the law relating to the requirement that, to be reviewable in Australia's statutory judicial review jurisdiction (*ADJR Act*), a decision must be made "under an enactment": Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 79-87. The *ADJR Act* is notable for restricting review to exercises of statutory power only, and in this regard has failed to keep pace with developments as old as *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, ('*GCHQ Case*'). See generally Mark Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?' (2004) 15(3) *Public Law Review* 202.

³⁹ Aronson, 'Private Bodies, Public Power' (2007) 35 *Fed LR* 1, 23.

difference from the point of view of judicial accountability⁴⁰ is that the former is subject to judicial review and the latter is not.

It is submitted that what is important from the point of view of accountability is the way that power is exercised *in fact* and not whether it meets a formalist definition of 'law'. On this reasoning, the result in *Tang* was less disappointing than the reasoning pursued by the majority, which set up 'power' and 'consent' as binary opposites in a wholly unconvincing fashion.⁴¹ There is no doubt that the relevant soft law policy issued by the University did *in fact* regulate the interactions between Ms Tang and the University.⁴² The disappointing aspect of *Tang* is truly in the court's disengagement from examining the possibility of expanding the scope of judicial review in the face of such circumstances. To reach the conclusion that the power exercised by the University was consensual without consideration of its publicness is deficient on this reasoning, a comment which has no bearing on the correctness of *Tang's* outcome.

Part II: Judicial review remedies

In Australia,⁴³ courts performing judicial review may not take account of the factual merits of a matter. In one of the most quoted passages in Australian administrative law, Brennan J put it thus:⁴⁴

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.

As a consequence, judicial review's remedies are axiomatically no more than procedural in nature.⁴⁵ Under the *Constitution*, certain remedies are always available against officers of the Commonwealth who commit jurisdictional errors in the exercise of their powers or duties.⁴⁶ The High Court's jurisdiction to grant these remedies is entrenched,⁴⁷ although in practice is often exercised by the Federal Court of Australia pursuant to a

⁴⁰ But note John McMillan, 'Re-thinking the Separation of Powers' (2010) 38(3) *Federal Law Review* 423.

⁴¹ It is not hard to think of examples of circumstances which are consensual in a formal sense but where one party has little to no power. Standard form contracts for the provision of utility services are an obvious example.

⁴² Likewise, there is no doubt that Ms Tang could have challenged the University's decision on the ground of procedural unfairness, either at common law or under statutory judicial review, if the relevant soft law instruments had been delegated legislation: Aronson, 'Private Bodies, Public Power' (2007) 35 *Fed LR* 1, 15; Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 79.

⁴³ For an overview of the Australian judicial review system, see Administrative Review Council, *Judicial Review in Australia*, Consultation Paper (2011) 35-50.

⁴⁴ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6 ('*Quin*').

⁴⁵ For a summary, see Stephen Gageler, 'Administrative Law Judicial Remedies' in Matthew Groves and H. P. Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 368.

⁴⁶ *Commonwealth of Australia Constitution* 1900 s 75(v). Jurisdictional error is not required where the remedies of injunction or declaration are sought; an error of law will suffice.

⁴⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, ('*Plaintiff S157*'). A recent High Court decision has extended the importance of jurisdictional error to the Supreme Courts of each of the Australian States and means that their jurisdiction to award certain remedies inherent to their status at the time that they were formed cannot be excluded by legislation: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, ('*Kirk v IRC*').

statutory grant of jurisdiction.⁴⁸ At Commonwealth level, Australia also has a statutory judicial review scheme,⁴⁹ which largely mirrors the grounds for review⁵⁰ and remedies⁵¹ available under the general law and the *Constitution*.

The remedies entrenched in the *Constitution* are the constitutional writs of mandamus (to compel the performance of an unperformed duty of a public nature)⁵² and prohibition (to prohibit a decision-maker from doing a future act, or continuing with a course of action already commenced, which is beyond his or her jurisdiction)⁵³ and the equitable remedy of injunction, a flexible remedy able to prohibit (or, on rare occasions, compel) administrative action where the applicant's interests⁵⁴ are at stake.⁵⁵ Additionally, the High Court has jurisdiction ancillary⁵⁶ to that granted by s 75(v) of the *Constitution* to grant the writ of certiorari (to quash a decision affected by jurisdictional error)⁵⁷ in order to ensure the effectiveness of the constitutional writs. It also has an inherent power to grant declaratory relief.⁵⁸

The availability of one or more of these remedies is generally proved by proving breach of at least one of the set grounds of judicial review. By way of summary, a decision maker will make a reviewable error if s/he:⁵⁹

1. mistakenly asserts or denies the very existence of his/her jurisdiction;
2. misapprehends or disregards the nature or limits of his/her functions or powers in a case where s/he correctly recognises that jurisdiction does exist;
3. while acting wholly within the general area of his/her jurisdiction, entertains issues or makes the type of decisions or orders which are forbidden under any circumstances;
4. mistakes the existence of a jurisdictional fact or other requirement whose objective existence is required by statute as a condition precedent to the challenged decision being valid;⁶⁰
5. disregards or takes account of some matter in circumstances where the statute or other instrument conferring jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case;
6. misconstrues that statute or other instrument and thereby misconceives the nature of the function which s/he is performing or the extent of his/her powers in the circumstances of the particular case;
7. acts in bad faith; or

⁴⁸ *Judiciary Act 1903* (Cth) s 39B.

⁴⁹ *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁵⁰ *ADJR Act 1977* (Cth) s 5.

⁵¹ *ADJR Act 1977* (Cth) s 16(1).

⁵² Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 833.

⁵³ Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 800.

⁵⁴ See *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, ('*Onus v Alcoa*').

⁵⁵ See Gageler, 'Administrative Law Judicial Remedies' in Groves and Lee (eds), *Australian Administrative Law*, 368, 371; Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), Ch16.

⁵⁶ *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, ('*Aala*').

⁵⁷ Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 800. Certiorari will also lie to quash an impugned decision for non-jurisdictional error of law on the face of the record, a remedy usually relevant only to review of the decisions of inferior courts: *Craig v South Australia* (1995) 184 CLR 163, 175-6; 180-3 ('*Craig*').

⁵⁸ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581 ('*Ainsworth*'). See generally Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), Ch15.

⁵⁹ See Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 14-15. My list is based directly on the list formulated by Aronson, Dyer and Groves and the grounds enumerated by the High Court in *Craig* (1995) 184 CLR 163, 177-8.

⁶⁰ Where the condition precedent is phrased as to require that the decision-maker reach a subjective state of satisfaction, this ground will be breached only if s/he does not turn his/her mind to the issue at all. Traditionally, this had not been included within the concept of 'jurisdictional fact', but see now *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, ('*SZMDS*').

8. fails to provide a hearing to a person whose rights, interests or legitimate expectations will be affected by administrative action⁶¹ or acts subject to actual or apprehended bias.⁶²

The problem for a person who wishes to have the benefit of soft law is that traditional administrative law doctrine, coupled with the High Court's narrow approach to the enforceability of soft law in *Tang*, means that breach of soft law in Australia will rarely be relevant to obtaining judicial review remedies.

The Rule Against Fettering

One of the reasons for this is that enforcement of soft law would generally fall foul of the rule against improper fettering of discretion. Classically, a decision-maker who inflexibly applies rules or policies⁶³ without listening to submissions that an exception be made, commits a jurisdictional error.⁶⁴ This position is usually justified on the basis that it is generally preferable for the potential breadth of statutory discretions granted to public decision-makers not to be fettered, even by their own representations, in reaching the decision which is most beneficial for the public at large.⁶⁵ Usually, the no-fettering principle is invoked where a decision-maker imposes restraints on himself or herself by adhering to the terms of a soft law instrument which impermissibly narrows the scope of his or her discretion such that he or she does not take account of the merits of an individual applicant's case,⁶⁶ but it cuts both ways. A decision-maker will not commit a jurisdictional error by disappointing an applicant's expectation that the terms of a soft law instrument would be adhered to in all circumstances; nor is a jurisdictional error committed by the mere fact of having a policy or rule. Jurisdictional error is caused by a rule applied consistently but without regard to the merits of the individual case.⁶⁷

There have been numerous cases in which have recognised that soft law is necessary, particularly in relation to high-volume decision-making.⁶⁸ From such judicial acceptance, it follows that soft law must be *intra vires*, subject to the prohibition of fettering. This does not provide a bright-line test, since the entire point of soft law is that it will guide decision-makers into making decisions which are at least broadly consistent with each other. Much as Brennan J accepted in *Drake (No.2)*,⁶⁹ there is a balance which needs to be struck between ensuring that each case is decided on its merits but not giving the impression of arbitrariness by allowing different results in cases which are substantially alike.

Aronson, Dyer and Groves have commented that:⁷⁰

If the courts were to acknowledge the intolerable pressures produced by prohibiting the fettering of discretions handling high-volume caseloads, they could modify the rule against fettering so as to allow the development of a requirement that discretionary powers be exercised consistently. In developing 'inconsistency' as a ground of judicial review, the courts could then explore the possibilities of giving more force to non-statutory guidelines.

⁶¹ *Kioa v West* (1985) 159 CLR 550, ('*Kioa*').

⁶² The latter requires conduct such that a fair-minded lay observer would conclude that the decision-maker could not bring an impartial mind to the exercise of his or her jurisdiction: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, ('*Ebner*').

⁶³ These terms are often used interchangeably; see e.g. Craig, *Administrative Law* (6th ed, 2008), 510.

⁶⁴ See *British Oxygen Co Ltd v Ministry of Technology* [1971] AC 610, 625 (Lord Reid) ('*British Oxygen*').

⁶⁵ See Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2008) 158.

⁶⁶ *R v London County Council; ex parte Corrie* [1918] 1 KB 68, ('*ex parte Corrie*'); *Green v Daniels* (1977) 13 ALR 1, ('*Green v Daniels*').

⁶⁷ *R v Secretary of State for the Home Department; ex parte Venables* [1998] AC 407, 496-7 (Lord Browne-Wilkinson) ('*ex parte Venables*'); *MLC Investments Ltd v Commissioner of Taxation* (2003) 137 FCR 288, 300 [43] - 302 [49] (Lindgren J) ('*MLC Investments*').

⁶⁸ This passage owes a debt to Chapter 3 of Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009).

⁶⁹ *Re Drake and Minister for Immigration and Ethnic Affairs (No.2)* (1979) 2 ALD 634, ('*Drake (No.2)*').

⁷⁰ Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 162.

The suggestion made by Aronson, Dyer and Groves that the rule against fettering be modified is persuasive, albeit not without difficulty since it challenges the “judicial review mantra” that decisions ought to be based on the individual merits of each case.⁷¹ The learned authors point out that it is, essentially, the prohibition of fettering that prevents soft law from being treated in exactly the same way as hard law in court proceedings. Furthermore, they regard the rule against fettering as being at odds with “the requirement (in certain circumstances) that those deciding like cases should treat subjects consistently”.⁷²

Take for example the case of *MLC Investments v Commissioner of Taxation*,⁷³ in which the Commissioner’s delegate had a broad statutory discretion to allow a company to end its accounting period on a date other than 30 June in any given year but treated as decisive two taxation rulings which had been issued by the Commissioner which severely curtailed this discretion to circumstances, *inter alia*, in which there was a “substantial business need”, where the change was not for mere administrative convenience or competitive advantage, and “where the most exceptional circumstances exist”.⁷⁴ Lindgren J held that the delegate fell into error⁷⁵ by purporting to make a decision which was consistent with current ATO policy rather than exercising the full discretion available to him under statute. With respect, this decision must be correct, otherwise the court would have taken as binding the interpretation of the statute contained in the rulings rather than reaching its own view.⁷⁶

However, there is nothing in this decision which would prevent courts from accepting⁷⁷ that soft law, once issued, cannot simply be ignored. To the extent that courts and tribunals are concerned that decision-makers ought not to look as though their decisions are made arbitrarily, this would be an important step, since failing to adhere to soft law issued by the public authority in which a decision-maker works looks very arbitrary indeed. The question then becomes in what way courts are able to enforce consideration of soft law.

The rule against fettering is not a demanding ground of review, even on decision-makers in high-volume areas of government. All that it requires is that a decision-maker have regard to the merits of each individual case rather than to apply a soft law exegesis of his or her statutory discretion mechanically.⁷⁸ As Deane J has noted, while consistency in decision-making is generally desirable, it is an ingredient rather than a hallmark of justice.⁷⁹ Where a statutory discretion is the subject of soft law, exercises of that discretion will largely be consistent with each other. The rule against fettering requires no more than that the elegance⁸⁰ of this consistency be put aside where justice so demands.

⁷¹ See Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (2nd ed, 2009) 989.

⁷² Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 306.

⁷³ *MLC Investments* (2003) 137 FCR 288. Aronson, Dyer and Groves use this case as the archetype of situations in which consistency and the rule against fettering are in direct tension: Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 162 (fn 444); 306 (fn 175).

⁷⁴ *MLC Investments* (2003) 137 FCR 288, 295 [20] - 297 [21].

⁷⁵ Here in relation to *ADJR Act 1977* (Cth) s 5(2)(f). The result would have been the same at common law.

⁷⁶ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151 [39] - 154 [44] (Gleeson CJ, Gummow, Kirby & Hayne JJ) (*‘Enfield Corporation’*).

⁷⁷ By which I mean accepting explicitly. There is already plenty of implicit suggestion from courts that soft law must mean something; see e.g. *Plaintiff M61/2010E v Commonwealth of Australia*; *Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 85 ALJR 133, (*‘Plaintiff M61’*). By way of contrast, English case law has moved decisively to the position of accepting that soft law has an effect which has legal meaning; see e.g. *R (Purdy) v Director of Public Prosecutions* [2009] 1 AC 345, (*‘Purdy’s Case’*); *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12.

⁷⁸ See *British Oxygen* [1971] AC 610.

⁷⁹ *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 334 (Deane J) (*‘Nevistic v MIEA’*). See also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 420-1 (Bowen CJ & Deane J) (*‘Drake’s Case’*).

⁸⁰ *Drake (No.2)* (1979) 2 ALD 634, 639 (Brennan J).

This principle does not provide any protection to the party whose concern is that a public authority⁸¹ has not adhered to a soft law instrument in exercising a discretion. Aside from circumstances creating an obligation to provide procedural fairness before the terms of a soft law instrument are departed from, the existence of soft law is all but legally irrelevant.⁸² The suggestion from Aronson, Dyer and Groves above that courts “explore the possibilities of giving more force to non-statutory guidelines” is interesting in as much as it foreshadows the possibility that soft law may be required to adhere to the presumption that it applies symmetrically or not at all. Once one recognises exceptions to the prohibition of fettering, then there is room for consistency to operate as more than just a procedural restraint.

It is unclear exactly how a court would bring about this end. To the extent that inconsistency already has a place in judicial review, it is as an aspect of *Wednesbury* unreasonableness,⁸³ although that fact is inseparable from the consequence that it is very rarely argued with success because the *Wednesbury* standard applies only to the most absurd exercises of discretion. Another way of giving greater substance to soft law may be to interpret each soft law instrument as containing an implied undertaking that the public authority which issued it undertakes to be bound by its terms unless or until the instrument is terminated. Yet another may be to give no evidentiary weight to any soft law instrument which does not apply symmetrically. What is clear is that it is difficult to create a solution in legal terms where the very potency of soft law comes from the fact that it is treated by so many individuals as having legal effect although it does not. It may be that the best response simply does not lie within the purview of the courts.⁸⁴

Mandatory Relevant Considerations

The weight of case law suggests that the most likely option for courts which wish to enforce consideration of soft law is for them to view it, in some circumstances, as a mandatory relevant consideration. Review for failing to take into account a mandatory relevant consideration was recently examined by the Full Federal Court in *Khan*.⁸⁵ Mr Khan was a Bangladeshi citizen who arrived in Australia on a student visa and was subsequently sponsored for a business visa of four years' duration by his employer at an Indian restaurant. Mr Sangha, a manager employed by Mr Khan's employer, subsequently wrote to the Department of Immigration and Citizenship (DIAC) and made a number of allegations against Mr Khan which would have had an impact on his status as the holder of a visa and requested that DIAC cancel his employer's sponsorship of Mr Khan. About a month later, DIAC wrote to Mr Khan to inform him that DIAC was considering the cancellation of his visa and that “grounds for cancellation of your visa appear to exist because [DIAC] received advice from your sponsor ... indicating that you had ceased employment”. A delegate of the Minister for Immigration and Citizenship later informed Mr Khan that his visa had been cancelled because he had ceased to be employed by his sponsor.

The Migration Review Tribunal (MRT) affirmed the delegate's decision but noted (contrary to the implication contained in the delegate's reasons for decision) that it was not mandatory for Mr Khan's visa to be cancelled. Rather, the remit of the MRT was to consider whether or not to cancel Mr Khan's visa “considering the circumstances as a whole”.⁸⁶ The relevant circumstances were, in part, defined by DIAC's ‘Procedures

⁸¹ Where the relevant body is not ‘public’, an applicant may struggle to prove that the matter is justiciable in the first place; see *Cameron v Hogan* (1934) 51 CLR 358, (*Cameron v Hogan*); *Jackson v Bitar* [2011] VSC 11.

⁸² cf Craig, *Administrative Law* (6th ed, 2008), 514-6.

⁸³ See e.g. *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121, 131-2 (Pincus J) (*Sunshine Coast Broadcasters*).

⁸⁴ See McMillan, ‘Re-thinking the Separation of Powers’ (2010) 38 *Fed LR* 423. This possibility will be examined in Part IV.

⁸⁵ *Khan v Minister for Immigration and Citizenship* [2011] FCAFC 21, (*Khan v MIAC*).

⁸⁶ *Khan v MIAC* [2011] FCAFC 21, [15] (Buchanan J). The Minister's discretion to cancel a visa arises, *inter alia*, if he or she is satisfied that “any circumstances which permitted the grant of the visa no longer exist”: *Migration Act 1958* (Cth) s 116(1)(a). See *Khan v MIAC* [2011] FCAFC 21, [70] (Flick J).

Advice Manual' (Manual), which set out soft law guidelines to assist DIAC officers in assessing visa applications and was "available to at least some migration agents".⁸⁷ The Manual listed several matters relevant to the cancellation of Mr Khan's visa.⁸⁸

Mr Khan's appeal on the merits was unsuccessful before the MRT. That decision was upheld by the Federal Magistrates' Court but the Full Court of the Federal Court upheld Mr Khan's appeal. Buchanan J stated that, if the MRT had not "given sufficient (or any) attention to matters which bore directly upon the exercise of its discretion" to cancel Mr Khan's visa,⁸⁹ it would have fallen into jurisdictional error. The statutory discretion to cancel Mr Khan's visa was not mandatory unless there existed "circumstances in which a visa must be cancelled" as prescribed in the *Migration Regulations*.⁹⁰ The MRT found that there were no such prescribed circumstances.⁹¹ Nonetheless, Buchanan J (with the agreement of Flick and Yates JJ) held, and counsel for the Minister had conceded at the appellate hearing,⁹² that the MRT was "bound to consider" the "circumstances in which the ground for cancellation arose (for example, whether extenuating or compassionate circumstances outweigh the grounds for cancelling the visa)".⁹³ This was a matter listed as relevant in the Manual but it did not bear the status of a mandatory matter which had been prescribed in subordinate legislation.

I take no issue with the finding of Buchanan J that the "circumstances in which the ground for cancellation *arose*" have an entirely different import from the matters which explain the MRT's decision.⁹⁴ There is no doubt that the MRT failed to review the matter whose relevance was indicated by the Manual, namely *why* Mr Khan was no longer employed by his sponsor rather than the mere fact that he was not.⁹⁵ The "relevancy grounds"⁹⁶ of review do not require that a decision-maker consider every matter which is objectively relevant to his or her decision. Rather, jurisdictional error results when a decision-maker "disregards ... some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction *requires* that that particular matter be taken into account ... as a pre-condition of the existence of any authority to make [a] ... decision in the circumstances of the particular case".⁹⁷ This is a point that has been made repeatedly by the High Court, most notably by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,⁹⁸ although there is nonetheless frequent slippage between what is merely relevant and what is mandatory.

Whether or not a decision-maker is *bound* to take a certain matter into account is a matter of statutory construction and most legislation is properly construed as *requiring* very few things from those on whom they confer a power or discretion.⁹⁹ The relevant section of the *Migration Act* in *Khan* certainly cannot be read as *requiring* the decision-maker to take account of the terms of the Manual. The better view, as put by Flick J, was that when "exercising the discretionary power conferred by [statute], the delegate and the

⁸⁷ *Khan v MIAC* [2011] FCAFC 21, [71] (Flick J).

⁸⁸ *Khan v MIAC* [2011] FCAFC 21, [15] (Buchanan J).

⁸⁹ *Khan v MIAC* [2011] FCAFC 21, [57] (Buchanan J).

⁹⁰ *Migration Act 1958* (Cth) s 116(3). The *Migration Regulations* are delegated legislation made under the authority of the *Migration Act*.

⁹¹ *Khan v MIAC* [2011] FCAFC 21, [59].

⁹² *Khan v MIAC* [2011] FCAFC 21, [61] (Buchanan J); [75] (Flick J).

⁹³ *Khan v MIAC* [2011] FCAFC 21, [60]-[61] (Buchanan J); [71] (Flick J).

⁹⁴ *Khan v MIAC* [2011] FCAFC 21, [61] (Buchanan J).

⁹⁵ However, this reasoning does not establish that Mr Sangha's letters and the reasons for which they reveal that Mr Khan lost his job were considerations that were mandatory for the MRT to take into account; nor does the fact that these documents were evidently viewed as "relevant" by DIAC: *Khan v MIAC* [2011] FCAFC 21, [62] (Buchanan J).

⁹⁶ Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 281.

⁹⁷ *Craig* (1995) 184 CLR 163, 177 (emphasis added).

⁹⁸ "The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision.": *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 (original emphasis) ("*Peko-Wallsend*").

⁹⁹ Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 282.

[MRT] were *entitled* to take into account government policy and such other matters as are set forth in the Manual”.¹⁰⁰

Flick J’s analysis of this issue modified that of Buchanan J.¹⁰¹ His Honour cited Mason J’s judgment in *Peko-Wallsend* to the effect that the matters which a decision-maker is bound to take into account “remain to be determined by reference to the objects and purposes” of the legislation which confers power on the decision-maker.¹⁰² Flick J used this reasoning to take the position that the requirement to look to the circumstances in which the cancellation arose was sourced to the *Migration Act*, rather than to the Manual.¹⁰³ His Honour read the statute to require a consideration of the circumstances in which cancellation arose on the basis that one can’t consider whether the visa conditions no longer exist unless one first considers whether those conditions had ceased to exist at the time of cancellation. If cancellation was wrong at the time, then the visa should be restored (and perhaps re-cancelled if the conditions subsequently cease to exist). Flick J reached this conclusion regardless of the Manual and stated that:¹⁰⁴

Whether or not the Manual identifies *considerations going beyond those that must be taken into account* when making a decision under [the relevant section of the *Migration Act*], those considerations which *must be taken into account* when making such a decision *include* “the circumstances in which the ground for cancellation arose”.

In his concluding remarks, Flick J indicated that such issues as exist with the failure of decision-makers to adhere to the terms of the Manual remain to be argued another day. He did, however, remark that “the Manual may nevertheless be taken as a formal guide as to how the power conferred by [the *Migration Act*] is to be administered as a matter of practice”.¹⁰⁵ This is a remarkable statement, which steps away from the orthodoxy of the position in *Peko-Wallsend* to recognise, as the High Court had in *M61*,¹⁰⁶ that soft law (particularly at this level of sophistication) must mean *something*. With respect, the approach of Flick J in this regard is to be preferred to that of Buchanan J, since whatever the relevance of the Manual, it departs from existing High Court authority to hold that its terms are mandatory considerations unless that conclusion is sourced directly from statute.

As Flick J noted in *Khan*, the High Court in *Peko-Wallsend* had extended the process of statutory interpretation involved in determining the issues mandatory for consideration by the decision-maker beyond the express terms of the relevant statute to implications which could justifiably be drawn from them.¹⁰⁷ There is no reason why *Peko-Wallsend*’s logic cannot be applied symmetrically. If there is a requirement on a decision-maker to consider the case that an applicant brings to the table, why oughtn’t the decision-maker also be required to take account of what s/he brings to the table (such as any applicable soft law)?

¹⁰⁰ *Khan v MIAC* [2011] FCAFC 21, [72] (emphasis added). To the same effect, his Honour referred approvingly to the judgment of Spender, Emmett and Jacobson JJ in *Hneidi v Minister for Immigration and Citizenship* (2010) 182 FCR 115, (*Hneidi v MIAC*).

¹⁰¹ To the extent that this is the case, Flick J is in the minority, given that Yates J agreed with the reasons of Buchanan J: *Khan v MIAC* [2011] FCAFC 21, [87]-[88] (Yates J).

¹⁰² *Khan v MIAC* [2011] FCAFC 21, [74] (Flick J). The relevant passage from *Peko-Wallsend* states that “where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account **unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act**.”: *Peko-Wallsend* (1986) 162 CLR 24, 39-40 (Mason J) (emphasis added).

¹⁰³ Flick J further commented that “as acknowledged in the Manual, the ‘circumstances in which the ground for cancellation arose’ should have been expressly addressed by both the delegate and the [MRT]. Irrespective of the Manual, those circumstances were in any event considerations that had to be taken into account when exercising the power conferred by s 116.”: *Khan v MIAC* [2011] FCAFC 21, [82] (Flick J).

¹⁰⁴ *Khan v MIAC* [2011] FCAFC 21, [75] (Flick J) (emphasis added).

¹⁰⁵ *Khan v MIAC* [2011] FCAFC 21, [84] (Flick J).

¹⁰⁶ *Plaintiff M61* (2010) 85 ALJR 133.

¹⁰⁷ *Peko-Wallsend* (1986) 162 CLR 24, 39-40 (Mason J). See Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 283.

The recognition that mandatory considerations need not be sourced to instruments with binding force¹⁰⁸ has not hitherto formed a basis by which a court could hold a consideration contained *only* in soft law and not otherwise able to be implied from the terms of the governing legislation to be mandatory, and therefore failure to consider it a jurisdictional error.¹⁰⁹ However, courts have been prepared to view non-regard or misconstruction of soft law as judicially reviewable on the basis that the decision-maker has failed to take account of a mandatory relevant consideration.¹¹⁰ This may particularly be so where there is an available inference that a discretion is to be guided by soft law,¹¹¹ either as a matter of statutory interpretation or, in the words of French J (as his Honour then was), by evidence of a “commitment on the part of the [decision-maker] to a particular approach to the law in those cases to which [the relevant soft law] applies ... [which] will necessarily be qualified by the extent to which the [soft law] itself embodies qualifications and conditions in its own terms.”¹¹² Such a commitment must, of course, fall short of estoppel¹¹³ or fettering, making it difficult to know exactly what kind of commitment that French J had in mind.

The high-water mark of judicial acceptance that sufficiently serious misconstruction of soft law could amount to jurisdictional error came in *Gray*.¹¹⁴ In that case, French and Drummond JJ (over a dissenting judgment by Neaves J) stated that Ministerial policy statements regarding deportation of non-citizens convicted of criminal offences “were relevant factors which the [decision-maker] was *bound to consider* although not bound to apply so as to prejudice its independent assessment of the merits of the case.”¹¹⁵ Aronson, Dyer and Groves suggest that subsequent Federal Court authority may require that *Gray* be reconsidered,¹¹⁶ citing the decision of Tracey J in *AB*.¹¹⁷ In that case, his Honour said that *Gray*:¹¹⁸

cannot be understood as supporting an unqualified proposition that an error in construing and applying a policy or an unincorporated treaty, which the decision-maker is not bound to apply, will amount to jurisdictional error. This will only be so if the misconstruction is “serious” such that “what is applied is not the policy but something else”. Moreover, their Honours’ reasoning assumes that the tribunal was bound to give consideration to the ministerial policy.

¹⁰⁸ Subsequent to the High Court’s decision in *Peko-Wallsend*, Davies J stated that “even if non-statutory rules do not, of themselves, have binding effect, the failure of a decision-maker to have regard to them or his failure to interpret them correctly may amount to an error of law justifying an order of judicial review.”: *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 17 FCR 1, 15 (Davies J) (*‘Gerah Imports’*).

¹⁰⁹ It is beyond the scope of this paper to attempt to unravel the Australian jurisprudence on whether a decision-maker empowered by statute is obliged to give effect to Ministerial policies or directions. See the conflicting judgments in *R v Anderson; ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, (*‘Ipec-Air’*); *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, (*‘Ansett’*).

¹¹⁰ *Holden Ltd v Chief Executive Officer of Customs* (2005) 141 FCR 571, 583 [38] (RD Nicholson, Weinberg & Selway JJ) (*‘Holden v Customs’*); cf *Minister for Immigration & Ethnic Affairs v Conyngham* (1986) 11 FCR 528, (*‘Conyngham’*).

¹¹¹ “Where the parliament has conferred wide discretions on an official decision-maker, particularly in relation to high volume decision-making, it is entirely consistent with the legislative intention in conferring such a discretion that its exercise will be guided by administrative policies. Indeed, it may be inferred that the creation of such policies is contemplated by the legislature when it confers such discretions.”: *BHP Billiton Direct Reduced Iron Pty Ltd v Duffus, Deputy Commissioner of Taxation* (2007) 99 ALD 149, 171 [103] (French J) (*‘BHP v Duffus’*).

¹¹² This is a reference to a previous comment of the Full Federal Court that a public ruling issued by the Federal Commissioner of Taxation “operates as if it is the statutory basis upon which tax is to be levied. No question arises as to whether it is or is not relied upon.”: *Bellinz and Others v Commissioner of Taxation* (1998) 84 FCR 154, 169 (Hill, Sundberg & Goldberg JJ) (*‘Bellinz’*). See *BHP v Duffus* (2007) 99 ALD 149, 171 [102].

¹¹³ See Greg Weeks, ‘Estoppel and Public Authorities: Examining the Case for an Equitable Remedy’ (2010) 4(3) *Journal of Equity* 247.

¹¹⁴ *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, (*‘MILGEA v Gray’*).

¹¹⁵ *MILGEA v Gray* (1994) 50 FCR 189, 211 (emphasis added).

¹¹⁶ Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 160.

¹¹⁷ *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53, (Tracey J) (*‘AB v MIAC’*).

¹¹⁸ *AB v MIAC* (2007) 96 ALD 53, 62 [25]. Tracey J was prepared to distinguish *Gray* in order to find that an international treaty which had not been incorporated into Australian domestic legislation could not form the basis of a mandatory relevant consideration: *AB v MIAC* (2007) 96 ALD 53, 63 [27]. His Honour noted that French J had himself reached the same conclusion in the earlier case of *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875, [61]-[66] (French J) (*‘Le v MIMIA’*).

These comments by Tracey J are consistent with what was said by French and Drummond JJ in *Gray*, although they do draw attention to the fact that it remains unclear what their Honours had in mind when they spoke of a “serious” misconstruction of a policy. It appears that a “serious” misconstruction is one which results in jurisdictional error, although this is unhelpful in as much as it states a conclusion¹¹⁹ rather than a test by which that conclusion may be reached. This departure from *Gray* is explicable as relying on the difference between, on one hand, a treaty of which a decision-maker is able but not obliged to take note and, on the other hand, soft law which amounts to a representation, binding on the decision-maker at least to consider, if not to apply. While both the treaty and the soft law are non-statutory, there must be a difference between the many hundreds of treaties to which Australia is party¹²⁰ and policies and guidelines issued by the same public authority which is then to make a decision to which that soft law applies.

The possibilities for giving greater application to soft law by presuming that it amounts to a mandatory relevant consideration may be easier to achieve than would be the case by doing away with the prohibition of fettering. On the other hand, this would be a process which could serve to exacerbate the damage that has already been done to the doctrine of relevant considerations as an exercise in statutory construction. An (overly) expansive interpretation of what constitutes or can be inferred from the governing statute to be a mandatory consideration has a long history, going back at least to *Peko-Wallsend* itself,¹²¹ and is notable in the most recent case law.¹²² However, on balance, requiring that a decision-maker take account of relevant material which impacts on the decision s/he is required to make whether that material constitutes submissions made by the applicant, as in *Peko-Wallsend*, or soft law is a reasonable standard for the courts to impose.

Substantive Enforcement of Legitimate Expectations

The rule against fettering is essentially the inverse of the argument that a person who has a legitimate expectation that a decision-maker will adhere to a policy from which s/he seeks to depart should be entitled to substantive enforcement of that expectation.¹²³ However, the conclusion that judicial review remedies will rarely be available for breach of soft law in Australia is emphasised most clearly by the approach that Australian courts have taken to the concept of substantive enforcement of legitimate expectations which has developed in the UK¹²⁴ and elsewhere.¹²⁵

¹¹⁹ See Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and H. P. Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 330.

¹²⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 316 (McHugh J) ('*Teoh*'); *Project Blue Sky v Australian Broadcast Authority* (1998) 194 CLR 355, 392 [96] (McHugh, Gummow, Kirby & Hayne JJ) ('*Project Blue Sky*').

¹²¹ The conclusion of the High Court that the appellant Minister was obliged to consider the “most recent and accurate information ... at hand” (at 44 per Mason J) made a mockery of the process of public consultation that had preceded the recommendation by the Aboriginal Land Commissioner to the Minister that land be granted to Aborigines since Peko only revealed important information about the location of certain valuable uranium deposits after the Commissioner had reported and had in fact actively misled the Commissioner (at 34-5 per Mason J): *Peko-Wallsend* (1986) 162 CLR 24. How can the implied mandatory consideration of the most recent information be reconciled with the statutory powers and duties of the Commissioner when the result is that Peko was allowed to withhold evidence to be presented to the Minister alone? See also Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 286.

¹²² *Re Tracey* [2011] NSWCA 43.

¹²³ Chris Hilson, 'Judicial Review, Policies and the Fettering of Discretion' [2002] *Public Law* 111.

¹²⁴ Most famously in *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850, ('*ex parte Coughlan*'). See Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247, 260-7.

¹²⁵ South Africa is an intriguing example. That country's Constitution specifically promises that administrative action which is procedurally fair: *Constitution of the Republic of South Africa 1996* s 33. This promise is effected by the *Promotion of Administrative Justice Act 2000* (South Africa). Furthermore, there is a long-standing recognition of the procedural aspects of legitimate expectations: *Administrator of the Transvaal v Traub* [1989] 4 All SA 924 (AD), ('*Traub's Case*'). Recently, some courts have attempted to give substantive enforcement to legitimate expectations: *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W), ('*Peter Klein Investments*'). However, this trend appears to have been halted, at least for the time being, by the decision of the

It is “trite law that promises and undertakings can generate obligations to observe the rules of natural justice”¹²⁶ although Australian courts will not give substantive effect to legitimate expectations which are excited as a result of representations made in soft law instruments. Soft law *may* create procedural obligations on the part of bodies which use it as a regulatory tool, most obviously where there has been a specific representation that the terms of a soft law instrument will be applied to a particular case. For example, consider a public authority which has the statutory power to grant a licence. Through soft law, it lists a series of requirements which need to be met by every licence application,¹²⁷ and states that it will grant a licence to every “complying application”. If a person has a complying application, in the sense that s/he has met all the requirements for obtaining a licence which are contained in the soft law instrument, then s/he has at least a legitimate expectation that s/he will be heard before any decision is made not to grant the licence.¹²⁸

In Australia, even the procedural consequences of such a legitimate expectation are quite limited. *Lam* stands as authority for the proposition that the authority with the power to grant the licence could satisfy the requirements of procedural fairness by either publicly withdrawing the soft law instrument or warning individuals that they ought not to rely on it. Indeed, Gleeson CJ stated explicitly that, in order for a judicial review remedy to be available for breaching the requirements of procedural fairness, “what must be demonstrated is unfairness, not merely departure from a representation”.¹²⁹ This was an opinion in which the rest of the *Lam* court concurred,¹³⁰ each identifying the lack of detrimental reliance on the part of Mr Lam as indicating that procedural fairness had been satisfied. In other words, substantive unfairness may be relevant to judicial review in Australian courts, although the remedy is only ever procedural and never substantive. It will not, however, arise merely from the failure to adhere to a stated procedure where the breach was immaterial.¹³¹ Mr Lam *had* suffered a breach of procedural fairness (by not having been warned that the decision-maker no longer proposed to seek comment from the woman who was caring for his children), but it was accepted that he had lost nothing as a result of that breach because she had already given her statement to the authorities and would not have said anything different or new if they had approached her again. Common law judicial review does not require that remedies be provided where to do so would be futile.¹³² This is to be contrasted to the situation where the content of the natural justice hearing rule is determined entirely by statute.¹³³

Lam has had the effect of inhibiting the use to which the concept of legitimate expectations can be put in Australian judicial review. However, judicial review of representations¹³⁴ or policy statements¹³⁵ made by public authorities need not rely on

Supreme Court of Appeal in *Duncan v Minister of Environmental Affairs and Tourism* 2010 (6) SA 374 (SCA), (*Duncan's Case*). See generally Cora Hoexter, *Administrative Law in South Africa* (2007).

¹²⁶ Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 159. See *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, (*Haoucher*); *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, (*Lam*).

¹²⁷ This amounts to a representation as to how the decision-maker will exercise his or her discretion. See Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 467.

¹²⁸ *Gerah Imports* (1987) 17 FCR 1.

¹²⁹ *Lam* (2003) 214 CLR 1, 12 [34] (Gleeson CJ).

¹³⁰ *Lam* (2003) 214 CLR 1, 34 [105] (McHugh & Gummow JJ); 35-6 [111] (Hayne J); 48-9 [149]-[151] (Callinan J).

¹³¹ Gleeson CJ did state expressly that the “content of the requirements of fairness may be affected by what is said or done during the process of decision-making, and by developments in the course of that process, including representations made as to the procedure to be followed”: *Lam* (2003) 214 CLR 1, 12 [34].

¹³² *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane & Dawson JJ) (*Stead*).

¹³³ *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, (*SAAP v MIMIA*). See Greg Weeks, ‘The Expanding Role of Process in Judicial Review’ (2008) 15(2) *Australian Journal of Administrative Law* 100, 105.

¹³⁴ As in *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, (*NAFF v MIMIA*).

¹³⁵ *Stewart v Deputy Commissioner of Taxation* [2011] FCA 336 [29].

that concept.¹³⁶ One case in which a public authority was held to soft law guidelines was *Applicants M16*.¹³⁷ In that case, Gray J considered ‘gender guidelines’ (draft guidelines issued by the respondent Minister for dealing with gender-related claims by asylum seekers)¹³⁸ and found a want of procedural fairness in the failure of the Refugee Review Tribunal to apply them in the case of a female Tamil asylum-seeker from Sri Lanka who had suffered a brutal assault while pregnant.¹³⁹ She had indicated unequivocally that she was prepared to discuss these aspects of her case only with a female case officer.¹⁴⁰ The gender guidelines had been put in place in order to ensure a “sensitive and fair process” for persons who claimed refugee status based on “gender-related claims” and recognised the specific difficulties faced by female asylum-seekers, particularly those who had been subjected to sexual violence.¹⁴¹ Gray J hinted that the procedural safeguards implemented by the gender guidelines may in any case have been required as a matter of common law since:¹⁴²

[t]he willingness, and often the very ability, of people to talk about their experiences are affected by what are described as ‘gender issues’, and by cultural norms. This is now so well understood that it hardly seems necessary to state it.

The gender guidelines supplemented the hearing rule of procedural fairness by establishing appropriate procedures for women to argue their claims for refugee status in circumstances where they may face “social and cultural barriers” to articulating the details of those claims. The failure of the RRT to follow the gender guidelines was a breach of the requirements of procedural fairness only in as much as it resulted in the RRT failing to give the first applicant a proper hearing.¹⁴³ This is to say that the gender guidelines did not assume the status of a hard legal requirement. They merely indicated what steps needed to be taken to lead to a procedurally fair outcome. In circumstances where Gray J was not prepared to accept that, as the High Court had in *Lam*, the breach of procedural fairness had had no substantive effect,¹⁴⁴ the RRT was obliged to follow the gender guidelines unless it had previously warned the first applicant that it would not do so.¹⁴⁵

Part III: Private law remedies

As we have seen, in Australia judicial review is limited in its capacity to provide a remedy where an individual wishes to enforce the terms of a soft law instrument and is opposed by a public authority. However, there are limited circumstances in which an individual in those circumstances may be able to obtain a private law remedy, either in damages for negligent misrepresentation or in equitable compensation.

¹³⁶ *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 609 (Brennan CJ, Dawson & Toohey JJ) (*‘Darling Casino’*). See Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 465.

¹³⁷ *Applicants M16 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 148 FCR 46, (Gray J) (*‘Applicants M16’*).

¹³⁸ See *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190, 199 [38] (Branson J) (*‘Khawar v MIMA’*).

¹³⁹ *Applicants M16* (2005) 148 FCR 46, 50-1 [13].

¹⁴⁰ *Applicants M16* (2005) 148 FCR 46, 51 [15]. Ultimately, the court did not decide whether there had been a breach of procedural fairness by the Minister’s delegate, noting that such a breach could in any event have been cured before the RRT: *Applicants M16* (2005) 148 FCR 46, 58 [46].

¹⁴¹ *Applicants M16* (2005) 148 FCR 46, 56 [37].

¹⁴² *Applicants M16* (2005) 148 FCR 46, 56 [35].

¹⁴³ See also *Stewart v Deputy Commissioner of Taxation* [2011] FCA 336, [48]; cf *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2008] 1 AC 1003, (*‘BAPIO Action’*).

¹⁴⁴ *Applicants M16* (2005) 148 FCR 46, 60 [52].

¹⁴⁵ This would be most unlikely in circumstances where the gender guidelines were issued by the Minister: *Drake (No.2)* (1979) 2 ALD 634.

Negligence

In Australia, statutory reform long ago¹⁴⁶ abolished the approach of the common law which held that government bodies were immune from suit.¹⁴⁷ The relevant statutory provisions are still in force,¹⁴⁸ generally in terms consistent with the Commonwealth *Judiciary Act 1903*, which reads at s 64:¹⁴⁹

In any suit to which the Commonwealth or a State is a party, the rights of parties shall **as nearly as possible be the same**, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

The qualification “as nearly as possible” recognises implicitly that governments cannot be dealt with on *exactly* the ‘same’ basis as private individuals and that their responsibilities *do* make them different to individuals in some important senses. As Gleeson CJ noted in *Graham Barclay Oysters*, the qualification “as nearly as possible”¹⁵⁰ is an “aspiration” that cannot be realised completely.¹⁵¹ While this principle alone will not prevent a duty of care being inferred in circumstances where soft law issued by a public authority induces an individual to act to his or her detriment, courts are generally reluctant to require more of public authorities as a result of their public status than would be required of private actors.

Liability in negligence arises only where the common law is able to infer that a defendant owed the plaintiff a duty of care and the plaintiff is able to prove that s/he has suffered damage which was caused by the defendant’s breach of that duty of care.¹⁵² A statutory grant of power for a public authority to do something does not necessarily translate to a common law duty to do that thing, even though public authorities are generally granted powers with the expectation that they will act for the benefit of society or certain sections of society.¹⁵³ In a recent High Court matter,¹⁵⁴ Crennan and Kiefel JJ commenced their analysis with the proposition that more can rightly be expected of public authorities where they have a capacity to prevent harm which is not possessed by individuals. This approach was not, however, adopted by the rest of the court.

¹⁴⁶ The first *Crown Proceedings Act* was passed in South Australia in 1853, followed by New South Wales and Queensland. For a brief overview of this early legislation, see Mark Leeming, ‘The Liability of the Government under the Constitution’ (1998) 17(3) *Australian Bar Review* 215, 217-19; Nick Seddon, ‘The Crown’ (2000) 28(2) *Federal Law Review* 245, 257; Mark Aronson, ‘Government Liability in Negligence’ (2008) 32(1) *Melbourne University Law Review* 44, 44.

¹⁴⁷ Although, Jaffe notes that “the expression ‘the King can do no wrong’ originally meant precisely the contrary to what it later came to mean. ‘[I]t meant that the king must not, was not allowed, not entitled, to do wrong ...’”: Louis L. Jaffe, ‘Suits against Governments and Officers: Sovereign Immunity’ (1963) 77(1) *Harvard Law Review* 1, 3-4 (footnotes omitted). This was misinterpreted by common law courts for many years, see e.g. *Tobin v The Queen* (1864) 16 CB (NS) 310, (*Tobin*); *Feather v The Queen* (1865) 6 B&S 257, (*Feather*). That misinterpretation is now recognised: *Mulcahy v Ministry of Defence* [1996] QB 732, 740 (Neill LJ) (*Mulcahy*).

¹⁴⁸ The current State and Territory legislation is: *Crown Suits Act 1947* (WA); *Crown Proceedings Act 1958* (Vic); *Crown Proceedings Act 1980* (Qld); *Crown Proceedings Act 1988* (NSW); *Crown Proceedings Act 1992* (SA); *Crown Proceedings Act 1992* (ACT); *Crown Proceedings Act 1993* (Tas); *Crown Proceedings Act 1993* (NT).

¹⁴⁹ *Judiciary Act 1903* (Cth) s 64 (emphasis added). The form of the qualification “as nearly as possible” is not precisely consistent across every Australian jurisdiction. The NSW, Queensland and Victorian legislation each uses the words “as nearly as possible”, as does s 64 of the *Judiciary Act*, but these words are not found in the relevant sections of the legislation in the other Australian jurisdictions. See generally Susan Kneebone, ‘Claims Against the Commonwealth and States and Their Instrumentalities in Federal Jurisdiction: Section 64 of the *Judiciary Act*’ (1996) 24(1) *Federal Law Review* 93; Bradley Selway, ‘The Source and Nature of the Liability in Tort of Australian Governments’ (2002) 10 *Tort Law Review* 14, 19-20.

¹⁵⁰ His Honour was discussing the NSW legislation: *Crown Proceedings Act 1988* (NSW) s 5.

¹⁵¹ “That formula reflects an aspiration to equality before the law, embracing governments and citizens, and also a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens.”: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 556 (citation omitted) (*Graham Barclay Oysters*).

¹⁵² See generally R.P. Balkin and J.L.R. Davis, *Law of Torts* (4th ed, 2009) Part III.

¹⁵³ *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 259 [129] (Crennan & Kiefel JJ) (*Stuart*).

¹⁵⁴ *Stuart* (2009) 237 CLR 215.

The potential relevance of a positive duty to act on the part of a public authority can be demonstrated using the well-worn example of *East Suffolk Rivers Catchment Board v Kent*.¹⁵⁵ The plaintiff suffered flooding to his land as the result of a breach in a sea wall. This was not as a result of any negligent act of the respondent authority. Rather, Mr Kent sought compensation from the defendant because it had exercised its statutory powers to repair the wall in such an inefficient manner that Mr Kent's farm land remained flooded for longer than it would have done if the Board had exercised its powers with due care and skill. Robert Stevens categorises this as nothing more than a failure of the Board to confer a benefit to which Mr Kent had no enforceable right.¹⁵⁶ This reasoning would be incontestable if the party who failed to confer the benefit of repairing the sea wall was Mr Kent's neighbour.¹⁵⁷

If we assume, however, that repairing sea walls was a substantial purpose of the defendant Board and that the plaintiff either elected not to take action to help himself or was unable to do so, then the Board's failure to prosecute its statutory purpose with reasonable¹⁵⁸ skill and expedition breaches, at the very least, a moral duty on the part of the Board, even if it cannot *create* a common law duty of care *per se*. The absence of an enforceable right to the benefit which it was the purpose of the Board to confer does not on its own provide a satisfactory basis for denying the existence of such a duty of care.

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.¹⁵⁹ The question becomes, therefore, whether the proposition, articulated by Mason J in *Heyman*, "that a public authority may be subject to a common law duty of care when it exercises a statutory power *or* performs a statutory duty"¹⁶⁰ can be extended to cover soft law obligations in addition to statutory powers and duties. A soft law instrument which is designed to guide the discretion granted to public officers by statute may be different in this regard from a soft law instrument aimed at regulating the behaviour of a *private* party, which takes its character as 'law' from its regulatory purpose or effect. However, Australian law has not yet provided an example of an occasion on which a court will compel a public authority to exercise its statutory powers for the benefit of individuals and this potential remedy therefore remains for now in the realm of theory.

Rather than leading to a finding of liability for negligent nonfeasance, it is more likely that a soft law instrument which is published may amount to a negligent misrepresentation if the authority which published it decides to act inconsistently with the instrument. Contrary to the law as regards a duty of care to take positive action, which may be owed to a complete stranger, the relationship between the parties is an essential part of establishing that a representation has been negligently made. The House of Lords referred to the requisite "special relationship" in general terms¹⁶¹ in *Hedley Byrne*.¹⁶² In

¹⁵⁵ *East Suffolk River Catchment Board v Kent* [1941] AC 74, (*'East Suffolk v Kent'*).

¹⁵⁶ Robert Stevens, *Torts and Rights* (2007) 221; cf Tom Cornford, *Towards a Public Law of Tort* (2008) 131.

¹⁵⁷ In any event, it is an accurate statement of the law relating to public authorities in the UK following *Stovin v Wise* [1996] AC 923, (*'Stovin'*).

¹⁵⁸ I use 'reasonable' in its negligence law sense, rather than the public law sense of *Wednesbury* unreasonableness. The relevance of the latter standard in tort law is discussed in Elizabeth Carroll, 'Wednesbury unreasonableness as a limit on the civil liability of public authorities' (2007) 15(2) *Tort Law Review* 77; Aronson, 'Government Liability' (2008) 32 *MULR* 44; Greg Weeks, 'A Marriage of Strangers: the *Wednesbury* Standard in Tort Law' (2010) 7(8) *Macquarie Journal of Business Law* 131.

¹⁵⁹ 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(5) *Australian Law Journal* 331, 334-5. By contrast, foreseeability of harm and capacity to prevent it are insufficient bases for finding that a duty of care is owed by a private actor, who would in any case generally have the right to refuse assistance.

¹⁶⁰ *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 458 (Mason J). See also at 467-8 (Mason J) (*'Sutherland SC v Heyman'*). Note that the plaintiff in *Heyman* was unsuccessful in establishing a common law duty of care on the part of the Council on either basis, and also that the existence of a statutory power or duty *per se* is insufficient to create a common law duty of care.

¹⁶¹ *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556, 621 (Owen J) (*'MLC v Evatt'*).

¹⁶² *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 486 (Lord Reid); 502-3 (Lord Morris); 514 (Lord Hodson); 528-9 (Lord Devlin); 539 (Lord Pearce) (*'Hedley Byrne'*).

MLC v Evatt, Barwick CJ considered “the features of the special relationship in which the law will import a duty of care in utterance by way of information or advice” to include “the subject matter of the information or advice being of a serious or business nature” where the speaker realises “that the recipient intends to act upon the information or advice” and in circumstances “such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker”.¹⁶³ A majority of the High Court in *San Sebastian* later commented that “there is no convincing reason for confining the liability to instances of negligent misstatement made by way of response to a request by the plaintiff for information or advice”.¹⁶⁴

It will not be reasonable to rely on a representation which, in effect, contains its own inbuilt warning that it ought not to be relied upon.¹⁶⁵ Some types of communication from public bodies (for example, published rulings by the Australian Tax Office) are designed to provide the public at large with comfort that they will be treated in a certain way if they act within the terms of the ruling. Encouragement of reliance is the very purpose for which they are issued. Other communications, for example *ad hoc* approvals of a proposed course of action, necessarily carry the implication that they are given with the proviso that they can be retracted if there is a change in policy. Some types of ‘assurance’ necessarily come with the unspoken warning that reliance is at the risk of the reliant party. 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.¹⁶⁶

Additionally, there is a significant difference between a statement of policy directed at future conduct - which is naturally always subject to alteration unless its maker is legally bound to it - and a soft law instrument which records an undertaking as to how a public authority will exercise its discretion in current matters.

The nature of the communication in which a representation is made will also have practical importance in ascertaining whether it is reasonable to rely upon it. The extent to which the representation, rather than its purpose, is ‘public’, is therefore a guide to whether a representation can be reasonably relied upon. While a direct and personal *oral* representation by an unknown employee of a public authority will not necessarily be reliable, a direct *written* representation on behalf of that authority is more likely to be so.¹⁶⁷ Reliance on a representation made to and passed on by a third party is less likely

¹⁶³ *MLC v Evatt* (1968) 122 CLR 556, 571. The decision of the High Court was overturned by a bare majority in the Privy Council: *Mutual Life & Citizens’ Assurance Co Ltd v Evatt* (1970) 122 CLR 628, (*MLC v Evatt (PC)*). The High Court was no longer bound by the Privy Council’s decision when it later heard *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225, (*Shaddock*). In that case, Mason J, with whom Aickin J agreed, expressly stated that the reasons of Barwick CJ should be preferred to the speech of Lord Diplock for the majority in the Privy Council: *Shaddock* (1981) 150 CLR 225, 251. Gibbs CJ and Stephen J, by contrast, distinguished the Privy Council’s decision but specifically declined to overturn it. Murphy J delivered a brief judgment in which he stated that “there is no justification for adhering to the error expressed by the Privy Council” but did not specifically approve the approach which had been taken by Barwick CJ in the High Court: *Shaddock* (1981) 150 CLR 225, 256. The head note to *Shaddock* in the Commonwealth Law Reports notes only that the Privy Council’s decision was “considered”: *Shaddock* (1981) 150 CLR 225, 226. However, the decision of Barwick CJ in *MLC v Evatt* was said to have “regained vitality” by Gleeson CJ, Gummow & Hayne JJ in *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, 16 [47] (*Tepko*). It was also approved in that case by Gaudron J: *Tepko* (2001) 206 CLR 1, 23 [75]. It now represents the orthodox view.

¹⁶⁴ *San Sebastian Pty Ltd v Minister Administering Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340, 356 (Gibbs CJ, Mason, Wilson & Dawson JJ) (*San Sebastian*).

¹⁶⁵ See e.g. *CPT Manager Ltd v Broken Hill City Council* [2010] NSWLEC 69 [128]. In that case, Craig J considered the effect of a soft law Code which was subject to a legislative provision which read: “Nothing in this section or such a code gives rise to, or can be taken into account in, any civil cause of action, but nothing in this section affects rights or liabilities arising apart from this section.” His Honour held that the terms of the Act prevented even an inference of fact being drawn from the defendant’s failure to adhere to the Code. With respect, this construction seems difficult to justify, given that it renders the existence of the Code otiose.

¹⁶⁶ This point was alluded to by Lockhart J in *Unilan Holdings Pty Ltd v Kerin* (Unreported, Federal Court of Australia, Lockhart J, 5 February 1993).

¹⁶⁷ *Shaddock* (1981) 150 CLR 225.

to be reasonable than reliance on a direct communication,¹⁶⁸ although communicating a representation indirectly will not necessarily preclude a duty of care from being owed in relation to that representation. In these circumstances, the purpose of the representation is likely to be decisive.¹⁶⁹ On the other hand, a statement of future policy made to the world at large, either by a public authority¹⁷⁰ or a Minister of State¹⁷¹ will necessarily be less reliable, because it is generally “understood that a public authority is free to alter a policy unless the policy is given binding effect by statute or by contract”.¹⁷²

Soft law is of a different order to a mere representation, since it regulates behaviour in a manner that has the practical effect of law but is able to be made without the oversight and inconvenience that is required to pass legislation or even subordinate legislation. Whether an instrument amounts to soft law by having a regulatory purpose or effect, and is therefore more than a mere representation, can be assessed by analogy to the reasoning which courts use to determine whether a decision is “of an administrative character” for the purposes of the *ADJR Act*,¹⁷³ or “of a legislative character” for the purposes of the *Legislative Instruments Act*.¹⁷⁴ This is not an exact science: as the Full Federal Court noted in *RG Capital Radio*, “there is no simple rule for determining whether a decision is of an administrative or a legislative character”.¹⁷⁵

If a plaintiff were able to establish that a soft law instrument made an unqualified¹⁷⁶ representation that the issuing authority *would always* follow a certain course of action, his or her reliance on that representation (if established) would likely be viewed as reasonable, subject to the instrument meeting the criteria set down by Barwick CJ in *MLC v Evatt*. This, however, is more difficult than it may appear. A planning instrument with statutory force and its various supporting documents were alleged in *San Sebastian* to have induced in the plaintiff an “expectation of being allowed to develop in accordance with the proposals”.¹⁷⁷ The majority of the High Court held that no representation had been made by making these documents available.¹⁷⁸ Similarly, in *Unilan Holdings*, the plaintiff alleged that it had lost money consequent on relying on a statement by the defendant Minister for Primary Industry and Energy at a conference held in Dubrovnik about the future “floor price” of Australian wool. Lockhart J noted that:¹⁷⁹

Persons in the wool industry who heard statements of the respondent were not entitled, in my opinion, to treat the statement as an absolute and unconditional guarantee and trade on the basis that if they made profits they would belong to them, but if they made losses they would be borne by the respondent or the Australian Government.

¹⁶⁸ *Tepko* (2001) 206 CLR 1.

¹⁶⁹ *Tepko* (2001) 206 CLR 1, 15 (Gleeson CJ, Gummow & Hayne JJ).

¹⁷⁰ *San Sebastian* (1986) 162 CLR 340.

¹⁷¹ *Unilan Holdings Pty Ltd v Kerin*, 5 February 1993 (Lockhart J).

¹⁷² *San Sebastian* (1986) 162 CLR 340, 374 (Brennan J). A similar view was expressed in that case by the plurality: *San Sebastian* (1986) 162 CLR 340, 360 (Gibbs CJ, Mason, Wilson & Dawson JJ). In *San Sebastian*, the Court did not express this in terms of the policy / operational distinction used in *Anns v Merton Borough Council* [1978] AC 728 and later in *Heyman* because the same work can be done by the existing concept that a misrepresentation is not actionable in negligence unless the plaintiff’s reliance upon it is reasonable.

¹⁷³ *ADJR Act* 1977 (Cth) s 3(1).

¹⁷⁴ *LIA 2003* (Cth) s 5(1)(a).

¹⁷⁵ *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185, 194 [40] (*RG Capital Radio*).

¹⁷⁶ A disclaimer will usually be effective to eliminate liability for negligent misrepresentations: *Hedley Byrne* [1964] AC 465.

¹⁷⁷ *San Sebastian* (1986) 162 CLR 340, 349.

¹⁷⁸ Brennan J, by contrast, did not address the issue of whether the alleged representation had in fact been made. Rather, his Honour held that if a representation was made at all, it was merely implied from the fact that the instrument and supporting documents were said to have been “expertly prepared”. This was too “limited” a representation to ground a duty of care to the appellants: *San Sebastian* (1986) 162 CLR 340, 373 (Brennan J).

¹⁷⁹ *Unilan Holdings Pty Ltd v Kerin*, 5 February 1993 (Lockhart J). This is the reason why s 52 of the *Trade Practices Act 1974* (Cth) (now s 18 of *The Australian Consumer Law*, which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) has always been pleaded so frequently in commercial litigation: in most business contexts, it completely supersedes the effect of *Hedley Byrne* [1964] AC 465.

In short, the case law indicates that 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.

Equity

Like tort law, equity provides limited scope for enforcing soft law. As I have already discussed, a public authority cannot fetter itself in respect of its future exercise of statutory powers and duties as a matter of public law,¹⁸⁰ nor can one obtain relief by way of enforcing an estoppel against a public authority where to do so would cause the authority to act *ultra vires*¹⁸¹ or would require the future exercise of a statutory discretion to be fettered.¹⁸²

However, there is a distinction which must be drawn between the equity which is raised where the conditions giving rise to an equitable estoppel are satisfied and the relief which a court will grant to fulfill the equity thus created. As I have argued elsewhere,¹⁸³ the mere fact that relief by way of enforcing an estoppel is inapt to be granted against a public authority where to do so would cause the authority to act *ultra vires* or would require the future exercise of a statutory discretion to be fettered does not prevent a court from fulfilling the equity with an award of monetary compensation.¹⁸⁴ A public authority being estopped from denying a "certain state of affairs"¹⁸⁵ at common law is different to holding a public authority to a representation that it will act in future in a certain way if such action would be *ultra vires*. The capacity of courts with equitable jurisdiction to "mould" a decree to satisfy the minimum equity¹⁸⁶ required to do justice between the parties means that courts can provide a remedy, such as equitable compensation, even where it is impossible to hold the relevant public authority to its initial representation.

The development of the equitable doctrine of estoppel in Australia over the past three decades¹⁸⁷ has broadened the scope of equity to provide a remedy in circumstances where damages in negligence would not necessarily lie. The increased coverage of equity means that, in relation to representations made by public authorities, equitable compensation may be available in circumstances where a duty of care is not owed. Notwithstanding this possibility, situations in which equity can provide a remedy where none is available at law will be exceptions to the general rule. Soft law representations from which a public authority seeks to depart will frequently see the grounds for a remedy to be made available satisfied both in equity and at law, although equity's remedies will only be applied where those available at law are insufficient. In response to the

¹⁸⁰ See e.g. *Green v Daniels* (1977) 13 ALR 1.

¹⁸¹ *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610; [1937] 1 All ER 748, ('*Maritime Electric*'); *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 211-16 ('*Kurtovic*'); K.R. Handley, *Estoppel by Conduct and Election* (2006) 22-3.

¹⁸² *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416, ('*Southend-on-Sea*').

¹⁸³ Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEQ* 247, 270-87.

¹⁸⁴ Enid Campbell, 'Estoppel in Pais and Public Authorities' (1998) 5(3) *Australian Journal of Administrative Law* 157, 167.

¹⁸⁵ Campbell, 'Estoppel in Pais' (1998) 5 *Australian Journal of Administrative Law* 157, 166.

¹⁸⁶ In *Crabb v Arun District Council*, Scarman LJ stated that courts "have to determine not only the extent of the equity, but also the conditions necessary to satisfy it": *Crabb v Arun District Council* [1976] Ch 179; [1975] 3 All ER 865, 880 ('*Crabb v Arun*'). The reasoning of Scarman LJ was subsequently approved by a majority of the High Court in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 404 (Mason CJ & Wilson J); 425 (Brennan J); 460 (Gaudron J) ('*Waltons v Maher*'). However, it received detailed consideration only from Brennan J, who articulated a reliance-based approach to remedying the breach of a legal obligation owed to the representee in circumstances where the conditions for an equitable estoppel are met: *Waltons v Maher* (1988) 164 CLR 387, 416. Notwithstanding this, Robertson has noted that, in the years immediately following *Verwayen*, courts almost universally satisfied equitable estoppels by granting expectation-based relief: Andrew Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805, 829.

¹⁸⁷ See *Legione v Hateley* (1983) 152 CLR 406, ('*Legione v Hateley*'); *Waltons v Maher* (1988) 164 CLR 387; *Foran v Wight* (1989) 168 CLR 385, ('*Foran v Wight*'); *Commonwealth v Verwayen* (1990) 170 CLR 394, ('*Verwayen*'). See also Handley, *Estoppel* (2006).

proposition that there is no need to stretch equity to provide a monetary remedy,¹⁸⁸ I therefore argue that it is anomalous for behaviour which both breaches a duty of care and creates an equity to be remediable in tort but not in equity merely because substantive effect cannot be given to an estoppel.

The availability of equitable compensation for breaches of equitable duties other than those of a fiduciary nature has for some time been orthodox in New Zealand.¹⁸⁹ In *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*,¹⁹⁰ the majority stated that:

There is now a line of judgments in this Court accepting that monetary compensation (which can be labelled damages)¹⁹¹ may be awarded for breach of a duty of confidence **or other duty deriving historically from equity**...

However, the judgment of the majority in *Aquaculture* has never been applied in Australia. In *Harris v Digital Pulse*, Heydon JA (as his Honour then was) dismissed it with the withering comment that “[i]t is difficult to imagine an ‘authority’ offered for adoption in New South Wales which could be less satisfactory.”¹⁹² Prior to that, the most recent authors of *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* (of whom Heydon J is one) had already referred to the *dictum* of the New Zealand Court of Appeal in *Aquaculture* quoted above as an “astonishing proposition”.¹⁹³

The basis of these impassioned criticisms of *Aquaculture* is that the reasoning of the majority is alleged to display evidence of a “fusion fallacy”.¹⁹⁴ However, there need be no question of either “the administration of a remedy ... not previously available either at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign”¹⁹⁵ where a court provides equitable compensation. On the contrary, this is a remedy which has been available to courts with equitable jurisdiction for centuries.

Following the decision in *Derry v Peek*,¹⁹⁶ the jurisdiction to provide equitable compensation was (mistakenly)¹⁹⁷ limited to circumstances where a fiduciary duty had been breached. Given that this aspect of *Derry v Peek* has long been disputed, it is open to Australian courts to decline to follow it in so far as it precludes an award of equitable compensation. This obstacle involves no “fusion fallacy” and can therefore be dealt with in the absence of the high doctrinal passion which has attached itself to that subject. It requires nothing more than that a superior court, confronted with the appropriate matter,

¹⁸⁸ See e.g. Ian E. Davidson, ‘The Equitable Remedy of Compensation’ (1982) 13 *Melbourne University Law Review* 349, 370-2.

¹⁸⁹ Charles E.F. Rickett and Tim Gardner, ‘Compensating for Loss in Equity: The Evolution of a Remedy’ (1994) 24 *Victoria University of Wellington Law Review* 19, 28.

¹⁹⁰ *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299; (1990) 19 IPR 527, 528 (Cooke P, Richardson, Bisson and Hardie Boys JJ) (emphasis added) (*‘Aquaculture’*).

¹⁹¹ In the course of his Honour’s extensive judgment in *Bell Group v Westpac*, Owen J recently stated that “strictly speaking the term ‘damages’ describes a monetary award for an infringement of a common law or statutory right while ‘compensation’ denotes a monetary award granted in the inherent jurisdiction of equity as relief for a breach of an equitable obligation”: *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No.9)* (2008) 225 FLR 1, 835 [9698] (*‘Bell (No.9)’*). In other words, equitable compensation is to breaches of equitable duty what damages are to breaches of common law duties: *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, 478 (Jules Sher QC) (*‘Disco Mix’*). Note, however, that the learned authors of *Meagher, Gummow & Lehane* use the term damages to refer to both the remedy available to a court in its exclusive equitable jurisdiction and the statutory remedy available under legislation modeled on *Lord Cairns’ Act* (21 & 22 Vict c 27).

¹⁹² *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 393 (*‘Harris v Digital Pulse’*).

¹⁹³ R.P. Meagher, J.D. Heydon and M.J. Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4th ed, 2002) 1140 (see also at 78-83; 1128).

¹⁹⁴ See Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane* (4th ed, 2002), Ch2; cf Andrew Burrows, ‘We Do This At Common Law But That In Equity’ (2002) 22(1) *Oxford Journal of Legal Studies* 1; *Harris v Digital Pulse* (2003) 56 NSWLR 298, 325-9 (Mason P).

¹⁹⁵ Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane* (4th ed, 2002), 54.

¹⁹⁶ *Derry v Peek* (1889) 14 App Cas 337, (*‘Derry v Peek’*). Davidson notes that the members of the Judicial Committee which handed down the decision in *Derry v Peek* were “all common lawyers”: Davidson, ‘The Equitable Remedy of Compensation’ (1982) 13 *MULR* 349, 362.

¹⁹⁷ Davidson, ‘The Equitable Remedy of Compensation’ (1982) 13 *MULR* 349, 368.

take the opportunity to articulate the circumstances in which equitable compensation can be awarded in Australia.

Even if there is nothing preventing courts from awarding compensation in equity for the breach of equitable duties other than of a fiduciary character, some may argue that there is no need for equity to move to cover any gap between its remedies and those available in tort.¹⁹⁸ There is, however, a difference between *extending* equity to provide a remedy hitherto unavailable and recognising a remedy known to equity but fallen into disuse. In those circumstances, the fact that such disuse has created an anomaly because remedies of similar (but not identical) scope have become, relatively recently, available at common law should be significantly more persuasive. Additionally, the purpose of the 'damages' remedy is compensatory in both equity and tort and the threshold requirements for each are broadly similar.

I respectfully submit that a renewal of the recognition that equity has the capacity to award compensation for breach of an equitable duty would be a significant improvement to the state of the law. However, it should be understood that compensation is a limited remedy which aims to compensate for the loss caused by *not* enforcing soft law; it does not give people what they *actually* wanted in the first place because estoppel is based upon relieving against unconscientious conduct rather than enforcing representations.¹⁹⁹ Furthermore, equitable compensation will only seldom be an available remedy, since its coverage is largely similar to that of damages for negligent misrepresentation.²⁰⁰ Importantly, though, the coverage of those remedies is not identical. There is no harm in equity extending to cover more ground in circumstances where soft law is being used as a regulatory tool more and more frequently.

Part IV: Non-judicial remedies

It is no great leap, in light of the previous sections of this paper, to conclude that judicial remedies for breach of soft law by public authorities are difficult to obtain in Australia. The reason for this is fundamental: soft law may be 'law' in the sense that it constitutes a norm that is usually followed but it is nonetheless 'soft' and as such is not directly enforceable by courts. The judicial remedies described above amount to work-arounds rather than indications that judicial remedies are applicable to breaches of soft law. Significant changes in established Australian legal doctrine will be required to change this state of affairs.

This is not to say that there is nothing that can be done to remedy loss caused by a public authority's departure from its own soft law; however, the available remedies are granted by consent rather than as of right. I propose to discuss two such remedies: investigation by the Ombudsman and payment of *ex gratia* compensation by the government.

¹⁹⁸ In *Harris v Digital Pulse*, Heydon JA specifically denied the proposition that an anomaly results from different remedies being available in equity and at law when he stated that "it is not irrational to maintain the existence of different remedies for different causes of action having different threshold requirements and different purposes" and "the resulting differences are not necessarily 'anomalous'": *Harris v Digital Pulse* (2003) 56 NSWLR 298, 404 (Heydon JA). His Honour was referring to the finding that equity, in the Australian jurisprudence at least, does not have the jurisdiction to award exemplary damages. Spigelman CJ concurred in this view, although Mason P dissented.

¹⁹⁹ *Waltons v Maher* (1988) 164 CLR 387, 404-5 (Mason CJ & Wilson J). See *Verwayen* (1990) 170 CLR 394, 501 (McHugh J); Michael Evans, *Equity and Trusts* (2nd ed, 2009) 259.

²⁰⁰ One potential area in which it may apply is where the inducement to rely on soft law to the plaintiff's detriment was not the result of negligence but of a deliberate act of an officer of the relevant public authority. See *New South Wales v Lepore* (2003) 212 CLR 511, ('Lepore').

Ombudsman

The office of the Ombudsman is one of Australia's "non-judicial accountability bodies"²⁰¹ and has been described as an element of the "integrity branch" of government.²⁰² The institution is Swedish in origin,²⁰³ but Spigelman CJ has noted that, as a genus, guardians of integrity in government have a strong connection to what Western scholars generally describe – inaccurately – as the "censorial" or "supervising" branch of the Chinese civil service,²⁰⁴ at least by analogy.²⁰⁵

Spigelman CJ did not regard the Ombudsman as a central feature of the integrity branch,²⁰⁶ in as much as the office's role was one of complaint handling.²⁰⁷

Complaint mechanisms are designed to improve the quality of decision-making and are more in the nature of the performance of an executive function, than an integrity function. Nevertheless, many complaint handling bodies, including Ombudsmen, do perform integrity functions, in the course of, or sometimes in addition to, dealing with individual complaints.

His Honour saw the integrity function as being exercised in the main through judicial review, which has the function of ensuring the legality of the actions of public authorities. By contrast, Professor Stuhmcke has argued that:²⁰⁸

[T]he more acute application of 'integrity review' in practice is diametrically opposed to the outcomes delivered by an adversarial system of dispute resolution. This is because, in the adversarial system, disputes arise precisely because there is a view by the litigant or complainant that the administrative decision was impaired and imperfect. Integrity review requires the opposite – that there is no originating dispute due to imperfection or incorrect administrative decision-makers. Indeed, effective integrity review means that administrative law will operate to ensure that government agency decision-making is perfect from its inception and that this is an ongoing state of government agency administrative decision-making.

Stuhmcke differentiates the reactive complaint handling role of Australian Ombudsmen from an active "system-fixing" role. While the first of these roles is the traditional focus of the Ombudsman's office, the latter is assuming an ever greater importance,²⁰⁹ with Ombudsmen making limited funds go further by commencing more investigations on their own motions and attempting to influence systemic change rather than redress individual grievances.²¹⁰ This active investigative function conforms more fully to the notion of integrity review.²¹¹

²⁰¹ McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 423. As to the Ombudsman's Constitutional position in the Australian government framework, see Creyke and McMillan, *Control of Government Action* (2nd ed, 2009), 268-73.

²⁰² J.J. Spigelman, 'The Integrity Branch of Government' (2004) 78(11) *Australian Law Journal* 724, 729; J.J. Spigelman, 'The Integrity Branch of Government - The First Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law' (Speech delivered at the AIAL National Lecture Series, Sydney, 29 April 2004). This concept has been picked up by others; see Anita Stuhmcke, 'Ombudsmen and Integrity Review' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008) 349, 349 (fn 6).

²⁰³ See Creyke and McMillan, *Control of Government Action* (2nd ed, 2009), 244.

²⁰⁴ Spigelman, 'The Integrity Branch of Government' (2004) 78 *ALJ* 724, 724.

²⁰⁵ J.J. Spigelman, 'Judicial Review and the Integrity Branch of Government' (Speech delivered at the World Jurist Association Congress, Shanghai, 8 September 2005).

²⁰⁶ cf Stuhmcke, 'Ombudsmen and Integrity Review' in Pearson, Harlow and Taggart (eds), *Administrative Law in a Changing State*, 349, 354. Whether or not the Ombudsman is "central" to integrity review, it is certainly "a central component of administrative justice": Carol Harlow and Richard Rawlings, *Law and Administration* (3rd ed, 2009) 480.

²⁰⁷ Spigelman, 'The Integrity Branch of Government' (2004) 78 *ALJ* 724, 729.

²⁰⁸ Stuhmcke, 'Ombudsmen and Integrity Review' in Pearson, Harlow and Taggart (eds), *Administrative Law in a Changing State*, 349, 353-4.

²⁰⁹ Stuhmcke, 'Ombudsmen and Integrity Review' in Pearson, Harlow and Taggart (eds), *Administrative Law in a Changing State*, 349, 365; John McMillan, 'Future Directions 2009 - The Ombudsman' (2010) 63 *AIAL forum* 13, 14-15.

²¹⁰ Creyke and McMillan, *Control of Government Action* (2nd ed, 2009), 253. The Commonwealth Ombudsman has an unreviewable discretion to refuse to investigate a complaint: *Ombudsman Act 1976* (Cth) s 6. In 2008, the

The Ombudsman's system-fixing role is relevant to an analysis of soft law because soft law remains a legally novel method of regulation. The fact that, as I have discussed above, courts have few current tools for dealing with soft law means that the Ombudsman, and other 'integrity branch' authorities,²¹² bear a responsibility for making sure that the steps required "to ensure that administrative law values are upheld" are properly understood.²¹³ In helping to define the norms in accordance with which activity is regulated, the Ombudsman fills a protective, rather than a remedial, role.

The practical limitations upon the scope of the Ombudsman's complaint-handling work should not distract attention from the fact that the office investigates many thousands of complaints every year²¹⁴ and, for each of these complainants, the Ombudsman endeavours to obtain a suitable remedy. Because it is situated outside the judicial branch of government, Australia's Constitutional separation of powers dictates that the Ombudsman's office cannot impose binding declarations of right on the public authorities which it investigates. At least one former Commonwealth Ombudsman does not view the incapacity to provide "traditional remedies"²¹⁵ as a problem, since he regards them as:²¹⁶

ill-adapted, for example to assist a person who is caught by an unintended anomaly in a legislative rule, who has fallen through the cracks of a government program, is confused about the advice received from an agency, is disadvantaged by an agency's delay in addressing a complaint, or is disabled by a physical or mental impairment in understanding or accessing his or her legal rights.

The Ombudsman, on the other hand, is able to assist in situations like these because the role of the office is restricted to recommending a course of action to the relevant public authority and is therefore not restricted to statements of legal right. 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.

Let us consider again the situation of Ms Tang. While exercises of power by Universities are not inevitably of a public nature, there are solid arguments in favour of that position.²¹⁷ One is that each jurisdiction's Ombudsman has jurisdiction over University decisions and conduct.²¹⁸ In Ms Tang's case, the *Ombudsman Act 2001* (Qld) empowered the Queensland Ombudsman to "investigate administrative actions of agencies",²¹⁹ including any entity (other than an individual) established either "for a public purpose" or "by government for a public purpose" under an Act.²²⁰ Griffith University falls within these statutory criteria, and Ms Tang could therefore have complained to the Ombudsman. While this (and like considerations) cannot be conclusive of whether a University's use of public power is otherwise legally significant, since the High Court of Australia has largely been slow to embrace foreign innovations which have extended the

Commonwealth Ombudsman's office investigated only one in every nine complaints: McMillan, 'Future Directions' (2010) 63 *AIAL forum* 13, 14.

²¹¹ Stuhmcke, 'Ombudsmen and Integrity Review' in Pearson, Harlow and Taggart (eds), *Administrative Law in a Changing State*, 349, 355.

²¹² An example is the Administrative Review Council, which is established under the *Administrative Appeals Tribunal Act 1975* (Cth). The ARC has published a recent report on soft law issues: Administrative Review Council, *Complex Regulation Report* (2008).

²¹³ McMillan, 'Future Directions' (2010) 63 *AIAL forum* 13, 18.

²¹⁴ McMillan, 'Future Directions' (2010) 63 *AIAL forum* 13, 14.

²¹⁵ Professor McMillan defines these as court or tribunal orders which quash erroneous decisions, substitute fresh decisions, restrain unlawful conduct, mandate lawful action or declare the law which is to be applied: McMillan, 'Future Directions' (2010) 63 *AIAL forum* 13, 17.

²¹⁶ McMillan, 'Future Directions' (2010) 63 *AIAL forum* 13, 17. Groves, too, doubts that having determinative powers would improve the effectiveness of the Ombudsman and suggests that they would cause the Ombudsman's office to foreshorten its investigative role in many instances: Matthew Groves, 'Ombudsmen's Jurisdiction in Prisons' (2002) 28 *Monash University Law Review* 181, 202. See also Creyke and McMillan, *Control of Government Action* (2nd ed, 2009), 265-6.

²¹⁷ Aronson, 'Private Bodies, Public Power' (2007) 35 *Fed LR* 1, 14-15.

²¹⁸ Aronson, 'Private Bodies, Public Power' (2007) 35 *Fed LR* 1, 14.

²¹⁹ *Ombudsman Act 2001* (Qld) s 6(b)(i). 'Agencies' were defined to include public authorities: *Ombudsman Act 2001* (Qld) s 8(1)(c).

²²⁰ *Ombudsman Act 2001* (Qld) s 9(1)(a).

coverage of judicial review's remedies²²¹ beyond public bodies to exercises of public power more generally,²²² Ms Tang may have been able to obtain a remedy through the Ombudsman's influence.

What remedy would she have been able to obtain? The Ombudsman does not have the jurisdiction to reverse the University's decision or to impose a decision of its own; indeed, the Ombudsman has no coercive remedial powers at all. However, the Ombudsman's office is, in practice, highly persuasive and uses its stature (and the fact that it is not involved in an adversarial process against administrative agencies)²²³ to obtain remedies, which may include "an apology, financial compensation, proper explanation, reconsideration of agency action, and expediting agency action".²²⁴ Clearly, some of these recommendatory remedial options would not work in circumstances where the Ombudsman was empowered only to make determinations.²²⁵

It is worth recalling that Ms Tang's contention was, essentially, that the University had promised her procedural fairness, through its soft law misconduct code, in coming to any decision to cancel her candidacy for a degree and that it had not fulfilled its promise in this regard. The Ombudsman may well have been of much greater assistance to her than the court could have been, even if it had taken a broader view of its capacity to review the University's decision, because a recommendation from the Ombudsman in a non-adversarial setting that the University abide by its promise would have done nothing to alter the substantive decision but would have ensured that it was made consistently with the values and principles of administrative law. Ultimately, this would also have avoided lengthy, expensive and (from Ms Tang's perspective, at least) fruitless litigation.

Ex gratia payments

One of the recommendations available to the Ombudsman is that a public authority provide financial compensation to an individual who has suffered loss as a result of defective administrative action, such as 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. There are legal limitations on the capacity of government to remedy injustice by spending from consolidated revenue,²²⁶ but Australia has administrative schemes which circumvent this problem. At Commonwealth level, there is a discretionary²²⁷ compensation mechanism under the *FMA Act*,²²⁸ known as the CDDA Scheme.²²⁹ One of the remedies available under that scheme (along with waiver of debt) is for a government agency to make an *ex gratia* payment to an applicant which it has "directly caused to experience detriment as a result

²²¹ It is commonplace for Australian courts to extend judicial review's principles, particularly that of procedural fairness, to some private institutions regardless of whether they exercise public power; see e.g. *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, ('*Forbes*'); cf *Hinkley v Star City Pty Ltd* [2010] NSWSC 1389, [114]-[183] (Ward J) ('*Hinkley v Star City*'). This extended coverage does not include judicial review's remedies: see generally Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 514-17.

²²² The High Court has recently left open "the question whether a party identified as 'an independent contractor' nevertheless may fall within the expression 'an officer of the Commonwealth' in s 75(v) [of the *Constitution*] in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been 'contracted out': *Plaintiff M61* (2010) 85 ALJR 133, 143 [51]. This seems to suggest that the Court is at least open to the possibility that the jurisdiction under s 75(v) attaches to an exercise of power rather than a certain individual.

²²³ Groves, 'Ombudsmen's Jurisdiction in Prisons' (2002) 28 *Monash ULR* 181, 202-3.

²²⁴ McMillan, 'Future Directions' (2010) 63 *AIAL forum* 13, 17.

²²⁵ Creyke and McMillan, *Control of Government Action* (2nd ed, 2009), 266.

²²⁶ *Auckland Harbour Board v R* [1924] AC 318, ('*Auckland Harbour*').

²²⁷ And unreviewable under the *ADJR Act*: *Smith v Oakenfull* (2004) 134 FCR 413.

²²⁸ *Financial Management and Accountability Act 1997* (Cth).

²²⁹ Commonwealth Department of Finance and Deregulation, 'The Scheme for Compensation for Detriment caused by Defective Administration', (*CDDA Scheme*). The CDDA Scheme is administered under the terms of Commonwealth Department of Finance and Deregulation, (2009) 'Discretionary Compensation and Waiver of Debt Mechanisms', (*Finance Circular No. 2009/09*). This circular replaced *Finance Circular No. 2006/05* (which in turn replaced *Finance Circular No. 2001/01*).

of defective administration” in circumstances “where there is no other viable avenue to provide redress”.²³⁰

The CDDA Scheme “is a valuable and important means of securing administrative justice in a complex system”,²³¹ and is particularly apt to dealing with situations in which people have relied on soft law but cannot enforce it. To the extent that agencies are reluctant to grant compensation under the scheme in circumstances where it would be justified, or otherwise to minimise the amount paid, the Ombudsman’s office has recently exercised its “system fixing” role by highlighting these deficiencies.²³²

Of course, the CDDA Scheme is limited to providing financial compensation. In circumstances where this is not appropriate (for example, it would not have been relevant to Ms Tang), the broader remedial focus of the Ombudsman is still able to achieve results.²³³

Conclusion

Soft law is highly and increasingly pervasive in Australia, as in other jurisdictions. It is a form of regulation which has become popular for reasons which are readily understandable. It is easily made, and changed, and requires no legislative oversight. While it is true that the *LIA* states that a legislative instrument is “not enforceable by or against the Commonwealth, or by or against any other person or body, unless the instrument is registered” in the Federal Register of Legislative Instruments,²³⁴ this may not be a practical issue where a majority of people *think* that an instrument is enforceable. This is why soft law is referred to as ‘law’; it has a practical effect which is very much like primary or secondary legislation. The problem is that this effect is not symmetrical. In other words, soft law only has a ‘law-like’ effect on individuals, but cannot be enforced against public authorities as ‘hard law’ could.

This state of affairs means that the available judicial remedies for breach of soft law by public authorities are fairly unsatisfying. Private law remedies are limited to circumstances in which the soft law instrument can either be understood as a negligent misrepresentation or as an inducement giving rise to an estoppel which is able to be remedied with an order for equitable compensation. These circumstances are, to say the least, infrequent. Public law is similarly limited, because its remedies attach only to administrative action which discloses a jurisdictional error in Australia. Unlike their UK counterparts, Australian courts have refused to provide a substantive judicial review remedy for disappointment of a legitimate expectation, meaning that the most one can say of soft law in Australia is that it may in some circumstances constitute a mandatory consideration to be taken into account by a decision-maker. The remedy for breach of this requirement would never be any more than procedural in nature.

It follows that the most effective remedies for breach of soft law by public authorities are also ‘soft’, in the sense that they are not determinative but are able to be obtained through influence and consent. The role of the Ombudsman in this process is central and serves to emphasise the role that that institution has in ensuring that administrative justice is done in Australia.

²³⁰ CDDA Scheme.

²³¹ McMillan, ‘Future Directions’ (2010) 63 *AIAL forum* 13, 17.

²³² See Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration*, Investigation Report No 11/2009 (2009) (*Putting Things Right*).

²³³ In 2007/08, the Commonwealth Ombudsman recommended a remedy of some sort in 75% of the cases which it investigated.

²³⁴ *LIA 2003* (Cth) s 31. See also Argument, ‘Delegated Legislation’ in Groves and Lee (eds), *Australian Administrative Law*, 134, 138.

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