Australian public authorities which breach their soft law : remedies and suggested reforms

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Australian Public Authorities which Breach their Soft Law: Remedies and Suggested Reforms

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This thesis considers the phenomenon of soft law. The very name 'soft law' sounds like an oxymoron: if law is soft, is it not therefore prevented from being law? There is some force to that objection, but only in a purely formalist sense. More practically, lawyers have understood for at least seventy years that public authorities are able to issue certain communications in a way that causes them to be treated like law, even though these are neither legislation nor subordinate legislation. Importantly for soft law as a regulatory tool, people tend to treat soft law as binding even though public authorities know that it is not. It follows that soft law's 'binding' effects do not apply equally between the public authority and those to whom it is directed. Consequently, soft law is both highly effective as a means of regulation, and inherently risky for those who are regulated by it. Much has been written about using soft law in regulation, but that is not the concern of this thesis.

Soft law plays a vital part in administrative law. It manages the tension between decision-makers having the flexibility to decide individual matters on their merits on one hand, and, on the other, the expectation that like issues will broadly be decided consistently with each other. That tension is central to the rule of law. Soft law cannot resolve the tension between flexibility and consistently, but it does provide a mechanism which can guide decision-makers towards consistency without binding them to certain outcomes.

This thesis examines a number of legal approaches and remedies to the issue of soft law and concludes that the court-based responses to this problem are inadequate and that the 'soft' controls on soft law are effective.

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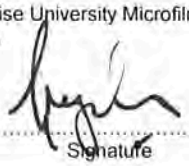

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Date 24 July 2013

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Mark Aronson taught me administrative law as an undergraduate in 2004; I was captivated. I have since learned, through my own teaching experience, that administrative law is not considered an inherently fascinating subject in the eyes of most law students (although I fail to see why). My captivation was, however, easily explained by the fact that Mark is, like most great thinkers, a great teacher. Since that first course and an elective course, through an undergraduate thesis and several articles on which Mark offered me the benefit of his guidance, our relationship has evolved, but Mark still teaches me, and I still learn from him, almost constantly. Mark's supervision of this thesis is in many ways nothing more than an extension of the interest he already took in my academic pursuits. There is little I can say about Mark Aronson that has not been said before. He is a demanding taskmaster but an incredibly generous one. His intellect is staggering but he is patient with those, like me, who cannot quite move at his blinding conceptual pace. Sometimes, it has taken me months to figure out the meaning of a comment that Mark has made but he never betrays impatience at my intellectual tardiness. A senior faculty member at UNSW remarked to me when I was still an undergraduate that I should appreciate how high a compliment it was that Mark was fond of me and interested in my work. I am now aware of that good fortune, although I think it also sells Mark a little

short: I do not doubt that he would have been every bit as generous to me if he found me personally odious and dull (and I'm reasonably sure that he would have told me by now if he did). At any rate, Mark's involvement with me has been a constant source of pleasure to me over many years and it is no exaggeration to say that I would not have achieved a fraction of what I have without his help.

Finally, and most importantly, I wish to thank my family. My parents, Lyn and Brian, have always supported me and I owe them immense thanks. My father-in-law, Stephen Smith, has valiantly faked an interest in areas of law far beyond the scope of the Western Australian *Criminal Code* for my benefit (and, more importantly, has demanded no reciprocity on my part) and I appreciate his consistent efforts in this regard. My greatest debt of gratitude is owed to my beloved wife, Rachael, and my children, Emily and James. They have been patient with my regular and lengthy absences and semi-absences (when I was physically present but mentally wrestling with thesis issues) and have shown me unstinting love and support. This thesis is for them.[1]

1 When she was much younger, my daughter was impressed that Mark Aronson, Bruce Dyer and Matthew Groves had written a book "for me", namely my well-thumbed copy of *Judicial Review of Administrative Action* (3rd ed, 2004). Rather than attempt to explain economies of scale in publishing, Matthew advised me to tell her that I was writing my thesis for *her* (and her brother). As is my usual practice, I followed his wise counsel and now deliver on my promise.

Abstract

This thesis considers the phenomenon of soft law. The very name 'soft law' sounds like an oxymoron: if law is soft, is it not therefore prevented from being law? There is some force to that objection, but only in a purely formalist sense. More practically, lawyers have understood for at least seventy years that public authorities are able to issue certain communications in a way that causes them to be *treated* like law, even though these are neither legislation nor subordinate legislation. Importantly for soft law as a regulatory tool, people tend to treat soft law as binding even though public authorities know that it is not. It follows that soft law's 'binding' effects do not apply equally between the public authority and those to whom it is directed. Consequently, soft law is both highly effective as a means of regulation, and inherently risky for those who are regulated by it. Much has been written about using soft law in regulation, but that is not the concern of this thesis.

Soft law plays a vital part in administrative law. It manages the tension between decision-makers having the flexibility to decide individual matters on their merits on one hand, and, on the other, the expectation that like issues will broadly be decided consistently with each other. That tension is central to the rule of law. Soft law cannot resolve the tension between flexibility and consistency, but it does provide a mechanism which can guide decision-makers towards consistency without binding them to certain outcomes. Chapter 2 deals extensively with issues that arise from soft law's role in managing this tension.

The focus of the remaining chapters is on people who are regulated by soft law and, more specifically, what happens when a public authority breaches its own soft law upon which people have relied. Where people in that circumstance suffer loss as a consequence of their reliance on soft law, this thesis asks what remedies might lie to assist them. Chapter 3 looks at whether judicial review can be extended to cover exercises of soft law, either in order to grant a procedural remedy or to compel the public authority to perform in substance what its soft law had promised. It concludes that other countries, such as the UK, provide some hope for people who have relied upon soft law to their detriment. Australian jurisprudence, by contrast, offers little scope for a person so affected to obtain a judicial review remedy, either procedural or substantive. The most that the Australian cases have offered is that soft law is not meaningless, even where it is unenforceable.

Chapter 4 examines the capacity to obtain a money remedy based upon establishing invalidity. This could either be through a damages remedy being included in judicial review for *ultra vires* acts or in restitution. Public law damages is a remedy whose time has not yet come. It has been firmly rejected in Australian courts and, in the UK, a Law Commission recommendation in favour of such a remedy was firmly rejected by the government. Restitution against public authorities has, by contrast, been on a firm footing in the UK for twenty years. Australian courts are yet to adopt the English jurisprudence formally, but there is little stopping them from doing so.

Chapter 5 looks at modes of compensation which are not based upon a finding of invalidity, namely tort and equity. Chapter 5 looks at two examples of how this might occur. The first asks whether and when public authorities might owe a duty of care to come to the aid of an individual, and what role a soft law set of instructions might play in deciding such a matter. It is nothing new that tort liability applies to public authorities "as nearly as possible" in the same way that it does to individuals. The key issue here is when a public authority might be required to do more than would be expected of an individual. The second example looks at whether equity has the capacity to provide a compensatory remedy where someone has suffered loss as a result of relying on soft law.

As with previous chapters, Chapter 5 concludes that the likelihood of an Australian court providing a remedy in either tort or equity is slender. Chapter 6 argues, however, that challenges to public authorities' use of soft law outside the scope of the courts are most likely to provide suitable remedies. In particular, the flexibility of the Ombudsman has been used to significant effect in obtaining remedies where people have relied to their detriment on soft law. The conclusion is that, just as the court-based responses to this problem are inadequate, the 'soft' controls on soft law are effective.

Chapter One

Introduction

> The expression 'soft law' is, at first sight, a non sequitur. Law is either 'hard' – that is, enforceable, ultimately by the state – or it is not law. A norm that lacks formal consequences is foreign to the lexicon applied to describe a domestic legal system. Nonetheless, … it may be the paucity of our legal lexicon, rather than the expression itself, which is deficient.[1]

Some norms have consequences which are not formal but remain powerful nonetheless. Consider an agency's formal statement of how it will interpret certain legislation;[2] or a Department's guideline as to how it will interpret certain ordinary English words which appear in legislative instruments.[3] Consider further a revenue authority, which implemented guidelines designed to collect more than the tax presently owed, in order to prevent the taxpayer (a building society) from receiving a windfall contrary to legislation setting limits to the authority's powers.[4] For a variety of reasons, instruments like those described above are effective at compelling compliance, from the legally naïve or unwary, but also from relatively sophisticated parties.[5] There can be little doubt that soft law has consequences and that they are significant.

Are these consequences formal? In one sense, they are not: soft law is not directly enforceable in court proceedings. This is the orthodox understanding of the effect of soft law. However, there are two ways in which soft law has effects which cannot be dismissed as merely informal. The first is that courts take notice of soft law. It is nearly twenty years since French and Drummond JJ noted in proceedings before the Full Federal Court that "the proposition that government policy cannot bind [a public authority] does not imply that the policy can be ignored".[6] Soft law, particularly in the form of policy, can be effective in delivering the connected benefits of predictability and consistency. These are issues closely connected to the operation of the rule of law. The operation of the law should be understood prior to decisions, either administrative or judicial, being made. Likewise, arbitrary decision-making is opposed to the rule of law. Soft law is a recognised way of ensuring consistency between like sets of facts.[7] Although Australian courts do not defer to administrative decision-makers

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1 R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, 2008) 377, 378.

2 For example, precedential views provided by the ATO represent the ATO's interpretation of any laws administered by the Commissioner of Taxation: Australian Taxation Office, *ATO Practice Statement Law Administration PS LA 2003/3* (2003), [1].

3 A reference to the annual "turnover" of a business appeared in the requirements for receiving a visa in Subclass 892 of Schedule 2 to the *Migration Regulations 1991* (Cth): *Cheng v Minister for Immigration and Citizenship* [2013] FCA 405, (Cowdroy J, '*Cheng v MIAC*').

4 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, ('*Woolwich*').

5 See eg Ibid; *R (Davies) v The Commissioners for Her Majesty's Revenue and Customs* [2011] 1 WLR 2625, ('*Davies v HMRC*').

6 *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 206 ('*MILGEA v Gray*').

7 See E Johnson, 'Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review?' (2013) 72 *AIAL Forum* 50.

on any legal issue,[8] the Administrative Appeals Tribunal (AAT) has recognised since the earliest days of its existence that, in the exercise of its *de novo* merits review jurisdiction, it is generally better to apply a lawful administrative policy in reaching a decision on review[9] than to risk what Brennan J characterised as the "inelegance" of inconsistency.[10]

The second 'formal' effect of soft law is connected to the first: people will be subjected to real and legally effective consequences as a result of the operation of soft law. This may be, as discussed above, because soft law is given something close to normative operation by tribunals and courts. It may also be because people structure their dealings in reliance upon soft law which either undergoes a change[11] or is subsequently interpreted in an unexpected way.[12] Consequences which materially affect individuals are in no way reduced or removed because they are not characterised as legally 'formal'.

Soft law can also have effects which are harder to trace to precise outcomes but which are nevertheless significant. For example, soft law is frequently used as a method of confining the discretion of administrative decision-makers. In part, this is designed to bring consistency to those decisions, but soft law is also used as a method of ensuring that discretionary power is exercised accountably. Chapter 2 attempts to deal with these issues by looking at what soft law is and how it is used within domestic legal settings.[13]

This thesis does not, however, have the definition and categorisation of soft law as its only – or even its main – concern. Chapters 3, 4 , 5 and 6 each deal with the possibility that people who have been exposed to soft law regulation, and particularly those who have relied on soft law only to suffer detriment when it is breached, altered or removed, might be able to obtain legal redress for their losses.

Judicial review is considered in chapter 3 as a potential source of remedies for people adversely affected by relying on soft law. In the Australian context, it is an ill fit for two main reasons. The first is that judicial review's remedies attach to invalidity and soft law does not give them any purchase because it operates outside the valid/invalid dichotomy. The second is that judicial review's remedies, as they apply in Australia, are procedural in nature and tend to provide no greater benefit to an applicant than the opportunity to have the decision-maker remake the decision according to law.

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8 The High Court rejected *Chevron* deference in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151-4 [40]-[45] (Gleeson CJ, Gummow, Kirby & Hayne JJ) ('*Enfield Corporation*'). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, Pyrmont, NSW, 2013) [4.60]; cf P Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, 2012).

9 *Re Drake and Minister for Immigration and Ethnic Affairs (No2)* (1979) 2 ALD 634, ('*Drake (No2)*').

10 His Honour's point is illustrated by the unfortunate facts of *Segal v Waverley Council* (2005) 64 NSWLR 177, ('*Segal*').

11 See eg *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 96; *HTV Ltd v Price Commission* [1976] ICR 170, ('*HTV*').

12 See eg *Davies v HMRC* [2011] 1 WLR 2625.

13 Soft law is already well understood in international legal scholarship, at least in part because the comparatively limited scope of primary legislation in international law has caused soft law to be an important and effective method of regulation; see eg O Dilling, M Herberg and G Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy* (Hart Publishing, Oxford, 2011); and the essays in D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Washington, DC, 2000).

One of the key battlegrounds in common law judicial review over the last two decades – whether or not courts can or should give substantive remedies to otherwise successful claimants in judicial review matters – can be located within the broader debate as to whether every problem must have a court-centred solution. The affirmative response to this proposition is typified by the *dictum* of Lord Bingham in *X v Bedfordshire CC*:[14]

> It is not suggested that the child could obtain, or ever could have obtained, any redress of any kind against the psychiatrist save by bringing this action. If she can make good her complaints (a vital condition, which I forbear constantly to repeat), it would require very potent considerations of public policy, which do not in my view exist here, to override *the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied*.

While Lord Bingham's approach has not been followed uncritically in the UK,[15] it is undoubtedly the case that the UK has embraced a broad judicial capacity to grant remedies for conspicuous unfairness amounting to an abuse of power.[16] This is a path down which the UK has been followed by various common law countries, with the notable exception of Australia.[17] The Australian reluctance to accept the proposition that every wrong must have a (legal) remedy is, as always, draped in the *Constitution*,[18] but to a certain extent this feels like more than just a formalist excuse to stop an unwelcome debate before it starts.[19] It is disingenuous to contend that the Australian judiciary as a whole (or at least a majority of the High Court) does not have a genuine concern about courts being invited to remedy unfairness which is "conspicuous" (to whom?); or to intervene in matters featuring a "potentially unjust decision"[20] (on what standard?). The orthodox judicial view in Australia is that such broad judicial discretion is apt to be misused, taking individual judges with the best motivations to prevent injustice outside the limits of the acceptable judicial role. There is no compelling evidence that this is part of a political agenda.[21] But does it amount to sacrificing justice on the altar of consistency? Not at all, once we are prepared to accept that sometimes serious issues will be exposed in legal proceedings which are then remedied outside those proceedings.

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14 *X and others (minors) v Bedfordshire County Council* [1995] 2 AC 633, 663 (Sir Thomas Bingham MR) (emphasis added) ('*X v Bedfordshire CC*').

15 See eg Lord Hoffmann's extra-curial remarks: "I yield to no one in my admiration for Lord Bingham, but I am bound to say that is as question-begging a statement as you could find. By what procedure should they be remedied; what should the remedy be; at whose expense should they be remedied? Should the law provide that every wrong should be remedied from the public purse? Because we are lawyers, does that mean that an action for damages is obviously the only right way of remedying a wrong?": L Hoffmann, 'Reforming the Law of Public Authority Negligence' (Speech delivered at the Bar Council Law Reform Lecture, London, UK, 17 November 2009) [20].

16 *R v Inland Revenue Commissioners; ex parte Unilever plc* [1996] STC 681, 695 (Simon Brown LJ) ('*ex parte Unilever*'); *Secretary of State for the Home Department; ex parte Zeqiri* [2002] Imm AR 296, [44] (Lord Hoffmann) ('*Home Office v Zeqiri*').

17 K Stern, 'Substantive Fairness in UK and Australian Law' (2007) 29 *Australian Bar Review* 266, 266.

18 As to which, see M Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1.

19 Cf M Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 27.

20 M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 20. Taggart was referring to *Griffith University v Tang* (2005) 221 CLR 99, ('*Tang*'). I argue later in this thesis that, as regrettable as the High Court's reasoning may have been, the outcome in *Tang* was undeniably correct.

21 Although others express doubt on this point. For example, in discussing the Australian High Court's embrace of legalism (or a "parody" thereof) and its "deliberate rejection both of the 'activist' traits – legal and political – of the Mason court" and the international rights jurisprudence that it is alleged to have "embraced", Tom Poole concluded that "no-one is remotely convinced that any of it is apolitical": T Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, Oxford, 2008) 15, 33.

The discussion about substantive remedies in judicial review continues into chapter 4, which considers two options through which people who have relied on soft law may be able to obtain monetary compensation. The first of these is to create a public law damages remedy, or alternatively to create tort liability for invalid administrative action. Even in the UK, this is considered a remedy beyond the proper scope of judicial review, as the responses (ranging from merely sceptical to highly antagonistic) to the Law Commission's *Administrative Redress* consultation paper demonstrated.[22] In Australia, too, the case against public law damages is very strong, not least because it would be highly likely to make the existing judicial review remedies otiose. However, chapter 4 contains a recommendation for reform, through the creation of a statutory 'administrative compensation order' (ACO). Such an order would be discretionary,[23] so as to make it consistent with the existing judicial review remedies without overwhelming them. It would require that a justification for compensation be made out before the court would have the discretion to award a monetary payment.[24] It could be awarded for conduct which would otherwise attract an equitable remedy.[25] It would require an applicant to particularise and quantify his or her loss and to establish causation to the satisfaction of the court.[26] It would be compensatory only, not punitive or exemplary. It would be entirely residual, with the discretion to make an ACO being exercised where the applicant had established in the same proceedings the basis for the compensation sought. The applicant would be required to make an irrevocable election at the time of commencing proceedings between seeking an ACO or damages at common law, if they might be available; the appellant could not seek both forms of redress. The first part of chapter 4 concludes by examining some principles which would guide the application of the ACO.

The second substantive remedy considered in chapter 4 is restitution for unjust enrichment where a public authority has made an *ultra vires* demand through the mechanism of a soft law instrument. This part looks at the English case of *Woolwich*[27] and, working through the elements of a claim for restitution, concludes that an *ultra vires* demand from a public authority is a public event to which public law can respond.[28] This does not require that Australia should follow the Canadian model,[29] which links the "public law of restitution"[30] directly to the Constitution. We have not done so up to

22 Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Report No 322, (2010).

23 At least, to a far greater extent than is the case for common law damages; the ACO would have more in common with the remedy of equitable compensation.

24 This need not be on the usual administrative law basis of invalidity but could be for mere unlawfulness, although in practice, even if no other remedy were suitable but the relevant administrative action was invalid, the applicant should be able to obtain a declaration to that effect.

25 A court would be likely to refuse an ACO (or award compensation in a nominal sum only) in circumstances where equitable compensation would not be available.

26 It would be both discretionary and small, and in that sense similar to the damages remedy which is available for the breach of Convention rights under the *Human Rights Act 1998* (UK) s 8. See also the general comments about the interplay between rights and administrative law in T Hickman, *Public Law after the Human Rights Act* (Hart, Oxford, 2010) 224-5.

27 *Woolwich* [1993] AC 70. See the essays in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, Oxford, 2013).

28 See R Williams, *Unjust Enrichment and Public Law: a Comparative Study of England, France and the EU* (Hart, Oxford, 2010); R Williams, 'Overpaid Taxes: A Hybrid Public and Private Approach' in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, Oxford, 2013) 23.

29 *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3, ('*Kingstreet Investments*').

30 R Chambers, 'Restitution of Overpaid Tax in Canada' in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, Oxford, 2013) 303, 303.

now.[31] Restitution will be an effective remedy where a public authority is unjustly enriched due to payment on an *ultra vires* demand, albeit probably not in a wide range of cases.

Compensation generally has nothing to do with proving invalidity in either tort or equity, and chapter 5 examines whether remedies in these disciplines have the capacity to assist people who have suffered loss as a result of having relied on soft law. The first part of the chapter deals with important threshold questions regarding whether public authorities can ever be liable in tort, whether they can be liable where private individuals would not be liable, the particular difficulties in proposing public authority liability for pure omissions, and whether public authorities can be liable in equity where an estoppel is raised.

The balance of chapter 5 covers two main issues. The first of these is whether and how soft law might create a common law duty of care, how it would be used to do so, and how knowledge of the terms of the soft law might affect the previous answers.[32] The second examines the importance of a plaintiff's subjective reliance on a soft law instrument, both as a matter of tort and of equity. A public authority will be held liable in negligence for loss caused by the failure to apply a soft law instrument if the soft law in question includes a misrepresentation that the authority would act in accordance with it and an individual has relied reasonably on that representation to his or her detriment. However, this ground of claim is difficult to make out, reflecting the traditional reluctance of the common law to attach a duty of care to words rather than acts. At first blush, equity is even less promising, since the usual remedy where a person has relied to his or her detriment on a non-contractual statement or instrument is promissory estoppel. Although the UK allowed the creation of a doctrine of public law estoppel,[33] Australia has been at best lukewarm on the issue and there has been no judicial consideration of the subject since 1990.[34] It is generally held that an estoppel will not be enforced where it would cause a public authority either to act *ultra vires* or to fetter its statutory discretion.[35] However, I suggest in chapter 5[36] that it is possible to harness the "remedial flexibility [which] is a characteristic of equity jurisprudence"[37] to fashion another response. This is possible in as much as an estoppel is not a remedy but a circumstance which allows an equity to be granted. This is usually in the form of an order to hold the representor to the substance of his or her representation but there

31 Cf PW Hogg, PJ Monahan and WK Wright, *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) 353 (n 61).

32 This part makes extensive use of the facts in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, ('*Stuart*').

33 It was absorbed into the public law doctrine of substantive enforcement of legitimate expectations after the decision of the House of Lords in *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2003] 1 WLR 348, ('*Reprotech*'). See G Weeks, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in M Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2013) (forthcoming).

34 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, (Mason CJ) ('*Quin*'); *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, (Gummow J) ('*Kurtovic*').

35 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610, ('*Maritime Electric*'); *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416, ('*Southend-on-Sea*').

36 See also G Weeks, 'Estoppel and Public Authorities: Examining the Case for an Equitable Remedy' (2010) 4 *Journal of Equity* 247.

37 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 304 [4] (Spigelman CJ) ('*Harris v Digital Pulse*').

is no need that it must be if that is not the 'minimum equity'.[38] It could also be an order for equitable compensation, which is a remedy that has fallen into disuse, but need not have done.

However, chapter 5's conclusion, which is inescapable, is that, although private law remedies are in some circumstances available for the failure of public authorities to adhere to their own soft law, they are severely limited, both in scope and regularity of occurrence. These remedies provide inadequate protection for individuals who have acted on the strength of soft law and it is likely that only a statutory remedy (like the ACO mooted in chapter 4) will overcome the issues created by the existing bodies of legal and equitable doctrine.

In many ways, chapter 6 is an appropriate chapter with which to end this thesis, because it concludes that the most effective remedies to soft law issues are, themselves, soft. The non-judicial remedies considered in chapter 6 are intervention by the Ombudsman and the various discretionary compensation schemes provided for by government. The Ombudsman is a consistently underestimated institution, often on the basis that it lacks the capacity to make binding declarations of right and is therefore a "toothless tiger".[39] However, the Ombudsman has "a potential for *systemic* impact beyond any court's capacity"[40] and is able to use it to effect change where soft law is being misused by public authorities. Ombudsmen are flexible and can recommend a wide variety of remedial action, including things that are beyond the capacity of the courts. Furthermore, ombudsmen's recommendations are usually followed by government and are most unlikely to be the subject of judicial review proceedings in Australia.[41] Either by examining the use of soft law at a systemic level or by investigating an individual complaint, ombudsmen are more likely than courts to obtain a satisfactory result.

One remedy which the Ombudsman might well recommend where a person has relied on soft law to his or her detriment is a payment under a discretionary scheme.[42] These schemes are designed to allow government to make payments to deserving parties without running afoul of the legal limitations

38 "Equitable estoppel … does not operate by establishing an assumed state of affairs. Unlike an estoppel *in pais*, an equitable estoppel is a source of legal obligation. It is not enforceable against the party estopped because a cause of action or ground of defence would arise on an assumed state of affairs; it is the *source of a legal obligation arising on an actual state of affairs.* An equitable estoppel is binding in conscience on the party estopped, and it is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the assumption or expectation which he has been induced to adopt. Perhaps equitable estoppel is more accurately described as an equity created by estoppel.": *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 416 (Brennan J) (emphasis added) ('*Waltons v Maher*'). See A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805, 821.

39 R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (3rd ed, LexisNexis, 2012) 217.

40 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.90] (emphasis added).

41 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423, 427.

42 The schemes are each set out in the Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09: Discretionary Compensation and Waiver of Debt Mechanisms*' (2009/09, 2009). This circular replaced the Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2006/05: Discretionary Compensation Mechanisms*' (2006/05, 2006). It had in turn replaced the Commonwealth Department of Finance and Administration, '*Finance Circular No. 2001/01: Commonwealth Compensation 'Schemes', Debt Waiver and Write-Offs*' (2001/01, 2001). The CDDA Scheme was originally established by the Commonwealth Department of Finance, '*Department of Finance Estimates Memorandum*' (1995/4, 1995).

on the capacity of government to remedy injustice by spending from consolidated revenue.[43] At Commonwealth level, there are discretionary mechanisms under the *Financial Management and Accountability Act 1997* (Cth) for the Finance Minister to authorise compensatory 'act of grace' payments[44] and to waive[45] or write off debts.[46] Another two non-legislative remedial schemes rely on the Commonwealth's executive powers under s 61 of the *Constitution* and are exercised by individual portfolio Ministers or their delegates. The first provides for *ex gratia* payments, which are designed as a remedy of last resort which is able to be made quickly and flexibly, without the criteria which operate under the other discretionary schemes. The second is known as the Scheme for Compensation for Detriment Caused by Defective Administration (CDDA Scheme), under which a government agency may make a payment to an applicant which it has "directly caused to experience detriment as a result of defective administration" in circumstances where the agency bears no legal liability and "there is no other viable avenue to provide redress".[47] These schemes are all intended to be used to remedy *exceptional* losses, rather than merely as a method of expenditure for providing compensation which has not been envisaged by the relevant statute.

Given that payments under these discretionary schemes generally require that an applicant have no other legal rights which s/he could exercise in order to obtain redress, they are in many ways the ideal response to the issues thrown up by the use of soft law. The ambiguous nature of soft law as law/non-law is precisely what makes it attractive as a regulatory instrument. But should Australian public authorities be able to rely on such a convenient regulatory device without accepting some responsibility for adverse impact suffered by those who have been influenced to their detriment by soft law? The following chapters look at this issue, and in particular what remedies might be available for breach of soft law.

43 *Auckland Harbour Board v R* [1924] AC 318, ('*Auckland Harbour*'). See also *Brown v West* (1990) 169 CLR 195; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, ('*BAT v WA*'); *Combet v Commonwealth of Australia* (2005) 224 CLR 494, ('*Combet v The Commonwealth*'); *The State of Victoria v The Commonwealth of Australia and Hayden* (1975) 134 CLR 338, ('*The AAP Case*').

44 *Financial Management and Accountability Act 1997* (Cth) s 33; *Public Governance, Performance and Accountability Act 2013* (Cth) s 65.

45 *Financial Management and Accountability Act 1997* (Cth) s 34.

46 *FMA Act 1997* (Cth) s 47.

47 Commonwealth Department of Finance and Deregulation, '*The Scheme for Compensation for Detriment caused by Defective Administration*'.

Chapter Two

The Rise of Soft Law: Definitions and Issues

Introduction

This chapter will introduce the concept of soft law and will consider both previous analyses of it as a phenomenon in domestic law and some of the doctrinal issues which it raises. It will look at what soft law is, what it is intended to do, and what happens when it is used. The final section considers two particular examples of soft law in regulatory regimes.

This thesis will look at soft law in a purely domestic context. Although it is true that there are many different approaches to considering soft law,[1] most of the academic writing is confined to its roles in international law.[2] It is true that soft law has often succeeded in attracting political consensus in international relations where harder forms of regulation would likely have been resisted.[3] However, the role, meaning and very existence of international soft law are all still contested. Blutman describes soft law, in its international senses, as a "a vague, redundant and unfounded notion, [whose] use may not be justified and can hardly withstand Ockham's razor".[4] His view, essentially, is that soft law is a mere 'label', which must be looked behind in order to yield meaning, but which

1 As is amply illustrated by the variety of topics covered by the papers presented at a recent international conference: International Symposium on Practice and Theory of Soft Law, Soft Law Centre, Peking University Law School, 9 July 2011.

2 See eg CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850; E Brown Weiss, 'Conclusions: Understanding Compliance with Soft Law' in D Shelton (ed), *Commitment and Compliance* (2000) 535; M 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); D Shelton, 'Law, Non-Law and the Problem of 'Soft Law'' in D Shelton (ed), *Commitment and Compliance* (2000) 1; K Anderson, 'Testing the Model Soft Law Approach to International Harmonisation: a Case-Study examining the UNCITRAL Model Law on Cross-Border Insolvency' (2004) 23 *Australian Yearbook of International Law* 1; A Tollenaar, 'Soft Law, Policy Rules and the Quality of Administrative Decision-Making', *The Challenges of Soft Law* (The Commercial Press, Peking, 2008) 263; I Gontcharov, *Ethics Creep, Soft Law and Positivism: The Problems of Regulatory Innovation in the Governance of Human Subjects Research* (Osgoode Hall Law School Research Paper 2009), http://ssrn.com/paper=1481992; AJ Ziaja, 'Beyond Soft Law? An Assessment of International Labour Organisation Freedom of Association Complaints as a Means to Protect Collective Bargaining Rights in the United States' (2009) 9 *Global Jurist* 1; T Meyer, 'Soft Law as Delegation' (2009) 32 *Fordham International Law Journal* 888; V Sundra-Karean, 'In Defense of Soft Law and Public-Private Initiatives: A Means to an End? — The Malaysian Case' (2011) 12 *Theoretical Inquiries in Law* 465; R Hooghiemstra and H van Ees, 'Uniformity as Response to Soft Law: Evidence from Compliance and Non-Compliance with the Dutch Corporate Governance Code' (2011) 5 *Regulation and Governance* 480; O Stefan, 'Hybridity before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law' (2012) 37 *European Law Review* 49; C Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge University Press, Cambridge, 2012); O Stefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects' (2012) 75 *Modern Law Review* 879.

3 M Cini, 'From Soft Law to Hard Law?' (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.

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

constitutes a 'trap' for the unwary. Dilling, Herberg and Winter, on the other hand, point to the fact that soft law has an undeniable effect:[5]

> It is important to note that transnational informal norms not only influence the internal formal law of states, but also the international formal law of state interactions. For instance, informal standards established by bureaucracies or expert networks operating under the umbrella of international organisations may change the agenda as officially defined by the Member States … Furthermore, informal standards can obtain a quasi-binding status in the framework of international treaties … [for example, which] provide a basis for the justification of trade restrictions, and thus impact indirectly on the internal legal order of states …

All of these observations are worth heeding, and indeed the first part of this chapter will look behind the 'labels' to examine the issue of what soft law is. However, it will not look at soft law as it applies in the international law context; I leave that to others (such as those cited above). This thesis will look only at soft law as it applies within domestic legal systems.

Another burgeoning academic field is the study of regulation. For reasons that will be considered below, soft law can be a highly effective form of regulation and much has been written about using soft law as a means of regulating conduct. In a little over a decade, there were two prominent Australian considerations of soft law, between which the concept of domestic soft law seemed to 'sleep'.[6] Both focused predominantly on soft law as a regulatory instrument. The first of these was the Report of the Commonwealth Interdepartmental Committee on Quasi-regulation (IDC),[7] which reported in December 1997. The second was the report by the Administrative Review Council (ARC) in November 2008 on *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*.[8] The reference to the IDC was established as a result of concerns raised in the report in November 1996 of the Small Business Deregulation Task Force to then-Prime Minister John Howard.[9] The ARC's reference followed up on the report of a later taskforce inquiry, that of the Taskforce on Reducing Regulatory Burdens on Business.[10] The reference to the ARC was not intended to result in a report which would cover the same ground as the Grey-Letter Law Report.

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5 O Dilling, M Herberg and G Winter, 'Exploring Transnational Administrative Rule-Making' in O Dilling, M Herberg and G Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy* (Hart Publishing, Oxford, 2011) 1, 5.

6 For the purpose of awaking soft law from its slumber, Creyke and McMillan cast Professor Aronson in the role of Prince Charming: R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 377. This analogy is not wholly novel; see M Kirby, 'Professor Mark Aronson: Doyen of Australian Administrative Law' (2006) 50 *AIAL Forum* 4, 6.

7 Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation*, (1997). Hereafter, the 'Grey-Letter Law Report'.

8 Administrative Review Council, *Complex Regulation Report* (2008). The *Grey-Letter Law Report* was commissioned in the first year of the Howard Government. In a neat piece of symmetry, the reference to the Administrative Review Council (ARC) from Commonwealth Attorney-General Phillip Ruddock which led to the Complex Regulation Report came just before the start of the final year of the Howard Government: Administrative Review Council, *Complex Regulation Report* (2008), v.

9 Recommendation 57 of the Small Business Deregulation Task Force, *Time for Business: Report of the Small Business Deregulation Task Force*, (1996). The Task Force recommended that "proposals to introduce quasi-regulation be subject to cost-benefit analysis, for instance in the form of a Regulation Impact Statement, and there be independent review processes built into quasi-regulations to ensure they remain effective and efficient": J Howard MP, 'More Time for Business: Statement by The Prime Minister, The Honourable John Howard, MP' (Press Release, 24 March 1997), 74-5. The government's response, in a revised edition of the *Guide to Regulation* published by the Office of Regulation Review, included the requirement of an RIS for each new regulation. This requirement potentially extended to new quasi-regulation, but not universally: the department or agency proposing quasi-regulation needed simply to consult with the Office of Regulation Review to determine whether an RIS would be necessary: Office of Regulation Review, *Guide to Regulation* (1998), A10.

10 Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, (2006). See Administrative Review Council, *Complex Regulation Report* (2008), 1.

Instead, it picked up from the point at which the Grey-Letter Law Report ended, placing a greater focus on review than on processes for developing regulations. Both reports defined soft law by reference to a specific focus on the regulatory effects and compliance burdens associated with its use.[11]

The Grey-Letter Law Report concluded that that there is a place for quasi-regulation in the spectrum of available regulatory forms. Its concern was the appropriate use of quasi-regulation,[12] and provided a checklist of the factors it perceived as relevant to whether and when the use of quasi-regulation is appropriate.[13] The Report discussed in detail strategies for developing effective and successful "quasi-regulatory arrangements". Nonetheless, its approach to the use of soft law is concerning in so far as its authors seemed to view regulation as a formal garden, in which everything grows in its appointed place. Soft law does not really fit this model, but is more akin to a weed – or, more generously, a wild-flower – which crops up opportunistically rather than always in the place it is expected. It thrives despite the disapprobation which may be directed to it because it is so effective *without* requiring either sanction or structure. While the Grey-Letter Law Report devoted much space to ensuring that quasi-regulation is applied in an orderly fashion, remarking that government may need "to insist on, assist with, or put into place, appropriate arrangements for monitoring and review" of quasi-regulatory schemes,[14] the passage of time has shown that dealing with the effects of soft law remains a point of concern for the business community.

The central recommendation made in the Complex Regulation Report was that administrative law values should apply "to business rules at the development, application, monitoring and review stages, regardless of whether the rules have been developed and applied by government agencies, industry bodies or other non-government entities".[15] In one sense, this recommendation broke no new ground. After all, judicial review's principles – although not its remedies – have long been available in circumstances completely unrelated to administrative decision-making governed by statute, typically to provide procedural fairness to members of private sector associations.[16] However, it is notable that

11 See Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter Law Report* (1997), xi-xii and Table 1; Administrative Review Council, *Complex Regulation Report* (2008), 5-8.

12 Detailed consideration of the following points appears at Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter Law Report* (1997), 50-7. By contrast, Keyes has argued that soft law is only appropriate "in two types of situations": JM Keyes, *Executive Legislation* (2nd ed, 2010) 77.

13 Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter Law Report* (1997), 55-6. The IDC recommended that quasi-regulation should be considered when: there is a public interest in some government involvement in regulatory arrangements and the issue is unlikely to be addressed by self-regulation; there is a need for an urgent, interim response to a problem in the short term, while a long-term regulatory solution is being developed; government is not convinced of the need to develop or mandate a code for the whole industry; there are cost advantages from flexible, tailor made solutions and less formal mechanisms such as access to a speedy, low cost complaints handling and redress mechanism; [or] there are advantages in the government engaging in a collaborative approach with industry, with industry having substantial ownership of the scheme. In relation to the final point, the Report noted that "to be successful, the following conditions need to apply: a specific industry solution is required rather than regulation of general application; there is a cohesive industry with like minded participants, motivated to achieve the goals; a viable industry association exists with the resources necessary to develop and/or enforce the scheme; effective sanctions or incentives can be applied to achieve the required level of compliance, with low scope for benefits being shared by non-participants; there is effective external pressure from industry itself (survival factors), or threat of consumer or government action."

14 Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter Law Report* (1997), 82.

15 Administrative Review Council, *Complex Regulation Report* (2008), 40.

16 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.210]-[3.230].

the ARC's recommendations, taken broadly, are swimming against the tide of recent High Court jurisprudence.[17]

The application of administrative law values[18] was the first of three support structures which, together, the ARC considered able to provide regulatory accountability where judicial review's procedures and remedies are unavailable. The second was that "redress mechanisms available in business areas should be responsive to changes in regulatory needs as business areas evolve",[19] which could allow soft law instruments to be reviewable without removing their great advantage of regulatory flexibility and speed.[20] The third support structure for accountability proposed by the ARC was that there should be improved consultation and drafting practices[21] and regular internal and external review of rules once they are in effect.[22]

The ARC conceded, however, that "soft law administered by industry bodies and other non-government entities falls completely outside the scope of administrative law".[23] Accountability and review measures in self-regulatory systems are therefore also 'soft'. Another example of the point that the most effective controls on soft law seem, themselves, to be 'soft' arose in regard to whether and when decisions made by public decision-makers in relation to soft law regulation should be subject to merits review. The ARC affirmed the recommendation from its earlier report[24] that, with the exception of a small category of decisions which are unsuitable for merits review, "a decision that will or is likely to affect the interests of a person should be subject to merits review".[25] However, it added some further comments with respect to review of regulation in particular, in order to avoid "the imposition of unnecessary red tape or additional burdens on business".[26] Specifically, it recommended that tribunals invested with merits review functions be given the capacity to respond to the issues thrown up by review of decisions relating to soft law instruments with efficiency, flexibility and responsiveness. This could be achieved, for example, by ensuring that tribunal members are selected for matters based on having a level of expertise in the matters before the tribunal. The ARC noted the Administrative Appeals Tribunal as an exemplar of flexibility and said that this approach is to be preferred to the relatively inflexible approach of adapting merits review procedures with legislation.[27]

The ARC took a pragmatic approach to the complicated problem of how to impose accountability upon soft law regulation in calling for the application of administrative law values to the development,

17 *Tang* (2005) 221 CLR 99. See M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1; M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.290].

18 Guideline principle 3: Administrative Review Council, *Complex Regulation Report* (2008), xiii.

19 Administrative Review Council, *Complex Regulation Report* (2008), xi.

20 Guideline principle 4: Administrative Review Council, *Complex Regulation Report* (2008), xiii.

21 Guideline principles 1 and 2: Administrative Review Council, *Complex Regulation Report* (2008), xii.

22 Guideline principle 5: Administrative Review Council, *Complex Regulation Report* (2008), xiii. These structures repeated the concerns stated in the Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter Law Report* (1997), Ch5.

23 Apart from limited exceptions under privacy and human rights legislation: Administrative Review Council, *Complex Regulation Report* (2008), 14.

24 Administrative Review Council, *What Decisions Should be Subject to Merit Review?*, Booklet, (1999).

25 Administrative Review Council, *Complex Regulation Report* (2008), 35.

26 Administrative Review Council, *Complex Regulation Report* (2008), 36.

27 Administrative Review Council, *Complex Regulation Report* (2008), 39.

monitoring and review of soft law and decisions thereunder, regardless of whether it originates from within government or an external industry or body. Not for nothing was the report entitled "Administrative Accountability in Business Areas subject to Complex and Specific Regulation". However, as the ARC well understood, this approach is fraught with limitations where soft law instruments neither originate from within government nor are susceptible to control by government, such as by a regulator imposing certain standards in order to register an instrument.[28] While the ARC found that most self-regulatory schemes are run in a way that applies administrative law's values, it is difficult to know whether this remains the case for soft law regimes which have not attracted government attention or are otherwise under minimal threat of being replaced with legislation.

The two reports by the IDC and ARC are not central to this thesis, which will not analyse how and why soft law is so effective as a regulatory tool – as is the case in regard to international law, others are better equipped, and there is already a burgeoning literature on the subject.[29] Rather, this thesis is written from the point of view of those who are subject to government's soft law regulation and, more specifically, those who feel as though their rights have been violated. I take it as read that there are limits to what can be done with legislation and that soft law responds directly to some of those limitations.[30] Similarly, while soft law creates some interesting and peculiar interpretive challenges,[31] we need to engage with the issues it creates on the understanding that soft law is unlikely to disappear from the regulatory landscape.

A: Defining soft law

Soft law means different things to different people. Stephen Argument noted that "one of the most difficult issues in dealing with quasi-legislation is to work out exactly what sort of creature quasi-

28 A question into which this thesis will not delve is whether regulation is necessary where there is effective competition.

29 See eg C Graham, 'Self-Regulation' in G Richardson and H Genn (eds), *Administrative Law and Government Action: the Courts and Alternative Mechanisms of Review* (Clarendon Press, Oxford, 1994) 189; J Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24; J Black, *Rules and Regulators* (Clarendon Press, Oxford, 1997); CA Breer and SW 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); G Pearson, 'The Place of Codes of Conduct in Regulating Financial Services' (2006) 15 *Griffith Law Review* 333; E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, Oxford, 2007); NA Mendelson, 'Regulatory Beneficiaries and Informal Agency Policymaking' (2007) 92 *Cornell Law Review* 397; D Mac Síthigh, *Datafin to Virgin Killer: Self-Regulation and Public Law* (University of East Anglia Working Paper No. NLSWP 09/02, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374846; C Scott, 'Standard-Setting in Regulatory Regimes' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (2010); D Oliver, T Prosser and R Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, Oxford, 2010); WD Araiza, 'Reinventing Regulation / Reinventing Accountability: Judicial Review in New Governance Regimes' (2010) 28 *Windsor Yearbook of Access to Justice* 361; M Legg (ed), *Regulation, Litigation and Enforcement* (Lawbook Co, 2011); F Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar, Cheltenham, 2011); J Freedman, 'Responsive Regulation, Risk and Rules: Applying the Theory to Tax Practice' (2012) 44 *UBC Law Review* 627; A Green, 'Regulations and Rule Making: The Dilemma of Delegation' in C Flood and L Sossin (eds), *Administrative Law in Context* (2nd ed, 2012) 125; G Pearson, 'Business Self-Regulation' (2012) 20 *Australian Journal of Administrative Law* 34; J Black, *Calling Regulators to Account: Challenges, Capacities and Prospects* (London School of Economics Legal Studies Working Paper No.15/2012, 2012); D Oliver et al (eds), *The Regulatory State: Constitutional Implications* (2010); K Yeung, 'The Regulatory State' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (2010).

30 Lyria Bennett Moses has commented that the limits of legislative responses are particularly evident in fast-moving areas of technological change. "The reason why many statutes fail to keep up with technological change is that the legislative process is cumbersome. If rules are formulated in legislation, the limits inherent in the words used continue until the legislation can be amended. However, legislation can be designed to give other institutions (such as agencies and courts) room to maneuver in interpreting legislation in light of technological change.": L Bennett Moses, 'Understanding Legal Responses to Technological Change: The Example of *In Vitro* Fertilization' (2005) 6 *Minnesota Journal of Law, Science and Technology* 505, 607.

31 See eg C Harlow and R Rawlings, *Law and Administration* (3rd ed, Cambridge University Press, London, 2009) 203-22.

legislation *is*".[32] 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".[33] It is convenient to begin this chapter's analysis of what is included under the heading of soft law by first excluding that which is not.

First, soft law is not conclusively determinative of legal outcomes. What it affects, it affects by influence. The success of the concept of soft law in international law is probably directly attributable to this fact.[34] Unlike prescriptive and overtly coercive forms of regulation,[35] it is less likely to provoke the development of a culture of resistance.[36] On the contrary, Rupp and Williams claim that many regulated parties will in fact internalise the values that are inherent in or otherwise promoted by soft law and thereby move 'beyond compliance' to the extent that justice becomes a 'social contagion' within an organisation.[37] As an effective means of regulation, soft law might be considered to speak for itself in this regard. However, the feeling of security in complying as readily – or more so – with soft law as with hard law in the positivist sense also presents significant risks to the regulated party.

Secondly, soft law as it is described in this thesis is fundamentally not delegated legislation. In their authoritative work on delegated legislation in Australia, Dennis Pearce and Stephen Argument defined 'delegated legislation' as comprising instruments of legislative effect made pursuant to the authority of Parliament.[38] Robert Baldwin described this as 'secondary legislation',[39] which he distinguished from 'primary' legislation (passed by parliament) and 'tertiary' legislation. The last of these he defined 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",[40] which rather begs the question of when legislation will fail to amount to delegated or secondary legislation as "usual". Nonetheless, there is a demonstrable difference between codes of practice issued and published subject to statutory authority on the one hand and mere 'guidance' on the other.[41]

Thirdly, treaties are not soft law. This point is more contentious than those preceding it because treaties sometimes look as though they share some of the characteristics of soft law. Like soft law,

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

33 CM Chinkin, 'Challenge of Soft Law' (1989) 38 *ICLQ* 850, 850. See also L Blutman, 'In the Trap of a Legal Metaphor' (2010) 59 *ICLQ* 605.

34 See Michelle Cini's point at n 3 above.

35 Although Harlow and Rawlings pointed out that it is often hard for the public to know whether guidance is prescriptive: C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 194.

36 DE Rupp and CA Williams, 'The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum' (2011) 12 *Theoretical Inquiries in Law* 581, 586.

37 DE Rupp and CA Williams, 'The Efficacy of Regulation as a Function of Psychological Fit' (2011) 12 *Th Inq in Law* 581, 595-6.

38 D Pearce and S Argument, *Delegated Legislation in Australia* (4th ed, LexisNexis Butterworths, Sydney, 2012) 1. The authors noted that a similar definition from an earlier edition of their work was approved by French J in *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209, 228-9.

39 R Baldwin, *Rules and Government* (Oxford University Press, Oxford, 1995) 60-80.

40 R Baldwin, *Rules and Government* (1995) 80.

41 This distinction is neatly explained by C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 193-4.

they mean *something*,[42] even if they have not been adopted into domestic legislation. However, the important difference between the two types of instrument is that treaties are regulatory instruments as between states. The government does not intend that they should have the effect of regulating the behaviour of individuals. If it did, it would be more likely to take steps to give treaties explicit status in domestic law, as is the case with the Refugee Convention.[43] Treaties are not intended to regulate behaviour *within* a country in the same way that soft law is and, for that reason, do not fall within the definition of soft law employed in this thesis.

Soft law has been a topic of mainstream academic consideration for at least seventy years.[44] Indeed, Craig has traced the use of the term 'quasi-legislation' back to the 19th century.[45] However, soft law is not a term whose content is agreed beyond argument,[46] particularly in regard to whether it is restricted to "tertiary rules"[47] or also includes delegated legislation. In its report on *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*,[48] the ARC stated that:[49]

> Non-legislative materials—such as codes of practice and codes of ethics developed by industry bodies and other non-government entities involved in self-regulation of business areas or regulation in conjunction with government (co-regulation)—are important regulatory tools. They are referred to in this report as 'soft law'; the expression also takes in the guidelines, codes and other non-legislative materials that are used increasingly by government regulatory agencies.

Despite the ARC expressly defining soft law to be limited to "non-legislative" materials, the *Complex Regulation Report* includes a diagram[50] which suggests that subordinate legislation may be included within the definitions of both 'soft law' and 'black letter' law. The reasoning behind this conclusion is readily understandable: it has long been understood that soft law can have the capacity to operate in the manner of legislation, even though it lacks legal force.[51] Indeed, the ARC reported that a number of participants in its research had "agreed that in practice soft law can be as influential in modifying behaviour as black letter law".[52]

To the extent that the ARC's *Complex Regulation Report* might be understood as including delegated or subordinate legislation within the definition of soft law, this thesis will respectfully depart from its reasoning and will not consider them, regardless of whether they are registered under the *Legislative*

42 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Re Tracey* (2011) 80 NSWLR 261. See Ch 3.B.I below.

43 See J Vrachnas, M Bagaric, P Dimopoulos and A Pathinayake, *Migration and Refugee Law: Principles and Practice in Australia* (3rd ed, Cambridge, 2012), 182.

44 See RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125.

45 PP Craig, *Administrative Law* (7th ed, 2012) 472 (n 219).

46 Unlike delegated legislation, it is not "a term of art": G Ganz, *Quasi-legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell, London, 1987) 1.

47 R Baldwin, *Rules and Government* (1995) 4.

48 Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation* Report No 49, (2008) (*Complex Regulation Report*).

49 Administrative Review Council, *Complex Regulation Report* (2008) xi, 5.

50 Administrative Review Council, *Complex Regulation Report* (2008), x. Interestingly, the diagram also excludes "aspirational edicts" from 'soft law' and places such instruments below 'soft law' on the pyramid. This classification is open to debate.

51 See eg RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125, 126.

52 Administrative Review Council, *Complex Regulation Report* (2008), 5.

Instruments Act 2003.[53] One reason for which soft law or 'tertiary rules' stand apart from secondary rules is that they are not reliant on power delegated by the legislature and, hence, are not directly enforceable.[54] It is practically more difficult to assess the legal force of soft law,[55] although, as noted above, it is a feature of soft law that it takes effect through influence rather than as an expression of positive law.[56] The difficulties raised by this will be the main focus of this thesis.

As long ago as the nineteenth century, issues of political responsibility "reduced the ability of administrators to act autonomously" in formulating rules and regulations, and this responsibility was increasingly reserved to those who were politically accountable.[57] In discussing this phenomenon, Professor Arthurs described what would now be known as delegated legislation. Even on a formalist approach to law, delegated legislation was always seen as 'law', since it is made subject to the express authority of parliament. Of course, at Commonwealth level in Australia, its legitimacy is bolstered by the effect of the *Legislative Instruments Act 2003*, which has been described as the "single most important development in delegated legislation for at least half a century".[58] That Act has its own definition of a 'legislative instrument'.[59] This has the effect that much of the debate that previously surrounded the difference between secondary and tertiary legislation is now moot at Commonwealth level in Australia. In practice, it is clear that secondary or delegated legislation includes any instrument "of a legislative character"[60] which "was made in the exercise of a power delegated by the Parliament"[61] or is within a list of nominated instruments.[62]

The question remains whether instruments which are not legislative instruments under the Act are thereby precluded from being 'law'. Professors Creyke and McMillan concluded that law in the positivist sense is both designed to control and to be enforceable:[63]

> From that one can draw a proposition that a soft law instrument, if it is to be so described, must be intended to influence or control behaviour, and that intention is backed up by some form of enforcement.

On this understanding, hard law differs from soft law in form more than substance.[64] Hard law binds and exerts its influence through the threat of a concrete sanction; soft law applies influence in some

53 "A legislative instrument that is required to be registered … is not enforceable by or against the Commonwealth, or by or against any other person or body, unless the instrument is registered.": *Legislative Instruments Act 2003* (Cth) s 31(1).

54 R Baldwin, *Rules and Government* (1995) 60.

55 R Baldwin, *Rules and Government* (1995) 80.

56 R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 379. Indeed, the definitions cited by Professors Creyke and McMillan tend to define soft law by reference to the principle of enforceability.

57 HW Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, Toronto, 1985) 136.

58 S Argument, 'Delegated Legislation' in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 134, 135.

59 *LIA 2003* (Cth) s 5. This inquiry is aimed at the function of an instrument, although in practice most statutes now specify whether the Act is to apply; see D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 33. In this regard, the learned authors cite G Weeks, 'The Use of Soft Law by Australian Public Authorities: Issues and Remedies' (Paper presented at the Practice and Theory of Soft Law Academic Symposium, Peking University Soft Law Centre, 9 July 2011) 4-5 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Weeks_SoftLaw_%20Australia.pdf>.

60 *LIA 2003* (Cth) s 5(2).

61 *LIA 2003* (Cth) s 5(1)(b).

62 *LIA 2003* (Cth) s 6. The Act also specifies certain categories of instrument which have been expressly declared not to be legislative instruments under the Act: *LIA 2003* (Cth) s 7.

63 R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 383.

less tangible form. Professors Harlow and Rawlings displayed greater ambivalence about "whether or not a lawyer would characterise … informal [guidance] documents as 'rules' but they are certainly intended by their authors to have some practical effect".[65] Regardless of the *legal* status of soft law, there has been a widespread outbreak of furious agreement that 'soft law must mean something'.

It is often possible to impute to the agencies which use soft law the intention for it to influence or control behaviour. In reasoning which departed from the rest of the Appellate Committee of the House of Lords, Lord Steyn stated in *McFarland* that:[66]

> in respect of the many kinds of "soft laws" with which we are now familiar, one must bear in mind that citizens are led to believe that the carefully drafted and considered statements truly represent government policy which will be observed in decision-making unless there is good reason to depart from it. It is an integral part of the working of a mature process of public administration.

It is uncontroversial in the UK that judicial review might be available for decisions made under soft law[67] and that government decision-makers must adhere to policy statements unless there is a "good reason" for departing from them.[68] Lord Steyn seemed to be proposing something greater, that a policy statement issued for the purpose of giving "guidance to the public" should entitle a citizen "to rely on the language of the statement, seen as always in its proper context". Unless or until the Minister responsible for such a policy retracts it for a "good reason":[69]

> the citizen is entitled to ask in a court of law whether he fairly comes within the language of the publicly announced policy. *That question, like all questions of interpretation, is one of law.* And on such a question of law it necessarily follows that the court does not defer to the minister: the court is bound to decide such a question for itself, paying, of course, close attention to the reasons advanced for the competing interpretations. This is not to say that policy statements must be construed like primary or subordinate legislation. It seems sensible that a broader and wholly untechnical approach should prevail. But what is involved is still an interpretative process conducted by a court which must necessarily be approached objectively and without speculation about what a particular minister may have had in mind.

Lord Steyn's preference for treating statements of policy as containing issues of law which courts are able to interpret and determine did not attract the support of the Appellate Committee in *McFarland*, although more recent judgments do not rule out such a position being adopted. Likewise, regardless of what is intended when agencies use soft law, Australian treatments of soft law have made clear that 'influence' does not cause soft law to be enforceable in the manner of hard law.[70] Perhaps, in the

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64 Heydon J noted the phenomenon of "tough law", as an example of which he gave the "specific and detailed rules of criminal procedure which exist under the general law" as compared to "mass of detailed anti-discrimination and other human rights legislation" which has been introduced in recent decades: *Momcilovic v The Queen* (2011) 245 CLR 1, 152 [381].

65 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 194.

66 *In re McFarland* [2004] 1 WLR 1289, 1299 [24] (emphasis added).

67 See eg *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 163 (Lord Fraser of Tullybelton); 177-8 (Lord Scarman) ('*Gillick v West Norfolk (HL)*')

68 This point was reiterated on several occasions by both Lord Hope and Baroness Hale in *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299.

69 *In re McFarland* [2004] 1 WLR 1289, 1299 [24].

70 Although the Federal Court has made some interesting decisions which seem to indicate that it views Independent Merits Reviewers as being reviewable for making jurisdictional errors; see n 347 below.

absence of a genuine claim to be 'law',[71] the presence of practical effect is the explanation behind Pearce and Argument's statement that soft law and rules often "go by the name 'quasi-legislation, on the basis that they are *almost* laws".[72] Likewise, Keyes stated that while soft law may not have "binding legal effect, it often has something approaching it".[73] This approach seems to be consistent with the argument of this thesis that soft law is best understood as occupying a space between instruments so soft as not to be law on one hand and hard law of the positivist variety on the other. Further, it is consistent with another central theme of this thesis, namely the tension which is integral within any rule of law system between allowing sufficient discretion to do justice in individual circumstances and requiring sufficient structure that exercises of discretion are broadly predictable. This tension cannot be resolved, nor is it desirable that it should. However, soft law can be seen as a means of *managing* this tension.

I: Types of soft law

Many attempts to classify soft law have been compelled simply to list various examples of soft law instruments.[74] 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.[75] As time has gone by, the problem has been one of ascertaining which of this "wide variety of instruments"[76] are included within quasi-legislation and by what other names it – and its constituent parts – might be called. I have chosen to use the term 'soft law'.[77]

It is interesting to note that attempts to define quasi-legislation by listing its varieties serve only to nominate instruments which could be either 'secondary' or delegated legislation on one hand or 'tertiary' legislation, rules 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 all generally fall into the latter category.[78] Writing from a British perspective, Aileen McHarg would have included within that category constitutional conventions which lack legislative force.[79] However, this is an unsatisfactory manner in which to define soft law, with such lists tending

71 See C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 192; L Sossin and CW 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.

72 D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 15 (original emphasis).

73 JM Keyes, *Executive Legislation* (2nd ed, LexisNexis Canada, Markham, Ont., 2010) 51.

74 See eg Administrative Review Council, *Complex Regulation Report* (2008), 5; CA Breer and SW Anderson, 'Regulation Without Rulemaking' (Paper presented at the Rocky Mountain Mineral Law Foundation Annual Institute Proceedings, 2001) 5-5 – 5-13; J Houghton and R Baldwin, 'Circular Arguments: the Status and Legitimacy of Administrative Rules' [1986] *Public Law* 239, 240-245; L Sossin and CW Smith, 'Hard Choices and Soft Law' (2003) 40 *Alberta LR* 867, 871; G Ganz, *Quasi-legislation* (1987) 1-2.

75 G Ganz, *Quasi-legislation* (1987) 1; M Cini, 'From Soft Law to Hard Law?' (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.

76 S Argument, 'Quasi-legislation' (1994) 1 *AJ Admin L* 144, 144.

77 This term is common in the literature, to the extent that it considers the phenomenon of soft law in a domestic setting at all, but is rarely used in judicial writing, with the exception of *Thamotharem v Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 385, [55] (Federal Court of Appeal, '*Thamotharem v Canada*').

78 D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 4-5; G Ganz, *Quasi-legislation* (1987).

79 A McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 *Modern Law Review* 853. See also AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan & Co Ltd, London, 1915) 413.

"to be over-inclusive, while not giving sufficient information to enable a classification to be made".[80] 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".[81] The most productive approach is typified by Sossin and Smith, who listed soft law's forms as including "[r]ules, manuals, directives, codes, guidelines, memoranda, correspondence, circulars, protocols, bulletins, employee handbooks and training materials" *because* all of the listed instruments "may have a substantial influence over decision-making".[82]

A rigid, taxonomic approach to determining what fits under the canopy of the term soft law would ignore the fact that soft law is better understood as including a range of different instruments[83] rather than a collection of like objects. In other words, soft laws have variable degrees of 'softness'. The softness of law may differ between, for example, mere guidance or statements about an agency's general practices, on one hand,[84] and, on the other, soft law which is all but compulsory to follow because, for example, it sets out the process to be followed if you wish to obtain a licence. This approach would answer Blutman's concern, set out under the heading "Why is it soft, if it is law?", that 'soft' and 'hard' are meaningless adjectives to the extent that the (international) legal system can be divided into things which are 'law' and those which are not.[85] In fact, between law which is 'hard', in the sense that it is enforceable by and against government, and edicts which are so 'soft' as not to be considered law at all, there is a range of instruments which mix softness with legality in varying concentrations.

Keyes stated that the "principal distinction between executive legislation and quasi-legislation lies in their legal effect. Quasi-legislation has a hortatory, rather than mandatory, effect" on the decision-making process.[86] He followed this by saying that, as a consequence, "the persons whom [soft law instruments] address are both freer to ignore them and less able to rely on them as a legal basis for their actions".[87] This statement is simultaneously true and inaccurate. It is true that people may not be bound by soft law as though it were hard law, although this chapter includes several examples of soft law with hard legal consequences. The flaw in Keyes' claim is more akin to that of Lord Diplock when he stated that people were free simply to ignore invalid decisions.[88] Such statements ignore the very real and persuasive power that instruments have when they bear some kind of official stamp. People tend not to ignore such instruments but *do* tend to rely on them as a legal basis for the actions they take. These very tendencies are what make soft law both so effective and so dangerous to

80 R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 380.

81 ibid.

82 L Sossin and CW Smith, 'Hard Choices and Soft Law' (2003) 40 *Alberta LR* 867, 871.

83 See the text accompanying n 75 above.

84 Cf n 50 above.

85 L Blutman, 'In the Trap of a Legal Metaphor' (2010) 59 *ICLQ* 605, 609.

86 JM Keyes, *Executive Legislation* (2nd ed, 2010) 50. See also G Ganz, *Quasi-legislation* (1987) 24.

87 JM Keyes, *Executive Legislation* (2nd ed, 2010) 51.

88 *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172 (Privy Council, '*Dunlop v Woollahra*'). See Chapter 4 below.

people who do not realise the difference, in this context, between hard and soft.[89] Indeed, general compliance with soft law is usually a positive good, reducing disputes and litigation, and enhancing the ability of third parties to order their own affairs.

As long ago as 1944, Robert Megarry noted that "administrative quasi-legislation" had invaded a legal world previously "bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions".[90] 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 between one subject and another".[91] Arthurs and Page have noted several examples of "codified discretion" from even earlier than this.[92]

The proliferation of legislation produced outside of Parliament noted by Megarry in 1944 has not abated. Pearce and Argument stated that this has not only caused problems with the use of delegated legislation but that there are "attendant problems of that use":[93]

> Outside of the established categories of delegated legislation[94] … a great body of instruments developed that apparently fit within the accepted definition of delegated legislation but in relation to which no discernible logic or discipline exists. From the 1980s, Australian parliaments (and particularly the Commonwealth Parliament) have passed into law an enormous number of provisions authorising the making of delegated instruments which were legislative in character but which do not obviously fit within the established categories of delegated legislation. In its 1992 report on this subject[95] … the ARC referred to these instruments as 'rules'.[96] They also go by the term 'quasi-legislation', on the basis that they are *almost* laws.

While the volume of delegated legislation has increased, the problems associated with it in Australia have been extensively reduced by the enactment of the *Legislative Instruments Act*, at least at the Commonwealth level.[97]

Soft law has been defined by Mark Aronson as including rules and other instruments which guide and influence behaviour but have neither statutory nor contractual force.[98] This definition is the most

89 This is by no means a problem isolated to the 'unsophisticated' in society; see *Davies v HMRC* [2011] 1 WLR 2625.

90 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 125-6.

91 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 126. See also D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 15-16; C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 190-1.

92 HW Arthurs, *Without the Law* (1985) 136; E Page, *Governing By Numbers: Delegated Legislation and Everyday Policy-Making* (Hart Publishing, Oxford, 2001) 13. For an account of the history of rule-making in the USA, see CM Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* (2nd ed, CQ Press, Washington, D.C., 1999) 7-22. For an account of the history of rule-making in the UK, see PP Craig, *Administrative Law* (7th ed, Sweet & Maxwell, London, 2012) 434-7.

93 D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 15 (original emphasis). See the discussion accompanying n 72 above.

94 Including 'regulations' made by Ministers or other members of the executive, 'rules' in the sense of legislation which specifies procedural formalities (such as court rules), 'by-laws' in the sense of legislation peculiar to a body of limited geographical jurisdiction, 'ordinances' which was formerly used to describe primary legislation in the ACT and Northern Territory and is still used in relation to some local government bodies, and 'proclamations' which refers to certain specific instruments of particular form made by Governors and Governors-General, usually in relation to the commencement of legislation: D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 4-5. Pearce and Argument note that the "great body of miscellaneous instruments" which fall outside all of this nomenclature are often described simply as 'quasi-legislation'.

95 Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35, (1992).

96 See also, generally J Houghton and R Baldwin, 'Circular Arguments' [1986] *PL* 239.

97 See R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377.

appropriate in the Australian context. However, within this definition, 'soft law' does not denote a cohesive body of legal instruments. Rather, it refers to a number of different types of rule, in a broad spectrum.[99] In *Rules and Government,* Robert Baldwin lists eight different types of soft law under the heading of tertiary rules classified by function: procedural rules, interpretive guides, instructions to officials, prescriptive rules, evidential rules, commendatory rules, voluntary codes and rules of practice.[100] In an earlier article written with John Houghton, Baldwin had also listed eight classifications of rules,[101] but had combined prescriptive and evidential rules under a single heading. The eighth classification was 'Consultative Devices and Administrative Pronouncements'. In relation to this final category, the authors noted that:[102]

> [A] statement may have normative effects in certain circumstances or from some perspectives and it may lack them in a different context. To adhere to rigid definitions or conceptual distinctions is therefore to fall into a trap. Our final group is thus something of a safety-net. It covers those pronouncements which fit into none of the other groups but which have a significance that goes beyond the individual case. Principal amongst these are consultative statements. These often involve draft outlines of agency or departmental policy and invite comments. As such, they form a halfway house in the rule-making or adjudicative processes. They allow an expression of policy views without undertaking a rigid commitment.

Within the sub-categories of rules proposed by Baldwin, there is a variety of purposes for which soft law may be used. Baldwin's classification of tertiary rules is focused on intention rather than effect: by definition, tertiary rules have no direct enforceability but are put in place in order to have some kind of practical effect. Baldwin divides them based upon the effect which the rule-makers intend for them to have.

Baldwin's approach contrasts with Megarry's earlier bipartite classification, based on whether regulation affected dealings between an entity of the State and another party or between two (or more) non-state parties. Writing some fifty years before Baldwin, in the infancy of the recognition of soft law, Megarry was understandably more concerned with the effect of soft law than its aims. Consequently, he was able to praise practice notes issued by the War Damage Commission as being "shining examples of official helpfulness"[103] 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".[104] In this respect, Megarry departed from the traditional post-Diceyan approach to the administrative state,[105] which would not

98 M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 3.

99 See the text accompanying n 85 above.

100 R Baldwin, *Rules and Government* (1995) 81-5.

101 J Houghton and R Baldwin, 'Circular Arguments' [1986] *PL* 239, 240-5.

102 J Houghton and R Baldwin, 'Circular Arguments' [1986] *PL* 239, 245.

103 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 126.

104 ibid.

105 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: G Hewart, *The New Despotism* (1975 ed, Greenwood Press, Westport, Conn., 1929) 37.

likely have been prepared to concede any positive aspects to guidelines being issued by executive agencies, regardless of their benign intention or positive effect.[106]

In the USA, Anthony and Kerwin are commentators who have attempted to categorise rule-making, although Kerwin noted at the outset of his consideration of this topic that to do so is "very difficult".[107] To begin with, it is important to note that the *Administrative Procedure Act 1946* (APA) specifies that rules are divided by function,[108] the first of which are 'legislative' or 'substantive' rules. These must be made in accordance with the APA's notice and comment procedures and, once made,[109] "bind the agency and the public".[110] Due to this mutually binding effect, legislative rule-making of this kind is analogous to delegated legislation in Australia rather than to soft law.[111]

The APA exempts from the 'notice and comment' requirements "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice".[112] Anthony and Kerwin both divide the 'non-legislative' rules[113] which fall within this exemption into two sub-categories: 'interpretive' and 'procedural' rules. 'Interpretive' rules are generally published in the *Federal Register*[114] although, unlike legislative rules, they need not be.

Furthermore, 'interpretive' rules do not impose new legal obligations on the agency which has issued them,[115] although this is not wholly true of those subject to them, since the Supreme Court's decision in *Chevron*[116] has the effect that some interpretive rules will not be overturned by the courts if they are reasonably open.[117] Interpretive rules generally take the form of guidelines, policy statements, technical manuals and the like, which are "intended to advise the public how the agencies [interpret]

106 Dicey himself devoted a large section of his most famous work to "conventions of the constitution", which he held to consist of "customs, practices, maxims or precepts which are not enforced or recognised by the Courts, [and] make up a body not of laws, but of constitutional or political ethics": AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915) 413. It is submitted that this "morality of the constitution" is in one sense a type of soft law but that it is of an entirely different order to the soft law considered in this thesis. I do not think it likely that Dicey would have approved of soft law that is created by administrators rather than that which has developed over the course of decades.

107 For example, the US *Code of Federal Regulations* organises rules into fifty distinct categories: CM Kerwin, *Rulemaking* (2nd ed, 1999) 22. See also S Croston, *It Means What It Says: Deciphering and Respecting the APA's Definition of 'Rule'* (SSRN Research Paper 2013), http://ssrn.com/abstract=2250022.

108 *Administrative Procedure Act 1946* (US) 5 USC § 553. Kerwin notes that the classification of rules by function in fact predates the APA by many years: CM Kerwin, *Rulemaking* (2nd ed, 1999) 23-ß4.

109 An increasingly important issue is that the notice and comment procedures are being bypassed, although this is not a phenomenon which is necessarily the fault of agencies, since there are numerous legislative exemptions to the notice and comment procedures, both under the APA and agencies' governing statutes. Taking account of this, the GAO recently found that: "Agencies did not publish a notice of proposed rulemaking (NPRM), enabling the public to comment on a proposed rule, for about 35 percent of major rules and about 44 percent of non-major rules published during 2003 through 2010": United States Government Accountability Office, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, Report to Congressional Requesters No GAO-13-21, (2012). The GAO also noted that some agencies voluntarily sought comment on proposed rules, even when not required to do so, and sometimes took account of those comments to revise rules. Nonetheless, the picture that is created by the GAO report is one in which notice and comment procedures are, at least, unevenly applied.

110 CM Kerwin, *Rulemaking* (2nd ed, 1999) 23.

111 RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like: Should Federal Agencies Use Them to Bind the Public?' (1992) 41 *Duke Law Journal* 1311, 1322.

112 *Administrative Procedure Act 1946* (US).

113 RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1321.

114 See Office of the Federal Register, *Federal Register* <http://www.archives.gov/federal-register/> at 3 November 2009.

115 RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1313-14.

116 *Chevron USA Inc. v Natural Resources Defense Council, Inc.* 467 US 837 (1984), ('*Chevron*'). See also *City of Arlington v Federal Communications Commission* (2013) US No. 11–1545, ('*Arlington v FCC*').

117 However, the agency can adopt a different interpretive rule, if it is still reasonable.

their legal obligations" under certain legislation or court cases in which it had been considered.[118] 'Procedural' rules, on the other hand, define and describe the internal operations of administrative agencies. This information remains important to the public, particularly when it describes how members of the public may interact with an agency or participate in rule-making.[119]

Another method of classifying rule-making is not by function but by purpose, asking whom the rules are intended to "influence and direct".[120] Predominantly, those affected by rules are businesses and much of the work that has gone into assessing the impact of rule-making has been focused on business regulation.[121] Kerwin made the point that, although government's capacity to involve itself in the way that private businesses are operated is virtually limitless, the methods by which this involvement can manifest itself *are* limited.[122] Most rules therefore either prohibit behaviour or things outright, put limitations on them or set standards;[123] each of the latter two forms of regulation essentially allows a private actor to do as it pleases, "within certain boundaries".[124] Another form of rule which may be used to supplement any of the other types named above is one which obliges private actors to submit information about their activities to government, allowing their activities to be monitored.[125] In particular, this is often a pre-condition for parties who wish to enter into contracts with government.[126]

Classification of rules by purpose as opposed to function implies a less benign effect from soft law instruments. The structure imposed under the APA suggests that rules which are not 'legislative' are in place merely to inform the public or as a courtesy. It does not take account of the reality that, even where rules do not have a binding effect (as is the case with all soft law), they are nonetheless able to influence outcomes. The wealth of soft law regulation to which businesses are subject stands as a testament to this proposition.

Many soft law instruments which have an effect on businesses, particularly industry codes of conduct,[127] *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. A particularly demanding example can be observed in relation to providers of *in vitro* fertilisation (IVF)

118 CM Kerwin, *Rulemaking* (2nd ed, 1999) 23.

119 Ibid.

120 CM Kerwin, *Rulemaking* (2nd ed, 1999) 24.

121 Administrative Review Council, *Complex Regulation Report* (2008); CM Kerwin, *Rulemaking* (2nd ed, 1999) 24-6; Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, Research Report, (2009); G Pearson, *Financial Services Law and Compliance in Australia* (Cambridge University Press, Port Melbourne, Vic., 2008); J Arancibia, *Judicial Review of Commercial Regulation* (Oxford University Press, Oxford, 2011).

122 CM Kerwin, *Rulemaking* (2nd ed, 1999) 26.

123 Professor Scott notes that the purpose of standard-setting is achieved through a mix of primary and delegated legislation and is therefore not the sole domain of either of these, or indeed of soft law: C Scott, 'Standard-Setting' in R Baldwin et al (eds), *Oxford Handbook of Regulation* (2010) [6.2.1].

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

125 Ibid.

126 C Scott, 'Standard-Setting' in R Baldwin et al (eds), *Oxford Handbook of Regulation* (2010) [6.2.1].

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

services. Certain activities can only be performed by certified members of the industry body, the Fertility Society of Australia (FSA). Certification is demanding and requires that an accredited Certification Body[128] assess the compliance of a party which wishes to provide IVF services to the standards in the FSA Reproductive Technology Accreditation Committee's Certification Scheme.[129] The FSA additionally publishes its own Code of Practice.[130] While these instruments fall within the definition of soft law in as much as they have not been legislated, there can also be no doubt that they are both mandatory (rather than merely influential) and highly effective.[131] This is more typical of industry schemes than of schemes which are designed to operate more broadly.

Governments are also able to set standards through the medium of placing certain requirements on the parties with whom they contract.[132] In its *Complex Regulation Report*, the Administrative Review Council noted that the effect of these standard-setting instruments is analogous to decisions of the Superannuation Complaints Tribunal (SCT), to which trustees of superannuation funds bind their trusts by contract in order to allow the trusts to obtain certain tax concessions.[133] The ARC sought to make the point that, to the extent that the operation of these codes is subject to accountability mechanisms, those mechanisms are outside the scope of administrative law. 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.[134] 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.[135] Nonetheless, the substance of the comparison between the SCT and many nominally voluntary industry codes of conduct is instructive.

Notwithstanding the various beneficial aspects of soft law which he was prepared to concede, Robert Megarry considered the phenomenon to be a "curate's egg",[136] which is to say that the negative aspects of soft law nullified any benefits which its positive aspects might otherwise have provided. He described 'quasi-legislative' 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". This was because "although no Court would enforce

128 See the material set out at Joint Accreditation System of Australia and New Zealand, *JAS-ANZ - RTAC Certification Scheme* <http://www.jas-anz.com.au/index.php?option=com_content&task=view&id=107&Itemid=34> at 5 May 2013.

129 Fertility Society of Australia, '*Reproductive Technology Accreditation Committee Certification Scheme*' (2010).

130 Fertility Society of Australia, '*Reproductive Technology Accreditation Committee: Code of Practice for Assisted Repreductive Technology Units*' (2010). The RTAC Code of Practice is a hard and "rule-like" example of soft law: L Bennett Moses, 'Understanding Legal Responses to Technological Change' (2005) 6 *MJLST* 505, 597.

131 Particularly by comparison to the USA; see L Bennett Moses, 'Understanding Legal Responses to Technological Change' (2005) 6 *MJLST* 505, 597-9.

132 CM Kerwin, *Rulemaking* (2nd ed, 1999) 28; C Scott, 'Standard-Setting' in R Baldwin et al (eds), *Oxford Handbook of Regulation* (2010) [6.2.1].

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

134 See G Pearson, *Financial Services Law and Compliance* (2008) 490; G Weeks, 'Superannuation Complaints Tribunal and the Public / Private Distinction in Australian Administrative Law' (2006) 13 *Australian Journal of Administrative Law* 147.

135 The majority noted 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, 111 [44] ('*Breckler*'). See Administrative Review Council, *Complex Regulation Report* (2008), 14.

136 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 127.

[the official announcements],[137] 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".[138] 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 legal status, without legislative scrutiny and which, while open to challenge in court, were unlikely to be so challenged. The effect of this quasi-legislative influence was considered to be of greater import than the purpose for which it might be employed. 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.[139] Part II, following, will examine some of the reasons why soft law regulation has remained (and become increasingly) attractive to administrators as a method of controlling behaviour.

II: Discretionary power

The delegation of decision-making to those better equipped than the legislative drafters to exercise discretion appropriate to the circumstances has a lengthy history.[140] Arthurs used the example of emigration officers who understood maritime engineering being better able than parliament to decide whether ships were 'seaworthy'.[141] Parliament, in turn, recognised the expertise of the officers and transferred its responsibility to these members of the administration, who in turn formulated technical manuals as a means of structuring their discretion.[142] Where Parliament has decided to delegate its legislative authority in this way, the exercise of that authority must be recognised as 'law', in the sense of encapsulating a norm of positive law.[143] There is a strong argument that so too must the policy instruments or guidelines which are developed as a means of exercising, structuring and controlling delegated authority, particularly since (for good or ill) these forms of soft law have immense capacity both to inform and to induce reliance.[144]

This section will consider the issues which are raised when administrative officers are granted discretion to exercise power and how these issues affect (and are affected by) the use of soft law. For example, might a level of residual discretion serve to mitigate the unsympathetic application of soft law in exceptional cases?[145]

137 This statement remains accurate, although courts are now prepared to view soft law as both significant and persuasive, to the extent that Keyes characterises it as having "something approaching … binding legal effect": JM Keyes, *Executive Legislation* (2nd ed, 2010) 51.

138 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 126.

139 Dicey took the view that judges 'are much more concerned than Parliament to maintain "the logic or the symmetry of the law"': HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1, 15; quoting AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2nd ed, Macmillan, London, 1962) 364.

140 HW Arthurs, *Without the Law* (1985) 137.

141 The difficulties inherent in determining the legal content of 'seaworthiness' were subsequently noted in the judgment of Diplock LJ in *HongKong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

142 HW Arthurs, *Without the Law* (1985) 137.

143 In recent decades, it generally has been; see C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 191.

144 JM Keyes, *Executive Legislation* (2nd ed, 2010) 55-6.

145 See C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 217.

The Diceyan view

Albert Venn Dicey, the author of what remains the most influential work on English constitutional theory,[146] was famously opposed to administrative law.[147] Those of Dicey's theoretical cast[148] were marked by their distaste for administrative law on the basis that it was a French concept (*droit administratif)* without any English analogue[149] and that it was fundamentally opposed to the notion that members of the executive should be held accountable under the "ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals", rather than in specialised administrative tribunals.[150] This vein of criticism is said to have resulted in "generations of lawyers … being brought up to believe … that administrative law was repugnant to the British constitution".[151]

Much has been made of the almost nationalistic tone of Dicey's stated opposition to the French *droit administratif*, which his numerous critics have often put down to a fundamental misunderstanding on his part of the tenets of that system.[152] This does Dicey a disservice: he was clearly very familiar with the *droit administratif*.[153] He was, however, philosophically opposed to specialist administrative courts, which were a feature of the French system, and it was in preference to these separate courts that Dicey advocated the role of "ordinary courts" applying the "ordinary law".[154]

Another reason for Dicey's antipathy towards administrative law was the breadth of the discretionary powers given to the administrative state. Dicey saw this as carrying with it the consequence that the rule of law was threatened. He took the view that discretion was the antithesis of law, although this proposition has been described even by those generally sympathetic to Dicey's views as "difficult to accept";[155] more so with the passage of time since Dicey first expressed it. In his introduction to the

146 AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, ECS Wade (ed), Macmillan, London, 1959).

147 See generally C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 4-25.

148 Notably Lord Hewart CJ, who set out his views in G Hewart, *New Despotism* (1975 ed, 1929). Lord Hewart's legacy as a jurist and intellectual is open to doubt; Professor Aronson suggested that he "may well have been Britain's worst Chief Justice ever": M Aronson, 'The Great Depression, This Depression and Administrative Law' (2009) 37 *Federal Law Review* 165, 174. Harlow and Rawlings make a contrasting claim in regard to Sir William Wade, whom they describe as "perhaps Dicey's greatest and certainly his most influential heir": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 24-25. See HWR Wade and C Forsyth, *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) 15-16. Note however that the most recent edition of the late Professor Wade's book, now written by Professor Forsyth alone, is not uncritical of Dicey, describing his approach as casting "a prolonged blight over administrative law in Britain": HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 20.

149 AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) 336-8; cited in C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 8-9.

150 AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) 187-96; cited in C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 6.

151 HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 15.

152 For a representative flavour of this line of criticism, see HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1, 6-7.

153 AV Dicey, '*Droit Administratif* in Modern French Law' (1901) 17 *Law Quarterly Review* 302; C Harlow, 'The Influence of Léon Duguit on Anglo-American Legal Thought' in F Melleray (ed), *Autour de Léon Duguit: Colloque commémoratif du 150e anniversaire de la naissance du doyen Léon Duguit tenu à Bordeaux les 29-30 Mai 2009* (Bruylant, Brussels, 2009) 227, 3-4.

154 Harlow remarks that English case law was "notably formalist": C Harlow, 'Duguit and Anglo-American Legal Thought' in F Melleray (ed), *Autour de Léon Duguit* (2009) 227, 4. Dicey was highly enamoured of the role of the English courts in developing the common law and protecting the rule of law; cf the extra-curial comment of Lord Devlin that the "English judiciary … tends to be admired to excess": P Devlin, *The Judge* (Oxford University Press, Oxford, 1979) 25.

155 ECS Wade, 'Introduction' to AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) cxxv. See also HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1, 23.

tenth edition of Dicey's *Introduction to the Study of the Law of the Constitution*,[156] Professor ECS Wade noted that:[157]

> Dicey's interest in discretions is not in their control by the courts, whether they could be challenged, in particular by certiorari, but in denying their existence. *Yet discretions are the most important of all topics for the modern constitutional lawyer.* It is not then surprising that an exposition of the rule of law which denied the existence of "the exercise by persons in authority of wide arbitrary or discretionary powers of constraint" has served as a text for those who are opposed to the collectivist activities of the modern State. The administrator to-day is fully equipped with statutory powers and therefore has in law the discretionary power wherewith to perform his branch of administrative activity in the public interest. But the reader can still turn to Dicey's chapters on the rule of law with profit if his interest lies in what may be called the political rather than the economic field of liberty, that of person and of opinion in its various manifestations.

Professors Harlow and Rawlings contend that Dicey's concern with discretionary powers was based on his confusion of 'discretionary' with 'arbitrary' powers,[158] but nonetheless Dicey's view that discretionary power is arbitrary per se had the effect of making suspicion of discretionary power a cornerstone principle of administrative law.[159] Certainly, the dichotomy between discretion and the rule of law was reinforced in England by the Franks Committee into Administrative Tribunals and Enquiries.[160] The difference between discretionary powers and arbitrariness is, by contrast, clearly articulated by Professors Wade and Forsyth,[161] who contended that the former is compatible with the principle of legality and the rule of law when "conducted within a framework of recognised rules and principles which restrict discretionary power".[162] The structural tension within the rule of law, between the value of predictability through adherence to law on the one hand and flexibility and the capacity to do justice in individual cases on the other, is inescapable. It is, however, manageable once one concedes that discretionary power is now always subject to limits. Hence, as Wade and Forsyth argued, broadly expressed legislative powers, while essential to the function of modern

156 AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959).

157 ECS Wade, 'Introduction' to AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) cxvii (footnote omitted, emphasis added). Wade's distinction between political and economic fields of liberty is striking, given that the most influential post-Diceyan opponent of executive discretion was an economist who was nonetheless definitely concerned with issues of political liberty, namely FA Hayek, *The Road to Serfdom* (University of Chicago Press, Chicago, 1944).

158 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 17. See also HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1, 23-5. This criticism appears to be borne out to some extent in the extract from Dicey's editor, above: Wade, 'Introduction' to AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) cxvii. Later, Gibbs J suggested that an exercise of discretion would only be arbitrary if the decision-maker lacked good faith:

> "Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously.": *Buck v Bavone* (1976) 135 CLR 110, 118.

159 Both in England and in America: see J Dickinson, *Administrative Justice and the Supremacy of Law* (1927) 35. Dickinson's distinctly Diceyan approach was cited in KC Davis, *Discretionary Justice: a Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969) 31.

160 Franks Committee, (Committee on Administrative Tribunals and Enquiries), *Report of the Committee on Administrative Tribunals and Enquiries*, Command Paper No 218, (1957) 6. Davis described this as "the extravagant version of the rule of law": KC Davis, *Discretionary Justice* (1969) 28-9.

161 HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 17.

162 In *Dawood*, O'Regan J stated on behalf of a unanimous Constitutional Court that, contrary to Dicey's view, "[d]iscretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.": *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), [53] (citation omitted). See also KC Davis, *Discretionary Justice* (1969) 25-6.

government,[163] must be controlled by common law principles of administrative law in order to be acceptable to the rule of law, rather than being left to mere political control.

The perils of skeletal legislation

Most modern legislation includes a capacity to make regulations, usually through the agency of the relevant vice-regal officer. The reasoning behind creating this capacity is that legislation is slow to make, due to the high level of oversight and debate to which it is subjected, and that Parliamentary time is limited. Primary legislation, while being held to a high standard of accountability, is therefore not very responsive or flexible. Regulations (in the sense of subordinate legislation) are able to be made more easily, with more limited parliamentary oversight,[164] although the efficacy of this oversight has been queried.[165] There is a tendency to draft legislation in minimalist or "skeletal" form[166] and to leave issues of detail or uncertainty "to the Regs".[167] To the extent that material more appropriate for consideration by Parliament is left to be the subject of delegated legislation in Australia,[168] it is mitigated by Parliamentary scrutiny committees.[169]

The question of whether skeletal legislation is valid for Constitutional purposes was decided more than eighty years ago. In *Dignan's Case*,[170] the High Court held that it was competent for the Commonwealth Parliament to delegate legislatively the entirety of the law-making function under an enactment to the executive.[171] If that were the only relevance of *Dignan's Case*, it would hardly rate a mention here. However, it is also notable – and arguably more important – for reminding us that skeletal legislation is not new and that modern legislatures and governments are not the first to act from questionable, or even positively malign, motives.[172]

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163 "Intensive government of the modern kind cannot be carried on without a great deal of discretionary power.": HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 18. The previous edition had continued "and since the terms of Acts of Parliament are in practice dictated by the government of the day, this power is often conferred in excessively sweeping language": HWR Wade and C Forsyth, *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 21. One may query whether the breadth of expression given to executive discretions is truly a function of transient political control of the legislative process.

164 See *LIA 2003* (Cth) Pt 5.

165 "In a parliamentary democracy …, the problem [of a 'democracy deficit'] may be papered over through arrangements by which 'statutory instruments' (ie regulations) are actually, or at least constructively, laid before Parliament. They are in theory available for question or debate, although that may rarely happen. In addition, characteristics of the parliamentary system may also mask the intensity of the democracy deficit.": PL Strauss, 'Legislation that Isn't - Attending to Rulemaking's "Democracy Deficit"' (2010) 98 *California Law Review* 1351, 1353.

166 J Freeman MLA, ''Calling Up' of Standards: Are We Creating a Legislative Labyrinth?' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011).

167 See S Argument, '"Leaving it to the Regs" – The Pros and Cons of Dealing with Issues in Subordinate Legislation' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011); D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 12-15; M Aronson, 'Great Depression' (2009) 37 *Fed LR* 165, 166.

168 Detailed guidance is provided by the Department of Prime Minister and Cabinet Handbook; see D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 119-20.

169 D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 121-3. The authors suggest that these committees could do more in this regard: Ibid. 144.

170 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, ('*Dignan's Case*'). See R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 264-7.

171 In other countries, such as South Africa, there are constitutional principles which prevent excessively broad delegation of powers. In *Dawood*, the Constitutional Court held that an overbroad grant of legislative discretion (without legislative criteria to guide its exercise) threatens to violate constitutional rights, the ambit of the discretion needs to be accompanied by more detailed criteria than where constitutional rights are not so threatened. A failure to provide such criteria may offend constitutionally entrenched rights: *Dawood* 2000 (3) SA 936 (CC), [46]-[56] (O'Regan J). See C Hoexter, *Administrative Law in South Africa* (2nd ed, Juta, Cape Town, 2012), 264-5.

172 EL Rubin, 'The Myth of Accountability and the Anti-Administrative Impulse' (2005) 103 *Michigan Law Review* 2073, 2074. See the description of the political background to *Dignan's Case* in R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 316-7.

Having said that, the problem of skeletal legislation appears to be more widespread than was formerly the case. Professor Strauss made this point[173] in relation to comparable legislation in the USA by comparing the *Railway Safety Appliances Act 1893* (US) to the *National Traffic and Motor Vehicle Safety Act 1966* (US). He determined that at the time of the earlier Act, Congress saw it as its business to maintain a "sharp focus on precise definition of the appropriate legal response to the problem at hand"[174] but that this focus had been lost by the time of the later Act. Professor Aronson concluded that "members of Congress used to be directly involved in formulating an Act's content, which they debated amongst themselves. That sort of work these days is left to huge congressional bureaucracies supervised by staffers".[175] The devolution of political authority from elected representatives to agencies and administrators has been blamed on "the complexities of contemporary society, and our understanding of the resulting needs for social order", with the result that "placing the power to create law in other hands [is] inevitable".[176] The world is simply more complicated than it used to be[177] and we want government to regulate it in considerable detail. On this view, Parliament lacks the expertise to deal with matters of detail which may arise under legislation. There is also some suggestion that Parliament simply lacks the time to do more than set out skeletal principles in many cases,[178] and leaves scrutiny of the operational law which is ultimately created to other oversight mechanisms, such as Parliamentary committees.

American concerns about increased devolution of law-making power to the executive creating a 'democracy deficit' have never exercised the same hold on Australian administrative lawyers.[179] Indeed, they do not even cause a universal degree of concern amongst American administrative lawyers; Rubin was prepared to see 'rule-making' by agencies as an intrinsic sign of how the administrative state had developed:[180]

> The power to make rules is the power of the legislature itself, and a grant of this power represents at least a partial surrender of the legislature's own prerogatives. But rule-making power cannot be equated with legislation in a modem administrative state.

Nonetheless, there are some issues with which administrative lawyers in both countries might legitimately concern themselves. One is that, the Constitutional determination in *Dignan's Case* notwithstanding, there is some legislation that is so skeletal that, whether or not it is 'an Act of Parliament', it no longer sits comfortably with any accepted normative definition of 'law'.[181] Another is

173 PL Strauss, 'Legislative Theory and the Rule of Law: Some Comments on Rubin' (1989) 89 *Columbia Law Review* 427, 428-30.

174 PL Strauss, 'Legislative Theory and the Rule of Law' (1989) 89 *Colum LR* 427, 429.

175 M Aronson, 'Great Depression' (2009) 37 *Fed LR* 165, 178 (n 83).

176 PL Strauss, 'Legislation that Isn't' (2010) 98 *Cal L Rev* 1351, 1353. See also EL Rubin, 'Law and Legislation in the Administrative State' (1989) 89 *Columbia Law Review* 369.

177 D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 18.

178 See D Pearce, 'Legislative Scrutiny: Are the ANZACs Still the Leaders?' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century, Parliament House, Canberra, Australia, 6-8 July 2009).

179 Despite these concerns, "American legislation these days typically leaves *everything* (even policy at the broadest level) to the executive branch and its agencies": M Aronson, 'Great Depression' (2009) 37 *Fed LR* 165, 178 (emphasis added).

180 EL Rubin, 'Law and Legislation' (1989) 89 *Colum LR* 369, 391.

181 EL Rubin, 'Law and Legislation' (1989) 89 *Colum LR* 369, 380-5; M Aronson, 'Great Depression' (2009) 37 *Fed LR* 165, 178.

that, increasingly, it is not mechanical provisions but also issues of policy which are left to delegated legislation[182] or, indeed, soft law.[183]

Neither of these points is directly of concern to this thesis,[184] although both are important. What is of concern is the likelihood that not all of the vast amount of law-making power which is "left to the Regs" in fact results in a legislative instrument. Some of what Parliament leaves for administrators and agencies to do is better done through the mechanism of soft law rather than subordinate legislation; the sheer proliferation of soft law instruments leads inevitably to this conclusion.[185] Soft law *is* used; as a practical matter, there is no prospect of this changing, and there are good pragmatic reasons why it ought not. As I have discussed above, the use of soft law is not likely to carry a cost in terms of effectiveness, since many people comply with soft law as though it were legislative in any case. It does however have a cost in terms of accountability, since soft law is not even subject to the minimal scrutiny of being tabled in Parliament, or the exposure of being placed on the Federal Register of Legislative Instruments.[186] It further carries a higher level of risk simply because the drafting standards of soft law instruments are inconsistent and inferior to those used by legislative drafters.[187]

Confining and structuring discretion

That discretion can be exercised other than arbitrarily is now well understood. Kenneth Culp Davis observed to this end that rules and discretion occupy a spectrum[188] rather than being two mutually exclusive options.[189] Within this spectrum, "a standard, principle or rule can be so vague as to be meaningless, it can have a slight meaning or a considerable meaning, it can have some degree of controlling effect, or it can be so clear and compelling as to leave little or no room for discretion".[190] It was Davis' thesis that the confinement and structuring of discretion are as relevant as its grant to administrators in the first place, and that discretion could be confined through the structure provided by rules as effectively as by restricting grants of discretion from the legislature.[191] Furthermore, Davis argued that, while administrative rule-making has a legislative aspect,[192] it should not shy away from being very specific[193] and should build a body of rules case by case if necessary. In this regard, he

182 S Argument, '"Leaving it to the Regs"' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, 26-28 July 2011).

183 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 196.

184 Harlow and Rawlings pointed out that defining soft law in terms of "procedural distinctions", as many commentators have done since Megarry in 1944 and as this thesis also does, is not the only suitable mode of classification. They said that theorists would distinguish rules from principles: C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 203-4. Provided that soft law is considered on the basis of its effect rather than any more superficial consideration, as argued above, I do not think that this issue is crucial.

185 D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 16-18.

186 *LIA 2003* (Cth) s 20. See http://www.comlaw.gov.au/Browse/ByTitle/LegislativeInstruments/. This observation is not new; see C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 192.

187 D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 19.

188 This is a related point to that made in the text accompanying nn 83-85 above, that the 'softness' of law lies on a spectrum. This linear mode of explanation has not been universally adopted; see C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 203.

189 Although Davis was still prepared to describe a broad discretion as "arbitrary" when it had no more than the *potential* for misuse: KC Davis, *Discretionary Justice* (1969) 78.

190 KC Davis, *Discretionary Justice* (1969) 15.

191 KC Davis, *Discretionary Justice* (1969) 55-7.

192 See the discussion in C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 201.

193 A "*rule need not contain any generalisation*": KC Davis, *Discretionary Justice* (1969) 60 (original emphasis), cf the discussion of skeletal legislation at nn 164-169 above.

can be seen as favouring (at least in some circumstances) an incrementalist, 'judicial' approach to rule-making, rather than an exclusively 'legislative' approach which sees administrators frame rules only at a high level of abstraction.[194]

Although Davis' central thesis in his highly influential[195] *Discretionary Justice* should not be understood in strictly Diceyan terms,[196] the bulk of the book is concerned with applying limits to administrative discretion. There is a long tradition of suspicion towards discretion which has developed in the US independently of Diceyan influence.[197] Davis strongly advocated executive rule-making and was massively influential in the expansion of rulemaking in the United States.[198] However, his approach was more 'pluralist' than most in at least one aspect: he argued that rules and guidelines about the enforcement of legislation which amount to the "substantial reformulation of enacted law" can have the practical effect of changing the law.[199] Davis justified this position on the basis that it is preferable to a situation where the enacted law is not enforced in practice but the discretion not to enforce the law is exercised on an *ad hoc* basis rather than in accordance with a stated policy.[200]

Dicey would have abhorred the use of soft law as an exercise of discretion. He objected, after all, to "official law", the term by which he described law administered by official bodies.[201] However, this was generally imposed by legislation and was saved, in Dicey's view, from violating the rule of rule of law only because the decisions of any such official body were reviewable by the "ordinary courts" applying "ordinary law".[202] Soft law, by comparison, amounts to the voluntary adoption by state administrative agencies of informal rules and processes which may be applied in some circumstances as though they were law, but generally without recourse to a court to review their application absent jurisdictional error by the administrative body in question.

In an oft-cited appraisal of Dicey's theoretical approach to administrative law, Professor Arthurs was extremely critical of the approach taken by Dicey and his followers (most notably, Lord Hewart) to the legitimacy of administrative law.[203] While Arthurs' criticisms of Dicey's exposition of the theoretical underpinnings of the rule of law are well reasoned and in the main difficult to dispute, there is a sense

194 KC Davis, *Discretionary Justice* (1969) 57-60.

195 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 201-2.

196 Davis favoured discretion over rules where it is important to counter legal rigidity: KC Davis, *Discretionary Justice* (1969) 19, 107. Davis stated that 'law' and 'discretion' do not form a dichotomy but that there is a "zone" between them, much as the dawn separates night and day: Ibid. 106. This analogy is beloved of lawyers. For example, Gleeson CJ described quality review as being akin to "twilight" between the 'night' of merits review and the 'day' of "judicial review based upon the principles of legality": AM Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 1, 8.

197 Davis was a central figure in this tradition but is by no means the only one; see PL Strauss, 'Legislation that Isn't' (2010) 98 *Cal L Rev* 1351, 1355 (n 17).

198 See RM Levin, 'The Administrative Law Legacy of Kenneth Culp Davis' (2005) 42 *San Diego Law Review* 315, 324-5.

199 KC Davis, *Discretionary Justice* (1969) 93-4. See eg the example in the text accompanying nn 128-130 above.

200 KC Davis, *Discretionary Justice* (1969) 94. Davis was specifically addressing police enforcement of criminal legislation which, it is conceded, carries its own specific issues.

201 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1902) 190-1.

202 HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1, 26-7. Note, however, Arthurs' argument that reviewing courts are limited to giving effect to "official law" prescribed by legislation: HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1, 27.

203 HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1, 26-7.

in which such attacks amount to taking aim at a target which has long since ceased to move, as Arthurs readily conceded.[204] Furthermore, while Arthurs' deconstruction of the Diceyan concept of the rule of law is essentially sound, this need not justify a wholesale repudiation of Dicey's work, which still retains "much that is attractive",[205] particularly when understood as a set of aspirations for equality of justice between government and citizens.

The reason that Dicey's approach to discretion must be discarded is that the functions of government have long since moved beyond the capacity of the legislature to handle alone. Representative democracy is limited in this regard, which only causes a problem to those who equate the *direct* responsibility of the legislature for all non-judicial law-making functions as a pre-requisite of the rule of law.[206] In this regard, Davis further submitted that, apart from the fact that legislatures are limited in their capacity to govern every aspect of modern life directly, they had also recognised that this was undesirable in many circumstances.[207] Where Parliament is unable to anticipate the detailed requirements of law, Davis argued that it is better to legislate at a higher level of generality and have administrative agencies, with the expertise garnered from applying legislation in a certain field, add the necessary level of detail in the form of 'rules'.[208]

Davis' proposal was for the courts to declare the appropriate extent to which administrative discretion should be structured by rules in order to satisfy the rule of law,[209] and even to compel administrators to formulate rules which supply "the desired standards" if they fail to do so as a matter of their own initiative.[210] These thoughts have recently obtained fresh relevance, some forty years after they were first published by Davis, after the Appellate Committee of the House of Lords (in its final judicial decision prior to the establishment of the Supreme Court of the United Kingdom) ordered the Director of Public Prosecutions to "promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding ... whether or not to consent to a prosecution" for the criminal offence of "aid[ing], abet[ting], counsel[ing] or procur[ing] the suicide of another"[211] by arranging for a terminally ill person to travel to a clinic in Switzerland.[212] This approach leaves some open questions, such as the level of specificity which will suffice to satisfy a court order

204 Arthurs made the concession that focusing his article on Dicey's work might be seen "to belabour a horse which is thought to have died so long ago, after assaults so numerous and savage, that humane considerations might dictate another line of investigation": HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1, 4 (citation omitted).

205 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, Thomson Reuters Australia, Pyrmont , NSW, 2009) 121. This language has not been included in the subsequent edition, M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013). However, it is clear that the authors did not intend to back away from the statement.

206 See eg KC Davis, *Discretionary Justice* (1969) 48.

207 KC Davis, *Discretionary Justice* (1969) 45-51.

208 Davis found the imprecision of this word to be "unsatisfactory" but recognised that this was a limitation of the language: KC Davis, *Discretionary Justice* (1969) 56 (n 4).

209 KC Davis, *Discretionary Justice* (1969) 50-1.

210 KC Davis, *Discretionary Justice* (1969) 58.

211 "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.": *Suicide Act 1961* (UK) s 2(1). The interesting (although deeply unfortunate) bind that Ms Purdy's husband found himself in was that, although suicide and attempted suicide have long ceased to attract criminal sanctions in the UK, the above section means that assisting someone to commit suicide remains a criminal act in its own right, not merely ancillary to the offence of the person who commits suicide.

212 *R (Purdy) v Director of Public Prosecutions* [2009] 1 AC 345, [56] ('*Purdy v DPP*').

to formulate soft law[213] and the amount of discretion that the DPP might justifiably leave to himself.[214] Most significantly, it raises the question of what remedies are available in the event that an administrative body formulates soft law from which it later seeks to depart. The potential answers to these questions will be the focus of the subsequent chapters of this thesis.

Davis proposed in *Discretionary Justice* that discretion was not an absolute evil but, to be useful, it needed to be curtailed in three ways: by confining it, structuring it and checking it.[215] Over forty years after its initial publication, much of what Davis has to say about checking discretion is moot in the Australian federal context as a result of the 'new administrative law' reforms of the 1970s. Specifically, the wide jurisdiction of the Administrative Appeals Tribunal, in addition to other more specialised tribunals at federal (and increasingly also at State) level means that there are institutionalised checking measures over executive discretionary decisions in addition to whatever internal review processes an administrative agency may have.[216] This is not to deny, however, that not every need to structure discretion is solved by the availability of a checking mechanism in the form of merits review.

The paradigm embodied in Davis' belief that previously announced rules are the most appropriate means of regulating discretion has been strongly criticised by Robert Baldwin, in general terms because:[217]

> To structure or confine discretion at one point without attention to the shaping of that discretion often leads to the phenomenon of displacement. Squeeze in one place and, like a tube of toothpaste, discretion will bulge at another.

As with the outlook espoused by Dicey,[218] Davis was focused strongly on justice in individual cases[219] but did not consider the issues of "collective consumption",[220] beyond an assessment that procedural limits on discretion would be of general benefit. Baldwin's critique of Davis was made on the basis that a legalist / formalist view of the world, which interprets the rule of law such that every flaw in administration can be remedied with more rules, fails to take account of the possibility that the "failings of a particular governmental process may be fundamental and may require substantial rethinking of such matters as broad government strategy, schemes of accountability, scrutiny procedures,

213 See below in Chapter 3.

214 The prospect also looms that the inevitably difficult and frequently heart-rending cases that will be covered by the proposed soft law will be dealt with through 'selective enforcement' of not only the *Suicide Act* but also of the DPP's guidelines, which cannot, after all, bind the DPP to commence a prosecution. The dangers of selective enforcement, even in regard to sympathetic subjects in 'hard cases', are well set out by C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 208.

215 KC Davis, *Discretionary Justice* (1969) chapters III, IV and V respectively.

216 Davis' view was that the acts of confining and structuring discretion "may overlap" and can both be accomplished through the medium of rule-making but are purposively different because the "purpose of confining is to keep discretionary power within designated boundaries" and the "purpose of structuring is to control the manner of the exercise of discretionary power within the boundaries": KC Davis, *Discretionary Justice* (1969) 97. This issue is broadly outlined above.

217 R Baldwin, *Rules and Government* (1995) 26.

218 Although Davis took pains to differentiate his views from the "extravagant version of the rule of law" espoused by Dicey and Hayek: KC Davis, *Discretionary Justice* (1969) 31-3.

219 But, oddly, did not favour broad discretion, which is usually seen as the best means of providing individual justice.

220 P McAuslan, 'Administrative Law, Collective Consumption and Judicial Policy' (1983) 46 *Modern Law Review* 1, 7.

organisational frameworks and goals".[221] In other words, where Davis was content to limit discretion and rules to either end of a spectrum,[222] Baldwin was prepared to see them as a legal issue forming only one part of a broader set of political and organisational queries. This difference in approach is exemplified by Baldwin's point that, so far from being an "apolitical benchmark" as Davis had seen it, the very concept of justice is essentially subjective.[223]

Baldwin made a further potent criticism of Davis' argument which goes right to the heart of the model suggested by Davis. Baldwin queried whether the increased amount of structure provided by rules has any effect in reducing the practical exercise of administrative discretion.[224] He argued that it may not because a highly detailed regulatory regime (such as the US taxation laws, which are cited by both Davis and Baldwin) can often allow administrators to choose *between* competing tenable decisions. If this analysis is correct, a highly detailed, fact-specific body of rules in a particular area will in fact *increase* the discretion of administrators to choose between applicable rules. There is much, including simple common sense, to support this view.[225] Every lawyer knows that, of the many thousands of cases which are decided every year, added to an already massive body of case law, it frequently occurs that there is no case on all fours with the fact scenario before him or her. In such cases, lawyers will argue that a court should apply certain authorities and distinguish others, meaning that there is a discretionary choice as to what case to apply. Baldwin's argument regarding very rule-heavy administration is analogous to this situation.

It follows from this that Davis' proposal that a body of rules should be built up in the smallest increments necessary[226] is flawed to the extent that it relies on the same factual scenarios recurring. Baldwin cited Daniel Gifford[227] as contending that, unless there is a high degree of factual recurrence in a particular area, the capacity to develop rules and also the value of those rules will be impaired by this method.[228] Assuming the accuracy of Gifford's research, this significantly undermines one of Davis' central findings, viz. that rules are generally, even if not universally, preferable to unstructured discretions. Davis, of course, readily conceded that it is undesirable to be so completely rule-bound that judicious use of discretion is unable to impose a just decision in circumstances unanticipated by existing rules,[229] but Baldwin pressed further, arguing that the somewhat Diceyan tendency to characterise discretionary decision-making as 'arbitrary' and 'capricious' is inaccurate in so far as it is based on a narrow conception of 'decision'.[230] The thrust of Baldwin's argument was that, even if discretion in the absence of rules is less structured, it has the concomitant advantage of greater

221 R Baldwin, *Rules and Government* (1995) 19.

222 KC Davis, *Discretionary Justice* (1969) 15.

223 R Baldwin, *Rules and Government* (1995) 22.

224 R Baldwin, *Rules and Government* (1995) 23.

225 Including evidence provided by the empirical work of Susan Long, which is cited by Baldwin: ibid.

226 KC Davis, *Discretionary Justice* (1969) 60.

227 DJ Gifford, 'Decisions, Decisional Referents and Administrative Justice' (1972) 37 *Law and Contemporary Problems* 3.

228 R Baldwin, *Rules and Government* (1995) 24.

229 KC Davis, *Discretionary Justice* (1969) 106-7. This concession was recognised by Baldwin: *Rules and Government* (1995) 27.

230 R Baldwin, *Rules and Government* (1995) 25-6.

flexibility which allows administrators to be more responsive in times of rapid or unanticipated change.[231] The issue returns again to the tension between the rule of law principles of flexibility and predictability.

Further to this, there are practical limitations on the capacity of agencies to issue prospectively binding rules. Mantel noted that "because agencies operate in a world of imperfect information where they cannot anticipate all scenarios that may arise in the course of implementing a statutory and regulatory scheme, an agency cannot define and set forth in its legislative rules every nuance of its policies".[232] Rules of this sort are effectively no better than legislation set out in general terms. Leaving some breadth of discretion also allows for creative responses to the problems which regulation seeks to address, rather than encouraging those subject to rules simply to 'tick the appropriate boxes'.[233] Flexibility, therefore, can be seen not only as a benefit allowing for a higher quality of regulation but a practical necessity, since both administrative and legislative foresight are limited.

Having said that, flexibility carries with it an extended level of risk in comparison to mandatory procedures. Stewart asked that proponents of flexibility remember that "there may be a trial and error process in [an administrative agency] finding the best means of achieving the posited goal, but persons subject to the administrator's control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor".[234] The capacity to experiment with administrative approaches should be understood as carrying with it a heavy responsibility.

In relation to judicial, rather than administrative decision-making, Haack said:[235]

> It may be feared that, if legal decisions are not a matter of logic, they can only be arbitrary and capricious; but a pragmatist will see at once that this fear arises from a false dichotomy. That legal decisions are under-determined by legislation or precedent doesn't mean there is no difference between wise decisions, based on judicious assessments of how best to marry older practice to new circumstances, and unwise decisions, based on hasty, prejudiced, or partisan assessments. Now it may be objected that such a contrast can only be sustained by appeal to some quasi-Kantian conception of the legal and the moral; but a pragmatist will see right away that this simplifies some very complicated questions both about ethics, and about the relation of law and morality.

Broadly, her point is that there is frequently a range within which different decisions are able to be logically and morally supported. Judicially, this is illustrated by the fact that dissenting judgments need not necessarily betray a want of logic.[236] This extends by analogy to administrative exercises of discretion. Haack's point goes to the fact that there is moral legitimacy to structuring democratic

231 R Baldwin, *Rules and Government* (1995) 28.

232 J Mantel, 'Procedural Safeguards for Agency Guidance: a Source of Legitimacy for the Administrative State' (2009) 61 *Administrative Law Review* 343, 351; see also NA Mendelson, 'Regulatory Beneficiaries and Informal Agency Policymaking' (2007) 92 *Cornell L.Rev* 397, 410.

233 See eg Scott's account of two regulatory approaches to aged-care facilities, one of which contained detailed and comprehensive standards and the other of which specified that the residents be offered a 'home-like environment'. Research indicated that the more general standard enabled managers and staff to use discretion to obtain the desired standard in ways difficult to express in detailed 'check-list' rules: C Scott, 'Standard-Setting' in R Baldwin et al (eds), *Oxford Handbook of Regulation* (2010) [6.2.2].

234 RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667, 1678.

235 S Haack, 'The Pluralistic Universe of Law: Towards a Neo-Classical Legal Pragmatism' (2008) 21 *Ratio Juris* 453, 471.

236 S Haack, 'Pluralistic Universe of Law' (2008) 21 *Ratio Juris* 453, 470-1; OW Holmes, 'The Path of the Law' (1896) 10 *Harvard Law Review* 457, 465.

power through indeterminate rules, if there is something *other than* those rules which structures discretion, such as legal and cultural values.

The requirement (as opposed to the effectiveness) of rules changes with the administrative body to which they would be applied. Baldwin noted that greater levels of administrative expertise,[237] externality from government[238] and other means of control (usually under contract and including audits, inspections and targets) will influence whether rules are in fact appropriate means by which to regulate administrative discretions.

Alternative approaches

While the main point made by Baldwin against Davis' vision of a body of precedent which both confines and adds structure to administrative discretion was that it serves in fact to increase the amount of discretion available to administrators in practice, others have taken an alternative approach. Arthurs noted that research had shown that administrative decision-makers "may tend to allow discretion to crystallise so completely into rules that they sometimes cease to function effectively, or at least as originally mandated".[239] Both James Farmer[240] and Philippe Nonet[241] had written to this effect within five years of the initial publication of Davis' *Discretionary Justice*.

Nonet considered the role of law by way of introduction to his broader topic of the administrative procedures of the Californian Industrial Accident Commission. He described the welfare state as having been designed to avoid the "rigid constraints that paralysed initiative and prevented effective action to solve the problems of society", constraints that were born of the "burdensome formalism of legal procedure".[242] Its critics, by contrast, employed Diceyan 'rule of law' reasoning[243] to argue for a restrictive approach to administrative power, which was to be subject to "public authority".[244] Nonet argued that imposition of external restraints on administrative action in the form of judicial review both obscured "opportunities for securing *internal* restraints in government, by building legal control within the administrative process" and "ruled out the possibility that, through the courts from without or through built-in legal processes, law might *positively* contribute to the capacities of government and further the realisation of public purposes".[245] This in turn was seen as diminishing "the scope and import of legal criticism" because, by separating substantive issues of policy from procedural issues of legality, the legal limitations placed upon the exercise of discretion serve only to place checks on

237 See eg *Australian Retailers' Association v Reserve Bank of Australia* (2005) 148 FCR 446, (Weinberg J, '*Australian Retailers*'). In this case, the decision challenged as being *Wednesbury* unreasonable was made by a particularly esteemed board of experts; see G Weeks, 'Litigating Questions of Quality' (2007) 14 *Australian Journal of Administrative Law* 76, 83.

238 See I Harden, *The Contracting State* (Open University Press, Buckingham, 1992) Ch 5.

239 HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1, 24.

240 JA Farmer, *Tribunals and Government* (Weidenfeld and Nicolson, London, 1974).

241 P Nonet, *Administrative Justice: Advocacy and Change in a Government Agency* (Russell Sage Foundation, New York, 1969).

242 P Nonet, *Administrative Justice* (1969) 3.

243 AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) 328-405.

244 P Nonet, *Administrative Justice* (1969) 4.

245 P Nonet, *Administrative Justice* (1969) 4 (emphases in original).

decision-makers who exceed their authority and not on those who stray from the policy basis for which their discretionary powers were granted.

Nonet took the view that this had dual consequences: first, that there was a reduced scope for challenge (at the level of administrative decision-making) to existing policies, thus binding the decision-maker in a practical sense to be "a docile executor of policies" determined by others and denied discretion, just as judges are; and secondly, that legal criticism is focused on the process rather than the substance of administrative decision-making.[246] Although Nonet described substance as being "more important", this procedural focus is seen as the necessary consequence of the constitutional separation of judicial power, in Australia[247] as in the USA, when considering judicial review of administrative action. Nonet proposed that "legal criticism" be extended to administrative decision-making to ensure, not simply that discretion be constrained, but that it is exercised "consistent with the aims of public welfare" following legal argument.[248]

Exercising discretion subsequent to legal argument would be unlikely to contribute to the goal of making administrative decision-making swift, efficient, effective, economical and responsive to change. It would carry with it *additional* procedural burdens and, inevitably, expose administrative decisions to a greater likelihood of challenge by way of judicial review.[249] This might be seen as an effect of the *Legislative Instruments Act*'s requirement that legislative instruments be tabled in Parliament, although in reality the Act has a negligible impact on validity.[250] Nonet asserted that, by this method, people can ensure that they obtain 'rights' to benefits provided by government through administrative discretion.[251] One of the reasons for the increasing use of soft law is to bypass onerous procedures of this type.[252]

Farmer's work specifically considered the similarities between judicial and tribunal decision-making and, in particular, the degree to which each applies precedent. He noted that, during the 1960s, the House of Lords and English Court of Appeal became less inclined to apply the doctrine of precedent as stringently as they had previously done,[253] with the effect that new common law doctrines

246 P Nonet, *Administrative Justice* (1969) 5. This is a common concern; see eg P Daly, 'The Unfortunate Triumph of Form over Substance in Canadian Administrative Law' (2012) 50 *Osgoode Hall Law Journal* 317; WMC Gummow AC, 'Form or Substance?' (2008) 30 *Australian Bar Review* 229. Criticisms of the Australian judiciary on the basis that it is "exceptionalist" are usually linked directly to the very process-heavy approach that Australian courts take to judicial review; see M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1.

247 *Quin* (1990) 170 CLR 1, 35-6 (Brennan J).

248 P Nonet, *Administrative Justice* (1969) 6.

249 This may, after all, be seen as an effect of the informal "notice and comment" procedures under *Administrative Procedure Act 1946* (US) 5 USC § 553. Davis' influential approach required courts to distinguish between adjudicative and legislative facts, providing a focus for potential disputes even as the formal rulemaking 'trial' procedure fell into disuse: RM Levin, 'Legacy of K.C. Davis' (2005) 42 *San Diego LR* 315, 325-6.

250 Additionally, the Act's requirement to consult before making a legislative instrument carries no consequences affecting the validity of the instrument if consultation does not occur: *LIA 2003* (Cth) ss 17, 19. See D Pearce and S Argument, *Delegated Legislation* (4th ed, 2012) 34-5.

251 P Nonet, *Administrative Justice* (1969) 6; CA Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733, 786; cf Stevens' view that public authorities only become liable in tort for infringing upon rights, but not for otherwise failing to confer a benefit: R Stevens, *Torts and Rights* (Oxford University Press, Oxford, 2007) Chapter 10.

252 See also the discussion in Chapter 5 below.

253 JA Farmer, *Tribunals and Government* (1974) 172.

developed.[254] However, this did not alter the sovereignty of the English Parliament and Farmer argues that courts became even less willing[255] to make new law as an exercise of policy: the increased inclination of Parliament to find legislative solutions to questions of policy was in general treated with appropriate deference by the judicial branch. Farmer linked this trend to the expansion of tribunal decision-making, particularly where pressure on parliamentary time meant that not every important issue was able to be legislated for in full.[256]

However, Farmer went on to argue that tribunal justice tends in practice to 'bind' itself to precedent.[257] It is true that tribunals generally are not required to hold previous tribunal findings as binding precedents, the justification for this position being that every matter is decided on its own merits and not by the application of precedent. Nonetheless, Farmer noted that, while "flexibility is the ideal", demands for consistent and predictable decision-making lead to "an informal de facto system of precedent".[258] Farmer distinguished between 'rules' which require decision-makers to conform to them and 'principles' which indicate issues of importance without compelling a particular decision.[259] His purpose was to distinguish between informal 'precedent' of the kind found in tribunals, and precedents which bind, or must be distinguished by, judges in court proceedings. On this view, tribunal members are guided, judges are bound.

The notion that tribunal decisions made on the facts have value as precedents abuts the question of what constitutes law. This is considered at some length below. At this point, it suffices simply to point to the issue and compare the traditional view with the realities of tribunal justice. The Diceyan approach that only Parliament and (preferably) the "ordinary law courts" had the power to make law has been questioned. By any practical definition, tribunals also set precedents which "might well" be included in a functionalist definition of 'law':[260]

> Tribunals are under the same pressures as the courts to decide like cases alike, to explain their understanding of the law, and to confine themselves to the case at hand. Their decisions are widely published, and read not just by anyone who is to appear before them, but also by anyone wanting to discover and study the substantive law with which they deal. … In any practical sense, their decisions are surely authoritative.

254 eg *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, ('*Hedley Byrne*').

255 With the exception of a few judges, including Lord Denning MR; see eg *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 397 ('*Dutton v Bognor Regis*'). Lord Denning may legitimately be seen as the exception which proves the rule on this issue.

256 JA Farmer, *Tribunals and Government* (1974) 173.

257 The same argument is sometimes made with regard to the judicial application of European Codes.

258 JA Farmer, *Tribunals and Government* (1974) 174.

259 Farmer was adopting Dworkin's terminology: RM Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 22-9. However, one may query to what extent this adoption was apposite, since tribunal rules may be very "rule-like" in the sense employed by Dworkin, in which rules have an "all or nothing" application.

260 M Aronson et al, *Judicial Review of Administrative Action* (4th ed, 2009) 189. See now M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.70].

Likewise, Peter Strauss has said that the APA:[261]

> seems to imagine that the impact of a publication rule will be rather like that of an agency adjudicatory precedent - not itself "law", yet establishing a principle[262] to which the public may be held unless the agency is persuaded not to apply it, and constraining the judgment of the agency itself in the absence of some demonstrated reason for departing from it.

This practical reality serves to emphasise the concern raised by Farmer that the balance between consistency and flexibility is tipped too far in the favour of the former where tribunals bind themselves to 'informal precedents'.[263] In Australia, however, this has been true for three decades since the highly influential decision of Brennan J, sitting as President of the AAT, in *Drake (No2)*.[264] In the later case of *Babaniaris*, the High Court was called upon to consider whether a decision of the Chairman of the Workers' Compensation Board, a judicial officer, was binding as precedent on later decisions of the Board. Brennan and Deane JJ held that, if the Chairman's decision:[265]

> was no more than an administrative opinion, the whole foundation of *stare decisis* would fall away. A court could not abdicate its function of expounding and applying Parliament's intention as the court sees it if that intention had not been judicially determined on a previous occasion: the court could not decline to perform its function in order to follow an administrative opinion or practice. To do so would be to permit the executive branch of government to usurp the function of the courts. But if [the Chairman]'s determination judicially declared what Parliament's intention was, so that "what before was uncertain and perhaps indifferent, is now become a permanent rule", another court may act upon that determination even if the latter court does not agree with it and is not bound by it. …
>
> When a tribunal which has exclusive jurisdiction to determine claims between parties for the enforcement of a statutory right construes the statute in order to determine a claim, the construction placed on the statute is not a mere administrative opinion; it is a judicial determination.

Brennan and Deane JJ's judgment in *Babaniaris* can therefore be seen as further reinforcing the distinction between informal (tribunals) and formal (judicial) precedents.

The conclusion reached by both Farmer and Nonet is that executive decision-makers may tend to allow discretion which is confined or structured by rules to be 'crystallised' by those rules (to use Arthurs' term), with the effect that discretionary decision-making is not markedly different from non-discretionary decision-making. As such, it may have none of the risks of excess that Davis noted as being inherent in discretion, but nor will it have any of the advantages, such as responsiveness, flexibility, the "potential for interpretation", particularly in circumstances where a rule is applied in geographically diverse areas, and "the development of innovative ways of addressing" the problem

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261 PL Strauss, 'The Rulemaking Continuum' (1992) 41 *Duke Law Journal* 1463, 1472-3. This point was later approved by a majority of the Supreme Court in *United States v Mead Corporation* 533 US 218 (2001), 232 ('*US v Mead Corp*'). It is instructive that Professor Strauss describes both the agency *and* the public as being bound by such a precedent.

262 More precisely, Strauss should have referred here to a 'norm'.

263 Deane J later commented that "while consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it.": *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 334 ('*Nevistic v MIEA*'). See also C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 207-8.

264 *Drake (No2)* (1979) 2 ALD 634.

265 *Babaniaris v Lutony Fashions Proprietary Limited* (1987) 163 CLR 1, 31-2 ('*Babaniaris*').

with which the soft law in question purports to deal.[266] Furthermore, to the extent that previous decisions have not been made in light of new information which will inevitably become known and which may demand a more "nuanced" policy, this method of restricting administrative discretion will result in decision-making with additional deficiencies:[267] for example, it will not only be unresponsive but also essentially backward-looking. Finally, it is inevitable that soft law, whose métier is influence, will continue to thrive and that the public will continue to be exposed to it. This will simply happen below the level of the formerly soft law which has been 'hardened' or 'crystallised' into law of a more formal, positivist kind.

The post-Dicey common ground on the issue of discretion is that the administrative state cannot be run either from the floor of Parliament (or indeed from Ministerial offices) alone.[268] Indeed, Professor Sunstein cited "the shift from regulation through common law courts to regulation through administrative agencies"[269] in support of the *Chevron*[270] doctrine of judicial deference to administrative statutory interpretation, a doctrine which Dicey would have placed wholly outside the rule of law.[271] *Chevron* has been criticised as "indicative of a 'delegalisation' of the administrative process",[272] although the fact that such criticism was repeated with evident approval by the Australian High Court will be considered significant by critics of its supposedly 'formalist' and 'legalist' tendencies.[273]

The undeniable development of the administrative state means that some degree of discretionary decision-making is inevitable and this is not wholly undesirable. Discretion allows flexibility in decision-making and this is necessary to allow for greater speed in responding to changing circumstances than is possible through the more rigorous process of legislation and also to ensure that justice is able to be done in unusual cases which have not been considered in formulating rules. While most agree that some level of structure is desirable in the exercise of discretions, particularly in circumstances where substantially similar factual situations recur frequently, the imposition of rules by government as regulations to a statutory scheme is beyond the scope of this thesis. The tension between consistency and flexibility is inevitable and not undesirable. Soft law emerges in the context of that inevitable tension as a device that tries to have it both ways: to be both hard, consistent,

266 C Scott, 'Standard-Setting' in R Baldwin et al (eds), *Oxford Handbook of Regulation* (2010) [6.2.1].

267 J Mantel, 'Procedural Safeguards for Agency Guidance' (2009) 61 *Admin LR* 343, 351.

268 Professor Rubin, however, still detected in arguments in favour of accountability stemming from popular election the defect of "a preanalytic hostility to the modern administrative state, an anti-bureaucratic pastoralism that feeds on nostalgia for simpler, more integrated times": EL Rubin, 'Myth of Accountability' (2005) 103 *Mich L Rev* 2073, 2074.

269 CR Sunstein, 'Beyond *Marbury*: the Executive's Power to Say What the Law Is' (2006) 115 *Yale Law Journal* 2580, 2583.

270 *Chevron* 467 US 837 (1984).

271 Although it was not strictly necessary to do so on the facts, a majority of the Australian High Court firmly rejected adoption of the *Chevron* doctrine in *Enfield Corporation* (2000) 199 CLR 135, 151-4 [40]-[45] (Gleeson CJ, Gummow, Kirby & Hayne JJ). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.60].

272 *Enfield Corporation* (2000) 199 CLR 135, 152 [42] (Gleeson CJ, Gummow, Kirby & Hayne JJ). Their Honours were citing K Werhan, 'Delegalizing Administrative Law' [1996] *University of Illinois Law Review* 423, 457.

273 See eg T Poole, 'Between the Devil and the Deep Blue Sea' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 15; M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1; cf the suggestion "that criticising the High Court on the basis of its 'formalism' or 'legalism' leads to no little confusion when it is done by using labels of inherently subjective and contested meaning": J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316, 329.

inflexible law and soft, adaptable, flexible non-law. The questions which remain are therefore to what extent soft law can succeed in this aim and what specific problems may be present in using soft law thus understood.[274]

B: Soft law as a regulatory instrument

I: The regulatory purpose of soft law

The preceding arguments in Part A about the nature of law lead to the question of what part of administrative rule-making leads to law or legal rules,[275] and what part merely results in soft law.[276] A further question is to what extent soft law can simply be described as 'rules'? The answer to this question will clarify the role and status of soft law. If we accept as a starting point that the category of 'rules' is broader than that of 'law', what part of the category 'rules' is outside the definition of 'law'? Soft law differs from law in that it does not have *binding* legal consequences. Likewise, rules are 'law' to the extent that they are legally enforceable. Rules can therefore be divided between the categories of those which are binding and those which are not; the latter of these can just as accurately be described as 'soft law'. However, soft law cannot be adequately defined in a purely negative way. The above reasoning explains why soft law is 'soft', but not why, without binding force, it is able to be described as 'law' despite being an essentially "bureaucratic phenomenon".[277] The answer to this is that, even without the capacity to bind, soft law is created with the capacity to have some kind of practical, normative effect. Soft law is *in fact* a regulatory tool.

The nature and attraction of rules and soft law

Much has been written about rule-making in the course of the last forty years, particularly by American authors, starting with the work of Davis[278] and including, for example, the work of Cornelius M Kerwin.[279] Julia Black[280] and Robert Baldwin[281] have also written about rule-making from the British perspective, as has John Braithwaite from the Australian perspective.[282] At least one major British administrative law text dedicates a chapter to rule-making[283] and an increasing amount of space was dedicated to the subject in each successive edition of KC Davis' *Administrative Law Treatise*.[284] Finally, rule-making has been the subject of a report by the Administrative Review Council in

274 For example, should public authorities structure their own discretions by making them subject to rules and, having done so, when and how are they able to reach a decision which is contrary to a self-imposed rule?

275 As opposed to 'secondary rules', delegated legislation or, as the English have it, Statutory Instruments; see R Baldwin, *Rules and Government* (1995).

276 The distinction between rules and law was drawn in C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 192.

277 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 196.

278 KC Davis, *Discretionary Justice* (1969).

279 CM Kerwin, *Rulemaking* (2nd ed, 1999).

280 J Black, 'Constitutionalising Self-Regulation' (1996) 59 *ModLR* 24; J Black, *Rules and Regulators* (1997).

281 J Houghton and R Baldwin, 'Circular Arguments' [1986] *PL* 239; R Baldwin and D Horne, 'Expectations in a Joyless Landscape' (1986) 49 *Modern Law Review* 685; R Baldwin, *Rules and Government* (1995).

282 J Braithwaite, 'Rules and Principles: a Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47.

283 PP Craig, *Administrative Law* (7th ed, 2012) Ch 15.

284 KC Davis, *Administrative Law Treatise* (1st ed, West Publishing Co, St Paul, Minnesota, 1958); KC Davis and JP Wilson, *Administrative Law Treatise* (2nd ed, K.C. Davis Publishing Co., San Diego, 1979); KC Davis and RJ Pierce, *Administrative Law Treatise* (3rd ed, Little, Brown, Boston, 1994).

Australia.[285] These works have focused mainly on rule-making as a *method* of imposing regulation. This thesis proposes instead to explore the *consequences* of the use of rules to regulate behaviour.

An argument against the legal status of soft law rules may be derived by extension from the fact that delegated legislation obtains legitimacy, at least in part, from parliament.[286] Soft law rules which develop or are developed without express parliamentary delegation beforehand or approval afterwards might be seen as illegitimate because they have not been exposed to political accountability processes. Indeed, this is often the very point: soft law can be implemented and have effect without the difficulty of the legislative process, something which Arthurs notes has been true since the 19th century:[287]

> Administrators became increasingly reluctant to embark upon legislative campaigns, and their political masters increasingly restrained such activity. Where they could enact regulations or improvise using their own quasi-legislation by the imaginative use of existing statutes, they did so. Where new or amending legislation was clearly needed, it was often limited to the specific situation at hand: 'we provided a plaster for the wound, but we do not make it any larger than the wound.' This attitude represented a retreat from the early Benthamite legislative ideal of comprehensive and formal specification. But it was a tactical retreat only. Comprehensiveness and specificity flourished in the regulations, rules, and practices developed under the protective umbrella of the general enabling legislation. What parliament could not or would not enact, what judges could not or would not read into legislation, might be provided by commissioners and inspectors themselves, through subordinate law-making and the daily routine of administration.

While such practices may have been intended as no more than a "tactical retreat" from the Benthamite ideal of comprehensive, specific legislation, they amounted to a more fundamental departure from positivist notions about the source of law. Administrative rule-making in lieu of legislation is *effective* only if those rules will have consequences comparable to the legislation in whose place they stand. In this practical sense, soft law rules are 'law'; whether or not they have the legitimacy that attaches to that term is a separate question, addressed above.

Craig nominated four main reasons why soft law may be used in preference to delegated legislation:[288]

> First, even where no explicit power to make regulations is granted to an agency, it will often make rules to indicate how it will exercise its discretion. This is a natural tendency for bureaucracies when faced with a recurring problem. … Second, non-legal rules facilitate the use of non-technical language, exemplified by the Highway Code, and the Health and Safety Codes. Third, such rules may be preferred because they are more flexible than statutory instruments, and hence can be changed more easily. Finally, these rules may be preferred to delegated legislation precisely because they are not legally binding. They enable policies to be developed voluntarily in the sense that "persuasion may be preferable to compulsion".

285 Administrative Review Council, *Rule Making* (1992).

286 Query, however, whether and to what extent political legitimacy attaches itself to delegated legislation formulated generally in seclusion from public scrutiny: E Page, *Governing By Numbers* (2001) 7. See also M Aronson, 'Great Depression' (2009) 37 *Fed LR* 165, 175.

287 HW Arthurs, *Without the Law* (1985) 160 (footnotes omitted). See also E Page, *Governing By Numbers* (2001) 13; C Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge University Press, Cambridge, 2006).

288 PP Craig, *Administrative Law* (7th ed, 2012) 467-8. Craig's reasons are generally representative of the various other commentators on this topic.

It is in the nature of rules that they tend either to be over-inclusive or under-inclusive,[289] even though it is clearly preferable that a "rule should apply to all the circumstances within the intent of a policy maker and to none that fall outside that intent".[290] That this ideal is not realised is because the purpose of rules has been to confine discretionary decision-making - the first of the considerations listed by Craig, which has been discussed at length above. One of the reasons that discretions are granted in the first place is that the relevant issues cannot be determined far enough in advance to make their regulation the subject of sufficiently detailed legislation. This is the source of Brennan J's comment in *Drake (No2)* that some discretions "cannot be exercised according to broad and binding rules",[291] such as the discretion reposed in the Minister for Immigration by the *Migration Act* to deport certain individuals who are not of good character.[292] There are circumstances which are beyond the capacity of rule-makers to predict and attempts to do so may result in the relevant discretion being unsatisfactorily exercised.

Generally, however, rule-making has come to be seen as an appropriate method by which discretionary powers are able to be guided.[293] The push towards rule-making as a means of controlling administrative discretion is several decades old in America. Literature which focuses on English rule-making, by contrast, talks more about the greater facility of governing without legislation as the genesis of the increase in rule-making.[294] There is a fundamental difference between rule-making which is motivated by a desire to control undemocratic power and rule-making which is designed to circumvent the inconvenience of dealing with the central organ of democracy.[295] Questions of motivation become all the more difficult if it is accepted that soft law instruments may be "of a generality of application such that if they were juxtaposed to real statutory instruments they would be indistinguishable in terms of their nature or content".[296] Harlow and Rawlings warned in this regard that "decisions to make rules are not always taken on rational grounds".[297]

Robert Anthony is one commentator who has contended that agencies tend to use rules to "avoid the procedural rigours of legislative rule-making".[298] Paul Craig also raised the point that, while soft law

289 J Black, *Rules and Regulators* (1997) 6.

290 C Scott, 'Standard-Setting' in R Baldwin et al (eds), *Oxford Handbook of Regulation* (2010) [6.2.2].

291 *Drake (No2)* (1979) 2 ALD 634, 640 (Brennan J).

292 See now *Migration Act 1958* (Cth) ss 501, 501A.

293 KC Davis, *Discretionary Justice* (1969).

294 See eg E Page, *Governing By Numbers* (2001) Ch 1.

295 A third motivation, much considered in Australia, is that soft law is an effective means of controlling discretion in a manner that allows it to retain its flexibility but reduces inconsistency, which carries with it the suspicion of arbitrariness; see *Drake (No2)* (1979) 2 ALD 634, 639 (Brennan J).

296 PP Craig, *Administrative Law* (7th ed, 2012) 467; cf RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1321. Anthony remarked that, in the American context, the difference between legislative and non-legislative rules "is very clear". The distinction between administrative and legislative facts in rule-making can be traced directly to Davis: RM Levin, 'Legacy of K.C. Davis' (2005) 42 *San Diego LR* 315, 325.

297 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 193.

298 RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1327. See also Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter Law Report* (1997), xii; CM Kerwin, *Rulemaking* (2nd ed, 1999) 24; L Sossin, 'The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, West Nyack, NY, 2004) 129, 138; Stenning and Associates Pty Ltd, (Department of Industry, Science and Tourism), *Codes of Practice Project Stage 1: Scoping Study*, Scoping Study, (1997) 5.

may be chosen as the method by which a policy is implemented, either because it is more efficacious or, alternatively, because it exemplifies the outcome of direct negotiation between the executive and a major stakeholder, with which a majority of the legislature may not agree, it may equally be used by:[299]

> a powerful executive [to implement] a code or rule which the relevant interest groups oppose, but which they are powerless to fight. Legislative scrutiny can be avoided, and the minimum of legal formalism troubles the executive in pursuit of its aim. Not all informal rules are therefore necessarily more truly consensual in nature than those norms which emerge as legislation.

The position described by Craig stands in stark contrast to the comment made by Cini that one of the strengths of soft law in the international context is that it is more likely to be supported by political consensus than harder forms of regulation.[300] Certainly, one of the major attractions of soft law in a domestic setting is that, unlike legislation, it requires *no* political consensus in order to be implemented.

It is not unduly cynical to make this point. Indeed, there is nothing more natural for the executive arm of government, increasingly used to power for over a century, than to seek to avoid dealing with an obstructive Parliament. The ship of state turns very slowly and members of the executive may believe, with entirely clear consciences, that to avoid the scrutiny of the legislature is a more effective means of responding to rapidly changing circumstances. They may in this way justify using the less democratic form of soft law to regulate public behaviour. Of course, they may ask themselves none of these questions of political morality and simply see it as an easier way to govern. The question which is inevitably left to be answered following any discussion of formulating rules in such a way as to avoid democratic scrutiny is whether a rule made with the latter purpose is lawful at all.[301]

The short answer is that it is very difficult to establish whether an administrator has made soft law in order to avoid legislative scrutiny[302] but, in Australia and England at least,[303] provided that making rules is within that administrator's powers and does not disclose an improper purpose which takes it beyond the extent of those powers, the soft law will not be 'illegal'. After all, since soft law does not have a *legally* binding effect, "to quash it seems to mean nothing. How can it be *ultra vires* if it has no

299 PP Craig, *Administrative Law* (7th ed, 2012) 468.

300 M Cini, 'From Soft Law to Hard Law?' (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; cf L Blutman, 'In the Trap of a Legal Metaphor' (2010) 59 *ICLQ* 605.

301 Determining the true purpose behind an exercise of executive power, particularly where it may differ from the avowed purpose, is very difficult; see eg *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 450 [140] (Black CJ, French & Weinberg JJ) ('*Dr Haneef's Case*'). This difficulty is increased where there are numerous people responsible for exercising the power, not all of whom may share the same purpose or purposes; see R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 502; M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.510]-[5.580].

302 Establishing the intention to bind creates specific problems under the APA: RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1331-2.

303 But not in America, where an intention to bind brings the notice and comment procedures of the APA into force: RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1355 ff.

vires to be *ultra*"?[304] The legal status of a soft law instrument depends on issues apart from it being *ultra vires*.[305]

Any treatment of a soft law instrument by an agency as though it *were* legally binding and therefore "as dispositive of the issues that it addresses" means that the instrument has binding effect in practice,[306] although arguably not for reasons of 'law'. Any challenge to soft law which is binding as a matter of practice rather than of law would be on the basis that the administrator in question had unlawfully fettered his or her discretion.[307] However, having a judicial review remedy[308] is not satisfactory *per se* if agencies choose to misuse soft law to control the behaviour of most people and come to an alternative arrangement with the few who have either the knowledge, the resources or the pugnacity to pose a challenge. The alternatives to this limitation on judicial review's utility in Australia and England are few once it is understood that what would be called 'legislative' rules (under the APA) are already subject to parliamentary supervision.[309] It is the very nature of soft law that it operates outside the scope of what is 'legislative' and is therefore not legally binding unless it amounts to an exercise of prerogative power or executive power under s 61 of the *Constitution*.

While much has been written on the benefits of rule-making,[310] the relative strengths and limitations involved in using soft law can, in light of the discussion above, be seen as a matter of perspective. For example, to the extent that a soft law instrument lacks binding force, this represents a limitation from the perspective of entities who seek to rely on that instrument but a strength from the perspective of the body which has issued the instrument but may later wish to resile from its effect.[311] Indeed, it was suggested on behalf of the Commonwealth in argument in *Plaintiff S157*:[312]

> that the Parliament might validly delegate to the Minister "the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia", subject only to this Court deciding any dispute as to the "constitutional fact" of alien status. Alternatively, it was put that the Act might validly be redrawn to say, in effect, "[h]ere are some non-binding guidelines which should be applied", with the "guidelines" being the balance of the statute.

Without deciding the issue, the court doubted that the Parliament could so delegate.

304 HWR Wade, 'Beyond the Law: A British Innovation in Judicial Review' (1991) 43 *Administrative Law Review* 559, 561.

305 PP Craig, *Administrative Law* (7th ed, 2012) 468-9.

306 RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1328.

307 The classic example is in *Green v Daniels* (1977) 13 ALR 1, ('*Green v Daniels*'). See also the discussion in JM Keyes, *Executive Legislation* (2nd ed, 2010) 56-8.

308 Professor Anthony points out that, *a fortiori*, the situation is worse where there is no immediate right to seek judicial review because, for example, an applicant is required to exhaust certain internal review processes first: RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1330.

309 The possible solutions proposed by Paul Craig all depend on either legislative or judicial scrutiny: PP Craig, *Administrative Law* (7th ed, 2012) 469-72.

310 See eg CM Kerwin, *Rulemaking* (2nd ed, 1999) 29-36.

311 This is true *a fortiori* if it is accepted that "in practice soft law can be as influential in modifying behaviour as black letter law": Administrative Review Council, *Complex Regulation Report* (2008), 5.

312 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512 ('*Plaintiff S157*'). See also *Plaintiff M79* [2013] HCA 24, [88] (Hayne J).

The purpose behind such a legislative approach would be to remove even the application of the constitutional writs under s 75(v) of the *Constitution* from the relevant statute by, effectively, placing every decision made under the statute within the discretion of the decision-maker.[313]

The largely self-imposed restraint of the AAT in reviewing policy decisions since *Drake (No2)* explains much about the appeal of soft law as a method of regulation in Australia. While it has been the established orthodoxy over a great many years that courts exercising a judicial review jurisdiction will rarely, if ever, inquire into the merits of a decision,[314] the reluctance of administrative tribunals to oppose a proper exercise of policy by an administrative decision-maker, notwithstanding that they are empowered to do so, has served to make soft law instruments 'harder' in practice than is the case in theory.[315]

Lorne Sossin noted that there is a beneficial role for soft law in causing executive discretion to be subject to judicial precedent.[316] He argued that it is one of the functions of soft law to ensure that executive decision-makers have taken account of the latest judicial findings and *dicta* on any given issue. In support of this, he pointed to the difference between hard and soft law:[317]

> Whereas statutes and regulations are meant to define the boundaries and mandates of public authority, soft law is intended to ensure coherence and consistency in the implementation of those mandates.

The APA would characterise this soft law as 'non-legislative'. Described thus, the least that can be said of soft law is that it is benign. At best, it is an important aid to guiding administrative decision-making. However, as has been noted above, soft law is not benign or malign *per se*. Its benefits and dangers are almost entirely due to the purpose for which it is made and used. Just as soft law has numerous incarnations, ranging from aspirational statements of policy to highly prescriptive instruments, so too are there different reasons why and how soft law is used.[318]

313 L McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

314 See G Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100. There are hints in a recent case that the High Court's formerly inflexible stance on the correct approach to *Wednesbury* unreasonableness is relaxing somewhat; see *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 ('*MIAC v Li*'). Basten JA has expressed only cautious and somewhat equivocal approval of the High Court's reasoning in that case: J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' (Speech delivered at the Constitutional and Administrative Law Section, NSW Bar Association, 14 May 2013).

315 Aspects of this issue have been discussed above.

316 L Sossin, 'The Politics of Soft Law' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact* (2004) 129, 134.

317 L Sossin, 'The Politics of Soft Law' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact* (2004) 129, 139.

318 Cini noted that soft law is used within the European Commission as nothing more than the confirmation of a "symbolic policy, marking out a certain common direction without formal commitment", as a solution to practical or political problems with implementing a more formal instrument, or as a way of bringing parties incrementally closer to each other.: M Cini, 'From Soft Law to Hard Law?' (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), 6. She theorised that, on a general level, the first of these uses of soft law represents a desire to replace 'hard' forms of regulation, whereas the second and third are better seen as "stepping-stones" to harder, binding forms of regulation by which they will eventually be replaced. Another possible explanation for soft law in some circumstances is that it has emerged *ad hoc* to fill a vacuum, an area where guidance is necessary but hard law has not entered. In domestic settings, the last of these explanations is the only one which is persuasive.

II: The regulatory effect of soft law

The 'hardening' of soft law

This section will examine the possibility that soft law can assume a 'hardened' status as a result of its application, although not necessarily in respect of both parties. In particular, it will look at the effects of Brennan J's iconic judgment in *Drake (No2)* and consider whether tribunal decisions made since that judgment have the effect of hardening soft law which they consider due to the informal – but undeniable – precedential value of tribunal decisions.

I have referred above to the work of James Farmer regarding the extent to which judicial and tribunal decision-making applies precedent.[319] The theory behind this question is simple enough. Judicial decision-making is based on deciding questions of fact and of legality in relation to particular sets of facts. The doctrine of *stare decisis* states that similar fact situations will be decided in substantially the same way - that is, by applying the precedent of previous cases - unless a higher court distinguishes or overturns the approach of the prevailing relevant cases.[320] Farmer noted that this doctrine was applied less stringently by English superior courts in the second half of the 20th century, leading to greater development in the common law.[321] Courts exercising judicial review functions are generally restricted to deciding whether the decision under review was made in accordance with the law. This process is complicated to some extent where there is a statutory condition precedent to the jurisdiction of the primary decision-maker, being either a certain fact[322] or opinion,[323] or a combination of the two.[324]

Farmer argued that English courts had largely ceased to make new law as an exercise of policy by the 1960s, deferring instead to legislative solutions to questions of policy, due in part to the greater availability of tribunal decision-making.[325] This is now seen as no more than the judicial branch restricting itself to its proper constitutional role[326] and has nothing to do with deferring to administrative interpretations of law.[327] Tribunal decision-making, on the other hand, is not restricted to questions of law but enables the tribunal to exercise the jurisdiction of the original administrative decision-maker

319 JA Farmer, *Tribunals and Government* (1974).

320 Although there is much acrimony about the proper judicial approach to precedent; see M Aronson, 'Process, Quality, and Variable Standards: Responding to an *Agent Provocateur*' in D Dyzenhaus, M Hunt and G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 5, 25-8.

321 JA Farmer, *Tribunals and Government* (1974) 172.

322 See *Enfield Corporation* (2000) 199 CLR 135; M Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12 *Public Law Review* 17; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, ('*Timbarra*').

323 The decision-maker's state of satisfaction has been considered a jurisdictional fact since the High Court's decision in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, ('*SZMDS*'). Gummow J had been advocating this approach for several years; see *Re Minister for Immigration and Multicultural Affairs; ex parte Eshetu* (1999) 197 CLR 611, 651 [130] ('*Eshetu*').

324 This is arguably the best explanation for the majority's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, ('*The 'Malaysia Solution' Case*'). The statutory picture now clearly places the Minister's satisfaction as the only prerequisite to exercising power; see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.540].

325 JA Farmer, *Tribunals and Government* (1974) 173.

326 See AM Gleeson, 'Judicial Legitimacy' (2000) 20 *Aust Bar Rev* 1.

327 As to which, see generally P Daly, *Deference in Administrative Law* (2012).

and to reach the correct or preferable decision on the merits of the case.[328] Such predominantly fact-based decisions have generally been assumed to contain little precedential value. However, unlike courts which - in Australia and the UK, at least - owe no duty of deference to executive interpretations of law,[329] it was decided very early in the history of the Administrative Appeals Tribunal (AAT) that Tribunal members should generally apply any lawful Ministerial policy in reaching a decision on review.[330]

Farmer's concern was that, regardless of these general principles, tribunals do in practice follow as precedents earlier decisions of the same tribunal,[331] with the result that they are unable to exercise discretion in a flexible manner. Such flexibility is inherent in the design of a tribunal authorised to come to the "correct or preferable" decision on the facts,[332] which is considered to be one of the hallmarks of merits review.[333] The Diceyan concern, by contrast, would have been somewhat less functionalist and focused on Dicey's view that only "ordinary law courts" had the power to make law by binding subsequent or subordinate courts with decisions accorded the status of precedent. Dicey's concern is outdated, since it is now generally accepted that the definition of 'law' extends beyond legislation and the binding decisions of superior courts. A functionalist definition of law "might well" extend to decisions of tribunals which are accorded the status of binding precedent on the basis that they are "authoritative".[334]

There are, of course, some differences between precedent as it applies in court hearings and the species of 'precedent' which applies to tribunal proceedings. Tribunals are obliged to decide each matter which comes before them on the merits and must therefore not fetter themselves to a reduced "range of discretion"[335] by following a precedent or policy which results in anything other than the correct or preferable decision being reached. However, there are also strong expectations that tribunal decisions will be largely consistent,[336] for reasons stated by Brennan J:[337]

> Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.

Individual decision-makers within the executive, such as Ministers, do not of course need to strive towards consistency in the same way that tribunals, with numerous members, must. To the extent that Ministers delegate their decision-making functions, consistency is achieved by the formulation of

328 See *Administrative Appeals Tribunal Act 1975* (Cth) s 43; *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286, ('*Shi v MARA*'). This is true of many tribunals but not all.

329 Cf *Chevron* 467 US 837 (1984).

330 *Drake (No2)* (1979) 2 ALD 634.

331 JA Farmer, *Tribunals and Government* (1974) 174.

332 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 589 (Bowen CJ & Deane J) ('*Drake's Case*').

333 See P Cane, 'Merits Review and Judicial Review: the AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213; MD Kirby, 'Administrative Review on the Merits: The Right or Preferable Decision' (1980) 6 *Monash University Law Review* 171.

334 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.70].

335 *Drake (No2)* (1979) 2 ALD 634, 641.

336 Although this expectation comes with a set of complex and contradictory pressures; see E Johnson, "Inconsistency' of Administrative Decisions' (2013) 72 *AIAL Forum* 50.

337 *Drake (No2)* (1979) 2 ALD 634, 639.

policy. This result has been described as "inevitable and desirable".[338] In *Drake (No2)*, Brennan J stated that, in order to bring consistency to decision-making standards and values,[339] the AAT ought also to make its decisions in such a way that it is "guided" but not fettered by any relevant Ministerial policy.[340] Soft law is able to promote consistent decision-making without being binding.[341] It should be understood, then, that tribunals which follow 'precedent' *strive* towards consistency without being bound in the same way that courts subject to the doctrine of *stare decisis* are.[342] This is a position strengthened by subsequent decisions of single judges of the Federal Court to the effect that tribunal members cannot be *bound* to follow earlier decisions in like cases.[343]

While the *raison d'être* of tribunals is to do "justice in the individual case",[344] the 'realities of tribunal justice' demand recognition of the fact that tribunals strive for consistency and are therefore "under the same pressures as the courts to decide like cases alike, to explain their understanding of the law, and to confine themselves to the case at hand".[345] They have at the very least the *de facto* status of precedent as a result of the expectation that like cases will be decided alike and that any variation from a previous like case will need to be explained by the tribunal.[346] These realities do nothing to assuage the fears expressed by Farmer over thirty years ago that some benefits of flexibility are being lost from tribunal decision-making, although it cannot be argued that *all* benefits of tribunal decision-making are being lost. They do point persuasively to the fact that tribunals are now a source of 'hard law'.

It is strongly arguable that the Administrative Appeals Tribunal in Australia has been a source of law for three decades, since Brennan J, sitting as President of the AAT, handed down his decision in

338 P Bayne, 'Policy Guidelines and Law - Some Intersections' (1991) 65 *Australian Law Journal* 607, 607.

339 Brennan J stated that the AAT was in fact "at liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function", although he regarded doing so as unwise: *Drake (No2)* (1979) 2 ALD 634, 642.

340 See JM Keyes, *Executive Legislation* (2nd ed, 2010) 58-9.

341 This aspiration is often stated expressly. See eg Australian Taxation Office, *ATO Practice Statement Law Administration PS LA 2003/11* (2003), [21].

342 Despite the Constitutional requirement that the AAT be a Chapter II body (rather than a Chapter III court), it has followed a 'judicial' model since the time that Brennan J was its first President, although this was probably not the intention of the Kerr Committee (Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144, 1971). In the UK, which imposes no constitutionally mandated separation of tribunals from courts, a preference for a judicial model of tribunal justice has been shown from the Report of the Franks Committee, (Committee on Administrative Tribunals and Enquiries, *Report of the Committee on Administrative Tribunals and Enquiries*, Command Paper No 218, 1957) to the Leggatt Review of Tribunals (Sir Andrew Leggatt, *Tribunals for Users: One System, One Service*, Report of the Review of Tribunals, 2001); see P Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, Oxford, 2009), 108-10. Stebbings reported that the use of the word 'tribunal' has traditionally carried "judicial connotations" and started commonly to replace terms like "commission" and "board" at a time when those bodies began to follow a more 'judicial' model of operation: C Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (2006), 329.

343 *NARY v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1255 (Unreported, Moore J, 6 November 2003) [10]; *SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 364, [31]-[32] (Selway J, '*SGBB v MIMIA*'). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.610].

344 *Drake's Case* (1979) 46 FLR 409, 590 (Bowen CJ & Deane J). In this respect, tribunals stand in contrast to courts exercising judicial review, where justice on the facts is irrelevant to the court's function: *Quin* (1990) 170 CLR 1, 36 (Brennan J).

345 M Aronson et al, *Judicial Review of Administrative Action* (4th ed, 2009) 189. This language was not included in the subsequent edition, but similar content can be found at M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.70]. In the American context, see PL Strauss, 'The Rulemaking Continuum' (1992) 41 *Duke LJ* 1463, 1472-3; *US v Mead Corp* (2001) 533 US 218 (2001), 232.

346 At a practical level, even factual scenarios which are to all intents and purposes identical may be decided differently, as occurred in *Segal* (2005) 64 NSWLR 177. See E Johnson, "Inconsistency' of Administrative Decisions' (2013) 72 *AIAL Forum* 50, 53-4.

Drake (No2).[347] In that case, his Honour was called upon to review the decision of the Minister to deport Mr Drake, who had been incarcerated for drug trafficking offences. The case was heard during the infancy of the AAT and Brennan J accordingly took the opportunity to make a statement of general principle about the role of precedent in deciding cases before the Tribunal. His Honour's position was that tribunals should strive for consistency without fettering their discretion;[348] consistency is a function of policy where numerous individuals are collectively responsible for decision-making; and, since policy-making is inconsistent with the other functions of adjudicative tribunals, they would be well-advised to follow any Ministerial policy on a matter within the Minister's responsibilities where to do so does not preclude the tribunal from reaching the correct or preferable decision.

It is important to note that Brennan J's comments about the general desirability of tribunals applying policy formulated by the executive were preceded by an affirmation that a Minister ought not to adopt - and the AAT will not apply - a policy which truncates his or her discretion to reach the proper decision on the merits of each matter, which takes into account irrelevant considerations, or precludes consideration of relevant arguments or is inconsistent with the statute which provides jurisdiction.[349] His Honour went on to declare the freedom of the AAT to come to the correct or preferable decision regardless of a Minister's statement of policy:[350]

> In point of law, the Tribunal is as free as the Minister to apply or not to apply that policy. The Tribunal's duty is to make the correct or preferable decision in each case on the material before it, and the Tribunal is at liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function.
>
> In fulfilling its function, the Tribunal, being independent of the Minister, is free to adopt reasoning entirely different from the reasoning which led to the making of the decision under review. But it is not bound to do so.

This judgment must be understood in the context of the early days of the AAT and the debate which surrounded its role and function.[351] It was presided over by a President who was a judge of the Federal Court[352] but 'stood in the shoes' of the original decision-maker and was able to exercise all the powers and discretions conferred on that person.[353] Brennan J's decision in *Drake (No2)* settled this debate by giving firm encouragement to the AAT to behave more like a court than an administrator, although Cane noted that "the assimilationist logic implicit in this situation cannot be carried through to a conclusion because of the constitutionally mandated distinction between judicial and non-judicial functions".[354]

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347 *Drake (No2)* (1979) 2 ALD 634.

348 Brennan J realised, of course, that this was not literally possible. Consistency demands some fettering of discretion. His Honour was seeking to promote a balance since, as I have discussed above, flexibility and consistency are in insoluble tension.

349 *Drake (No2)* (1979) 2 ALD 634, 640-1.

350 *Drake (No2)* (1979) 2 ALD 634, 642.

351 See the sources listed at P Cane, 'Understanding Administrative Adjudication' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, Oxford, 2008) 273, 293 (n 73).

352 *AAT Act 1975* (Cth) s 7(1).

353 *AAT Act 1975* (Cth) s 43(1).

354 P Cane, 'Administrative Adjudication' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 273, 293.

Brennan J advised that AAT tribunals would be "manifestly imprudent"[355] to adopt their own policies where there already existed a Ministerial policy, which had been subject to the scrutiny and sanction of the political process in a way that a tribunal-generated policy could not be.[356] His Honour justified this position by arguing that, for the sake of consistency, some kind of policy is generally desirable, particularly where there is a high volume of decision-making, in order to structure executive discretions. Thirty years after the decision of Brennan J in *Drake (No2)*, the AAT remains deeply reluctant to exercise its freedom to come to the correct or preferable decision without applying Ministerial policy, where such exists. It adheres instead to Brennan J's recommendation in favour of departing from such a policy only cautiously and sparingly.[357]

Professor Cane noted that one of the benefits of Australia's system of merits review tribunals being located within the executive branch of government was supposed to be that, unlike the courts, they are not compelled to refrain from overturning a decision if that would not "be the best of the available options".[358] Rather, they are able to take advantage of greater resources and investigative capacity to balance the various issues in question and thereby come to the correct or preferable decision. In so doing, they need not defer to the opinion reached on that subject by the original decision-maker. However, in practice, merits review since *Drake (No2)* has generally been applied with a reluctance to exercise the theoretical power to disagree with government policy: "Brennan J's caution has been more influential than his strong statement of the law".[359]

A Ministerial policy is capable of providing strongly persuasive 'guidance' to a tribunal, which is expected to follow that guidance, at least in part, because Ministers in the Westminster system of government are (nominally) responsible to parliament for the effects of that policy.[360] Political accountability on the part of Ministers is not what it was; its decline has been long and steady. Harlow and Rawlings argued that the "inadequacies of ministerial responsibility" were exposed 60 years ago in the Crichel Down affair.[361] It is unthinkable that any Minister would resign over a similar matter today. That being the case, is there a strong argument for courts and tribunals to attach weight to the 'guidance' provided by soft law generally?

One of the problems with courts (as opposed to tribunals) being guided by soft law is that it is difficult to assess the weight that is assigned to individual instruments in individual cases. Much soft law in England arises from that country's membership in the European Union, such as various European Codes.[362] It has been noted that courts merely declaring that they are 'assisted' by any such soft law instrument which has no explicit treaty basis effectively treat it, for example, as having no greater

355 *Drake (No2)* (1979) 2 ALD 634, 644.

356 *Drake (No2)* (1979) 2 ALD 634, 643-4.

357 Particularly if it has been scrutinised and approved by parliament: *Drake (No2)* (1979) 2 ALD 634, 644.

358 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *Public Law* 479, 490. See also P Cane, *Administrative Tribunals and Adjudication* (2009) 57-67.

359 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 489.

360 *Drake (No2)* (1979) 2 ALD 634, 643-4.

361 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 38-9.

362 See C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 199-200.

worth than academic books or articles. On the other hand, the solution to that problem has generally been for the soft law in question to be 'hardened' not by the manner of its application in court proceedings but by adoption into domestic legislation.

Similarly, guidelines made pursuant to statutory authorisation have previously been seen as something less than 'hard law' in both England and Australia. Australian guidelines have previously been held not to be of a 'legislative character',[363] although the problems encountered in these cases would now be addressed in practice by the *Legislative Instruments Act* if the instrument were also "made in the exercise of a power delegated by the Parliament".[364] In England, however, courts still assess whether codes of practice have binding effect on the basis of whether they purport to offer guidance or instruction.[365] It should follow that any guideline which is not specifically anticipated in legislation cannot be given any greater weight than one which is. However, even though soft law is made without statutory authority, this does not mean that it lacks legal effect. *Craies on Legislation* noted that some soft law can be useful to courts in determining "the standard that can reasonably be expected having regard to the norms within an industry" in order to establish negligence.[366] Where soft law has the function of informing the public about the law in a manner which is more accessible than the operative legislation, breach of the soft law may in practice amount to a criminal offence.[367] Nonetheless, reliance on legally flawed soft law by a decision-maker causes decisions based on it to be unlawful too.[368]

However, it need not necessarily follow that soft law will fall within the parameters set out in *Drake (No2)*. If Brennan J's *dicta* regarding the wisdom of generally following executive policy were directed only to policies for which political responsibility would be taken by a Minister - under the Westminster system, both a member of the executive government and of Parliament - do they apply to soft law more generally? If so, *Drake (No2)* has the practical effect of 'hardening' soft law guidelines for the purpose of merits review proceedings before the AAT.

Two examples of the regulatory effects of soft law

This chapter will conclude with consideration of two examples of soft law with regulatory effects.

The first example arose in a taxation matter heard in the Administrative Appeals Tribunal. In *Hua-Aus*,[369] Edmonds J heard an application for the court to use its discretion to extend the time for appeal against a decision of the AAT. The proposed appeal was from the decision of a Senior

363 See the cases discussed by P Bayne, 'Policy Guidelines and Law' (1991) 65 *ALJ* 607, 608.

364 *LIA 2003* (Cth) s 5(1)(b).

365 See eg *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, 189 [21] (Lord Bingham of Cornhill) ('*Munjaz v Mersey Care*'). See also D Greenberg, *Craies on Legislation: A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation* (9th ed, Sweet & Maxwell, London, 2008) 146.

366 D Greenberg, *Craies on Legislation* (9th ed, 2008) 147. Soft law has also been used to this end in Australia; see eg *Benton v Tea Tree Plaza* (1995) 64 SASR 494.

367 The *Highway Code* (UK) is a good example; see C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 195.

368 See eg *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319, ('*Offshore Processing Case*'); *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, ('*Newbury DC*').

369 *Hua-Aus Pty Ltd v Commissioner of Taxation* (2009) 75 ATR 886, ('*Hua-Aus v FCT*').

Member of the AAT[370] to affirm (with some variation) a decision of the Australian Taxation Office (ATO) in relation to payments of GST by the applicant company, which provided escort services.[371] The applicant had objected to a Notice of Assessment of GST which it had received from the ATO. It had further objected to a Notice of Penalty "for failure to withhold related amounts from payments made to his suppliers".[372] The obligation to withhold GST from payments made by the applicant to its escorts was imposed by Division 12 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (TAA). Failure to comply with Division 12 enlivened a discretion in the Commissioner to impose a penalty in the amount equal to that which the applicant failed to withhold by the operation of section 16-30 of Schedule 1 to the TAA.[373] The ATO issued a soft law practice statement which explained the criteria for reducing the presumptive penalty,[374] which included a guide to when penalties will be remitted by the ATO for the express purpose of maintaining "consistency with other tax penalties".[375] A Deputy Commissioner reduced the amount of GST payable and reduced the penalty payable to 50% but upheld the decision to impose a penalty on the applicant.[376]

The Deputy Commissioner's decision was reviewable in the AAT,[377] before which the applicant argued for a further reduction of the penalty on the basis that the calculations of taxable supplies for both the GST assessment and the penalty were excessive and should be reduced. To this end, he relied on the ATO's practice statement.[378] The Deputy Commissioner had held that the applicant's conduct was "reckless", as that term had previously been defined by the ATO,[379] in that the applicant had demonstrated "gross carelessness showing a disregard or indifference to their obligations".[380]

The AAT had complete discretion over the penalty that would be imposed following its hearing but the Senior Member simply applied the ATO's soft law, for the same reasons as the Deputy Commissioner had done.[381] The applicant then sought judicial review of the AAT's decision in the Federal Court, including on the ground that the AAT had affirmed the decision under review "without undertaking its own independent assessment or making its own findings in order to re-exercise the discretion to further remit the penalty for failure to withhold afresh".[382] The issue before the Federal Court in *Hua-*

370 *Re Hua-Aus Pty Ltd and Commissioner of Taxation* [2008] AATA 1033.

371 *Re Hua-Aus Pty Ltd and Commissioner of Taxation* [2008] AATA 1033 [1].

372 Ibid.

373 See *Re Hua-Aus Pty Ltd and Commissioner of Taxation* [2008] AATA 1033 [46].

374 Australian Taxation Office, *PS LA 2003/11* (2003), [1].

375 Australian Taxation Office, *PS LA 2003/11* (2003), [21].

376 *Re Hua-Aus Pty Ltd and Commissioner of Taxation* [2008] AATA 1033 [48].

377 *Taxation Administration Act 1953* (Cth) s 14ZZA.

378 Australian Taxation Office, *PS LA 2003/11* (2003).

379 See Australian Taxation Office, *ATO Taxation Ruling TR 94/4: Income tax: tax shortfall penalties: reasonable care, recklessness and intentional disregard* (1994). TR 94/4 has since been withdrawn and has been replaced by Australian Taxation Office, *ATO Miscellaneous Taxation Ruling MT 2008/1: Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard* (2008), [99]-[116].

380 Australian Taxation Office, *PS LA 2003/11* (2003), [21], [23]. Such an assessment is subject to increase or reduction in accordance with certain aggravating and mitigating factors: Australian Taxation Office, *PS LA 2003/11* (2003), [28]-[32]. Furthermore, the merits of the Deputy Commissioner's finding are hard to dispute when it is understood that the ATO website provides specific advice in regard to collecting GST on the services of escorts: *GST and the sex industry - questions and answers* (2008) <http://www.ato.gov.au/businesses/content.asp?doc=/content/18507.htm> at 23 October 2009.

381 *Re Hua-Aus Pty Ltd and Commissioner of Taxation* [2008] AATA 1033 [45].

382 *Hua-Aus v FCT* (2009) 75 ATR 886, 22.

Aus was dealt with in short order. Edmonds J held that, because the AAT had made findings which were open to it, the pleading extracted above did not raise a question of law.[383] The decision reached by Edmonds J was both obvious and certainly correct.

The point of interest for this thesis is the extent to which a soft law instrument may have 'hardened' in the course of its consideration by the AAT as a result of *Drake (No2)*. Given the conclusions reached above regarding both the precedential value of AAT case law and the application of Brennan J's *dictum* in *Drake (No2)* to soft law (particularly when it has been developed by a very large and independent administrative agency such as the ATO, for which no Minister is responsible), soft law must harden, at least in regard to subsequent treatments of the same soft law instrument in the AAT.

Of course, it remains open for a court to overturn the soft law instrument that the AAT has effectively 'hardened'; in that sense, it is no harder than any other policy considered by the AAT.[384] Indeed, the Commissioner has been chastised by the Full Federal Court for failing to give effect to a court's understanding of a statute in preference to the understanding reached by the ATO.[385] Regardless of this obvious and natural limitation, what is clear from the analysis above is that soft law applied by the AAT cannot be denied the status of authoritative legal precedent until such time as it is overruled in court proceedings.[386]

Professor Cane has identified another point of difference between the application of law and policy by administrators and review tribunals respectively.[387] This derives from the inexact nature of the metaphor that a tribunal empowered to review the merits[388] of an administrative decision 'stands in the shoes' of the original decision-maker. Cane pointed out that these decision-makers have essentially different functions:[389]

> The basic responsibility of the bureaucrat is to promote the social purposes of general rules - hard and soft law - by deciding individual cases, whereas the basic responsibility of the merits reviewer is to afford to the interests of the individual applicant for review maximum protection compatible with fidelity to relevant hard and soft law. Although only a matter of priority or emphasis, this difference between implementation and adjudication is fundamental and significantly reduces the value of the shoe metaphor as a description of the [juridical basis] of merits review…

383 *Hua-Aus v FCT* (2009) 75 ATR 886, 24. However, his Honour allowed the extension of time sought by the applicant because its draft notice of appeal revealed an alternative question of law.

384 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.80].

385 *Federal Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325, 326-7 (Allsop J; Stone & Edmonds JJ concurring).

386 Peter Cane has commented in this regard: "although the AAT can set decisions aside for error of law - in other words, it can decide questions of law - it cannot do so "conclusively" because conclusive resolution of issues of law is (according to the High Court) a judicial function that only courts can perform. In other words, the AAT cannot make law - or, perhaps more precisely, it cannot make hard law, although it can (and does) make soft law; and in practice, soft law made by the AAT is generally treated as if it were hard law.": P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 496.

387 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 486-7.

388 *Shi v MARA* (2008) 235 CLR 286, 296-9 [30]-[37] (Kirby J), 326-7 [139]-[140] (Kiefel J); P Cane, *Administrative Tribunals and Adjudication* (2009) 144-76. See also the general comments on the use of the term "merits" at P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 485.

389 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 487; cf *Drake (No2)* (1979) 2 ALD 634, 639.

Of course, the issues raised by the application of policy in the course of merits review differ in various jurisdictions: English administrative tribunals are considered part of the "machinery of justice"[390] alongside the courts, whereas in America, by contrast, Administrative Law Judges are embedded within the administrative departments whose decisions they review.[391] Cane contended that, notwithstanding these differences, merits review in each of the three jurisdictions is exercised in practice by attaching significant weight to soft law.

Cane noted that Australian tribunals are "technically"[392] part of the executive as a result of the High Court's interpretation of the constitutional separation of judicial power.[393] Indeed, there is significant support for this approach in regard to bodies which perform "integrity" functions.[394] As Cane himself pointed out, the ironic fact is that "despite the bright-line constitutional distinction between courts and tribunals … in reality the AAT inhabits an uncomfortable limbo somewhere between the judicial and executive branches".[395] The Constitutional basis for tribunals being located within the executive rather than designated as Chapter III courts goes back so far[396] that it has taken on a level of permanence; this is the only ground on which one might query regarding tribunals' status as part of the executive as merely "technical". In the AAT, soft law is approached much as it would be in a court and Cane noted that a "decision may not be the preferable one if it is based on a policy that is *Wednesbury* unreasonable; but the AAT appears even less willing than the courts to set aside a decision on this ground".[397]

Likewise, Cane stated that in the UK a tribunal had no jurisdiction to review the "discretionary application, non-application or misapplication"[398] of soft law by a decision-maker and, where the application of a soft law instrument was "not in accordance with the law", the applicant had nothing more than a procedural right to have the decision made again according to law.[399] In the meantime, the law with regard to the UK tribunal system has been in a "state of flux".[400] A range of separate tribunals have been replaced by two: the First Tier Tribunal which is supervised by the Upper Tribunal.

390 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 484; Franks Committee, *Franks Committee Report* (1957), [40]; *R (Cart) v Upper Tribunal* [2012] 1 AC 663, ('*Cart v Upper Tribunal*').

391 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 483.

392 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 484. Cane has argued elsewhere that the AAT and the courts are actually more similar in practice than has traditionally been believed and that "merits review can plausibly be described as judicial review in disguise"; see P Cane, 'The AAT as Trojan Horse' (2000) 28 *Fed LR* 213.

393 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, ('*Boilermakers' Case*'). See P Cane, 'Administrative Adjudication' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 273, 289-93.

394 See eg M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.90]; J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423.

395 P Cane, 'Administrative Adjudication' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 273, 291.

396 *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422. See P Cane, 'Administrative Adjudication' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 273, 291.

397 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 489; cf *MIAC v Li* (2013) 87 ALJR 618.

398 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 491.

399 *AG and Others (Policies; Executive Discretions; Tribunal's Powers) Kosovo v Secretary of State for the Home Department* [2007] UKAIT 00082 [44].

400 HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 783.

Additionally, new rules have been developed and new hard law handed down.[401] To compare UK tribunals to the AAT is, at this point, an uncertain business.

In the USA, Cane argued, the "prime function" of an Administrative Law Judge "is to apply and give effect to soft law developed by the agency" in which the ALJ is embedded,[402] although he remarked in passing that "the limited freedom of agencies to disagree with the ALJ about the proper inferences to be drawn from agreed facts may confer on the ALJ a degree of de facto power to develop policy without interference from their agencies".[403] In general, then, it is accurate to say that soft law is treated by tribunals in each of these jurisdictions as though it were hard.

A second example of how soft law is able to be 'hardened' in Australia can be observed in the operation of Part II of the Commonwealth *Freedom of Information Act*.[404] Prior to amending legislation passed in 2010,[405] s 9 of the *FOI Act* required government agencies to publish soft law instruments used by them in their internal deliberations. These specifically included "manuals or other documents containing interpretations, rules, guidelines, practices or precedents". Following the *FOI Reform Act* in 2010, Part II is substantially broader in scope,[406] creating an impetus for agencies to be active in publishing government information. This is consistent with the inclusion in the objects of the *FOI Act* after 2010 of the statement that "information held by the Government is to be managed for public purposes, and is a national resource".[407] The Australian Information Commissioner has been active in promoting this new approach to open government,[408] both officially[409] and in his personal capacity.[410]

Agencies are required to publish "operational information", which is "information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities)",[411] provided that such information is not already publicly available. Where an agency fails to publish operational information "in relation to a function or power of the agency", and "a person engages in conduct relevant to the performance of the function or the exercise of the power"

401 See eg *Cart v Upper Tribunal* [2012] 1 AC 663; *R (Jones) v First Tier Tribunal (Social Entitlement Chamber)* [2013] 2 WLR 1012, ('*Jones v First Tier Tribunal*'). See also R Carnwath, 'Tribunal Justice: A New Start' [2009] *Public Law* 48; R Carnwath, 'Tribunal Justice: Judicial Review by Another Route' in C Forsyth, M Elliott, S Jhaveri, M Ramsden and A Scully-Hill (eds), *Effective Judicial Review: a Cornerstone of Good Governance* (2010) 143; M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [10.260].

402 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 493.

403 P Cane, 'Judicial Review in the Age of Tribunals' [2009] *PL* 479, 494.

404 *Freedom of Information Act 1982* (Cth). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.250]. This example is not limited to Australia; see JM Keyes, *Executive Legislation* (2nd ed, 2010) 55.

405 *Freedom of Information Amendment (Reform) Act 2010* (Cth).

406 See R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 1018-19.

407 *FOI Act 1982* (Cth) s 3(3).

408 For many years, 'open government' had been something of a punchline, on the basis that "you can either be open, or have government" or that government should be open "but not gaping": A Jay and J Lynn, *The Complete 'Yes, Minister': The Diaries of a Cabinet Minister* (HarperCollins, 1988) 27. The changes to Part II introduced by the *FOI Reform Act* are intended to secure political and Public Service support for open government in an unprecedented fashion.

409 J McMillan, 'Freedom of Information Reform - The Australian Government' (2011) 65 *AIAL Forum* 31, 33-4.

410 Office of the Australian Information Commissioner, *Guide to the Freedom of Information Act 1982* (2011), 64-7 <http://www.oaic.gov.au/publications/agency_resources/guide_freedom_of_information_act_1982.html>.

411 *FOI Act 1982* (Cth) s 8A(1).

and was not at that time "aware of the unpublished information", the FOI Act provides a remedy which predates the 2010 reforms:[412]

> The person must not be subjected to any prejudice only because of the application to that conduct of any rule, guideline or practice in the unpublished information, if the person could lawfully have avoided that prejudice had he or she been aware of the unpublished information.

This provision does not 'harden' soft law in the sense that it becomes binding. In this regard, it cannot be said to have the same effect as *Drake (No2)* has on decisions in the AAT. Rather, the FOI legislation requires that soft law instruments which have a practical effect on the way public bodies make administrative decisions are known to those who may be affected by their content. As the decision of the High Court majority in *Tang*[413] demonstrates, this does not mean that such persons are able to bind that public body to act consistently with their published guidelines, nor are those guidelines elevated "to the status of law" such that they are enforceable under s 5(1)(b) of *ADJR*.[414] However, a person may not suffer prejudice by an agency's failure to publish operational information under Part II of the *FOI Act*.[415] Furthermore, the failure to publish information as required under Part II is a "decision" for the purposes of *ADJR* which would allow a "person aggrieved" to seek redress.[416]

More generally, the requirement that law must be promulgated before it can be applied adversely to an individual is nothing less than a rule of law principle.[417] Fuller took the view, writing almost fifty years ago, that this principle should apply to both hard and soft law:[418]

> Deciding agencies, especially administrative tribunals, often take the view that, though the rules they apply to controversies ought to be published, a like requirement does not attach to the rules and practices governing their internal procedures. Yet every experienced attorney knows that to predict the outcome of cases it is often essential to know, not only the formal rules governing them, but the internal procedures of deliberation and consultation by which these rules are in fact applied.

The UK Supreme Court has applied this reasoning in holding that, by adopting and acting upon a secret policy, the Home Office acted *ultra vires*.[419] To the extent that the rule of law demands that we be informed in advance of any law which might be applied adversely to us, the FOI Act upholds that principle by severely constraining the results of unpublished information.

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412 *FOI Act 1982* (Cth) s 10. The relevant legislation in Queensland, NSW and Victoria each features an equivalent provision; see R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 672-3.

413 *Tang* (2005) 221 CLR 99.

414 *Joseph Richard Bryant v Deputy Commissioner of Taxation* (1993) 25 ATR 419, [8] (Whitlam J, '*Bryant v DCT*'). See G Weeks, 'Expanding Role of Process' (2008) 15 *AJ Admin L* 100, 102-3.

415 *Ian Duncan v Chief Executive Officer, Centrelink* (2008) 244 ALR 129, 135 (Finn J, '*Duncan v Centrelink*'). This would, of course, depend on such a person being able to establish that they had standing to challenge in court proceedings the failure of the agency to produce its soft law instruments.

416 *Duncan v Centrelink* (2008) 244 ALR 129, 137. In *Duncan*, Finn J exercised his discretion to deny the applicant declaratory relief, holding that it would provide no "real practical consequences": *Duncan v Centrelink* (2008) 244 ALR 129, 138.

417 This is a principle which has been recognised for 120 years in England in legislation which requires the publication of every statutory instrument. From 1946, the legislation was expanded to cover the "flood tide of rules and regulations which arrived with the welfare state": HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 760.

418 LL Fuller, *The Morality of Law* (1964) 50.

419 *R (Lumba) v Secretary of State for the Home Department; R (Mighty) v Secretary of State for the Home Department* [2012] 1 AC 245, ('*Lumba v Home Secretary*'). The policy at issue in this case was not one with which the claimants were able to comply actively, but the application of which merely affected them. This distinction was not considered to be of any consequence to the Supreme Court.

Conclusion

It should not come as a surprise that soft law is hard to define. It can be – and frequently has been – characterised by listing examples of how soft law has manifested in the past. However, although helpful to a certain extent, this method of definition is imprecise. It is hard to consider soft law alone, since it takes so much of its character from what is left after primary and secondary legislative instruments have been applied. Law-makers are welcome to create as much hard law as they choose. However, what is important is that once the choice has been made, only a trained and experienced eye will notice that there is still some law which is not hard. Most people will only see law, and this is the cause of soft law's great influence. The following chapters will look at what remedies are available to those who have been influenced to their detriment by soft law.

Chapter Three

Court-based Remedies: Non-compensatory Judicial Review Remedies

Introduction

The aims and content of judicial review are hard to define, and even a base-level desire for "a legal system which addresses the ideals of good government according to law"[1] leaves open the question of what is covered by the concept of "law". As I have demonstrated in Chapter 2 above, soft law operates like law even though it cannot be enforced like law. It is lawful in the jurisprudential sense[2] but it is only "law" (as opposed to hard law) because it is not sourced from either the Constitution, the legislatures or the courts, the three sources of law accepted by our rule of recognition. However, since judicial review currently operates as a check on exercises of power by public authorities only if they are both legally supported and legally enforceable, soft law is not judicially reviewable on this definition. In order for soft law to fall within the scope of judicial review, its conception would need to be reassessed. The first section of this chapter will consider whether it is the purpose of judicial review to civilise law, or power. It will ask, in other words, whether judicial review is merely about enforcing government adherence to law, or does it also extend to enforcing symmetrical adherence to all the means by which government asserts power over us? It will also consider more generally the province of judicial review,[3] the relevance of soft law to judicial review proceedings, and the role of the Australian *Constitution*.

The second and third sections will look at remedial processes where breach of soft law is held to be relevant to judicial review proceedings. The second section will look at the orthodox procedural remedies and the third section will analyse the developing role of substantive remedies in judicial review.

1 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.10].

2 Because it is governed by a rule of recognition: HLA Hart, *The Concept of Law* (Oxford, 1961) 97-107; J Raz, 'The Rule of Law and its Virtue', *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) 210, 213.

3 A form of words usually and deservedly associated with the late Mike Taggart; see M Taggart, 'The Province of Administrative Law Determined?' in M Taggart (ed), *The Province of Administrative Law* (Hart, 1997) 1.

A: The province of judicial review

The reason that judicial review is available as a check on governmental power is slightly different in Australia compared to other similar democracies. This is due to the fact that section 75(v) of the *Constitution*:[4]

> introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review. There was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada.

The rule of law, in turn, "forms an assumption" upon which the *Constitution* was framed[5] and which in turn informs the content of judicial review. Therefore, the basis of judicial review as a constitutional fundamental informs the content of the rule of law; the *Constitution* amounts to a guarantee that judicial review will continue to be available in Australian courts.[6]

The question 'what is judicial review for?' compels the answer, in Australia as elsewhere, 'to restrain the arbitrary exercise of public power, whatever its source and legal form'. This response is in tune with a rule of law analysis but also invites further questions, such as 'what is arbitrariness?' and 'what is public power?'. The first part of this Chapter will address these questions.

A helpful starting point is to consider the meaning of 'government'. In its nominal sense, all administrative lawyers generally treat the executive government as being a component of 'the state'. Most modern texts on administrative law now begin with a theory, and some political and historical analysis, of the administrative state, sometimes briefly[7] but often at length;[8] only a couple offer no background political history[9] and no theory of the state.[10] Given that the subject of this thesis is soft law, which I have defined as any non-legislative but governmental regulatory instrument, this approach to defining government is somewhat inadequate. Rather, I seek to examine 'government' in its use as a verb, an assault on English grammar though that is, since the purpose of soft law is typically to 'do government' other than to act directly through the state. All of administrative law's "rules and mechanisms are potentially relevant to all the various interactions between 'governors' and 'the governed'".[11] This Chapter will examine that particular relationship, and the extent to which it is subject to judicial review, in the broadest sense.

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4 *Plaintiff S157* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ). See also J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector' (2013) 36 *UNSWLJ* 316, 320-31. Aronson and Groves noted cases of substantially greater age which also emphasise "the centrality of s 75(v) to the rule of law": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [2.120].

5 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J) ('*The Communist Party Case*'). His Honour's *dictum* was approved by the majority in *Plaintiff S157* (2003) 211 CLR 476, 513 [103].

6 Previously, this guarantee was understood to apply at the Commonwealth level only and not to the States. The High Court altered that position in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, ('*Kirk v IRC*').

7 eg R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) Ch1.

8 eg C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) Ch1 & 2; PP Craig, *Administrative Law* (7th ed, Sweet & Maxwell, London, 2012) Ch1 - 4.

9 H Woolf, J Jowell and A Le Sueur, *De Smith's Judicial Review* (6th ed, Sweet & Maxwell, London, 2007).

10 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.40].

11 P Cane and L McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2nd ed, Oxford University Press, South Melbourne, 2012) 1.

Another way of putting this is by differentiating an institutional understanding of the scope of judicial review from a functionalist approach to the same question. Administrative law is a relatively new field of law in Australia,[12] although judicial review's principles and remedies have been around for substantially longer.[13] It is significant[14] that the High Court is granted jurisdiction by s 75(v) of the *Constitution* where the formerly prerogative[15] writs of mandamus and prohibition, and the equitable remedy of injunction, are sought against an "officer of the Commonwealth".[16] This reflects the reality that, in 1901, seeking a remedy against an *ultra vires* exercise of public power inevitably meant seeking a remedy against the government or its officers. However, the expansion of the administrative state no longer makes such an institutional approach to judicial review appropriate in all circumstances.

Cane and McDonald put the difference between institutional and functional approaches to the scope of administrative law in these terms:[17]

> The functions which, according to the functional approach, define the scope of administrative law, may be thought of as 'governmental' in the sense that these are functions that would appropriately be performed by organs of government even if they are in fact performed by non-governmental entities. The word 'governance' is apt to capture the idea that government, as well as being a set of institutions, is also a set of activities. Pursuing this line of thinking, we might say that administrative law is about control of governance (certain activities or functions) rather than about the control of government (certain institutions).

As will become clear, Australia has not reached the point, arrived at many years ago in England, where administrative law has a functional, rather than a more limited institutional, scope. Part of the problem is the difficulty in knowing what is a function of government.[18]

The categorisation of law becomes important when considering what legal status ought to be given to soft law. Creyke and McMillan used a dictionary definition of 'law' to get past the philosophical implications of what that term entails and come to the conclusion that, domestically, positive law must

12 The first Australian text on the subject was not published until 1950: W Friedmann, *Principles of Australian Administrative Law* (Melbourne University Press, Melbourne, 1950). It took another two decades before the Kerr Report signalled the start of the reforms which would become the "new administrative law": JR Kerr, AF Mason, RJ Ellicott and H Whitmore, (Commonwealth Administrative Review Committee), *Commonwealth Administrative Review Committee Report*, Parliamentary paper No 144, (1971).

13 TH Bingham, *The Rule of Law* (Allen Lane, London, 2010) 60.

14 Quick and Garran noted that the Constitutional Convention "was in considerable doubt as to whether this sub-section [s 75(v)] was necessary or not": J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Kessinger Publishing, 1901) 778. By the end of the following century, such doubts seemed remarkable.

15 These are now described as "constitutional writs": *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, 92-3 (Gaudron & Gummow JJ); 133-4 (Kirby J); 142 (Hayne J) ('*Aala*'); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 666 ('*Bodruddaza v MIMA*').

16 See J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector' (2013) 36 *UNSWLJ* 316; M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [2.150].

17 P Cane and L McDonald, *Principles of Administrative Law* (2nd ed, 2012) 4.

18 Cane and McDonald see this form of words as being "slightly different" to the concept of 'public functions' used in England: P Cane and L McDonald, *Principles of Administrative Law* (2nd ed, 2012) 4-5. Given my broad approach to 'doing government' (ie where the purpose of an act by a private entity is to govern public behaviour), nothing turns on the distinction for this thesis.

be both enforceable and designed to control.[19] To then discern the legal status of a particular instrument, they stated that three considerations will be pre-eminent:[20]

(i) the text of the instrument itself;
(ii) its purpose; and
(iii) whether it has statutory backing or authorisation.

The first of these considerations, I would respectfully suggest, is relevant only to the extent that it casts light upon the second and third considerations.

In regard to the third consideration proposed by Creyke and McMillan, the issues are uncomplicated where, as in the example of *Adultshop.com v Members of the Classification Review Board*,[21] the rules or guidelines in question have been specifically authorised or anticipated by the relevant empowering legislation and a court exercising a judicial review function is required only to consider whether the decision-maker acted *ultra vires*.[22] Additionally, guidelines might be valid but their application invalid. Their application can be challenged on the basis that the policy has been applied inflexibly or without consideration of the merits of the individual case.[23]

The purposive element of the definition by Creyke and McMillan is difficult but central. For example, the Grey-Letter Law Report stated:[24]

> Guidelines are likely to be quasi-regulation if:
>
> A. they suggest particular actions or procedures not specified in the law itself which businesses should adopt; and
>
> B. business has a strong incentive to comply.
>
> The incentive to comply can take a number of forms, including:
>
> C. an indication[25] that a business following the guidelines will not be in breach of the relevant legal requirement; ...
>
> D. an indication by a regulator that compliance with the guidelines will be a consideration in its enforcement of regulation, decision making or handling of complaints; … [and]

19 R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 383.

20 R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 393-4.

21 *Adultshop.com v Members of the Classification Review Board* (2007) 243 ALR 752, ('*Adultshop.com*'). In *Adultshop.com*, the applicant "challenged the classification decision on a number of grounds, including that the [*Guidelines for the Classification of Films and Computer Games 2005*] were unlawful as exceeding the power of the Minister under the [*Classification (Publication, Films and Computer Games) Act 1995* ('*Classification Act*')] because they dictated a classification without regard to the *Classification Act* or the [*National Classification Code* ('*Classification Code*')]; that the Review Board misconstrued the expression in the *Classification Code* 'likely to cause offence to a reasonable adult'; that the Review Board applied the *Guidelines* inflexibly and without regard to the merits of the case and without taking into account considerations that were relevant under the *Classification Act* and the *Classification Code*; and that the *Guidelines* were *Wednesbury* unreasonable.": R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 395.

22 It is usual that guidelines will be unreviewable under the *ADJR Act* because they are not made "under an enactment": *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1). See also R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 394-6; *Tang* (2005) 221 CLR 99; *White Industries Australia v Federal Commissioner of Taxation* (2007) 160 FCR 298, ('*White Industries v FCT*'). Guidelines may still be reviewable at common law or under section 39B of the *Judiciary Act 1903* (Cth) at Commonwealth level.

23 *Green v Daniels* (1977) 13 ALR 1.

24 Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter Law Report* (1997), 23-5. Detailed examples are given in the Grey-Letter Law Report of each variety of 'incentive to comply'.

25 This may fall short of a representation which would be actionable in tort if it were negligently inaccurate, as to which see Chapter 5.

E. a perception that adherence to guidelines will help to keep businesses in compliance with the law.

The second of the considerations nominated by Creyke and McMillan in ascertaining the enforceability of a soft law instrument is, arguably, the most important; the purpose of the instrument. Creyke and McMillan recognised that the question of purpose may vary from the mechanical, such as when a guidance note indicates the steps that will be taken to implement a certain policy or statute, to the merely aspirational, such as the Australian Public Service *Values*.[26] Where a soft law instrument is intended to have a practical effect, that effect will generally be observable in practice. Consultations undertaken by the Administrative Review Council in preparing the *Complex Regulation Report* confirmed that:[27]

> despite their non-binding character, soft law 'guidelines', 'practice notes', and so on, developed by government agencies are treated in practice little differently from black letter law. Some of those consulted said that only people with 'deep pockets' would be in a position to mount a legal challenge to the validity of soft law produced by government agencies.

Creyke and McMillan's third element suggests that there is a sense in which the hardness or softness of a legal instrument is an inquiry separate from that as to its legal status. In other words, the legality or legitimacy of an instrument may be decided by its source: acts within power by the legislature and decisions of the courts are law, at least until such time as they are validly overturned. However, if the adjective 'soft' denotes an instrument which a court cannot enforce or otherwise give consequence to, it cuts across some legislation, for example legislation of a wholly aspirational nature. For example, the *Charter of Budget Honesty Act 1998* (Cth) set out the Charter of Budget Honesty as Schedule 1, but stated that "nothing in the Charter of Budget Honesty creates rights or duties that are enforceable in judicial or other proceedings".[28] In this sense, the charter was undeniably soft: it sought to regulate behaviour through recommendation[29] rather than by setting a judicially enforceable norm. On the other hand, being an Act of Parliament which had been considered, debated and voted upon, it was undeniably law. Its 'softness' did not make it any less a valid expression of the will of Parliament. In other words, it was certainly 'hard' law in the eyes of the legislature, even if courts could not enforce it.[30]

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26 R Creyke and J McMillan, 'Soft Law versus Hard Law' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 377, 380. See also M D'Ascenzo, 'Effectiveness of Administrative Law in the Australian Public Service' (2008) 57 *AIAL Forum* 59.

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

28 *Charter of Budget Honesty Act 1998* (Cth) s 3(2). The requirement that tribunals perform their functions in such a way as to provide review which is "fair, just, economical, informal and quick" appears in several legislative schemes, including in regard to the Migration Review Tribunal in *Migration Act 1958* (Cth) s 353(1). Hayne, Kiefel and Bell JJ commented that these "adjectives … are apt to apply to objectives but not to enforceable requirements, not the least because each pulls the Tribunal in a different direction. It is contended that provisions of this kind do not detract from, but nor do they add to, such obligations, limits or powers as arise from the language of the statute.": *MIAC v Li* (2013) 87 ALJR 618, 635 [51].

29 Although some aspects of the Charter regime are more prescriptive than that; see eg Secretary to the Treasury and Secretary to the Department of Finance and Deregulation, '*Charter of Budget Honesty - Policy Costing Guidelines*' (Guidelines, 2012).

30 A further example can be seen in *LIA 2003* (Cth) s 17. That provision states that, prior to making a legislative instrument, a "rule-maker *must* be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken" (emphasis added). However, s 19 then provides that "[t]he fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument."

This point was picked up by McHugh J during argument in *Plaintiff S157*.[31] His Honour put to Mr John Basten QC,[32] who was appearing as senior counsel for the applicants in the companion case being heard concurrently,[33] the following point in relation to reaching a determination whether the relevant section of the *Migration Act* was a privative clause:[34]

> **McHUGH J**: … It seems to me [the clause] has the dilemma, either it is an ouster clause or, arguably, it runs into various constitutional prohibitions or it is a delegation of power, or it is not even a law. It is not a law in the Austinian sense. Austin's definition of Law may not be exhaustive but in this present context how does one know what the command of the sovereign is?
>
> **MR BASTEN**: Yes, indeed. Your Honour, ... there is, we say in the submissions, a distinct difference between the circumstance we are now envisaging and the circumstance where the Parliament has simply been silent, as in the *Project Blue Sky*[35] type case, as to the effect of non-compliance, so that we accept ...
>
> **McHUGH J**: I really had in mind cases like *Ex parte Walsh and Johnson*[36] and the *Communist Party Case*,[37] both of which struck down laws which really depended upon the Executive view of the law.

Ultimately the court was able to "eviscerate" the privative clause without having to decide this point,[38] although the question of how the legal system is able to deal with instruments which fall short of being binding law arose in the later High Court case of *Griffith University v Tang*.[39] Both *Tang* and the Constitutional requirement of a 'matter', which is relevant to McHugh J's point, will be considered in detail below.

I: Judicial review and the rule of law

If the scope of judicial review is to be broadened to cover all exercises of public power, whether regulated by hard or soft law, there must be some normative justification for that step. One way of reaching this end is to frame the expansion of judicial review to cover soft law as a rule of law issue. This involves casting governance through the mechanism of soft law as an exercise of arbitrary power, to the extent that such governance lacks accountability. Such governance must be subject to legal safeguards.

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31 *Plaintiff S157* (2003) 211 CLR 476. A similar point was referred to, but not decided, in the joint judgment: *Plaintiff S157* (2003) 211 CLR 476, 512-3 [102] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ).

32 Latterly, Basten JA of the NSW Court of Appeal.

33 *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Applicants S134/2002* (2003) 211 CLR 441, ('*Applicants S134*').

34 *Plaintiff S157/2002 v Commonwealth* [2002] HCA Trans 420 (3 September 2002). This issue also arose in the *Offshore Processing Case* (2010) 243 CLR 319, 139 [21].

35 *Project Blue Sky v Australian Broadcast Authority* (1998) 194 CLR 355, ('*Project Blue Sky*').

36 *Re Yates; ex parte Walsh and Johnson* (1925) 37 CLR 36, ('*ex parte Walsh and Johnson*').

37 *The Communist Party Case* (1951) 83 CLR 1.

38 M Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 35. The joint judgment flagged this issue without determining it at *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512-13 [101]-[102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Hayne J has recently revived the issue, again without expressing a final view: *Plaintiff M79* [2013] HCA 24, [88]. Professor Aronson has raised some persuasive doubts about this line of argument, based upon the fact Australia's immigration legislation has gone from being very brief, explicitly racist and full of discretionary power reserved to the Minister to a statutory behemoth full of detail. On what basis can it be suggested that the *Migration Act* is not a real law? See M Aronson, 'Statutory Interpretation or Judicial Disobedience?' (3 June 2013) *UK Constitutional Law Group Blog* http://ukconstitutionallaw.org/2013/06/03/mark-aronson-statutory-interpretation-or-judicial-disobedience/.

39 *Tang* (2005) 221 CLR 99.

The rule of law is frequently defined by its aversion to arbitrariness,[40] although what is meant by that statement can differ. Raz argued that, on a positivist view, the law inherently creates the risk of arbitrary power[41] and that the rule of law serves to minimise this danger.[42] He denied that this occurred through the presence of morality in the rule of law;[43] in other words, there is no normative basis for the rule of law's opposition to arbitrariness in Raz' view.

Dicey, too, defined the rule of law in opposition to arbitrariness, by which he meant:[44]

> in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

Hunt argued that Dicey, in contrast to Raz, in fact used the rule of law in a sense informed by notions of common law constitutionalism.[45] This gave Dicey's view of the rule of law a normative element,[46] since the sovereignty of parliament was offset by the common law courts which would interpret statutes in accordance with 'fundamental rights' of constitutional standing.

In his controversial paper, *Judicial Activism and the Death of the Rule of Law*,[47] JD Heydon also placed an opposition to arbitrary decision-making at the heart of the rule of law.[48] As others have noted,[49] Heydon J's conception of the rule of law depends on the view that, subject to legislation, *any* failure by a court to adhere strictly to the doctrine of *stare decisis* (as his Honour formulates it) results

40 Writing extra-judicially, Lord Bingham described arbitrariness as "the antithesis of the rule of law": TH Bingham, *Rule of Law* (2010) 48. Likewise, "[i]n Canadian public law, *Roncarelli v Duplessis* [[1959] SCR 121; (1959) 16 DLR (2d) 689] stands for the proposition that arbitrariness and the rule of law are conceptually antithetical values.": M Liston, 'Witnessing Arbitrariness: *Roncarelli v Duplessis* Fifty Years On' (2010) 55 *McGill Law Journal* 689, 691.

41 "'Arbitrary power' is a difficult notion. We have no cause to analyse it here. It seems, however, that an act which is the exercise of power is arbitrary only if it was done either with an indifference as to whether it will serve the purposes which alone can justify the use of that power or with belief that it will not serve them. The nature of the purposes alluded to varies with the nature of the power. This condition represents 'arbitrary power' as a subjective concept.": J Raz, 'The Rule of Law and its Virtue', *The Authority of Law* (1979) 210, 219.

42 J Raz, 'The Rule of Law and its Virtue', *The Authority of Law* (1979) 210, 224.

43 Cf D Dyzenhaus, 'The Legitimacy of the Rule of Law' in D Dyzenhaus, M Hunt and G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) 33, 40.

44 AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) 188.

45 M Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in M Taggart (ed), *The Province of Administrative Law* (Hart, 1997) 21, 24-5.

46 Cf PP Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework' [1997] *Public Law* 467, 470.

47 JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) XLVII *Quadrant* 9. This paper was originally given as an address to the Quadrant Dinner held on 30 October 2002, at which time Heydon JA was a judge of the NSW Court of Appeal. In February 2003, his Honour was elevated to the High Court of Australia. The text of his speech was subsequently reproduced in other journals: JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110; JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10 *Otago Law Review* 493. His Honour's career on the High Court was bookended by another controversial paper: JD Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205.

48 JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Aust Bar Rev* 110, 132.

49 AC Hutchinson, 'Heydon' Seek: Looking for Law in All the Wrong Places' (2003) 29 *Monash University Law Review* 85, 90.

in “arbitrary, whimsical, capricious, unpredictable and autocratic decision making” and may result in “the citizen … being at the mercy of an individual mind uncontrolled by due process of law”.[50]

Heydon J saw the rule of law in a way not anticipated by Dicey, in that he saw it being violated by unpredictable judges rather than by arbitrary legislation or administration. Dicey saw judges as the heroes of the common law.[51] At least from Hunt’s perspective,[52] this view was not altered on Dicey’s part by the fact that judges could read down or otherwise affect the implementation of formally impeccable statutes which interfered with the ‘fundamental values’[53] of the common law, and were empowered to protect against the excesses of the administrative state.

Just as there are different interpretations of the content of the rule of law throughout the last century or more, so too are there different interpretations of its content in different countries today. South Africa is at one end of the spectrum, being a country in which judicial remedies may be based upon nothing more substantive that the court’s understanding of the rule of law. Professor Cora Hoexter has written approvingly of the enforceable status of the rule of law in South Africa, and has contended that it was still necessary even after the passage of a Constitution “fairly bristling with human rights”.[54] Over the past decade, the South African Constitutional Court has taken the same view, to the extent that the rule of law (and specifically the principle of legality) has become directly enforceable. In South Africa, as in Australia[55] and elsewhere, the rule of law exists “either as a founding value or, if need be, as a doctrine implicit in the Constitution”.[56] However, the *Constitution of the Republic of South Africa 1996* also contains express rights in s 33, such as the right that administrative action be “procedurally fair”.[57] This scheme of rights, codified in the *Promotion of Administrative Justice Act 2000*,[58] is now being subverted by the tendency of courts to apply the principle of legality directly and therefore “go behind” the difficulties imposed by the terms of the PAJA.[59] The explicit warnings of Chaskalson CJ,

50 JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Aust Bar Rev* 110, 132. The weakness of the historical underpinnings of such a narrow approach to the rule of law had been pointed out by Professor Wade, who noted that the attempts of the Stuart monarchs to rule by proclamation were backed by substantial common law precedent: AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) xcviii-xcix.

51 AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) 193-4.

52 M Hunt, 'Constitutionalism and Contractualisation' in M Taggart (ed), *The Province of Administrative Law* (1997) 21, 25. See also PP Craig, 'Conceptions of the Rule of Law' [1997] *PL* 467, 470-1.

53 Note, however, the comment by McHugh J on the lack of utility in searching for fundamental rights and values: *Malika Holdings Pty Ltd v Streeton* (2001) 204 CLR 290, 298-9 (McHugh J) (‘*Malika Holdings*’). To like effect, Lord Hoffmann commented that “Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The *Human Rights Act 1998* will not detract from this power.”: *R v Secretary of State for the Home Department; ex parte Simms & O'Brien* [2000] 2 AC 115, 131 (‘*ex parte Simms*’).

54 C Hoexter, 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165, 166.

55 “[T]he Constitution … is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, … others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.”: *The Communist Party Case* (1951) 83 CLR 1, 193 (Dixon J). See also *Plaintiff S157* (2003) 211 CLR 476, 513 [103].

56 C Hoexter, 'The Rule of Law and the Principle of Legality in South African Administrative Law Today' in M Carnelley and S Hoctor (eds), *Law, Order and Liberty: Essays in Honour of Tony Mathews* (UKZN Press, 2011) 9.

57 *Constitution of the Republic of South Africa 1996* (South Africa) s 33(1). See generally C Hoexter, *Administrative Law in South Africa* (2nd ed, 2012) Ch7.

58 *Promotion of Administrative Justice Act 2000* (South Africa) (henceforth PAJA).

59 C Hoexter, 'Rule of Law and the Principle of Legality' in M Carnelley and S Hoctor (eds), *Law, Order and Liberty* (2011) 10. This is despite the official view of the Constitutional Court that constitutionally mandated legislation, such as PAJA, must be used where it is applicable: *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), (‘*New Clicks*’). “The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution.”: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), [25] (O'Regan J) (‘*Bato Star*’).

that this "would defeat the purpose of the Constitution",[60] and Ngcobo J, that it would result in "two parallel systems of law, one under PAJA and another under section 33 [of the *Constitution*] and the common law",[61] have not prevented South African courts (up to and including the Constitutional Court) from avoiding "the difficult questions" which may sometimes ensue from applying PAJA rather than the common law principle of legality.[62] The result is that the principle of legality is the cause of no little unpredictability in South Africa,[63] and is "susceptible of abuse",[64] even though it gives courts an increased capacity to provide administrative justice.[65]

This recent South African jurisprudence is in contrast to the view (articulated above by both Dicey and Heydon J) that inconsistency and unpredictability indicate (at least possible) arbitrariness, the very antithesis to the rule of law.[66] As the Australian AAT discovered in its early years,[67] administrative justice usually calls for a compromise to be struck between consistency and the capacity to do justice in individual cases.[68] Some of the development of South African law may therefore be explicable as a result of that country having no equivalent to the AAT.[69] While there is some scope for administrative decisions to be appealed on their merits,[70] judicial review courts in South Africa bear a greater burden of providing administrative justice than is the case in other comparable jurisdictions, none more so than Australia. The burden is great indeed when one recalls that South African courts need still to respect the doctrines of the separation of powers and legislative supremacy. As the Supreme Court of Appeal has noted (in overturning a case which had enforced an estoppel against a public authority), judges must avoid:[71]

> exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the *ultra vires* doctrine nugatory. None of that would be in the interests of justice. Nor, can it be said, would any of that be sanctioned by the *Constitution*, which is based on the rule of law, and at the heart of which lies the principle of legality.

The principle of legality requires that governmental power be exercised with lawful authority. Judicial review is a component of this, since it has the function of ensuring that the limits to power imposed by law are observed. In this sense, the principle of legality has a more defined meaning than 'the rule of law', which remains indeterminate in its content and scope. A further component of the principle of

60 *New Clicks* 2006 (2) SA 311 (CC), [96] (Chaskalson CJ).

61 *New Clicks* 2006 (2) SA 311 (CC), [436] (Ngcobo J). Sachs J did not agree on the facts of the case that PAJA applied but held that, where it does, "there is no scope for bypassing it": *New Clicks* 2006 (2) SA 311 (CC), [585]-[586] (Sachs J).

62 C Hoexter, 'Rule of Law and the Principle of Legality' in M Carnelley and S Hoctor (eds), *Law, Order and Liberty* (2011) 11-12.

63 Professor Hoexter has referred to "the generality (and indeed the uncertainty) of the Rule of Law" when compared with the PAJA: C Hoexter, 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macq LJ* 165, 166.

64 C Hoexter, 'Rule of Law and the Principle of Legality' in M Carnelley and S Hoctor (eds), *Law, Order and Liberty* (2011) 13.

65 It should be noted that South Africa, unlike Australia, does not possess a tribunal of broad jurisdiction to decide cases on their merits. The role of courts performing judicial review to provide administrative justice is therefore increased.

66 See TH Bingham, *Rule of Law* (2010) 49-50.

67 See eg *Drake (No2)* (1979) 2 ALD 634; *Drake's Case* (1979) 46 FLR 409.

68 As Dr Hilson has pointed out, however, "where you have a compromise, you inevitably lose some of the good features from both sides": C Hilson, 'Judicial Review, Policies and the Fettering of Discretion' [2002] *Public Law* 111, 113.

69 See C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 70-2.

70 C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 67-70.

71 *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA), [24] (Ponnan JA) ('*RPM Bricks*').

legality is interpretive, that legislation is to be read such that fundamental rights cannot be abrogated by general or ambiguous words.[72] This is a principle that has been stated in Australian[73] and English[74] cases on numerous occasions. It is possible, however, for courts to deal with this aspect of the principle of legality in more than one way.

The first of these is with insouciance bordering on disobedience, as when courts express feigned disbelief that the legislature could have meant to violate a 'fundamental right'.[75] It is frequently clear that that was precisely the legislature's intention. *Coco v R* provides a good example, in which the High Court held that, in the absence of express words, a Queensland statute could not confer power on a Supreme Court judge to authorise conduct which would otherwise amount to trespass at common law.[76] This required interpreting the statute such that the power to "use" a listening device did not carry with it the power to install that device. The House of Lords came to a similar conclusion in *Simms*, in relation to the Home Secretary's policy that journalists would only be allowed to conduct oral interviews with prisoners if they undertook in writing that they would not publish any part of the interviews.[77] Lord Steyn, having referred obliquely to England's sorry recent history of miscarriages of justice in criminal matters, stated:[78]

> For my part I am reasonably confident that once it is accepted that oral interviews with prisoners serve a useful purpose in exposing potential miscarriages of justice the Home Secretary would not wish his present policy to be maintained.

His Lordship went on to grant a declaration[79] that the Home Secretary's policy was unlawful, having stated that the principle of legality allowed the Appellate Committee to construe subordinate legislation which gave effect to that policy such that it was not *ultra vires* because it was presumed to be subject to the "fundamental and basic rights asserted by the applicants in this case".[80]

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72 PP Craig, *Administrative Law* (7th ed, 2012) 578-9; cf *Malika Holdings* (2001) 204 CLR 290, 298-9 (McHugh J); *ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann). Professor Aronson has noted that "in Australia as in England, courts began 'reading down' legislative grants of broad and seemingly unfettered discretionary power long before the currently fashionable 'principle of legality' entered the public lawyer's lexicon": M Aronson, 'Statutory Interpretation or Judicial Disobedience?' (3 June 2013) *UK Constitutional Law Group Blog* http://ukconstitutionallaw.org/2013/06/03/mark-aronson-statutory-interpretation-or-judicial-disobedience/.

73 eg *Plaintiff S157* (2003) 211 CLR 476, 492 [30] (Gleeson CJ).

74 eg *ex parte Simms* [2000] 2 AC 115; *R (Roberts) v Parole Board* [2005] 2 AC 738, ('*Roberts v Parole Board*').

75 This attitude has a long history; see eg *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J). His Honour quoted *Maxwell on Statutes* (4th ed, 1905) as follows: "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.": PB Maxwell, *On the Interpretation of Statutes* (4th ed, 1905) 122 (citation omitted). This quotation was later repeated with approval in *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron & McHugh JJ) ('*Bropho*'); *Coco v R* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron & McHugh JJ) ('*Coco*'). See also *ex parte Walsh and Johnson* (1925) 37 CLR 36, 93 (Isaacs J).

76 *Coco* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron & McHugh JJ).

77 *ex parte Simms* [2000] 2 AC 115, 119 (Lord Steyn).

78 *ex parte Simms* [2000] 2 AC 115, 129 (Lord Steyn).

79 Lords Browne-Wilkinson, Hoffmann and Millett concurred with Lord Steyn's reasoning and proposed orders; Lord Hobhouse agreed that the regulations were *intra vires* but were being applied unlawfully, but would not have quashed the impugned decisions of the governors (at AC 144).

80 *ex parte Simms* [2000] 2 AC 115, 130 (Lord Steyn). Lord Steyn also invoked the principle of legality in the later case of *Roberts v Parole Board* [2005] 2 AC 738, [88]-[97]. See C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 643.

Lord Hoffmann's reasoning in *Simms* was subtly different, and represents the second method by which courts can deal with the principle of legality. While his Lordship agreed with the reasons given by Lord Steyn, and was prepared to presume the validity of the subordinate legislation[81] on the basis that any legislative instrument expressed in general terms is subject to "fundamental human rights",[82] his reasons for reaching this conclusion were expressed in slightly different terms. His Lordship stated that the power of the Parliament to legislate contrary to "fundamental principles of human rights" was subject to restraints which:[83]

> are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. *This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.* In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

This approach requires a Parliament which seeks to over-ride fundamental common law rights to confront what it is doing squarely "and accept the political cost".[84] Ensuring that governments say clearly what it is that they want and accept full political responsibility for it has become a common feature of the principle of legality. Sometimes this is implicit in the courts' reasoning on other grounds, such as Laws LJ finding that the process of consultation required before altering subordinate legislation governing grants of legal aid for public interest litigation was inadequate because it did not reveal that the government's motivation was illegal (namely, to limit embarrassing legal action taken against it).[85] At other times, courts explicitly disapprove of attempts by government to avoid political responsibility for their decisions.

Rarely has such an attempt been as clear as in *Lumba*, in which a senior officer in the Home Office drafted a policy which said in part that, while it was likely the policy in question was unlawful, "if we were to lose a test case, we could present any change in [foreign national prisoners'] detention practice as having been forced on us by the courts". Lord Dyson considered this course of action "deplorable",[86] a conclusion with which it is hard to disagree. At the very least, it demonstrates that the principle of legality will, at least occasionally, have real work to do and cannot simply be categorised, by those so inclined, as the tool of an obstructionist judiciary.

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81 *Prison Service Standing Order 5 of 1996* (issued by the Secretary of State pursuant to rule 33 of the *Prison Rules 1964*, under authority conferred by section 47(1) of the *Prison Act 1952*).

82 *ex parte Simms* [2000] 2 AC 115, 132 (Lord Hoffmann).

83 *ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann) (emphasis added). See also *Plaintiff S157* (2003) 211 CLR 476, 492 [30] (Gleeson CJ).

84 PP Craig, *Administrative Law* (7th ed, 2012) 579. Professor Aronson put the same principle in different words, saying that "any government seeking such an untoward power should be forced to 'fess up to the Parliament, and face the political music": M Aronson, 'Statutory Interpretation or Judicial Disobedience?' (3 June 2013) *UK Constitutional Law Group Blog* http://ukconstitutionallaw.org/2013/06/03/mark-aronson-statutory-interpretation-or-judicial-disobedience/.

85 "Had the [government]'s concerns been disclosed as a factor in the decision-makers' minds, muscular representations would have been advanced by interested parties, no doubt including the claimant. The Lord Chancellor would most likely have been expressly confronted with the assertion that he was contemplating a legally irrelevant factor. He could have made it plain, before the amendments were made, that he disavowed it.": *R (on the application of Evans) v The Lord Chancellor & Secretary of State for Justice* [2012] 1 WLR 838, 30 ('*Evans v Lord Chancellor*'). (Laws LJ, with whom Stadlen J agreed)

86 *Lumba v Home Secretary* [2012] 1 AC 245, 162.

To what extent the rule of law ought to be understood as having normative content rather than being merely procedural is beyond the scope of this work. At any rate, the issue is far from settled.[87] It suffices to say that, if courts are opposed to the arbitrary use of power, there is more good to be done by extending the coverage of judicial review to include exercises of soft law than by remaining aloof and thereby legitimating whatever arbitrariness arises.

There are three possible objections to this position, two formal and the other practical. The formal objection is that, by broadening its jurisdiction to cover applications of soft law, the courts may be acting against the terms of the *Bill of Rights*.[88] This argument proceeds on the basis that, by treating soft law as though it has the full force of law, the courts would in effect be saying that soft law derived from the executive branch of government is of the same effect as laws enacted by parliament.[89] The soft law would thereby be in breach of the second article of the *Bill of Rights*, which states that:

> the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

For such an objection to be upheld would represent a victory of form over substance. The fact of the matter is that the executive *does* regulate behaviour through soft law; this does not become the case only as a result of legal recognition. As Chapter 2 pointed out, soft law is not inherently bad, and has the potential to be beneficial, for example in alerting the public to the executive's view of a statute that has not been interpreted by the courts,[90] or by otherwise bringing predictability to a field of the law by adding a level of detail to a more generally expressed statutory instrument. Soft law is a tool, just as a sharp knife is.[91] The fact that it is sharp means that it is a well-made knife, but it also gives it the potential to be used for ill as well as good, for stabbing people as well as cutting vegetables. What is concerning about soft law is its capacity for misuse: knowing that soft law is followed as though it were hard, and that it can be made without the inconvenience of consulting parliament, the executive will often be tempted to regulate behaviour through the mechanism of soft law. This is a threat to the spirit of the *Bill of Rights*, if not to its precise terms. Judicial oversight of the use of soft law by the executive can only serve the better to ensure that it is a tool that is not misused.

The second formal objection is simply that, while soft law would indeed be *ultra vires* if it were to "dispense" with laws or their execution, if that is not the case, then soft law is not "dispensing" with law but *adding* law (of a sort).

The practical objection to extending the scope of judicial review to cover soft law is aptly stated by Mark Aronson, who was commenting in regard to *Datafin*:[92]

87 See PP Craig, 'Conceptions of the Rule of Law' [1997] *PL* 467.

88 *Bill of Rights 1688* (UK).

89 For an analogous argument, see the judgment of Kearns P in *Fleming v Ireland* [2013] IEHC 2 (at n 154 below).

90 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 126.

91 This metaphor is borrowed from J Raz, 'The Rule of Law and its Virtue', *The Authority of Law* (1979) 210, 226.

92 M Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in M Taggart (ed), *The Province of Administrative Law* (1997) 40, 47.

> What is the point of supervising the way a body interprets rules which it can change without legal formality? The further a regulatory regime travels from the legal paradigm, the less relevant is judicial review as an accountability device.

It is hard to get around this question. To extend the metaphor used above, perhaps judicial review is simply not a tool fit to the purpose of curbing formally extra-legal methods of regulation. To the extent that this is true, Chapter 6 below will examine various non-judicial methods of dealing with soft law.

The limitations of judicial review in the face of an executive branch capable of altering the rules without parliamentary sanction can be demonstrated by looking at *Quin*,[93] a case involving a judicial review application brought by a former stipendiary magistrate who the government of the day had not appointed to a Local Court magistracy when the New South Wales Courts of Petty Sessions were abolished by statute. The government's policy was that stipendiary magistrates would be appointed to the new court unless unfit for judicial office. Quin was one of only five stipendiary magistrates who were not appointed. The New South Wales Court of Appeal held that these five former stipendiary magistrates had been denied natural justice by the Attorney-General and declared that his decision not to recommend their appointment was void.[94] At this juncture, the Attorney-General[95] altered the existing policy to state that, rather than giving preference to former stipendiary magistrates, he would appoint new magistrates to the Local Courts based only on merit. The successful *Macrae* plaintiffs were able to apply on equal terms to any other applicant, and would not have allegations of unsuitability held against them unless they were given an opportunity to respond to such allegations.[96] Quin[97] sought and obtained a declaration from the Court of Appeal that he was entitled to have his original application for appointment considered with procedural fairness,[98] notwithstanding the new policy of the Attorney-General.

By a bare majority, the High Court upheld the Attorney-General's appeal.[99] The majority of Mason CJ, Brennan J and Dawson J each followed substantially different reasoning, but the basic proposition that can be taken from their combined judgments is that it is not for the courts to compel the executive government to adhere to one policy rather than another.[100] Although it formed no part of the court's formal reasoning, this is true *a fortiori* where, as in these circumstances, a policy is changed as a result of a change in government. *Quin* is now a quintessential part of the Australian administrative law landscape,[101] and the decision of the majority is undoubtedly correct.

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93 *Quin* (1990) 170 CLR 1.

94 The terms of the declaration were not, however, entirely clear: *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268, ('*Macrae*'). Special leave to appeal was subsequently denied by the High Court.

95 By this time, there had been a change of government in NSW and consequently there was a new Attorney-General, John Dowd QC. Prior to the change of government, the Australian Labor Party had been in power for the previous twelve years and five separate Attorneys General had served during this period; see http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/attorney_generals_department_2007_03_26.

96 *Quin* (1990) 170 CLR 1, 50-1.

97 Along with two other of the *Macrae* plaintiffs, who subsequently withdrew their claims.

98 *Quin v Attorney-General (NSW)* (1988) 16 ALD 550.

99 *Quin* (1990) 170 CLR 1, (Mason CJ, Brennan & Dawson JJ; Deane & Toohey JJ dissenting).

100 The substantive enforcement of legitimate expectations is considered in detail in Part C below.

101 M Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399.

It does, however, point clearly to the fact that judicial review of soft law may be of absolutely no utility without the court having the capacity to enforce substantively previous or existing soft law instruments. While the executive retains the capacity to change soft law without reference to any other body, judicial review's retrospective remedies will likely be of no greater avail than they were to the *Macrae* plaintiffs.

Quin occupies a status of almost unquestionable authority in Australia, making it difficult to argue persuasively that courts should intervene to enforce soft law. There is, however, no equivalent case in the UK. This chapter will therefore examine a recent trio of cases in which the UK's highest court has been faced with soft law issues: *Purdy v DPP*,[102] *Lumba v Home Secretary*[103] and *Kambadzi v Home Secretary*.[104]

Purdy v DPP

An additional (although not alternative) method of providing a normative basis for extending the scope of judicial review is through the adoption of legislation which provides for substantive protection of rights, such as the *Human Rights Act 1998* (UK). A recent example of the interaction between the *Human Rights Act* and soft law was seen in *Purdy*, the final case of the judicial branch of the House of Lords and one in which their Lordships reached what one commentator has described as an "astonishing" conclusion.[105] It was also a case which showed the difficulties inherent in treating soft law as though it were hard law.

Briefly, the facts of *Purdy* are these. Debbie Purdy suffered from incurable multiple sclerosis and expected that her health would eventually deteriorate to the point that she would wish to end her life. However, by the time this point were to arrive, she was concerned that she would likely be unable to commit suicide unassisted. Assisting a person to commit suicide is a breach of the *Suicide Act 1961*.[106] Ms Purdy wished to be able to travel with her husband to Switzerland (where assisted suicide was legal) to commit suicide when she decided that she wished to die, but was concerned that her husband should not face criminal liability after her death for assisting her to commit suicide by helping her in Switzerland.

The *Suicide Act* confers upon the Director of Public Prosecutions (DPP) a discretion as to whether he or she will proceed against any person for breach of section 2.[107] As required under the *Prosecution of Offences Act 1985* (UK) s 10, the DPP publishes a Code for Crown Prosecutors,[108] which is a soft

102 *Purdy v DPP* [2009] 1 AC 345.

103 *Lumba v Home Secretary* [2012] 1 AC 245.

104 *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299, ('*Kambadzi v Home Secretary*').

105 JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *New Zealand Law Review* 601, 603.

106 "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.": *Suicide Act 1961* (UK) s 2(1).

107 "No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.": *Suicide Act 1961* (UK) s 2(4). See Crown Prosecution Service, '*The Code for Crown Prosecutors*' (2010).

108 Crown Prosecution Service, '*Code for Crown Prosecutors*' (2010). See *Purdy v DPP* [2009] 1 AC 345, 393 [47] (Lord Hope of Craighead).

law document providing guidance to Crown Prosecutors about whether a prosecution is justified in various circumstances.

Ms Purdy took action against the DPP to compel him to include in the Code specific guidance about the circumstances in which he would prosecute a person who breached the *Suicide Act* s 2(1) by travelling with another person to Switzerland to assist the latter person to commit suicide there.[109] She did not seek an immunity from criminal prosecution for her husband,[110] nor did she seek to compel the DPP to formulate a policy which stated that he would not prosecute her husband. Indeed, how could she seek either of these outcomes? What she sought, on the face of her claim, was information which would enable her to make an informed choice as to when and how she should commit suicide, based on whether or not she would need to be sufficiently able bodied to do so unassisted. However, Ms Purdy was, in a practical sense, after more than information.[111] After all, the opinion of the DPP about whether he would prosecute a hypothetical crime that had not yet been committed would ordinarily be a thing subject to change in changing circumstances.[112] What Ms Purdy wanted in fact was the promulgation of a detailed policy by the DPP which would thenceforth be treated as though it were hard law. No other outcome would provide any comfort to her husband.

Ms Purdy based her application in article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[113] which states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In a previous case on substantially similar facts,[114] the House of Lords had held that the DPP had not breached article 8 by refusing to provide an undertaking that he would not prosecute the husband of a terminally ill woman if he assisted her to commit suicide. Their Lordships held that article 8 "is

109 *Purdy v DPP* [2009] 1 AC 345, 391 [42] (Lord Hope of Craighead). See R Nobles and D Schiff, *Observing Law Through Systems Theory* (Hart, Oxford, 2012), 82-6.

110 *Purdy v DPP* [2009] 1 AC 345, 386 [30] (Lord Hope of Craighead).

111 Cf Lord Hope's statement that "[w]hat she seeks is information. It is information that she says she needs so that she can take a decision that affects her private life.": *Purdy v DPP* [2009] 1 AC 345, 386 [30].

112 This was assumed by Lord Neuberger of Abbotsbury: *Purdy v DPP* [2009] 1 AC 345, 407 [97].

113 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS No.005 ('*European Convention on Human Rights*'). The Convention is included as Schedule 1 to the *Human Rights Act 1998* (UK).

114 *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, ('*Pretty's Case*'). As Lord Hope of Craighead pointed out in *Purdy*, there was one very important difference between the two cases: "Mrs Pretty, who could no longer do anything for herself, was seeking an undertaking that her husband would be immune from prosecution if he assisted her in the very act of committing suicide. Unlike Ms Purdy, she was not contemplating travelling to another country for this purpose. Nor was there any question, in Mrs Pretty's case, of her being forced by lack of information about prosecution policy to choose between ending her life earlier than she would otherwise have wished while she was still able to do this without her husband's assistance. The difference is a subtle one.": *Purdy v DPP* [2009] 1 AC 345, 390 [38].

expressed in terms directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the article has reference to the choice to live no longer."[115]

The House of Lords' decision in *Pretty* was overturned by the European Court of Human Rights,[116] which held that Mrs Pretty's decision to end her own life at a time of her choosing engaged article 8. Professor Finnis has criticised this decision on the basis that it remains a criminal offence to aid, abet, counsel or procure the suicide of another person and, if the ECtHR is correct, there is no principled reason why article 8 ought not to cover other crimes:[117]

> That same right to privacy is engaged in countless offences, serious and minor: whatever one does in one's home or in one's correspondence to advance some criminal purpose, from mass murder to evasion of licence fees, engages the right. Is one entitled, whenever one's privacy right is thus engaged, to the assistance of the courts in determining, in advance, how likely it is that the prosecuting authorities will judge a prosecution contrary to the public interest?

However, in *Purdy*, the House of Lords departed from its earlier decision in *Pretty* and applied the interpretation of article 8 adopted by the ECtHR in holding that article 8(1) was engaged.[118] Giving a judgment with which the other members of the Appellate Committee largely concurred, Lord Hope reasoned that, in order to give effect to the stipulation in article 8(2) that the right in article 8(1) could only be interfered with "in accordance with the law", any such interference would need to be legally justified, expressed with sufficient clarity to enable a person "to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law" and not applied in an "arbitrary" fashion, for example "in bad faith or in a way that is not proportionate".[119] His Lordship stated that "law" was, in this context, to be understood substantively, rather than formally,[120] with the effect that that term would cover the DPP's soft law Code. Therefore, although s 2(1) of the *Suicide Act* was drafted such that it could leave Ms Purdy in no doubt that her husband would commit a criminal offence by assisting her to travel to Switzerland for the purpose of committing suicide, Lord Hope accepted the argument put by Lord Pannick QC for Ms Purdy[121] that the rule of law required the

115 *Pretty's Case* [2002] 1 AC 800, 821 [23] (Lord Bingham of Cornhill). Lord Steyn agreed (at AC 835 [61]) "that the guarantee under article 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die", and stated further that if the guarantee had been infringed that that infringement would have been justified. Lord Hope of Craighead did not dissent, but nonetheless stated the contrary view (at AC 846 [100]) that "respect for a person's 'private life', which is the only part of article 8(1) that is in play here, relates to the way a person lives. The way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect Mrs Pretty has a right of self-determination. In that sense, her private life is engaged even where in the face of a terminal illness she seeks to choose death rather than life." This passage was approved by the ECHR at *Pretty v United Kingdom* (2002) ECtHR 427, 64 (Fourth Section, '*Pretty v UK*'). See also *Purdy v DPP* [2009] 1 AC 345, 389 [36]. Lord Hope had continued in his *Pretty* judgment to say: "But it is an entirely different thing to imply into these words a positive obligation to give effect to her wish to end her own life by means of an assisted suicide. I think that to do so would be to stretch the meaning of the words too far.": *Pretty's Case* [2002] 1 AC 800, 846 [100].

116 *Pretty v UK* (2002) ECtHR 427.

117 JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *NZLR* 601, 603.

118 *Purdy v DPP* [2009] 1 AC 345, 390 [39] (Lord Hope of Craighead).

119 *Purdy v DPP* [2009] 1 AC 345, 390 [40] (Lord Hope of Craighead).

120 *Purdy v DPP* [2009] 1 AC 345, 390 [41] (Lord Hope of Craighead).

121 *Purdy v DPP* [2009] 1 AC 345, 352 G.

DPP to provide guidance as to when he would exercise his discretion to bring a prosecution under s 2(4) of the *Suicide Act*.[122]

It is important to understand the substantive effect of the existence of the rights in article 8. In Australia, where there is no statutory or constitutional protection of rights at a Commonwealth level, it is almost unthinkable that the current High Court would issue an order seeking to confine the scope of a discretion granted to the DPP by parliament.[123] A person in the position of Ms Purdy's husband would not generally even be able to argue, after the DPP had exercised his statutory discretion to prosecute, that the DPP's decision was *Wednesbury* unreasonable.[124] The High Court has recently stated that the capacity to stop a prosecution in the event of abuse of process means that judicial review is neither required nor available.[125]

Article 8, by contrast, creates a substantive right with which law must comply in order to be valid. Lord Hope followed a recent decision of the Grand Chamber of the European Court of Human Rights[126] that 'law' includes "both enactments of lower rank than statutes and unwritten law".[127] It was on this basis that the House of Lords examined whether the discretion granted by s 2(4) of the *Suicide Act* was sufficiently certain to allow Ms Purdy's husband to regulate his behaviour without breaking the law.[128]

However, there are a couple of comments which can be made about the way the House of Lords went about this task. First, as Professor Finnis pointed out, there is the misconception that Ms Purdy's husband would have remained "of a law-abiding persuasion",[129] having committed an act in breach of s 2(1) of the *Suicide Act*, provided that he was not prosecuted for that act in the DPP's discretion under s 2(4). Professor Finnis cited Hart to maintain that, in fact, there was no question at all of Ms Purdy's husband being able to regulate his behaviour so as to avoid breaking the law; his only interest was in whether, having broken the law, he would be prosecuted for that breach.[130] On this approach,

122 *Purdy v DPP* [2009] 1 AC 345, 391 [43] (Lord Hope of Craighead). Guidelines in regard to when the DPP will exercise his or her power to commence a prosecution against a person who has assisted another person to commit suicide are publicly available in every Australian jurisdiction: B White and J Downie, 'Prosecutorial Guidelines for Voluntary Euthanasia and Assisted Suicide: Autonomy, Public Confidence and High Quality Decision Making' (2012) 36 *Melbourne University Law Review* 656, 660-1.

123 See *Likiardopoulos v The Queen* (2012) 86 ALJR 1168, 1176-8 [31]-[39] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Likiardopoulos v R*').

124 Even that would be a most unpromising basis for challenge since, where a discretion is granted in broad terms and particularly where it calls on the decision-maker to reach a state of satisfaction as "a matter of opinion or policy or taste", a court exercising judicial review will never substitute its opinion for that of the decision-maker, even on the clearest evidence: *Buck v Bavone* (1976) 135 CLR 110, 118-119 (Gibbs J). See generally M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.390]-[6.500].

125 *Likiardopoulos v R* (2012) 86 ALJR 1168, 1177 [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); French CJ agreed substantially but was not prepared to say that "that the exercise of a statutory power or discretion by a prosecutor is immune from judicial review for jurisdictional error, however limited the scope of such review may be in practice" (at 1171 [4]). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [7.320].

126 *Kafkaris v Cyprus* (2008) 25 BHRC 591, [139]-[140] ('*Kafkaris*').

127 *Purdy v DPP* [2009] 1 AC 345, 390 [41] (Lord Hope of Craighead).

128 *Purdy v DPP* [2009] 1 AC 345, 408 [100] (Lord Neuberger of Abbotsbury).

129 *Purdy v DPP* [2009] 1 AC 345, 397 [59] (Baroness Hale of Richmond); cf R Nobles and D Schiff, 'Disobedience to Law – Debbie Purdy's Case' (2010) 73 *Modern Law Review* 295, 296; JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *NZLR* 601, 608.

130 JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *NZLR* 601, 602. Professor Finnis' brilliant reasoning fails to deal with the fact the *Human Rights Act* is capable of over-riding pre-existing law, either entirely or merely on a case-by-case basis.

it was at all times entirely clear that Ms Purdy was inviting her husband to commit a criminal act.[131] No judgment by their Lordships could alter the fact that Ms Purdy's husband was proposing to break the law; any such alteration to the law is within the domain of Parliament alone.[132] Their Lordships seem to have proceeded on the basis that Ms Purdy's husband would have committed no crime as long as no prosecution was brought against him.[133] The reasoning leading to that conclusion is left to the reader's guesswork by the House of Lords rather than set out in detail. It may be right, not least in a practical sense, but depends on a view of what it means to be "law-abiding" which remained unarticulated. By contrast, Nobles and Schiff have concluded that a legal system cannot incorporate a right to disobey law.[134]

Secondly, the House of Lords' reasoning draws no clear distinction between hard law and the discretion granted to the DPP by s 2(4) of the *Suicide Act*. Even if the concept of 'law' is understood broadly, as this thesis argues it ought to be, to include what Lord Hope described as "unwritten law",[135] there are essential differences between legislation and the DPP's Code. This remark does not necessarily betray an exclusively positivist view of 'law'. The difference is not in whether or not the Code is law, but in whether or not it is legitimate in the sense of being representative. The Code is 'harder' than some soft law instruments because it is required by legislation.[136] Nonetheless, it is representative only in the sense that the parliament has granted discretions to the DPP as to the performance of his function (including under s 2(4) of the *Suicide Act*) and has separately required that he provide guidance[137] as to how those discretions will generally be exercised. Finnis asked:[138]

> why should the measure of the 'accessibility and foreseeability' of [the Code's] operation be the desires of an individual who wishes to promote the commission of an offence, rather than the assessment of the public interest made, first, by Parliament and, secondly, by the executive officer entrusted by Parliament with acting in the public interest in prosecuting or not prosecuting that offence? Why, indeed, should a duty to give guidance to Crown Prosecutors be converted into a duty to give guidance to prospective offenders about their chances? In holding that the DPP had acted unlawfully in not acceding to Ms Purdy's demand for information, the House of Lords simply substituted its judgment for the DPP's.

Part of being representative is weighing Ms Purdy's right to privacy under article 8[139] against "the public interest in maintaining a clear and exceptionless prohibition of assisting suicide",[140] which would

131 Cf J Waldron, 'Torture, Suicide, and *Determinatio*' *New York University Public Law and Legal Theory Working Papers* Paper 249, 19. Professor Waldron was critical of Professor Finnis' conclusion that the relevant statutory provision was "clear".

132 *Purdy v DPP* [2009] 1 AC 345, 385 [26] (Lord Hope of Craighead); *Pretty's Case* [2002] 1 AC 800, 809 [2] (Lord Bingham of Cornhill). See also Crown Prosecution Service, '*Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*' (2010), [5].

133 This is clearly not the assumption of the DPP: Crown Prosecution Service, '*CPS Policy on Assisted Suicide*' (2010), [48].

134 R Nobles and D Schiff, *Observing Law Through Systems Theory* (2012), 58.

135 *Purdy v DPP* [2009] 1 AC 345, 390 [41] (Lord Hope of Craighead). Note that in Australian legislation, the term "unwritten law" may be used to describe equity or a combination of law and equity; see eg *The Australian Consumer Law* § 20 (Schedule 2 to the *Competition and Consumer Act 2010*).

136 *Prosecution of Offences Act 1985* (UK) s 10.

137 Finnis pointed out that this guidance was required by statute to be provided to Crown Prosecutors and was not designed to be directed to people such as Ms Purdy: JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *NZLR* 601, 606. Nonetheless, the Code is explicitly marked as a 'public document': Crown Prosecution Service, '*Code for Crown Prosecutors*' (2010).

138 JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *NZLR* 601, 606.

139 Which, as Finnis pointed out, "the ECtHR had already ruled can entirely properly be overlaid by the 'blanket ban' in s 2(1)" of the *Suicide Act* in its judgment in *Pretty v UK* (2002) ECtHR 427, [76]: JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *NZLR* 601, 606-7 (n 20).

provide a deterrent effect while remaining flexible enough to deal with particular cases without creating a legitimate expectation that a certain course would be followed.[141] The arguments in favour of limiting discretions with rules[142] lose much of their force when the rulemaking is not the result of a democratic process[143] but at the order of a court which is seeking to delimit the bounds of a statutorily granted discretion. On the other hand, insisting on representivity as the central factor in the lawfulness of rules amounts to opening a second front against any subordinate legislation which is not disallowable by a vote in either chamber of the Parliament.

The order ultimately issued by the House of Lords required the DPP to identify in the Code for Crown Prosecutors "facts and circumstances which he will take into account in deciding whether to consent to prosecution under section 2(1) of the *Suicide Act 1961*". The DPP responded by committing to produce an interim policy within two months,[144] followed by a public consultation to produce a more detailed permanent policy,[145] assuming "the continuing absence of any legislative framework".[146] If this comment was designed to spur Parliament into action, it did not succeed.

In February 2010, the DPP issued his *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*[147] to stand alongside the Code. It confirms that it remains against the law in the UK to end the life of another, even at their express request.[148] This meets some of the concern expressed by Finnis that Lord Brown (with whom Lady Hale and Lord Neuberger agreed) was prepared to recognise "altruistic" assistance to commit suicide[149] without restricting the ambit of his comments to assistance to travel abroad.[150] The most that anyone can do for a loved one who wishes to commit suicide within the UK is to stand by while the loved one commits the act of suicide; the law thus remains as it ever was. The Policy is concerned with the potential liability of people in the position in which Ms Purdy's husband may have expected to find himself (and in which Mrs Pretty's husband did find himself), who may be called upon to assist a person who no longer has the capacity to perform the requisite physical acts to commit suicide. However, as Heywood has noted, it is framed in such general terms that the Policy may provide little practical guidance.[151]

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140 JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *NZLR* 601, 607.

141 Cf R Nobles and D Schiff, 'Disobedience to Law – Debbie Purdy's Case' (2010) 73 *ModLR* 295, 298.

142 See eg KC Davis, *Discretionary Justice* (1969).

143 Such as under the *Administrative Procedure Act 1946* (US).

144 And did so in September 2009: Crown Prosecution Service, '*Interim Policy for Prosecutors in Respect of Cases of Assisted Suicide*' (2009).

145 Crown Prosecution Service, *Public Consultation Exercise on the Interim Policy for Prosecutors in respect of Cases of Assisted Suicide Issued by The Director of Public Prosecutions: Summary of Responses*, (2010).

146 K Starmer QC, 'CPS statement on Debbie Purdy' (Press Release, 30 July 2009) <http://www.cps.gov.uk/news/press_statements/debbie_purdy/index.html>.

147 Crown Prosecution Service, '*CPS Policy on Assisted Suicide*' (2010). See B White and J Downie, 'Prosecutorial Guidelines for Assisted Suicide' (2012) 36 *Melb U LR* 656, 663-71.

148 Crown Prosecution Service, '*CPS Policy on Assisted Suicide*' (2010), [33]. See R Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) 21 *King's Law Journal* 425, 428.

149 *Purdy v DPP* [2009] 1 AC 345, 404 [83] (Lord Brown of Eaton-under-Heywood).

150 JM Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] *NZLR* 601, 609.

151 "Minimal assistance, without any further explanation, is so vague as to be virtually meaningless. Would this include booking a flight to Switzerland, giving the victim a lift to the airport, or accompanying them to Dignitas to provide comfort and help in their last moments?": R Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) 21 *King's LJ* 425, 434. Heywood comments that the "*Coroners and Justice Act 2009* has now broadened the offence of assisted

Interestingly, the Irish High Court declined to follow *Purdy* in its decision in *Fleming*,[152] a case which dealt with an identical legislative prohibition. The High Court held that the DPP had no power to issue guidelines,[153] but held further that it would be unconstitutional to do so. It held that, since Article 15.2 of the Irish Constitution provides that "the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas ... [and] no other legislative authority has power to make laws for the State", the DPP would infringe that provision if she issued guidelines which amounted to making a *de facto* change to the law:[154]

> The plaintiff … accepted that whatever powers the Director might have, they could not have the effect of overriding the intention of the Oireachtas or offending the separation of powers principles inherent in Article 15.2 of the Constitution.
>
> On behalf of the Director it was submitted that the Director would be "aiding a crime" if she were to grant the plaintiff's request to outline the factors that would be considered when deciding whether or not to prosecute for assisted suicide. Any such guidelines would constitute a "road map" under which a person might more safely commit a crime and avoid prosecution.
>
> It was argued that the Director has no power to adopt a policy that she will not prosecute in certain cases. The Director was, in effect being asked to legislate in a way that was quite impermissible under both the *Prosecution of Offences Act 1974* and, more particularly, the Constitution.

Although the case was appealed unsuccessfully to the Supreme Court,[155] this point was not appealed by the appellant. It has already been the subject of some criticism,[156] although this seems to downplay the Constitutional principles relevant to deciding the case[157] and, more importantly, to discount the relevance of the High Court asking what legal consequences would follow from the DPP being compelled to issue guidelines:[158]

> While the plaintiff asserts that she is seeking no more than a statement of factors which would influence the decision of the Director whether or not to prosecute, the reality of course is that, for her own very good reasons, she wishes to know that the Director will not in fact prosecute in her case. Whatever the stated objective of seeking guidelines may be, there can be no doubt but that the intended *effect* of obtaining such relief would be to permit an assisted suicide without fear of prosecution. No amount of forensic legerdemain can alter that fact. For, absent such *effect*, one is driven to ask what practical purpose or value lies in seeking such guidance? There is, in truth, none. It follows therefore that in this context 'effect' is every bit as important as 'object'.

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suicide to potentially include such acts" as would fall within the ambit of 'minimal assistance': R Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) 21 *King's LJ* 425, 434 (n 43).

152 *Fleming v Ireland* [2013] IEHC 2, ('*Fleming*').

153 Daly commented that this "doubtless came as a shock to the Director of Public Prosecutions, who issued a set of general guidelines several years ago": P Daly, 'Death, Democracy and Delegation' (14 May 2013), *UK Constitutional Law Blog*, http://ukconstitutionallaw.org/2013/05/14/paul-daly-death-democracy-and-delegation/.

154 *Fleming* [2013] IEHC 2, [147]-[149] (Kearns P).

155 *Fleming v Ireland* [2013] IESC 19.

156 P Daly, 'Guidelines and Assisted Suicide' (28 April 2013), *Administrative Law Matters*, http://administrativelawmatters.blogspot.com.au/2013/04/guidelines-and-assisted-suicide.html; P Daly, 'Death, Democracy and Delegation' (14 May 2013), *UK Constitutional Law Blog*, http://ukconstitutionallaw.org/2013/05/14/paul-daly-death-democracy-and-delegation/; cf R Ekins, 'Defying the Law: a Reply to Daly' (23 May 2013) *UK Constitutional Law Group Blog* http://ukconstitutionallaw.org/2013/05/23/richard-ekins-defying-the-law-a-reply-to-daly/.

157 Kearns P summarised this by concluding that "once guidelines may be characterised as having the effect of outruling a prosecution, they must be seen as altering the existing law and must therefore fall foul of Article 15.2 of the Constitution": *Fleming* [2013] IEHC 2, [166].

158 Ibid. The plaintiff had conceded that "even if the [DPP] published fulsome guidelines, there would remain the possibility that the [DPP] could still elect to prosecute any given case": *Fleming* [2013] IEHC 2, [147].

Albeit in a different constitutional context, this is an issue which was all but completely avoided by the House of Lords in *Purdy*.

In the UK, while the "early signs are that the DPP will take a generous approach to what is characterised as minimal assistance",[159] problems will arise when, inevitably, the DPP exercises his or her discretion to prosecute someone who feels that they ought not to have been prosecuted under the Policy or because it ignores certain considerations of the Policy. Nobles and Schiff[160] have pointed out that if a person who satisfied all of the circumstances which would indicate that a prosecution would be inappropriate under the Policy[161] were nonetheless prosecuted, it could either amount to an abuse of process or give rise to judicial review proceedings consequent on the disappointment of a legitimate expectation that no prosecution would be launched.[162] A court may also have to consider whether it should compel an unwilling DPP to provide formal reasons for his or her decision to prosecute in a certain case,[163] where there is no general common law duty to do so.[164]

The real significance of *Purdy* to this thesis is to show the profound effect that substantively enforceable rights can have. The case was decided on the basis that Ms Purdy had a right to know more about how the DPP might exercise his discretion to prosecute her husband if he assisted her to travel to Switzerland for the purpose of committing suicide. Clearly, in the absence of a bill of rights, the decision in *Purdy* could not have been made in Australia, a jurisdiction which has not yet been required to make decisions necessitating this sort of compromise between doctrinal clarity and the protection of human rights.

Lumba v Home Secretary

The effect of a public authority's failure to adhere to a stated policy, or alternatively to publish its true policy, was at issue in *Lumba*, a case in which two claimants (Walumba Lumba from the Democratic Republic of Congo and Kadian Mighty from Jamaica) had served periods in gaol as a result of having committed criminal offences. They challenged the legality of their immigration detention (following the expiry of their prison terms) pending deportation from the United Kingdom in actions for false imprisonment. They argued successfully at trial that it was unlawful for the Home Secretary to govern their detention through an unpublished policy,[165] but that judgment was overturned by the Court of Appeal. Before the Supreme Court, Messrs Lumba and Mighty were successful in their tort claims for false imprisonment but received only nominal damages of £1 each.

159 R Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) 21 *King's LJ* 425, 434.

160 R Nobles and D Schiff, 'Disobedience to Law – Debbie Purdy's Case' (2010) 73 *ModLR* 295.

161 They claim that this is "easily foreseeable ", but cf R Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) 21 *King's LJ* 425, 439.

162 R Nobles and D Schiff, 'Disobedience to Law – Debbie Purdy's Case' (2010) 73 *ModLR* 295, 298. Such proceedings would need to be directed against the DPP, since it is hard to imagine a court conducting judicial review of a criminal court. Having said that, the trial judge in criminal proceedings has a broad discretion to stay proceedings: *Connolly v Stokes* (Unreported, Queensland Court of Appeal, McPherson, Pincus JJA and Moynihan J, 5 May 1999).

163 See B White and J Downie, 'Prosecutorial Guidelines for Assisted Suicide' (2012) 36 *Melb U LR* 656, 696-8.

164 R Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) 21 *King's LJ* 425, 438.

165 R Husain QC, *Joint Case on behalf of the Appellants in R (Walumba Lumba); R (Kadian Mighty) v Secretary of State for the Home Department* (2010), [142]-[189].

There were two general bases upon which the nine sitting members of the Supreme Court[166] differed from each other in the course of eight published judgments: first, the effect of the Home Office's application of a secret, unpublished "blanket policy"[167] in preference to the published policy in establishing false imprisonment; and secondly, the appropriate measure of damages if false imprisonment were made out.[168] For the purposes of this chapter, I shall focus only on the first of these.

For a period of over two years,[169] the published policy of the Home Office stated that foreign national prisoners (FNPs) would benefit from a "presumption" in favour of release in most cases, although leaving detention as an available option in some cases. The Home Secretary calculated that "only 1.5% of those who were liable to detention under her immigration powers were actually detained" when this policy was in effect.[170] However, during the same period, an entirely different – and unpublished – policy was in fact being applied by the Home Office, which the Home Secretary advised the Prime Minister amounted to a "near blanket ban on release, regardless of whether removal can be achieved and the level of risk to the public linked to the nature of the FNP's original offence".[171]

In his lead judgment, Lord Dyson discussed at length the *Hardial Singh* principles,[172] which hold that:[173]

> (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
>
> (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.

166 Lord Dyson delivered the lead judgment, with which Lord Hope of Craighead, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Collins of Mapesbury and Lord Kerr of Tonaghmore substantially agreed as to the issue of the unpublished policy's illegality and the consequent establishment of false imprisonment. Lord Phillips of Worth Maltravers and Lord Brown of Eaton-under-Heywood (with whom Lord Rodger of Earlsferry agreed) each published dissenting judgments as to the result of the case.

167 *Lumba v Home Secretary* [2012] 1 AC 245, 683 [21] (Lord Dyson).

168 By majority, the Court held that the appropriate measure of damages where the tort of false imprisonment was made out but the claimants had suffered no actual damage (because they would have remained in detention even if the proper policy had been applied) was a nominal sum only: *Lumba v Home Secretary* [2012] 1 AC 245, 700 [95] (Lord Dyson); 738-9 [236]-[237] (Lord Collins); 769 [335] (Lord Phillips). Lords Brown and Rodger opposed even nominal damages and *a fortiori* vindicatory damages to reflect the seriousness of the tort committed even though it resulted in no loss to the claimants: *Lumba v Home Secretary* [2012] 1 AC 245, 778 [361]. Lord Kerr thought that vindicatory damages may be available in a class of cases which is "very limited indeed" but not on the facts of this case: *Lumba v Home Secretary* [2012] 1 AC 245, 743-4 [256]. By contrast, Lords Hope and Walker and Lady Hale would each have awarded a small but not merely nominal sum of vindicatory damages to each claimant in the amount of either £1,000 (Lords Hope and Walker) or £500 (Lady Hale): *Lumba v Home Secretary* [2012] 1 AC 245, 722-3 [180] (Lord Hope); 727 [195] (Lord Walker); 733 [217] (Lady Hale). Lord Hope conceded (at 723 [180]) that the court had "no yardstick by which [the sum of vindicatory damages] can be measured to test its accuracy".

169 Lord Dyson noted that "[t]he 'presumption' of release had been entrenched in the Secretary of State's published policies since at least 1991": *Lumba v Home Secretary* [2012] 1 AC 245, 681 [11].

170 *Lumba v Home Secretary* [2012] 1 AC 245, 755 [284] (Lord Phillips).

171 *Lumba v Home Secretary* [2012] 1 AC 245, 679 [5].

172 *R v Governor of Durham Prison; ex parte Hardial Singh* [1984] 1 WLR 704, (Woolf J, '*Hardial Singh*').

173 This summary comes from the judgment of Dyson LJ in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 [46]. It is repeated at *Lumba v Home Secretary* [2012] 1 AC 245, 683 [22].

These common law principles formed the background to the Home Secretary's policy and were not challenged in argument (although the derivation of the first two principles from *Hardial Singh* was doubted by Lord Phillips). If we leave *Hardial Singh* to one side, the Supreme Court was left to consider the familiar questions of: whether the Home Secretary was bound to apply her published policy; and the legal status of her unpublished policy.

Lord Dyson held that the unpublished policy, being a blanket policy to which there had been only a handful of exceptions on compassionate grounds, was unlawful as a fetter on the discretion of the decision-makers responsible for assessing whether individual FNPs should be detained.[174] His Lordship further held that the unpublished policy was unlawful on the ground that it conflicted with the Home Office's published policy and cited extensive support for the proposition that a "policy must be consistently applied", unless there exists a good reason to depart from it.[175] Counsel for the Home Secretary had accepted these propositions in argument.

These two propositions are, however, problematic when considered side by side. There is at once the standard requirement (in both Australia and the UK) that policy not be applied inflexibly[176] with the largely contrary requirement that policies must be applied consistently unless a "good reason" exists to depart from that policy. What may qualify as such a reason is likely only to be clear to a decision-maker after it has become the subject of judicial attention. The plot thickens further when one considers that the Home Secretary's unpublished policy *had* been applied consistently, albeit in circumstances which reflected little credit on the Home Secretary herself. Given this emphasis, the real problem was not inconsistency of the decision making with a policy, but that it had been consistent with the 'bad' policy and not with the 'good' one.

Was the unpublished policy the wrong policy simply because it had not been published? If that were the case, the Home Office's legal obligation would not really have been one of consistency but one of publication. Ultimately, the position reached by the Supreme Court was simply that an unpublished policy could not legally be applied *if* there was an applicable published policy from which there was no good reason to depart. The principles underlying that conclusion are readily understandable and the Supreme Court needn't have gone further to deal with the facts of the case before it.

However, Lord Dyson was prepared to say that policies must be published "both as a matter of common law and human rights law".[177] At the heart of his Lordship's reasoning lies the rule of law, which "calls for a transparent statement by the executive of the circumstances in which … broad statutory criteria will be exercised".[178] The same principle may also be expressed in the language of

174 *Lumba v Home Secretary* [2012] 1 AC 245, 683 [21].

175 *Lumba v Home Secretary* [2012] 1 AC 245, 684 [26].

176 See eg *Green v Daniels* (1977) 13 ALR 1.

177 *Lumba v Home Secretary* [2012] 1 AC 245, 684 [27]. These comments were *obiter dicta*, dealing with a passage of the Court of Appeal's judgment regarding a topic upon which it had not had the benefit of argument and which Michael Beloff QC for the Home Secretary was not prepared to endorse in argument before the Supreme Court.

178 *Lumba v Home Secretary* [2012] 1 AC 245, 686 [34].

procedural fairness by saying that people have a right to know the terms of the policy upon which their cases will be decided,[179] but this amounts, I think, to essentially the same thing. Yet, to say that there is a free-standing duty to publish a given policy or soft law instrument rather implies that that instrument carries the force of law. Neither policies nor soft law instruments do so in the way that 'hard law' instruments do, but nonetheless tend to have much the same effect as hard law, as has been discussed elsewhere in this thesis. Such a conclusion is implicit in a common law requirement that policies and soft law must be published in order to be valid.

By contrast, the standard Australian position on the legal effect of policies and guidelines is decidedly more equivocal. The orthodox view was recently repeated by Buchanan J, who said that "such guides are not binding, but they are generally applied unless there are compelling reasons not to do so".[180] This simultaneously recognises that soft law has "general application" in the manner of law, particularly if issued by an authoritative body, but that it can also be ignored by the courts, such as where they conclude that the soft law surpasses its legal limits. Ultimately, however, there is no significant difference between the English and Australian approaches to the extent that they do not apprehend a method of setting aside soft law without judicial participation. Any suggestion that soft law can simply be "ignored" on the basis that it does not affect a party's legal rights is reminiscent of Lord Diplock's similar statement about the capacity to ignore decisions which are void.[181] What the English approach does have strongly in its favour is that it is prepared to require public authorities to issue policies and guidelines under certain circumstances, and to bind the public authorities to the terms of the soft law thus issued. The 'hardened' effect of soft law in these circumstances applies against both the public authority *and* individuals who are subject to the soft law.

Kambadzi v Home Secretary

That the position about government policies outlined in *Lumba* is now orthodox in the UK[182] became clear shortly after *Lumba* was handed down when the Supreme Court delivered its delayed decision in *Kambadzi v Home Secretary*.[183] Mr Kambadzi was in a similar position to Mr Lumba and Mr Mighty, with the exception that the Home Office had not breached the *Hardial Singh* principles in respect of his detention. It had, however, breached its own published guidelines in regard to the frequency with which Mr Kambadzi's detention would be subject to review, the seniority of the officer conducting the

179 See *Lumba v Home Secretary* [2012] 1 AC 245, 686 [35] (Lord Dyson).

180 *P v Child Support Registrar* [2012] FCA 1398 [3]. Lord Hope said in *Kambadzi* that "[p]olicy is not law, so it may be departed from if a good reason can be shown": *Kambadzi v Home Secretary* [2011] 1 WLR 1299, 1315 [36]. As we will see, the similarity between this *dictum* and that of Buchanan J disguises a very real difference in approach to the enforceability of soft law.

181 *Dunlop v Woollahra* [1982] AC 158, 172. His Lordship's *dictum* is discussed in greater detail in Chapter 4 below.

182 The point has not been addressed squarely, much less decided, in Australia. A majority of the High Court has indicated broad approval, albeit in a fairly Delphic remark that it was "within the competence" of the Minister for Immigration and Citizenship to issue guidelines which stated in advance whether s/he would be prepared to exercise certain discretionary powers: *Jasvir Kaur & Ors v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 665 [91] (Gummow, Hayne, Crennan & Bell JJ) ('*Kaur v MIAC*'). The footnote to this remark says that "[n]o question arises of the application of an 'unpublished' Ministerial policy or guidelines inconsistent with 'published' policy or guidelines; cf *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245". While somewhat unclear, the better view is that the joint judgment in *Kaur* did no more than reserve the question of whether (and, if so, in what circumstances) the government is bound to publish its policies as a precondition to applying them adversely to a person.

183 Judgment in *Kambadzi* was delayed until after the Supreme Court had decided *Lumba* and counsel were invited to make submissions in light of the Supreme Court's decision.

review and whether reasons for any continuation of his detention would be provided. Mr Kambadzi argued that these failures caused his detention to be unlawful, grounding his claim for damages for false imprisonment. Because of the way that the case was argued, the Supreme Court did not consider the crucial circumstance from *Lumba*, namely that the Home Office had been applying an unpublished policy which contradicted the terms of its published policy.[184]

Lord Hope, who gave the lead judgment, for substantially the same reasons as those given by Lady Hale and Lord Kerr, started by stating that the statutory power invested in the Home Secretary to detain a person pending his or her deportation was "not unfettered",[185] but was constrained by the terms of Woolf J's judgment in *Hardial Singh*.[186] Furthermore, the Home Secretary was the repository of a statutory power to make rules for the regulation and management of detention centres,[187] although Lord Hope further opined that the case before the Supreme Court dealt with "public law duties which are not set out in the statute".[188] The legal effect was that the Home Secretary was under a *common law* duty to comply with his department's guidelines unless there existed "a good reason" to depart from them. What is clear from Lord Hope's judgment is that guidelines published by the Home Office, in this case, and by government more generally, have at least some of the force of law, in that failures of government officers to adhere to the terms of such guidelines are actionable in law and are capable of grounding claims for damages in tort. His Lordship sheeted the entirety of the responsibility for the relevant breaches to the Home Secretary directly, rather than finding that officers within the Home Department had acted unlawfully by exceeding the terms of their delegated authority, as discerned from the guidelines.

A final interesting point comes from the speech of Lady Hale (with which Lord Hope agreed).[189] The case had been argued, in light of the previous decision in *Lumba*, on the basis that merely procedural breaches could amount to "material" public law errors,[190] which would carry as a necessary consequence the unlawfulness of the claimant's detention. Lady Hale reiterated the view she had earlier expressed in *Lumba*,[191] that:[192]

> the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result – which is not the same as saying that the result would have been different had there been no breach.

184 See *Kambadzi v Home Secretary* [2011] 1 WLR 1299, 1328 [77] (Lady Hale).

185 *Kambadzi v Home Secretary* [2011] 1 WLR 1299, 1306 [11].

186 *Hardial Singh* [1984] 1 WLR 704.

187 *Kambadzi v Home Secretary* [2011] 1 WLR 1299, 1308 [15].

188 *Kambadzi v Home Secretary* [2011] 1 WLR 1299, 1315 [36].

189 Presumably, Lord Hope's agreement included Lady Hale's comments about the irrelevance to the case before the Supreme Court of Mr Kambadzi's undeniably bad character: *Kambadzi v Home Secretary* [2011] 1 WLR 1299, 1323 [61]. Her Ladyship described the claimant as not being "the most wicked of men", damning him with the faintest possible praise.

190 See eg *Kambadzi v Home Secretary* [2011] 1 WLR 1299, 1314 [31], [33] (Lord Hope).

191 In agreement with Lord Dyson: *Lumba v Home Secretary* [2012] 1 AC 245, 312 [207].

192 *Kambadzi v Home Secretary* [2011] 1 WLR 1299, 1325 [69].

Lady Hale drew a "distinction between the substantive limitations on the power to detain and the procedural requirements for exercising it".[193] What is *material* on this view is whether the error leads to invalidity, regardless of whether it was a procedural error. Materiality is not assessed by asking whether the error in question *caused* the adverse decision to be made (i.e. by using a 'but for' test).[194]

II: Does judicial review civilise law or power?

The system of judicial review as it operates in the common law world is not organized in a "rational" way, in as much as it does not prescribe a single remedy for breach of any legal norm.[195] This criticism applies *a fortiori* to the Australian conception of judicial review, which is still "remedy-oriented". By comparison, English administrative law looks to the 'public' or 'private' nature of functions to determine their susceptibility to judicial review.[196] However, even if judicial review does not currently give courts the jurisdiction to review the application of soft law on the ground of error of law, that is not to say that it cannot do so. The province of judicial review can be broadened to reflect the changing nature of public administration, albeit by a process which is fraught with difficulties and, if driven by the courts, apt to attract the label of judicial activism.[197] Expanding the traditional gamut of judicial review can be justified where it is necessary to make accountable those who exercise public power.[198] Both *Lain*[199] and *CCSU*[200] expanded the scope of judicial review, albeit by "removing impediments to review, [rather] than with stating positive criteria of reviewability".[201] As will be seen below, the English Court of Appeal further broadened judicial review's coverage in *Datafin*.[202]

The applicability of judicial review to exercises of soft law poses the fundamental question of whether it is the purpose of judicial review to enforce government adherence to law or to regulate exercises of public power more generally. Judicial review is "an aspect of the rule of law"[203] in that it is the function whereby the judicial branch says "what the law is".[204] However, this is problematic, since failure to comply with the requirements of the rule of law may not equate to illegality, let alone to invalidity, the standard by which an exercise of statutory or executive power falls foul of judicial review.[205]

193 Ibid.

194 See *Stead v State Government Insurance Commission* (1986) 161 CLR 141, ('*Stead*').

195 S Gageler SC, 'Administrative Law Judicial Remedies' in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 368, 368. One might alternatively say that common law judicial review has a degree of unpredictability, although Gageler was making the point that the *organisation* of judicial review lacks rationality, rather than its operation.

196 P Cane and L McDonald, *Principles of Administrative Law* (2nd ed, 2012) 71.

197 M Taggart, 'The Province of Administrative Law Determined?' in M Taggart (ed), *The Province of Administrative Law* (1997) 1, 2. Taggart used the term without evident disapproval and Allan has noted that while the "judicial activism charge is a serious one to make, … it does not necessarily connote bad faith": J Allan, 'The Three 'Rs' of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)'Riginalism' (2012) 36 *Melbourne University Law Review* 743, 744; cf JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Aust Bar Rev* 110.

198 P Craig, 'Public Law and Control over Private Power' in M Taggart (ed), *The Province of Administrative Law* (Hart, 1997) 196, 216.

199 *R v Criminal Injuries Compensation Board; ex parte Lain* [1967] QB 864, ('*ex parte Lain*').

200 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, ('*CCSU*').

201 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.130].

202 *R v Panel on Take-overs and Mergers; ex parte Datafin plc* [1987] 1 QB 815, ('*Datafin*').

203 S Gageler SC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 279.

204 *Marbury v Madison* 1 Cranch 137, 177 ('*Marbury v Madison*'). See also *Quin* (1990) 170 CLR 1, 35-6 (Brennan J).

205 See eg *New South Wales v Commonwealth* (2006) 229 CLR 1, 175 [399] ('*Work Choices Case*').

Professor Aronson has noted that:[206]

> [P]ublic power is increasingly exercised from places within the private sector, by non-government bodies, and according to rules found in management manuals rather than statute books. If judicial review is about the restraint of public power, it will need to confront these shifts in who exercises public power, and in the rules by which they exercise it.

That is a big 'if', particularly in Australia, where the scope of judicial review is influenced to such a great extent by the constitutional separation of judicial power and, to a lesser extent, by the interpretive approach which holds that the grounds for the exercise of judicial review are to be inferred from statute. This approach is associated most strongly with Sir Gerard Brennan,[207] and particularly with his judgment in *Quin*, in which he said:[208]

> 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.

For Brennan J, "judicial review's primary job was to enforce the statutory limits to the exercise of public power".[209] Sir Anthony Mason described Sir Gerard as subscribing to "an underlying theory of judicial review which is based on the notion that statute impliedly authorises judicial review for *ultra vires* and nothing else."[210] Much has been made of the Mason / Brennan debate over the years,[211] which has purported to pit a "common law" interpretation of the law against one of "legislative intention".[212] Essentially, to the extent that it is still seen as being relevant,[213] it is about starting

206 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 4. See also FG Brennan, 'The Review of Commonwealth Administrative Power: Some Current Issues' in P Keyzer and R Creyke (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002) 9, 26.

207 Eg in the cases listed below at n 221. See also J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' (Speech delivered at the Constitutional and Administrative Law Section, NSW Bar Association, 14 May 2013).

208 *Quin* (1990) 170 CLR 1, 35-6.

209 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 18. Sir Anthony Mason also noted that "[a] careful reading of the judgments reveals that Sir Gerard accepted the doctrine of legislative supremacy as qualified by the Australian Constitution and constantly deferred to the legislative judgment.": A Mason, 'Judicial Review: the Contribution of Sir Gerard Brennan' in P Keyzer and R Creyke (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002) 38, 43.

210 A Mason, 'Judicial Review' in P Keyzer and R Creyke (eds), *The Brennan Legacy* (2002) 38, 44. Sir Anthony cited in support of this description Brennan J's dissent in *Walton v Gardiner*, in the course of which his Honour said: "Where a statute confers a jurisdiction or power, the Supreme Court must construe the statute in order to exercise its supervisory jurisdiction. If the statute, either expressly or by implication, limits the power or prescribes rules governing its exercise, the Court enforces the limitation or the observance of the rules in obedience to the intention of the legislature. That legislative supremacy is the justification for judicial supervision is clear enough when the limitation or the rules are expressed; it is no less the justification for judicial supervision when a limitation or governing rule is implied.": *Walton v Gardiner* (1993) 177 CLR 378, 408.

211 See eg M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 2.

212 See the different positions adopted by Mason and Brennan JJ in *Kioa* (1985) 159 CLR 550. It is worth noting that their Honours' different approaches led to the same substantive result.

points. Brennan J's view, far from being diametrically opposed to that espoused by Mason J, simply held that a model of judicial interpretation which *starts* with the common law and *then* superimposes values which the legislature clearly never had in mind has the effect of amending Acts, even if only a little.

Professor Aronson suspected Brennan J of dissembling to some extent in his aim as articulated in *Quin*, noting that the avoidance of administrative injustice was "a by-product that his Honour's judgments happily produced with remarkable consistency".[214] Indeed, Brennan J did somewhat temper his views[215] in retirement, stating that:[216]

> Although it has been my view that the exercise or non-exercise of statutory power was the central, if not the exclusive, subject for consideration by a court possessed of judicial review jurisdiction,[217] there is growing judicial opinion that the jurisdiction is not so confined. In those circumstances, the basis for attributing a wider scope to the judicial review jurisdiction should be examined.
>
> In a free society, the rule of law is incompatible with any unqualified power to create, modify or extinguish rights or liabilities or otherwise to affect the interests of an individual.

Reasoning based on the rule of law led Brennan J to conclude that, in the absence of contrary legislation, and subject to the Constitution,[218] courts could expand their jurisdiction to "protect the interests of the individual by ensuring that a power which may be exercised in the course of public administration is exercised lawfully, rationally and with procedural fairness".[219] His Honour cited *Datafin* with apparent approval, and at any rate without criticism.[220]

These comments do not precisely constitute Brennan J recanting the position which he took up in numerous judgments during his tenure on the High Court,[221] most notably in *Quin*, although they do constitute a change in tone. His Honour's comments are consistent with the *dicta* from *Quin* quoted above in as much as they are expressed as being subject to contrary legislation. Brennan J stated that he was prepared to advance the common law within the confines of the judicial method, but saw

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213 A majority of the High Court was recently dismissive of the "false dichotomy" between common law and legislative intention, stating that a debate on those terms was "unproductive": *Kaur v MIAC* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ). The debate, which was once seen as central to the High Court's approach to public law issues, is now seen as little more than a distraction by the members of that court.

214 M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 21.

215 Aronson, Dyer and Groves recorded that he "virtually recanted": M Aronson et al, *Judicial Review of Administrative Action* (4th ed, 2009) 116. This form of words did not appear in M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013).

216 FG Brennan, 'Commonwealth Administrative Power' in P Keyzer and R Creyke (eds), *The Brennan Legacy* (2002) 9, 25.

217 *Annetts v McCann* (1990) 170 CLR 596, 604 ('*Annetts*'); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 585 ('*Ainsworth*').

218 FG Brennan, 'Commonwealth Administrative Power' in P Keyzer and R Creyke (eds), *The Brennan Legacy* (2002) 9, 33-7.

219 FG Brennan, 'Commonwealth Administrative Power' in P Keyzer and R Creyke (eds), *The Brennan Legacy* (2002) 9, 32.

220 FG Brennan, 'Commonwealth Administrative Power' in P Keyzer and R Creyke (eds), *The Brennan Legacy* (2002) 9, 27-8.

221 See *F.A.I. Insurances Ltd. v Winneke* (1982) 151 CLR 342, 409; *Church of Scientology Inc. v Woodward* (1982) 154 CLR 25, 70; *Coutts v The Commonwealth* (1985) 157 CLR 91, 105; *Kioa* (1985) 159 CLR 550, 609-11; *Quin* (1990) 170 CLR 1, 36-7; *Annetts v McCann* (1990) 170 CLR 596, 604; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 583-6; *Walton v Gardiner* (1993) 177 CLR 378, 408. Aronson and Groves noted that "his Honour's judgments were not all aligned, although his overall suspicion of an autonomous common law theory came across clearly. His judgments in *Kioa*, *Ainsworth* and *Annetts* were careful to reserve for future consideration the possibility of judicial review over prerogative power and power under a Royal Charter, franchise or custom.": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.110] (n 83).

the rule of law as depending primarily on the legislature providing laws which "tend to diminish injustice and establish and maintain a mechanism to redress injustice by application of those laws".[222]

It is, in a sense, unsurprising that Sir Gerard Brennan appeared to become prepared to extend the scope of judicial review past exercises of statutory public power, given that it has always been a weakness of the statutory intent theory of *ultra vires* that it cannot explain[223] judicial review's coverage of exercises of non-statutory[224] or prerogative power,[225] and certainly cannot extend to review of private bodies exercising public, non-statutory power.[226] The limitations of the statutory intent approach, which were catalogued in detail by Aronson and Groves,[227] at the very least compel the conclusion that statutory intention cannot be a self-sufficient explanation for the capacity of courts to engage in judicial review.[228] Brennan J's remarks subsequent to his retirement from the High Court should be understood as an attempt to shore up the statutory intent theory of *ultra vires* with principled rule of law foundations.[229]

Notwithstanding his Honour's post-retirement comments, I will characterise the 'bottom up' concerns with judicial review of soft law as belonging to a 'Brennanite approach'. This approach has two broad concerns with extending judicial review to cover exercises of public power which stem from neither legislation nor the prerogative. The first concern is the source of the court's jurisdiction to review exercises of soft law. The second is whether, by reviewing soft law, the court would effectively be granting legitimacy to a law-making process in which Parliament plays no part.

The legitimacy of soft law

Can judicial review assert jurisdiction over soft law?

The first of these concerns does not seek to stretch the coverage of the courts' judicial review jurisdiction any further than *Datafin* does. In *Datafin*,[230] the Court of Appeal held that decisions made by the Panel on Take-overs and Mergers were judicially reviewable. The Panel had "no visible means

222 FG Brennan, 'Why Be a Judge?' (1996) 14 *Australian Bar Review* 89, 90.

223 Brennan J acknowledged this limitation frankly; see R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 570.

224 Reviewable in the UK since *ex parte Lain* [1967] QB 864.

225 Reviewable in the UK since *CCSU* [1985] 1 AC 374. Sir Anthony Mason has remarked that the "doctrine of implied limitations on statutory power, based in presumptions as to legislative intent, can have no application to prerogative power": A Mason, 'Judicial Review' in P Keyzer and R Creyke (eds), *The Brennan Legacy* (2002) 38, 47. While *CCSU* has never been expressly approved by a High Court majority, Mason J had previously expressed the view that prerogative powers are subject to judicial review: *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, 219-21 ('*Toohey*'). Given that the High Court would make exercises of executive power under s 61 of the *Constitution* subject to the remedies in s 75(v), there is no reason to expect that it would not do the same for exercises of prerogative power, which is at any rate within the scope of s 61: *Pape v Commissioner of Taxation* (2009) 238 CLR 1, ('*Pape*'). See also M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.60].

226 *Datafin* [1987] 1 QB 815. See generally P Cane, *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) 14-17.

227 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.80]-[3.120]. See also the list of "inadequacies" at A Mason, 'Judicial Review' in P Keyzer and R Creyke (eds), *The Brennan Legacy* (2002) 38, 45.

228 R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 570.

229 Aronson, Dyer and Groves have noted that "only a common law judicial supremacist could argue for a truly autonomous common law operating in an area governed by statute": M Aronson et al, *Judicial Review of Administrative Action* (4th ed, 2009) 116. These words were not repeated in the current edition but the equivalent content appears at M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.100]-[3.110]. It would seem to follow that the statutory intent and common law approaches to judicial review are closer than some protagonists in this argument have acknowledged. The acknowledgment that the common law can and does modify statute was made in C Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' in C Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) 29.

230 *Datafin* [1987] 1 QB 815.

of legal support"[231] but was a quintessential example of the power of soft law, since it was explicitly in the business of regulating behaviour which would otherwise have been regulated by government, but did so without statutory support. Sir John Donaldson MR remarked that it was "a body which *de facto* exercises what can only be characterised as powers in the nature of public law powers".[232] The Panel was responsible for drafting the City Code on Take-overs and Mergers, breach of which led to indirect but real and effective sanctions.[233] By contrast, the Code was not binding on the Panel because it had an unfettered power to change the Code.[234] The Court of Appeal held that the Panel's decisions were subject to judicial review because of the undoubtedly public nature of its power.[235]

Put simply, the Court of Appeal in *Datafin* decided that the provenance of power which controls behaviour is less important than the effect of that power. In other words, the fact that the Panel on Take-overs and Mergers had no "visible means of legal support" was less important than the fact that it was intended to, and did in fact, exercise immense *de facto* and public power over commercial activities.[236] The Panel was, at least, *doing* government:[237]

> As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where E.E.C. requirements called for statutory provisions. No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain.

Moreover, it may even have been *part of* the government:[238]

> It is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centrepiece of his regulation of that market. … Its source of power is only partly based upon moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England. In this context I should be very disappointed if the courts could not recognise the *realities of executive power* and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted.

231 *Datafin* [1987] 1 QB 815, 824 (Sir John Donaldson MR). The Master of the Rolls later noted that "[i]nvisible or indirect support there is in abundance": *Datafin* [1987] 1 QB 815, 834.

232 *Datafin* [1987] 1 QB 815, 828 (Sir John Donaldson MR).

233 *Datafin* [1987] 1 QB 815, 826 (Sir John Donaldson MR).

234 M Aronson, 'Responses to Privatisation and Outsourcing' in M Taggart (ed), *The Province of Administrative Law* (1997) 40, 45-6.

235 The Court of Appeal was also influenced by the fact that the applicant had no other available cause of action against the Panel in private law: PP Craig, *Administrative Law* (7th ed, 2012) 848.

236 Lloyd LJ commented that "[t]he panel wields enormous power. It has a giant's strength. The fact that it is self-regulating, which means, presumably, that it is not subject to regulation by others, and in particular the Department of Trade and Industry, makes it not less but more appropriate that it should be subject to judicial review by the courts.": *Datafin* [1987] 1 QB 815, 845 (Lloyd LJ).

237 *Datafin* [1987] 1 QB 815, 835 (Sir John Donaldson MR).

238 *Datafin* [1987] 1 QB 815, 838-9 (Sir John Donaldson MR) (emphasis added). See also at 841: "Consistently with its character as the controlling body for the self-regulation of take-overs and mergers, the panel combines the functions of *legislator*, court interpreting the panel's legislation, consultant, and *court* investigating and imposing penalties in respect of alleged breaches of the code. As a legislator it sets out to lay down general principles, on the lines of E.E.C. legislation, rather than specific prohibitions which those who are concerned in take-over bids and mergers can study with a view to detecting and exploiting loopholes." (emphasis added).

In these circumstances, the Court of Appeal thought it right to extend judicial review's coverage to bring accountability to an exercise of public power. It is no more relevant that the power had no statutory basis than if it were an exercise of prerogative or executive power.

The Australian reception of *Datafin* has been cautious, to put it mildly, although not dismissive.[239] Cane and McDonald noted that the High Court did not give "serious and direct consideration" to the issues raised in *Datafin* until it decided *NEAT Domestic Trading*,[240] which is a generous assessment of the High Court's approach in that case. The High Court's attitude to *Datafin* is better characterised as one of studious avoidance;[241] indeed, Gummow J has likened dealing with *Datafin* to descending into a pit.[242] In *NEAT Domestic Trading*,[243] only Kirby J even mentioned *Datafin*[244] and the majority concluded that the private sector company in question (AWBI) was amenable to *none* of judicial review's principles at all. Later, in *Tang*,[245] a differently constituted High Court carried this exercise in problem-avoidance further to conclude 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.[246] There has been a palpable level of academic disappointment with the result in *Tang*,[247] although I submit that the result was less disappointing than the reasoning pursued by the majority, which set up 'power' and 'consent' as binary opposites in a wholly unconvincing fashion. 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.[248] 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.

Aronson and his co-authors were frank about the fact that the purpose of judicial review is to curb power, rather than only *statutory* power:[249]

> Accepting for the moment the traditional position that all powers have their limits, however attenuated, the question naturally arises as to who (if anyone) should police those limits. It could be the judiciary, the press, the Parliament, the Executive, or independent administrative agencies, but Anglo-Australian judges have long regarded the judiciary as the only possible answer. In our system, a legal limit and its judicial supervision are an obvious package. The existence of a limit

239 Professor Groves has noted a particular fascination with *Datafin* in State Supreme Courts, such as: *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* (2000) 206 FLR 120, ('*MBA Land Holdings*'); *State of Victoria v The Master Builders' Association of Victoria* [1995] 2 VR 121, ('*Master Builders*'). Strictly speaking, the only case in which a State Supreme Court has granted relief based on the *Datafin* principle is *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd and Julie Wong (No2)* (2004) 50 ACSR 554, (Shaw J, '*Masu (No2)*').

240 P Cane and L McDonald, *Principles of Administrative Law* (2nd ed, 2012) 5.

241 M Aronson et al, *Judicial Review of Administrative Action* (4th ed, 2009) 146. The *Datafin* principle is "much-discussed" at State level, although almost never applied and still uncertain: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.200].

242 *Gould v Magarey & Ors; Albarran v Companies Auditors and Liquidators Disciplinary Board & Anor; Visnic v ASIC* [2007] HCA Trans 5.

243 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, ('*NEAT Domestic*').

244 Although the excellent judgment by Gleeson CJ did at least grapple with the possibility that public functions can be exercised by private parties.

245 *Tang* (2005) 221 CLR 99.

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

247 See the sources cited in: M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 2-3; PA Keane, 'Judicial Review: the Courts and the Academy' (2008) 82 *Australian Law Journal* 623, 625.

248 Standard form contracts for the provision of utility services are an obvious example.

249 M Aronson et al, *Judicial Review of Administrative Action* (4th ed, 2009) 102-4. This is subject to the power in question being justiciable. See now M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.60].

> to public power is generally regarded as meaningless unless the superior courts can grant judicial review for its breach.

On this approach, with which I agree, all that matters is that 'law' is applied through an exercise of public power. This excludes exercises of power which gather their force from private arrangements,[250] most usually contractual,[251] and this is as it should be. There is significant overlap between the concepts of law and public power, but their similarities are not absolute. Their key difference from the point of view of judicial accountability[252] as things stand is that law, but not necessarily power, is subject to judicial review. However, 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'. There is no need to characterise soft law as "real law" in order to impose accountability upon its use.[253] It is enough to say that the common law will allow (and perhaps occasionally compel) the making and application of soft law *on terms set by the common law*, including being subject to judicial review, on the basis that soft law is, in a sense, a common law power which sits alongside prerogative and executive powers.

Must Parliament have a role?

The second of what I have described as Brennanite concerns is that, by exercising a review function over exercises of soft law, courts will grant legitimacy to a form of law-making which circumvents the authority of parliament. My response to this concern is that it is unduly focused on form in preference to substance. As I have discussed above, the central truth about soft law is that it is frequently used as a regulatory mechanism precisely because people will give it the same respect that they would 'hard' law. Public entities which use soft law may do so in order to circumvent parliamentary supervision; because soft law is easy to make, and change, and requires no debate or compromise in parliamentary proceedings. None of these advantages is lost or diminished by bringing soft law under judicial supervision. On the other hand, those who regulate with soft law will not have circumvented all mechanisms for accountability if the judiciary is able to award judicial review remedies for misuse of power, rather than just for breach of a 'law' in the formal sense.

The capacity of courts exercising a judicial review function to provide "judicial protection"[254] in the context of relationships governed only by soft law was thrown into doubt by the majority judgment in *Tang*.[255] That case, along with *NEAT Domestic*, provoked a flurry of academic comment, most of it

250 Such arrangements are said to be consensual, rather than resulting from an exercise of public power: *Tang* (2005) 221 CLR 99. However, as I argue herein, 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.

251 See the discussion of the law relating to the requirement that, to be reviewable under the *ADJR Act*, a decision must be made "under an enactment": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [2.520]-[2.640]. 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 *CCSU* [1985] 1 AC 374. See generally M Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202.

252 But note J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423.

253 *In re McFarland* [2004] 1 WLR 1289, 1299 [24] (Lord Steyn).

254 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 2.

255 *Tang* (2005) 221 CLR 99.

highly critical of the majority's reasoning.[256] Much of the early academic criticism of *Tang* was driven at least in part by concern with its result, but this line of criticism is misguided. To the extent that *Tang* was decided on whether the decision to exclude the respondent from the University's PhD programme was made "under an enactment" for the purposes of ADJR,[257] this conclusion must be correct and it is beyond the scope of this thesis to delve further into the majority's reasoning in that regard. As I will argue below, the greatest point of concern to emerge from *Tang* is the majority's exclusion of interests conferred under soft law instruments from judicial protection on the basis that they do not amount to a 'matter' in the Constitutional sense. The federal judiciary's powers are constitutionally limited to the resolution of "matters", a term whose meaning is hard to pin down.

To the extent that the academic pieces which were critical of the reasoning employed in the majority judgment of Gummow, Callinan and Heydon JJ in *Tang*[258] agreed with the lament of Kirby J that the decisions in *NEAT Domestic* and *Tang* were "an erosion of one of the most important Australian legal reforms of the last century",[259] I disagree. The preferable view was put by Keane J, who argued in an extra-curial article that *NEAT Domestic* and *Tang* "faithfully reflect the limits imposed by the legislature upon the scope of judicial review provided by the ADJR Act."[260] As an exercise in construing the terms of the ADJR Act's terms,[261] *Tang* in particular is very hard to fault.

However, I respectfully suggest that Keane J has focused on the *outcome* of the case exclusively. To point to the thorny doctrinal issues evident in *Tang* is not necessarily to dispute its outcome; to the contrary, to justify the majority's decision based only upon the outcome and the content of the case argued before the High Court is to ignore the most striking aspects of *Tang*.[262] As Professor Aronson has noted, the result in *Tang* was "entirely predictable"[263] and the majority's construction of the phrase "under an enactment" was both welcome[264] and unsurprising given the way that the case had been argued.[265] The basis upon which the majority allowed the University's appeal was, I venture to think, apparent even to those unaccustomed to "the discipline imposed by the pressures of argument in open court".[266] The disconcerting aspect of *Tang* is, rather, what was said by the majority, which was not necessary for the disposition of the matter on its legal merits. As a signal of the High Court's general approach to judicial review, *Tang* speaks volumes.

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256 See n 247 above.

257 *ADJR Act 1977* (Cth). This appeal in fact considered the *Judicial Review Act 1991* (Qld), which is drafted in the same relevant terms: *Tang* (2005) 221 CLR 99, 112; 131 (Gummow, Callinan & Heydon JJ).

258 For a representative sample, see the sources noted at M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 2 (n 6).

259 *Tang* (2005) 221 CLR 99, 133 [100]. His Honour was, of course, referring to the *ADJR Act*.

260 PA Keane, 'The Courts and the Academy' (2008) 82 *ALJ* 623, 625. This is not necessarily to agree with Keane J's subsequent conclusion that "this understanding of the limits on judicial review under the ADJR Act is consistent with the historical appreciation of the scope of judicial review of administrative decision-making.": ibid.

261 Which *Tang* primarily was; see D Stewart, 'Non-Statutory Review of Private Decisions by Public Bodies' (2005) 47 *AIAL Forum* 17, 17.

262 Cf PA Keane, 'The Courts and the Academy' (2008) 82 *ALJ* 623, 627.

263 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 23.

264 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 13.

265 PA Keane, 'The Courts and the Academy' (2008) 82 *ALJ* 623, 628.

266 PA Keane, 'The Courts and the Academy' (2008) 82 *ALJ* 623, 626.

As a concept, soft law tends to expose the inadequacy of traditional categories of legal analysis. Soft law is not binding in the manner of primary or delegated legislation, but this point does not explain its effectiveness at regulating behaviour. In *Tang*, it was certainly *an* issue that Ms Tang and the University had a relationship which was not governed "under an enactment"; indeed, this was the decisive legal issue in terms of the outcome of the matter in the High Court. However, the fact that this was the central issue presented by the parties for determination by the court does not alter the "breath-taking"[267] character of the High Court's statement that the relationship between Ms Tang and the University was *no more than* consensual.[268] There is no doubt that the relevant soft law instruments issued by the University (the Policy on Academic Misconduct and the Policy on Student Grievances and Appeals) did *in fact* regulate the interactions between Ms Tang and the University. 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 the *Judicial Review Act 1991* (Qld), if the relevant soft law instruments had been delegated legislation.[269]

What follows from this is not that *Tang* was wrongly decided. Rather, one is able to make the substantially different criticism that the majority's characterisation of the relationship between Ms Tang and the University is unsatisfying because it considered *only* whether the University's decision was "under an enactment" and not whether it is public in nature.[270] 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.[271] To reach the conclusion that the power exercised by the University was consensual without consideration of its publicness is deficient on this reasoning. That comment has no bearing on the correctness of *Tang*'s outcome.

Exercises of power by Universities are not inevitably of a public nature, although there are solid arguments in favour of that position.[272] One is that each jurisdiction's Ombudsman has jurisdiction over University decisions and conduct.[273] In Ms Tang's case, this is because the *Ombudsman Act 2001* (Qld) empowers the Ombudsman to "investigate administrative actions of agencies",[274] agencies being defined to include public authorities[275] and public authorities including:[276]

> an entity, other than an individual, that is:

267 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 23.

268 It may have been contractual, potentially giving Ms Tang a right to sue for damages for breach of contract. However, this point was not pursued by Ms Tang and the court made no express findings in this regard. In the Supreme Court of NSW, Ward J assented to the submission that the requirement to provide natural justice in the so-called 'club cases' has its juridical basis in contract: *Hinkley v Star City Pty Ltd* [2010] NSWSC 1389, [199] (Ward J, '*Hinkley v Star City*'). Mere consensus to Ms Tang's PhD candidacy, on this construction, would not have required Griffith University to provide procedural fairness. Regardless, Ms Tang's remedy would have been in damages rather than a judicial review remedy: *Hinkley v Star City Pty Ltd* [2010] NSWSC 1389, [200] (Ward J).

269 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 15; M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [2.530].

270 Cf PA Keane, 'The Courts and the Academy' (2008) 82 *ALJ* 623, 631.

271 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 23.

272 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 14-15.

273 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 14.

274 *Ombudsman Act 2001* (Qld) s 6(b)(i).

275 *Ombudsman Act 2001* (Qld) s 8(1)(c).

276 *Ombudsman Act 2001* (Qld) s 9(1)(a). Griffith University was established under the *Griffith University Act 1998* (Qld).

(i) established for a public purpose under an Act; or

(ii) established by government for a public purpose under an Act.

Ms Tang could have complained to the Ombudsman because Griffith University meets the statutory definition of a 'public authority'. However, 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 coverage of judicial review's remedies[277] to exercises of public power generally.[278] This was at issue in *NEAT Domestic*, where the majority held that the powers and obligations of AWBI were "to a very great extent" governed by its character as a company limited by shares and incorporated under corporations legislation.[279] While agreeing with the majority's conclusion that the appeal should be dismissed, however, Gleeson CJ indicated his preference for seeing the decision of AWBI to withhold its permission for NEAT to export wheat as a decision of an administrative character made under an enactment.[280] His Honour said:[281]

> While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds what amounts, in practical effect, to a virtual or at least potential statutory monopoly in the bulk export of wheat; a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate. It exercises an effective veto over decisions of the statutory authority established to manage the export monopoly in wheat; or, in legal terms, it has power to withhold approval which is a condition precedent to a decision in favour of an applicant for consent. Its conduct in the exercise of that power is taken outside the purview of the *Trade Practices Act*.

Gleeson CJ's comment that AWBI's interests were not "purely private" has some application by analogy to soft law. It suggests that the power to regulate conduct must come with some mechanism to ensure accountability for the exercise of that power. However, his Honour's view has not been adopted by a High Court majority.

III: The Constitutional limits to Australian judicial review

Concerns with expanding judicial review to meet the realities described above are now frequently expressed in constitutional terms. In particular, the basis of Australian judicial review in s 75 of the *Constitution* means that the limitations imposed by the terms of the *Constitution* cannot be ignored.

277 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 eg *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, ('*Forbes*'); cf *Hinkley v Star City* [2010] NSWSC 1389, [114]-[183] (Ward J). This extended coverage does not include judicial review's remedies: see generally M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [7.410]. NB that Professor Aronson reads the judgment of the majority in *NEAT Domestic* as concluding implicitly that AWBI was immune from both judicial review's remedies *and* its grounds: M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 9.

278 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'": *Offshore Processing Case* (2010) 243 CLR 319, 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. See generally J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector' (2013) 36 *UNSWLJ* 316.

279 *NEAT Domestic* (2003) 216 CLR 277, 296 [47] (McHugh, Hayne & Callinan JJ).

280 *ADJR Act 1977* (Cth) s 3(1).

281 *NEAT Domestic* (2003) 216 CLR 277, 290 [27] (Gleeson CJ). Kirby J appeared to take as established fact that previous exports of wheat by NEAT had been in "the Australian national interest": *NEAT Domestic* (2003) 216 CLR 277, 301 [71] (Kirby J).

The restriction of the *ADJR Act* to decisions made "under an enactment" means that its jurisdiction cannot be invoked alongside or instead of common law judicial review.[282]

Mike Taggart was responsible for a provocative[283] critique of the Australian High Court's judicial review jurisprudence, which he decried as creating a form of "Australian exceptionalism" in matters of public law.[284] Since the publication of Professor Taggart's article, this process has, if anything, gathered pace, particularly in regard to the importance attached by the High Court of Australia to jurisdictional error as a prerequisite to remedies being available in judicial review proceedings. The centrality of jurisdictional error[285] is justified on Constitutional grounds.

In his 2010 Garran Oration, Spigelman CJ noted that the process of 'constitutionalising' Australian administrative law has been in train for at least a decade, since the High Court in *Aala*[286] declared that the remedies in s 75(v) of the *Constitution* were no longer to be known as 'prerogative writs' (as had been common), but as 'constitutional writs', in order to make clear that the *Constitution* is the source of the power to grant such relief.[287] Since then, the High Court has recognised the constitutional foundations of judicial review at both Commonwealth[288] and State[289] levels, with the result that jurisdictional error has become the "central unifying principle of administrative law" throughout Australia.[290] The difference between jurisdictional and non-jurisdictional errors of law has long since ceased to be relevant in the UK[291] and elsewhere. Although Professor Taggart readily conceded the difficulty of ascribing to a nation's entire jurisprudence the epithet 'exceptionalist',[292] it is true that the High Court evinces a greater comfort working within established doctrinal categories[293] rather than developing the law afresh. Whether this is an outcome mandated by the *Constitution* itself is open to doubt.[294]

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282 By which expression, I mean to include review under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903* (Cth).

283 See M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 2. Spigelman CJ recognised that Professor Taggart did not refer to Australian exceptionalism by way of compliment: JJ Spigelman, 'Public Law and the Executive' (2010) 34 *Australian Bar Review* 10, 17.

284 M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1.

285 JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.

286 *Aala* (2000) 204 CLR 82, [21] (Gaudron & Gummow JJ). See also JJ Spigelman, 'Centrality of Jurisdictional Error' (2010) 21 *PLR* 77, 79.

287 JJ Spigelman, 'Public Law and the Executive' (2010) 34 *Aust Bar Rev* 10, 15.

288 *Plaintiff S157* (2003) 211 CLR 476.

289 *Kirk v IRC* (2010) 239 CLR 531.

290 JJ Spigelman, 'Public Law and the Executive' (2010) 34 *Aust Bar Rev* 10, 16. See also C Finn, 'Constitutionalising Supervisory Review at State Level: The End of *Hickman*?' (2010) 21 *Public Law Review* 92; JJ Spigelman, 'Centrality of Jurisdictional Error' (2010) 21 *PLR* 77; M Groves, 'Federal Constitutional Influences on State Judicial Review' (Paper presented at the Australian Association of Constitutional Law, Federal Court, Sydney, 26 August 2010).

291 *Cart v Upper Tribunal* [2012] 1 AC 663. See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.120]. It is widely believed that the English rejection of non-jurisdictional errors of law began in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, ('*Anisminic*'). In reality, this approach was not made official until the decision in *R v Lord President of the Privy Council; ex parte Page* [1993] AC 682, ('*Hull University Visitor; ex parte Page*'). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.290].

292 This was because such an ascription supposes an external norm against which that jurisprudence can be compared: M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 2.

293 M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 9.

294 Professor Taggart took the view that "grounding … administrative law in the *Constitution*" shows "a tinge of jingoism": M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 27.

Both Taggart and Aronson traced the exceptionalism of Australian judicial review to the incrementalist approach of the current High Court,[295] which prefers to change the law in the smallest possible stages from the 'bottom up' rather than in response to normative values.[296]

The Constitutional requirement of a 'matter'

The High Court's jurisprudence on the concept of what constitutes a 'matter' has been consistent for almost 90 years. In *Re Judiciary and Navigation Acts*, a High Court majority of Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ held that the original jurisdiction of the High Court was limited by the requirement in ss 75 and 76 of the *Constitution* that there be a "matter":[297]

> It was suggested in argument that "matter" meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which this Court might be called on to interpret the Constitution by a declaration at large. We do not accept this contention; we do not think that the word "matter" in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court.

In *Tang*, it was held that the respondent could not compel the University to provide her with procedural fairness, even though its academic misconduct code promised that it would. Aronson argued that this conclusion in the judgment of the *Tang* majority was based not on considerations of whether the University was exercising public power,[298] but on whether the University's decision to exclude the respondent created or altered any legal right or obligation between the parties. The majority said that PhD candidacy created no legal right or obligation between the parties and that the Misconduct Codes made no difference. This was a necessity imposed by the terms of the Queensland *Judicial Review Act 1991*, but the majority stated expressly that the same conclusion would have applied if the respondent had been a federal body and a Constitutional writ had been sought. In that scenario, the Court said that there would have been no 'matter'.[299]

The *Tang* majority's application of *Lam*'s[300] conclusion that Australian courts will not substantively enforce legitimate expectations[301] will be considered in detail in Part C of this Chapter. The current point that I wish to make draws upon both *Tang* and the previous comments of McHugh J during argument before the High Court in *S157*:[302] there is a disjuncture between the concept of 'law' on one hand, as it is understood either in purely Austinian terms or through the High Court's 'matter'

295 Professor Taggart additionally singled out the Federal Court's decision in *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, ('*General Newspapers*'). See M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 21. He thought that that case was mistakenly decided and that commercial decision-making by Telstra should have been evaluated against "public law norms".

296 Cf K Mason AC, 'What is Wrong With Top-Down Legal Reasoning?' in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012* (2012) 69.

297 (1921) 29 CLR 257, 265.

298 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 15.

299 *Tang* (2005) 221 CLR 99, 131 (Gummow, Callinan & Heydon JJ).

300 *Lam* (2003) 214 CLR 1.

301 *Tang* (2005) 221 CLR 99, 132 (Gummow, Callinan & Heydon JJ); *Lam* (2003) 214 CLR 1, 27-8 (McHugh & Gummow JJ), 48 (Callinan J).

302 *Plaintiff S157/2002 v Commonwealth* [2002] HCA Trans 420 (3 September 2002). See the text accompanying n 34 above.

jurisprudence, and instruments which have a legal *effect* on the other.[303] On the other hand, judicial review is only ever about acts and omissions. The relevance of this to the current discussion is that the real issue before a court will be to assess whether certain acts or omissions need to conform to soft law instruments.

I have sought to demonstrate in the discussion above that soft law has a level of 'practical legality', particularly where it constitutes the basis for action by an administrative decision-maker.[304] There is, however, an asymmetrical effect to soft law, as *Tang* demonstrates. This stems from the difference between law having an effect and that effect being binding on both the law-maker *and* those subject to the law. The rule of law requirement that laws be predictable is not satisfied by soft law for this reason. The legislation nominated by McHugh J in the extracts from argument in *S157* reproduced above may fail to meet an Austinian standard of law, but they are able to be relied on for their effect and are *binding* upon both the parties subject to them and the state. This stands in contrast to the academic misconduct code in *Tang*, which had the practical effect of guiding the behaviour of the parties but could not be enforced by the respondent.

A further point that arises in Australia relates to the powers reposed in the Commonwealth executive by section 61 of the *Constitution*, which provides that:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

The powers of the executive which are covered by s 61 include prerogatives of the Crown, such as the powers to enter into treaties and to declare war, and the "capacities" which may be held by any person other than the Crown.[305] In his judgment in *Pape v Commissioner of Taxation*, French CJ stated that "such powers as may be conferred upon the Executive by statutes made under the *Constitution* are plainly included"[306] but that these powers taken together are not exhaustive of the content of s 61.[307] To the same end, the majority of Gummow, Crennan and Bell JJ commented that:[308]

> the phrase "maintenance of this Constitution" in s 61 imports more than a species of what is identified as "the prerogative" in constitutional theory. It conveys the idea of the protection of the body politic or nation of Australia.

303 Professor Aronson alluded to this in remarking that "classical imagery can sometimes be misleading. Some government contracts are in reality rules, and the same is true of some non-contractual relationships adopting a seemingly consensual form. The characterisation of Ms Tang's relationship with her former university as merely consensual is nothing short of breath-taking.": M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 23; cf PA Keane, 'The Courts and the Academy' (2008) 82 *ALJ* 623, 629. The distinction which I have drawn should not be confused with whether or not an instrument has a legal *consequence*, in the sense that it confers a right or imposes an obligation; the High Court's interpretation of Constitutional 'matters' has consistently stated that the courts are not interested in any controversy which falls short of this standard. A 'matter' therefore requires that an instrument have binding effect.

304 Anthony argued that rules and soft law can be binding in a practical sense, even if they are not legally binding. See RA Anthony, 'Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like' (1992) 41 *Duke LJ* 1311, 1327-9.

305 *Pape* (2009) 238 CLR 1, 60 [126]. See also *Williams v The Commonwealth* (2012) 86 ALJR 713 ('*The School Chaplains Case*').

306 *Pape* (2009) 238 CLR 1, 60 [126].

307 "The collection of statutory and prerogative powers and non-prerogative capacities form part of, but do not complete, the executive power.": *Pape* (2009) 238 CLR 1, 60 [127].

308 *Pape* (2009) 238 CLR 1, 83 [215].

What has long been uncertain is the extent to which s 61 of the *Constitution* provides scope for the executive government to operate independently of the Commonwealth Parliament. In *Pape*, French CJ, Gummow, Crennan and Bell JJ indicated that the High Court is prepared to allow some level of independent operation to the executive. In this respect, the Court continues to move away from the approach to s 61 advocated by the late Professor George Winterton, who argued that the power of the executive to "maintain" the *Constitution* should be limited to the prerogative powers traditionally vested in the Crown.[309] Professor Winterton believed that history[310] - including the Watergate scandal which brought down the Nixon administration in the US - provides ample warning against giving the executive government a field of authority independent from parliamentary control.[311]

Furthermore, the *Pape* majority's interpretation of the extent of executive power under s 61 leaves a much smaller scope for judicial review, since there are no statutory boundaries for the courts to police.[312] While *CCSU* stands for the proposition that power of this kind is subject to judicial review, it also shows the limitations of the courts' oversight.[313]

After *Pape*, the High Court handed down a decision which has served to limit the operation of s 61. *Williams v The Commonwealth* concerned the plaintiff's challenge to the Commonwealth government providing funds to allow school chaplains to be provided to public schools. His primary legal arguments – that the arrangement was contrary to the limited Constitutional prohibition on the Commonwealth involving itself in religious matters[314] - failed comprehensively. However, the plaintiff's secondary argument succeeded, the Court rejecting the Commonwealth's arguments that it had contractual power equivalent to its legislative capacities under s 51 of the *Constitution* and that it had all the powers of a natural person.[315] It held invalid the arrangements under which the Commonwealth entered into contracts for the provision of chaplaincy services and spent money to perform its obligations under those contracts. In this sense, the Court's statements about the scope of s 61 were *obiter dicta*,[316] but were no less significant for that.

The High Court confirmed in *Williams* that, aside from exercises of prerogative power, the Commonwealth's capacity to enter into and perform under contracts is always limited by statute. Further, the Court's finding that the Commonwealth's power under s 61 is not coextensive with that of

309 G Winterton, *Parliament, the Executive and the Governor-General: a Constitutional Analysis* (Melbourne University Press, [Melbourne], 1983) 33.

310 See *The Communist Party Case* (1951) 83 CLR 1, 287 (Dixon J).

311 G Winterton, *Parliament, the Executive and the Governor-General* (1983) 33. See also P Gerangelos, 'Parliament, the Executive and the Governor-General: The George Winterton Thesis' (Paper presented at the Australian Association of Constitutional Law, Federal Court of Australia, Sydney, 17 November 2009).

312 See C Horan, 'Judicial Review of Non-Statutory Executive Powers' (2003) 31 *Federal Law Review* 551.

313 In *CCSU* itself, it was held that the national security implications of the matter excused the Minister for the Civil Service (who was also the Prime Minister, Mrs Thatcher) from the necessity of observing procedural fairness: *CCSU* [1985] 1 AC 374. The current ubiquity of "national security" issues means that action independent of Parliament under s 61 may often be similarly protected; see eg B Saul, 'The Kafka-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33 *University of New South Wales Law Journal* 629. It should be noted that this was not relevant in *Pape*.

314 "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.": *Constitution* s 116.

315 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.130].

316 See P Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative' (2012) 12 *Oxford University Commonwealth Law Journal* 97, 128.

a natural person sets Australia's jurisprudence on this issue aside from that of the UK,[317] although by reasoning which is not restricted to the Australian Constitutional setting.[318] Especially by contrast with s 51, the power granted by s 61 is vaguely articulated, with the result that for many years it was often discussed "but never defined".[319] It is intriguing, although consistent with much of the High Court's Constitutional jurisprudence,[320] that the definition which is starting to develop as to the grant of power to the executive under s 61 is peculiar to Australia, even though that result has not specifically been sheeted home to the Constitutional text. This development could also lead to further difficulties, for example of the type which led to the litigation in *ABC v Redmore*,[321] which may require legislative intervention to the extent that principles of statutory interpretation do not allow any resort to the natural person powers once statutory authority runs out.[322]

There is a rich field of scholarship and many authoritative statements from the High Court with respect to s 61 of the *Constitution.* It is not the place of this thesis to explore these in detail, but merely to note that this is a source of executive power that has expanded significantly following the *Tampa* litigation. Subject to the limitations imposed by *Pape* and *Williams*, an increased scope of operation for s 61 will likely remain, particularly in regard to arguments based on the 'nationhood power', which have not traditionally met with great success.[323] However, those limitations are significant.

French CJ commented in *Pape*:[324]

> Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.

Full acceptance of this view could allow the executive government in Australia a law-making role differing substantially from the traditional Diceyan conceptions of 'law'.[325] However, both *Pape* and

317 The so-called "Ram doctrine" has been interpreted in the UK as allowing the state and its individual departments to do whatever a natural person can, subject to statutory limitations; see H Woolf et al, *De Smith's Judicial Review* (6th ed, 2007) 236; J McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, Cambridge, 2012), 161-2. The correctness of this doctrine has been assumed in recent English litigation, although it has been subject to some debate otherwise; see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.250] (n 303).

318 Mike Taggart commented some years earlier that "[o]ne particular issue that calls for further exploration is the assumption that the State ('the Crown' as well as other public entities) has, by way of prerogative or common law, all the powers of a legal person and hence is able to trade , contract, and hold and dispose of land, shares ('golden' and otherwise), and other incorporeal property. This assumption is often the legal source of the State's power to contract out.": M Taggart, 'The Nature and Functions of the State' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP, 2005) 101, 117.

319 *Davis v The Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane & Gaudron JJ) ('*Davis v Cth*').

320 See M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1.

321 *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454. In that case, the High Court was obliged to interpret whether failure to comply with legislation which required the ABC to obtain Ministerial approval for expenditure over a certain sum rendered the ABC's act invalid or merely unlawful. The answer was crucial to Redmore Pty Ltd, who had rented premises to the ABC for a sum of rent over the statutory limit for reporting by the ABC. Redmore would not have been able to obtain an order compelling the ABC to pay the rent if the ABC's entry into the lease contract was invalid. By a bare majority, the High Court held that the ABC's failure did not lead to invalidity. However, the dissenting judgments were very strong and a case on similar facts would not lead to a certain outcome.

322 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.130].

323 AR Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (5th ed, Federation Press, Sydney, NSW, 2010) 503.

324 M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5.

325 Although this is not to say that all Executive Orders are "law". Acceptance of French CJ's proposition would also amount to an implicit rejection of the warning sounded by Professor Winterton (at n 311 above).

Williams indicated that the High Court was prepared to impose limits on the Commonwealth's powers under s 61.

In particular, both *Pape* and *Williams* indicated that expenditures in reliance on the "appropriations power" will be invalid. This is especially interesting given that the response of the Commonwealth government to *Williams* was to rush through legislation[326] to protect schemes which it believed to be threatened by the result in *Williams*. The amending legislation is clearly intended to allow the government to continue much as it always had, with several sections specifically "reserved" for grants yet to be made. Otherwise, it simply lists grants and schemes, with the intention of making them *Williams*-proof by placing what were previously executive schemes on a legislative footing, rather than simply making the necessary payments following the passage of an Appropriations Act.[327] Aronson and Groves speculated that this outcome may now be forced on the executive.[328]

IV: The influence of soft law on judicial review proceedings

There have been indications in recent cases that courts exercising a judicial review function are prepared to give considerable weight to soft law instruments in some circumstances. I will consider two such cases in detail and seek to draw some general conclusions. I will also consider a third case which indicates that there remains significant risk in relying on soft law.

Plaintiff M61 v Commonwealth (The Offshore Processing Case)

The High Court has clarified that executive power needs to be controlled by law for constitutional reasons. *Plaintiff M61/2010E v Commonwealth*[329] involved a challenge by two Sri Lankan citizens who had been detained under the *Migration Act 1958* (Cth) after arriving at Christmas Island claiming refugee status, to be determined under Australia's "offshore processing regime" for asylum-seekers. The court rejected the submissions made on behalf of the respondent Minister that departmental assessment officers were able to hold persons who arrived in an "offshore" location in administrative detention with no obligation to bring that detention to an end while there was a reasonable possibility that the Minister may exercise his powers under the *Migration Act*.[330] The court responded that "it is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive".[331]

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326 *Financial Framework Legislation Amendment Bill (No3) 2012* (Cth). The Act also took care to amend the ADJR Act in order to ensure that it would not apply.

327 The results in *Pape* and *Williams* may also lead to more creative analysis of the heads of legislative power under s 51; see AR Blackshield and G Williams, *Australian Constitutional Law and Theory* (5th ed, 2010) 504.

328 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [2.640].

329 *Offshore Processing Case* (2010) 243 CLR 319.

330 *Offshore Processing Case* (2010) 243 CLR 319, 348-9 [64]. The High Court stated that the Minister's submission was that "detention of an offshore entry person was permitted while the officer detaining the person awaited the *possibility* of the exercise of power under either s 46A or s 195A [of the Migration Act]. That is, the obligation to bring to an end the detention of an unlawful non-citizen … who has not subsequently been immigration cleared, and who has not made (and cannot make) a valid application for a visa, by removing that person from Australia as soon as reasonably practicable, was said to be suspended for so long as there remains a possibility (presumably a reasonable possibility) of an exercise of power under s 46A or s 195A."

331 Ibid. This comment must be understood as referring solely to discretionary extension of a period of detention as opposed to circumstances in which an indefinite period of detention is Constitutionally permissible. The majority judgments in *Al-Kateb* held that provisions of the *Migration Act* which required the continued detention of unlawful non-citizens were valid, even where they resulted in the potentially indefinite detention of stateless persons who were not able to be released from detention either by being removed from Australia, deported or granted a visa. The majority held that as a purpose of detention was the

The government attempted to justify both detention and determinations of asylum seekers' refugee status as being done under s 61 of the *Constitution*. The court held that the Minister had in fact exercised his statutory powers, "constituted by two distinct steps: first, the decision to consider exercising the power to lift the bar or grant a visa and second, the decision whether to lift the bar or grant a visa. The Minister is not obliged to take either step."[332] An interesting point implicit in this reasoning but which the court did not confront directly is what might happen in the event that an asylum seeker were held offshore and her claim for refugee status were assessed without reference either to the *Migration Act* or Australia's treaty obligations. Her detention may be illegal[333] but it is arguable that her status assessment would not have contained jurisdictional error of law on the basis that there is no law. The Full Federal Court bench of five which heard *Minister for Immigration and Citizenship v SZQRB* was evidently discomforted by that line of argument.[334]

In the *Offshore Processing Case*, the High Court expressly declined to decide the implications of outsourcing executive power to a private company.[335] The really interesting question which arose on the facts was whether a remedy – *any* remedy – was available against a contractor. The Court avoided this by saying that, although the contractors had made errors of law[336] in relying on soft law instruments[337] which both misstated the requirements of the Act and erroneously indicated that Australian case law could and should be ignored, these errors were in fact the errors of the Minister, because the Minister had, in effect, decided to consider exercising his statutory powers[338] in *every* case where an offshore entry person claimed to be owed protection obligations.[339]

In regard to the two soft law manuals, the Court noted that:[340]

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eventual removal of unlawful non-citizens, the detention was not prohibited by the Constitution: *Al-Kateb v Godwin* (2004) 219 CLR 562, ('*Al-Kateb*'). Notwithstanding this, one gets the general impression that the *Offshore Processing Case* represents the High Court stepping quietly away from *Al-Kateb*.

332 *Offshore Processing Case* (2010) 243 CLR 319, 350-1 [70].

333 In which case, she would be able to get *habeas corpus*: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [14.40]-[14.50].

334 None more than Flick J; see *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33, [349]-[391].

335 *Offshore Processing Case* (2010) 243 CLR 319, 345 [51]. See M Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 *Public Law Review* 3; J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector' (2013) 36 *UNSWLJ* 316, 317.

336 The *Offshore Processing Case* is notable for the High Court's articulation of what was capable of constituting an error of law in determining whether Australia owed protection obligations to the plaintiffs. The soft law RSA Manual stated that "the Migration Act, the Migration Regulations 1994 ... and Australian case law on the interpretations of the definition of a refugee and 'protection obligations' do not apply" to assessments of whether Australia owes obligations to 'offshore entry persons', although it stated that they should nonetheless be followed as a matter of policy, and this statement was echoed in the soft law IMR Manual. The court held that the reviewers had erred in law by not treating Australian legislation and relevant case law as binding upon their decisions. This was expressly on the basis that any decision by the Minister to use s 46A of the *Migration Act* to allow the plaintiffs to make valid applications for protection visas would be "pointless" unless it was made consistently with the terms of the legislation as construed by Australian courts. However, it would have been a remarkable result if the court had held that it was valid for the executive to use soft law to authorise decisions which could be inconsistent with Australian legislation and case law.

337 These were a procedural manual entitled "Refugee Status Assessment Procedures Manual" (RSA Manual) and another entitled "Guidelines for the Independent Merits Review of Refugee Status Assessments" (IMR Manual).

338 *Offshore Processing Case* (2010) 243 CLR 319, 351 [71].

339 In effect, the Minister's announcement was taken as confirmation that the assessment and review processes were undertaken under power bestowed by the *Migration Act* rather than as an exercise of non-statutory executive power and having "decided that he should consider the exercise of [statutory] power … with respect to every offshore entry person who thereafter claimed that Australia owed that person protection obligations, the Minister required his Department to undertake the inquiries necessary to make an assessment and, if needs be, review the conclusion reached.": *Offshore Processing Case* (2010) 243 CLR 319, 350-1 [70].

340 *Offshore Processing Case* (2010) 243 CLR 319, 342 [39] (original emphasis).

> The manuals were cast in terms that made plain that the processes for which each provided were to be applied to *all* unlawful non-citizens who entered Australia at an excised offshore place and who, as the RSA Manual said, raised "claims or information which *prima facie* may engage Australia's protection obligations".

The Court concluded that the adoption of the procedures set out in the Manuals and their application to the plaintiffs could "only be understood as implementing the [Minister's] announcements"[341] which had the effect of stating that the Minister would consider exercising his statutory powers "in every case in which an offshore entry person claimed that Australia owed that person protection obligations."[342] In other words, the soft law manuals were legally wrong and any decision made in reliance in them would also be legally wrong. The Court dealt with the significance of the manuals decisively and clearly.

In regard to an available remedy, the Court held that the assessment and review inquiries commenced under the Manuals directly affected the plaintiffs' rights and interests by prolonging their detention "for so long as the assessment and any necessary review took to complete".[343] Those contracted to make the inquiries on the Minister's behalf were therefore bound by the common law obligation to afford procedural fairness to the plaintiffs.[344] The court held that neither of the plaintiffs had been afforded procedural fairness by the contractors who had undertaken internal merits review of the decisions that they were not parties to whom Australia owed obligations under the Refugees Convention.[345]

Nothing hard-edged can be taken from the *Offshore Processing Case* for the purposes of this thesis. However, it must be relevant that the High Court was prepared to recognise that the two soft law manuals did not exist in a legal void; rather, they meant *something*. This may become important as a step towards the High Court extending judicial review under s 75(v) to providers of contractually outsourced government services by holding them to be "officers of the Commonwealth",[346] particularly in circumstances where the party to whom power has been outsourced operates in a milieu of soft law. This Chapter has posited the reverse formulation of this idea, viz. that a more expansive approach to the application of judicial review to exercises of public power, typified in the UK by

341 *Offshore Processing Case* (2010) 243 CLR 319, 342 [40].

342 *Offshore Processing Case* (2010) 243 CLR 319, 350-1 [70].

343 *Offshore Processing Case* (2010) 243 CLR 319, 353 [76]. The High Court gave an expansive reading of what triggers an obligation to provide procedural fairness: *Offshore Processing Case* (2010) 243 CLR 319, 352-3 [75]. Note, however, that this ought not to have been at all complicated, given that the members of the Kioa family had no rights whatsoever: *Kioa* (1985) 159 CLR 550.

344 This was not an obligation with any substantive element, since the plaintiffs had "no right to have the Minister decide to exercise the power or, if the assessment or review were favourable, to have the Minister exercise one of the relevant powers in his or her favour.": *Offshore Processing Case* (2010) 243 CLR 319, 353 [77].

345 *Offshore Processing Case* (2010) 243 CLR 319, 356 [90]; 358 [98]. The contractor had failed to address the full claim made by the first plaintiff: *Offshore Processing Case* (2010) 243 CLR 319, 356 [90]; and see *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, 1092 [24] (Gummow & Callinan JJ); 1102 [95] (Hayne J) ('*Dranichnikov v MIMA*'). In both cases, the contractors had failed to put to the plaintiffs the substance of matters of which the reviewers knew and which they considered may bear upon whether to accept the plaintiffs' claims: *Offshore Processing Case* (2010) 243 CLR 319, 356-7 [91]; 358 [98].

346 The *Offshore Processing Case* raised, but did not answer, the question of whether parties contracted to perform work on behalf of the executive government were beyond the court's supervisory jurisdiction under s 75(v): M Groves, 'Outsourcing' (2011) 22 *PLR* 3; J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector' (2013) 36 *UNSWLJ* 316.

Datafin, may lead courts to recognise and exercise supervisory control over governance through soft law. There is, however, much more to be done before a court could, for example, require a private repository of public power to adhere to a soft law instrument by which it governed the behaviour of members of the public.[347]

By way of contrast, consider the later case of *Kaur*, in which the High Court heard applications from four individual plaintiffs who were each non-citizens who had been refused visas which would have allowed them to remain in Australia. In circumstances where the Minister had issued ministerial guidelines in the form of directions to departmental officers setting out the circumstances in which the Minister may wish to consider exercising certain discretionary statutory powers, the applicants argued that the guidelines amounted to a decision by the Minister to consider exercising his powers and that the exercise of the relevant statutory powers "is conditioned upon compliance with the requirements of procedural fairness".[348] These propositions were rejected.

At its broadest, *Kaur* can be interpreted as the High Court distinguishing the decision in the *Offshore Processing Case*,[349] although it also gave strong indications that the guidelines in question simply didn't apply to the applicants. The ministerial guidelines were issued "from time to time" in order to inform the exercise of the Minister's statutory powers.[350] Some were "cast in the first person as instructions from the Minister",[351] who remained personally responsible to Parliament in respect of certain statutory powers. Each of the statutory powers had as a prerequisite to its exercise that the non-citizen applicant had previously had a visa application determined by a body other than the

347 Nonetheless, after the *Offshore Processing Case*, there has been further consideration of the role of Independent Merits Reviewers (IMRs); see *SZQDZ v Minister for Immigration and Citizenship* (2012) 200 FCR 207, 210-11 [8]-[10] (Keane CJ, Rares and Perram JJ). Cases in the Full Federal Court have since referred to IMRs (rather than the Minister who has the statutory power to act upon an IMR's recommendation) committing jurisdictional errors; see eg *MZYPW v Minister for Immigration and Citizenship* (2012) 289 ALR 541, 547-8 [19] (Flick and Jagot JJ); *MZYPO v Minister for Immigration and Citizenship* [2013] FCAFC 1 [59] (Lander and Middleton JJ). In *Minister for Immigration and Citizenship v SZQOT* [2012] FCAFC 141 [22], Marshall J held that the court below had erred in finding that an IMR had committed a jurisdictional error in the circumstances but assumed that it *could* properly have done so in the appropriate circumstances. It seems that the Federal Court is saying that the IMRs are *themselves* exercising statutory functions (removing any need to consider *Datafin*), on the basis that the Minister has already made decisions which trigger his or her dealing with certain matters. If that reading of the Federal Court's decisions is correct, there remains an "officer of the Commonwealth" issue. This might be avoided by simply joining the Minister and/or somebody from the Department.

348 *Kaur v MIAC* (2012) 246 CLR 636, 641 [2] (French CJ and Kiefel J).

349 Each judgment pointed out that the specific statutory scheme which was considered in the *Offshore Processing Case* did not apply to the plaintiffs in *Kaur*, who were not "offshore entry persons". French CJ and Kiefel J additionally noted that "there has not been, in relation to the cases presently before the Court, any ministerial announcement of the kind which applied to the assessment and review processes considered in the *Offshore Processing Case*. The function of the guidelines in issue in these cases was significantly different from the function of the assessment and review procedures under consideration in the *Offshore Processing Case*. Those were procedures which were undertaken as an incident of the exercise of a statutory power which the Minister had effectively announced was to be undertaken, namely, the power to consider whether to exercise the substantive [statutory] powers.": *Kaur v MIAC* (2012) 246 CLR 636, 653 [45] (French CJ and Kiefel J).

350 *Kaur v MIAC* (2012) 246 CLR 636, 649 [33] (French CJ and Kiefel J).

351 *Kaur v MIAC* (2012) 246 CLR 636, 649-50 [34] (French CJ and Kiefel J). Gummow, Hayne, Crennan and Bell JJ expressed this point in a slightly different way, stating that "[t]he term 'guidelines' is apt to mislead; their content is in the form of directions by the Minister.": *Kaur v MIAC* (2012) 246 CLR 636, 664 [90].

Minister.[352] Further, none of the judgments was prepared to find that the plaintiffs were owed procedural fairness.[353]

The contrast between the plaintiffs in *Kaur* and those in the *Offshore Processing Case* is obvious once the respective statutory schemes and their attendant soft law instruments are compared.[354] The guidelines in the *Offshore Processing Case* were construed as part of a process intended to trigger the applicability of the *Migration Act* in a context where the Minister's intention was determinative, which is to say that he was not required to think about his special powers. The guidelines in *Kaur*, on the other hand, were not interpreted as the Minister agreeing to engage in further consideration, pursuant to powers that carried duties only if he *chose* to trigger those powers into operation. Hence, the purpose and effect of the guidelines in *Kaur* was also different to those considered in the *Offshore Processing Case*, although a detailed consideration of the effect of publishing soft law was expressly deferred by a majority of the court.[355]

Khan v MIAC

Mr Khan was a Bangladeshi citizen who arrived in Australia on a student visa and was subsequently sponsored for a Business (Long Stay) visa of four years' duration by his employer at an Indian restaurant. A manager employed by Mr Khan's employer wrote to the Department of Immigration and Citizenship (DIAC) and alleged that Mr Khan had engaged in "fraudulent behaviour" which would disentitle him from holding a visa. The manager requested that DIAC cancel his employer's sponsorship of Mr Khan and that DIAC not reveal to Mr Khan that the manager had made any allegations against him. About a month later, DIAC wrote to Mr Khan to inform him that DIAC was considering the cancellation of his visa and that:[356]

> The grounds for cancellation of your visa appear to exist because the Department received advice from your sponsor … indicating that you had ceased employment … .

A delegate of the Minister informed Mr Khan that his visa had been cancelled because he had ceased to be employed by his sponsor.[357] The Migration Review Tribunal (MRT) affirmed the delegate's

352 See *Kaur v MIAC* (2012) 246 CLR 636, 669-70 [107] (Heydon J).

353 Their expressions of reasons supporting that conclusion differed. French CJ and Kiefel J said that the statutory powers were exceptional in nature and should not be encumbered with obligations of procedural fairness: *Kaur v MIAC* (2012) 246 CLR 636, 649 [32] (French CJ and Kiefel J). Gummow, Hayne, Crennan and Bell JJ interpreted the statute as excluding procedural fairness. Heydon J put the matter with great clarity: "The [four disputed] provisions create only powers to soften the rigours an adverse outcome of the former regime might create – powers depending on much vaguer and more impressionistic criteria, which are to be invoked when all else has failed. The terms in which [those] provisions are cast and the circumstances in which the Minister's powers are to be exercised, when compared to … the provisions giving merits review, suggest that no rights to procedural fairness exist in relation to either the Minister's powers or to the activities of officials of the Minister's Department in advising the Minister whether to consider to exercise those powers, or to exercise those powers.": *Kaur v MIAC* (2012) 246 CLR 636, 672-3 [118] (Heydon J).

354 Each of the three judgments in the High Court in *Kaur* addressed (at greater or lesser length) and rejected the analogy between the cases which the plaintiffs sought to draw: *Kaur v MIAC* (2012) 246 CLR 636, 652-3 [41]-[47] (French CJ and Kiefel J); 656-7 [59], 662-3 [79]-[82] (Gummow, Hayne, Crennan and Bell JJ); 673-4 [120]-[121] (Heydon J). Aside from Heydon J, the members of the Court styled *M61* as "the *Offshore Processing Case*".

355 *Kaur v MIAC* (2012) 246 CLR 636, 665 [91] (Gummow, Hayne, Crennan and Bell JJ).

356 The manager had advised DIAC that Mr Khan had ceased employment as a result of the allegations set out in his letter to DIAC, although the Full Federal Court inferred that Mr Khan was informed of that fact by neither DIAC nor his employer: *Khan v Minister for Immigration and Citizenship* 192 FCR 173, [7] (Buchanan J) ('*Khan v MIAC*').

357 Buchanan J noted that "Mr Khan was misinformed about the nature (and impliedly the content) of the advice received by [DIAC]. … There was no mention in the delegate's decision of the accusations made against Mr Khan by the manager.": *Khan v MIAC* 192 FCR 173, [11] (Buchanan J).

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".[358] The relevant circumstances were, in part, defined by DIAC's 'Procedures Advice Manual' (Manual), which set out guidelines to assist DIAC officers in assessing visa applications. Flick J noted that the Manual is "available to at least some migration agents".[359] Relevant to the cancellation of Mr Khan's visa, the Manual listed the following matters:[360]

> - If cancellation is being considered because of a breach of visa condition (and cancellation is not mandatory) – the reason for, and extent of, the breach. As a rule, a visa should not be cancelled where the breach of a visa condition occurred in circumstances beyond the visa holder's control;
>
> - The circumstances in which the ground for cancellation arose (for example, whether extenuating or compassionate circumstances outweigh the grounds for cancelling the visa); and
>
> - The visa holder's past and present behaviour towards the department (for example, whether they have been truthful in statements or applications made to the department or have previously complied with visa conditions).

Mr Khan's appeal on the merits was unsuccessful before the MRT. That decision was upheld by the Federal Magistrates' Court but, in the Full Court of the Federal Court, Buchanan J (with whom Flick and Yates JJ agreed) held that, because the MRT had not disclosed the substance of the manager's allegations against Mr Khan, it had breached s 359A of the *Migration Act*.[361] Buchanan J went on to consider other grounds of review.

The discretion to cancel Mr Khan's visa under s 116 of the *Migration Act* was not mandatory unless there existed "circumstances in which a visa must be cancelled", which were prescribed in the *Migration Regulations*.[362] The MRT found that there were no such prescribed circumstances.[363] Nonetheless, Buchanan J (with the agreement of Flick and Yates JJ) held, and counsel for the Minister had conceded at the appellate hearing,[364] 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)".[365] This was a matter

358 *Khan v MIAC* 192 FCR 173, [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* 192 FCR 173, [70] (Flick J).

359 *Khan v MIAC* 192 FCR 173, [71] (Flick J).

360 *Khan v MIAC* 192 FCR 173, [15] (Buchanan J).

361 *Khan v MIAC* 192 FCR 173, [44]-[56] (Buchanan J). Due to s 357A(1) of the *Migration Act*, the Division in which s 359A appears "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". There was therefore no question of any breach of a common law duty of natural justice to Mr Khan in as much as disclosure of the existence and contents of the manager's letters were "matters" dealt with by the relevant Division of the *Migration Act*: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 266 [35] - 267 [42] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ) ('*Saeed v MIAC*').

362 *Migration Act 1958* (Cth) s 116(3).

363 *Khan v MIAC* 192 FCR 173, [59].

364 *Khan v MIAC* 192 FCR 173, [61] (Buchanan J); [75] (Flick J).

365 *Khan v MIAC* 192 FCR 173, [60]-[61] (Buchanan J); [71] (Flick J).

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.[366] 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. This reasoning certainly supports Buchanan J's earlier finding that procedural fairness demanded that the existence and contents of the manager's letters be revealed to Mr Khan. However, it does not establish that the manager'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.[367]

As indicated above, the "relevancy grounds"[368] of review do not require that a decision-maker consider every matter which is objectively relevant to his or her decision. Rather, in the words from *Craig* which were cited by Buchanan J, 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".[369] 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*,[370] although, as I will discuss below, there is nonetheless frequent slippage between what is mandatory and what is merely relevant.

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.[371] Section 116 of the *Migration Act* 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:[372]

> When exercising the discretionary power conferred by s 116, the delegate and the [MRT] were *entitled* to take into account government policy and such other matters as are set forth in the Manual.

366 *Khan v MIAC* 192 FCR 173, [61] (Buchanan J).

367 *Khan v MIAC* 192 FCR 173, [62] (Buchanan J).

368 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.20].

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

370 "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*').

371 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.30].

372 *Khan v MIAC* 192 FCR 173, [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*').

Flick J's analysis of this issue modified that of Buchanan J.[373] 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.[374] The relevant passage from *Peko-Wallsend* reads as follows:[375]

> What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors — and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. … [W]here 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.*

By reference to this passage, Flick J took 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.[376] His Honour read s 116 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 of Mr Khan's visa 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:[377]

> Whether or not the Manual identifies *considerations going beyond those that must be taken into account* when making a decision under s 116, 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 nonetheless 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:[378]

> Some concern, it should be noted, is expressed with such submissions as were advanced on behalf of the Respondent Minister as to the limited consequences of a delegate or the [MRT] not taking into account those matters which are apparently set forth with some considerable detail in the Manual. Those persons who may have access to this Manual were not identified with any degree of precision. *But the Manual may nevertheless be taken as a formal guide as to how the power conferred by s 116 is to be administered as a matter of practice.* Where such guidance has been provided and where matters are there identified as matters that should be taken into account, it is not self-evidently correct to further conclude that a failure on the part of the [MRT] to

373 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* 192 FCR 173, [87]-[88] (Yates J).

374 *Khan v MIAC* 192 FCR 173, [74] (Flick J).

375 *Peko-Wallsend* (1986) 162 CLR 24, 39-40 (Mason J) (emphasis added).

376 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* 192 FCR 173, [82] (Flick J).

377 *Khan v MIAC* 192 FCR 173, [75] (Flick J) (emphasis added).

378 *Khan v MIAC* 192 FCR 173, [84] (Flick J) (emphasis added).

> properly apply the guidance provided has such limited consequences as was contended by the Minister. Consistency in the administration of provisions such as s 116 would not appear to be promoted if such consideration as is required to be given to the matters identified in the Manual is satisfied by the oblique or ambiguous references as made by the [MRT] in the present proceeding. In the absence of knowing more as to the circumstances in which the Manual has been prepared and its status as an aid to decision-making, little more may presently be said.

This remains a remarkable passage, referring as it does to the Manual as a "formal" guide and leaving open the question of whether a failure to apply the terms of the Manual consistently with other similar decisions opens a ground of judicial review. This steps away from the orthodoxy of the position in *Peko-Wallsend* to recognise, as the High Court did in the *Offshore Processing Case*, that soft law (particularly at this level of sophistication) must mean *something*. It is unnecessary to determine whether the Manual's terms are mandatory considerations (whether because they are sourced directly from the *Migration Act* itself or are sourced to procedural fairness obligations). A public authority cannot depart from a 'promise' of the sort contained in the Manual without first providing a warning,[379] and if a warning is needed, it follows that the authority's decision-maker has to think about it and therefore *consideration* must be given to the terms of the Manual.

Davies v HMRC

The Supreme Court of the UK's decisions in the joined appeals of Davies and James (the first appellants) and Gaines-Cooper (the second appellant) from decisions of the Court of Appeal in favour of Her Majesty's Revenue and Customs Commissioners (the Revenue) were long awaited, particularly amongst tax advisors, but were not received with unbridled satisfaction for all that. Each appeal had broadly similar facts: the appellants were each British citizens who were born and had worked in the UK; each purchased residential property outside the UK in which they lived for some months every year; each appellant nonetheless maintained ties to the UK and returned every year. The appellants did not wish to have the status of being "resident" in the UK since they would then have been required to pay taxes – such as income tax and capital gains tax – to which they would not have been subject if they were "resident" abroad (in Belgium and the Seychelles respectively).

Between 1999 and 2009,[380] the Revenue published a soft law instrument called IR20 which, amongst other things, purported to offer guidance as to when a person could be said to be "resident" in the UK. The appellants' contentions were twofold. The first was that, properly construed, IR20 "contained a more benevolent interpretation of the circumstances in which an individual becomes non-resident and not ordinarily resident in the UK than is reflected in the ordinary law and that the appellants had a legitimate expectation … that the more benevolent interpretation would be applied to the determination of their status for tax purposes". The second was that, regardless of the construction of IR20, "it was the settled *practice* of the Revenue to adopt [a more benevolent interpretation than is reflected in the ordinary law] and that the practice was such as to give rise to a legitimate expectation

379 *Lam* (2003) 214 CLR 1.

380 Although IR20 had existed "in various guises" since 1973 and was replaced by a new guidance document in 2009: M Spinney, 'Case Comment: *R (Davies & Anor) v HMRC; R (Gaines-Cooper) v HMRC* [2011] UKSC 47' (30 October 2011), *UKSC Blog*, http://ukscblog.com.

… that the interpretation would be applied to the determination of their status".[381] The Revenue did not contest that a legitimate expectation on either basis should be given substantive effect, a point on which this case is already at odds with Australian precedent and practice, as Part C of this Chapter will discuss.

The parties agreed that "residence" is not a concept which the statute defined,[382] nor was the case law clear or of easy application,[383] all of which left a gap on a matter of some practical importance which IR20 sought to fill in quite specific terms.[384] The appellants therefore invited the Supreme Court, and the Court of Appeal before it, to construe IR20 as though it were a legislative instrument. The appellants clearly hoped that this approach would steer them around the troublesome and contentious case law which held that a person only ceases to be ordinarily resident in the UK if s/he makes "a distinct break".[385] This was not a requirement that was given clear expression in IR20, a circumstance of which Lord Mance made much in his dissenting speech,[386] although Lord Wilson accorded it much less importance, saying that "if invited to summarise what [IR20] required, [the ordinarily sophisticated taxpayer] might reasonably have done so in three words: a distinct break."[387]

The appellants' claimed reliance on IR20 rather than the case law was not necessarily a cynical manipulation of the tax system. Their submissions to the Court of Appeal indicated genuine dismay that the Revenue refused to apply the terms of IR20 as the appellants understood them. The Revenue's approach had been characterised as a "betrayal of trust"[388] and Moses LJ was driven to comment that:[389]

> from time to time in the meandering course of these proceedings, it has appeared that the appellants, their advisers and the taxation profession have doubted whether IR20 can be relied upon at all; they harbour the suspicion that the Revenue regards itself as free to apply or to disapply its guidance, as it chooses. They describe IR20 as misleading and a trap.

Ward LJ's concurring judgment in the Court of Appeal was delivered "not without considerable hesitation" as a result of his sympathy for the circumstances in which the appellants (particularly the first appellants) found themselves.[390] Furthermore, there is much to support the conclusion that, despite the appellants' relative sophistication and that of their advisors, they had every reason to rely upon IR20 rather than to reach their own views as to the requirements of the law. Lord Mance noted that the first appellants were advised by "accountants rather than lawyers, and correspondingly [were]

381 *Davies v HMRC* [2011] 1 WLR 2625, 2629 (Lord Wilson) (original emphasis).

382 The government has indicated that it plans to change this state of affairs: M Spinney, 'Case Comment: *Davies* ' (30 October 2011), *UKSC Blog*, http://ukscblog.com.

383 *Davies v HMRC* [2011] 1 WLR 2625, 2632 [13] (Lord Wilson).

384 See the passages set out by Moses LJ in *R (Davies) v The Commissioners for Her Majesty's Revenue & Customs* [2010] EWCA Civ 83 [38].

385 *Davies v HMRC* [2011] 1 WLR 2625, 2633-5 [14]-[21] (Lord Wilson).

386 *Davies v HMRC* [2011] 1 WLR 2625, 2662 [93] (Lord Mance), cf 2648 [64] (Lord Hope).

387 *Davies v HMRC* [2011] 1 WLR 2625, 2644 [45] (Lord Wilson).

388 *R (Davies) v The Commissioners for Her Majesty's Revenue & Customs* [2010] EWCA Civ 83 [2].

389 *R (Davies) v The Commissioners for Her Majesty's Revenue & Customs* [2010] EWCA Civ 83 [20].

390 *R (Davies) v The Commissioners for Her Majesty's Revenue & Customs* [2010] EWCA Civ 83 [122]; cf *Davies v HMRC* [2011] 1 WLR 2625, 2648 [65] (Lord Walker).

interested in HMRC's understanding and practice rather than prepared to attempt exhaustive analysis of legal authority".[391]

This is an excellent example of the power and danger of soft law. The appellants were unsuccessful before a united Court of Appeal and ultimately had their appeals dismissed by majority in the Supreme Court. This outcome was due in large measure to the fact that IR20 was expressed in equivocal terms as providing "general guidance only",[392] a disclaimer whose effect is reminiscent of the result in *Hedley Byrne*.[393] Lord Hope attempted to capture the crucial nature of this issue to the litigation:[394]

> The difference between Lord Wilson and Lord Mance JJSC as to the primary issue turns on the meaning that paragraphs 2.7 to 2.9 of IR20 would convey to the ordinarily sophisticated taxpayer. Is the question whether the taxpayer has become non-resident and not ordinarily resident in the United Kingdom to be determined simply by reference to the taxpayer's intention when going abroad regarding the overall duration of his absence and counting up the days of any return visits? Or is it to be determined by evaluating the quality or nature of the absence and of any return visits that he has made?

The issue may be more accurately expressed as whether, having issued guidance in the form of a soft law instrument, the Revenue may contest those who have followed the guidance so issued by stating that the guidance was only "general" and pointing to inconsistent and contested case law to support its own contrary conclusions. The Revenue stated throughout that it would submit to an order to give substantive effect to any legitimate expectation it could be held to have created in the appellants, although there is long-standing precedent that the Revenue *can* agree not to enforce the law to the full in its discretion.[395] In the end, the point was not central to the outcome of the case because Lord Wilson held both that the relevant paragraphs of IR20 were "very poorly drafted" and expressed doubt that they were sufficiently precise to generate a legitimate expectation in the first place.[396]

More than the result in *Davies*, this specific outcome is a cause for significant concern. Where people, indeed sophisticated businessmen with professional advisors, read and rely upon soft law, how can it be any kind of response to say that nothing can be done because the soft law was so badly drafted in the first place? The finding of the Supreme Court must be distinguished from examples of badly drafted legislation, which are legion; these primarily become the problem of lawyers, who are trained to deal with legislative drafting, be it good, bad or indifferent. Soft law, on the other hand, is presented as an accessible guide to the requirements of government and is therefore more likely to be relied upon by people who would never dream of attempting to extract meaning from legislation. The Supreme Court's approach places the risk for poor drafting of soft law upon the claimant – who, after all, was sufficiently able to understand the soft law to rely upon it – rather than the public authority

391 *Davies v HMRC* [2011] 1 WLR 2625, 2663 [94] (Lord Mance), cf 2647 [56] (Lord Wilson).

392 *Davies v HMRC* [2011] 1 WLR 2625, 2639 [32] (Lord Wilson), 2649 [66] (Lord Walker).

393 *Hedley Byrne* [1964] AC 465; cf *R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545, 1569 (Bingham LJ and Judge J, '*MFK Underwriting*'). cited in *Davies v HMRC* [2011] 1 WLR 2625, 2637-8 [28] (Lord Wilson).

394 *Davies v HMRC* [2011] 1 WLR 2625, 2648 [62] (Lord Hope).

395 See *R v Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617, ('*Fleet Street Casuals Case*').

396 *Davies v HMRC* [2011] 1 WLR 2625, 2641-2 [39].

responsible for the poor drafting. Put more briefly, it is akin to saying that soft law means nothing; the authority which issues soft law can avoid its effects with careful disclaimers or careless drafting. A poorly drafted Act cannot be dismissed in this way. While England is still far ahead of Australia in its capacity to enforce the terms of soft law, *Davies* contains some worrisome elements which suggest that soft law remains a dangerously one-sided phenomenon.

B: Procedural Judicial Review Remedies

The remaining two Parts of this Chapter proceed on the assumption that the scope of common law judicial review[397] is able to extend to exercises of power where there is a relevant soft law instrument. If that is the case, there are two possible outcomes. One is that judicial review will take account of the legitimate expectation entertained by the party who has relied on the terms of the soft law instrument and require either that any departure not be *Wednesbury* unreasonable[398] or that the opportunity for consultation be given "unless there is an overriding reason to resile from it".[399] The other is that, where the legitimate expectation is of a substantive benefit, the frustration of the legitimate expectation is not "so unfair that to take a new and different course will amount to an abuse of power".[400] Substantive enforcement of a legitimate expectation of a benefit will be examined in Part C. At this point, it suffices to say that the weight of Australian authority is against this doctrine as it has developed in the UK.[401]

Section I of Part B will look at the grounds upon which traditional judicial review remedies, which are axiomatically procedural in their effect, may be available where a public authority fails to adhere to a soft law instrument. Some courts have been prepared to allow judicial review of decisions made under soft law,[402] although they still fall short of having the status of hard law. Evans JA put the point succinctly:[403]

> Although not legally binding on a decision maker in the sense that it may be an error of law to misinterpret or misapply them, guidelines may validly influence a decision maker's conduct.

Guidelines may also assist a court in concluding that a decision-maker has fallen into reviewable error. Part B will examine the ways in which this may come about.

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397 Soft law is unreviewable under the *ADJR Act* and equivalent State and Territorial legislation because it is not made "under an enactment": *ADJR Act 1977* (Cth) s 3(1). See *Tang* (2005) 221 CLR 99.

398 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213, 871-2 ('*Coughlan*'). See M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 478-9.

399 *Coughlan* [2001] 3 QB 213, 871-2. See *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, (Privy Council, '*Ng Yuen Shiu*').

400 *Coughlan* [2001] 3 QB 213, 871-2. This third element is now subject in the UK to the comments of the Court of Appeal in *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, ('*Bibi*').

401 See *Quin* (1990) 170 CLR 1; *Lam* (2003) 214 CLR 1.

402 *Gillick v West Norfolk (HL)* [1986] AC 112, 163 (Lord Fraser of Tullybelton); 177-8 (Lord Scarman); *Bristol-Myers Squibb Australia Pty Ltd v Minister for Health and Family Services* (1997) 49 ALD 240, 258 (Wilcox, O'Loughlin & Lindgren JJ) ('*Bristol-Myers Squibb*').

403 *Thamotharem v Canada* [2008] 1 FCR 385, [59] (Evans JA).

I: Possible grounds of judicial review

Improper fettering of discretion

This ground of review is essentially the inverse of the argument that a person has a legitimate expectation that a decision-maker will adhere to a policy from which s/he seeks to depart.[404] Classically, a decision-maker who inflexibly applies rules or policies[405] without listening to submissions that an exception be made, commits a jurisdictional error.[406] As I have discussed above in Chapter 2, 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.[407] 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,[408] but it cuts both ways. A decision-maker will not commit a jurisdictional error under this ground 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.[409]

There have been numerous cases which have recognised that soft law is necessary, particularly in relation to high-volume decision-making.[410] 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. Brennan J dealt with this issue in *Drake (No2)*,[411] when he said that 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 and Groves have commented that:[412]

> If the courts were to acknowledge the intolerable pressures produced by prohibiting the fettering of discretions in agencies 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.

404 C Hilson, 'Policies and Fettering' [2002] *PL* 111.

405 These terms are often used interchangeably; see eg PP Craig, *Administrative Law* (7th ed, 2012) 542.

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

407 See P Cane and L McDonald, *Principles of Administrative Law* (2nd ed, 2012) 144.

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

409 *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*').

410 The following passage owes a debt to Part 3.8 of M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013).

411 *Drake (No2)* (1979) 2 ALD 634.

412 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.280].

The suggestion made by Aronson 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.[413] The learned authors point out that it is, essentially, the prohibition on 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".[414]

Take for example the case of *MLC Investments v Commissioner of Taxation*,[415] 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".[416] Lindgren J held that the delegate fell into error[417] 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 been taken as applying the interpretation of the statute contained in the rulings rather than reaching its own view.[418]

However, there is nothing in this decision which would prevent courts from accepting[419] 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 weight of case law suggests that this is most likely to occur by viewing policies as mandatory relevant considerations in some circumstances. This will be discussed below.

There are indications that, subject to limits, soft law can be a tool of statutory interpretation. In *Cheng*,[420] Cowdroy J heard an appeal from members of a family from China who claimed that they were entitled to residence visas on the basis that they ran a business with an annual turnover over a certain threshold. There was a dispute over the meaning of the word "turnover", a term undefined in either the *Migration Act 1956* (Cth) or the *Regulations*, which the Migration Review Tribunal (MRT)

413 See R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 827.

414 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.270].

415 *MLC Investments* (2003) 137 FCR 288. Aronson and Groves use this case as the archetype of situations in which consistency and the rule against fettering are in direct tension: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.280] (n 334), [5.270] (n 115).

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

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

418 See *Enfield Corporation* (2000) 199 CLR 135, 151 [39] - 154 [44] (Gleeson CJ, Gummow, Kirby & Hayne JJ).

419 By which I mean accepting explicitly. As this Chapter has discussed, there is already plenty of implicit suggestion from courts that soft law must mean something. See eg *Offshore Processing Case* (2010) 243 CLR 319.

420 *Cheng v Minister for Immigration and Citizensip* [2013] FCA 405.

resolved against the applicants. The MRT was called upon to construe a word which bore its ordinary English meaning, thereby making its construction a question of fact,[421] provided its construction is within a reasonable "either-way" margin.[422] In the course of its decision, the MRT referred to the Procedures Advice Manual (PAM3) of the Department of Immigration, which set out guidelines for the determination of visa applications and included guidance on the meaning of "turnover". Its approach was upheld by the Federal Magistrate in review proceedings.

On appeal to Cowdroy J, the appellants submitted that the MRT erred in its construction of the word "turnover" and that PAM3 should not have been considered in preference to established authorities from English courts since it is not binding on the MRT. His Honour cited the statement of French and Drummond JJ in *Gray* that the "proposition that government policy cannot bind the [MRT] does not imply that the policy can be ignored",[423] and held that the MRT had a discretionary power to seek out a construction of "turnover" that would be consistent with other cases.[424] It was therefore permissible for the MRT to be guided by the relevant soft law (PAM3), provided that the MRT did not allow the soft law to dictate the outcome of the hearing.

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.[425] As Deane J has noted, while consistency in decision-making is generally desirable, it is an ingredient rather than a hallmark of justice.[426] 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 elegance[427] of this consistency be put aside where justice so demands.

This principle does not provide any protection to the party whose concern is that a public authority[428] *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.[429] The suggestion from Aronson and Groves above that courts "explore the possibilities of giving more force to non-statutory guidelines"[430] 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

421 *Collector of Customs v Agfa-Geveart Ltd* (1996) 186 CLR 389, 395.

422 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.260].

423 *MILGEA v Gray* (1994) 50 FCR 189, 206. Cowdroy J also cited *Drake (No2)* (1979) 2 ALD 634.

424 *Cheng v MIAC* [2013] FCA 405, [23]-[24].

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

426 *Nevistic v MIEA* (1981) 51 FLR 325, 334 (Deane J). See also *Drake's Case* (1979) 46 FLR 409, 420-1 (Bowen CJ & Deane J).

427 *Drake (No2)* (1979) 2 ALD 634, 639 (Brennan J).

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

429 Cf PP Craig, *Administrative Law* (7th ed, 2012) 545-7.

430 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.280].

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,[431] although that fact is inseparable from the consequence that it has very rarely been argued with success. Another way of giving greater substance to soft law may be to interpret each soft law instrument as an implied undertaking that the public authority who 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.[432]

Procedural fairness

Procedural fairness may offer the best opportunity of subjecting decisions to judicial review where a soft law scheme is in effect. Aronson and Groves cited *Haoucher* and *Lam* to state that "[i]t is trite law that promises and undertakings can generate obligations to observe the rules of natural justice".[433] Soft law may create procedural obligations on the part of bodies which use it as a regulatory tool, although, as Part C of this Chapter makes clear, Australian courts will not give substantive effect to legitimate expectations which are generated by representations made in soft law instruments.

Procedural obligations will most obviously be created 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,[434] 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.[435]

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

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

432 See J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423. This issue is explored at length in Chapter 6.

433 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.260]. See *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, ('*Haoucher*'); *Lam* (2003) 214 CLR 1.

434 This amounts to a representation as to how the decision-maker will exercise his or her discretion. See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [7.200].

435 *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 17 FCR 1, (Davies J, '*Gerah Imports*').

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".[436] This was an opinion in which the rest of the *Lam* court concurred,[437] 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.[438] 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 had they approached her again. Common law judicial review does not require that remedies be provided where to do so would be futile.[439] This is to be contrasted to the situation where the content of the natural justice hearing rule is determined entirely by statute.[440]

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 representations[441] or policy statements[442] made by public authorities need not rely on that concept.[443] One case in which a public authority was held to soft law guidelines was *Applicants M16*.[444] In that case, Gray J considered 'gender guidelines' (draft guidelines issued by the respondent Minister for dealing with gender-related claims by asylum seekers)[445] 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.[446] She had indicated unequivocally that she was prepared to discuss these aspects of her case only with a female case officer.[447] 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,

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

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

438 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].

439 *Stead* (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane & Dawson JJ).

440 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, ('*SAAP v MIMIA*'). See G Weeks, 'Expanding Role of Process' (2008) 15 *AJ Admin L* 100, 105.

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

442 *Stewart v Deputy Commissioner of Taxation* (2011) 194 FCR 194, 29 (Perram J, '*Stewart v FCT*').

443 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 609 (Brennan CJ, Dawson & Toohey JJ) ('*Darling Casino*'). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [7.200].

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

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

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

447 *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].

particularly those who had been subjected to sexual violence.[448] 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:[449]

> [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.[450] This is to say that the gender guidelines did not assume the status of a hard legal requirement. They merely indicated what procedurally fair steps needed to be taken to lead to an 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,[451] the RRT was obliged to follow the gender guidelines unless it had previously warned the first applicant that it would not do so.[452]

The effect of *Lam* can be seen in *Stewart v Deputy Commissioner of Taxation*.[453] In that case, Perram J considered seizure of documents relating to the taxation affairs of the second and third applicants (Messrs Hogan and Cornell) and their accountant (Mr Stewart) by the Australian Crime Commission (ACC) under a compulsory statutory process. The ACC subsequently provided the documents to the Australian Tax Office (ATO) and the ATO decided, in relation to each of the applicants, to allow the documents to be seen by the ATO officers who were auditing the applicants.[454] These decisions were made in circumstances where the Commissioner of Taxation had publicly issued *Guidelines to Accessing Professional Accounting Advisors' Papers* (the Guidelines) which applied to Messrs Stewart and Cornell (but not, as Perram J ultimately held, to Mr Hogan).[455] The Guidelines stated that advices prepared for taxpayers by their accountants should "in all but exceptional circumstances" remain confidential and set out how such circumstances were to be identified. They included, relevantly, that there was a scheme or arrangement within the meaning of Part IVA of the *Income Tax Assessment Act 1936* (the Act's anti-avoidance provisions) or that there were reasonable grounds to believe that fraud or evasion has taken place. Messrs. Stewart and

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

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

450 See also *Stewart v FCT* (2011) 194 FCR 194, 48; cf *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2008] 1 AC 1003, ('*BAPIO Action*').

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

452 This would be most unlikely in circumstances where the gender guidelines were issued by the Minister: *Drake (No2)* (1979) 2 ALD 634.

453 *Stewart v FCT* (2011) 194 FCR 194.

454 "More formally, the audit teams had not seen the documents in the case of Messrs. Stewart and Cornell and a decision was made to give them access. In Mr Hogan's case, the audit team had already had access to the documents and the decision in his case was, in effect, that there was no reason to change that state of affairs.": *Stewart v FCT* (2011) 194 FCR 194, [5].

455 *Stewart v FCT* (2011) 194 FCR 194, [63].

Cornell alleged that they were denied procedural fairness because the Guidelines were misapplied by the ATO. This argument was rejected by Perram J on the facts in relation to Mr Cornell:[456]

> it is clear that … [the second respondent] had twice called for submissions on whether there were exceptional circumstances by reason of a Part IVA scheme or the existence of reasonable grounds to suspect fraud or evasion. Further, Mr Cornell had, in fact, made submissions about those issues.
>
> It was in that context that [the second respondent] then made the decision to allow access to the documents ... He concluded that there were exceptional circumstances justifying access. I do not see how this could be procedurally unfair. Submissions were called for on whether there were exceptional circumstances and Mr Cornell's particular attention was twice drawn to the fact that [the second respondent] was considering whether such circumstances existed by reason of Part IVA scheme or fraud or evasion. Mr Cornell made submissions on that issue. [The second respondent] did not accept them. There was no procedural unfairness.

His Honour applied the same reasoning to Mr Stewart[457] but found, by contrast, that the ATO had not represented to Mr Hogan's solicitors that the Guidelines applied to their client.[458] Rather, the ATO took the view that Mr Hogan had waived the benefit of the Guidelines because his solicitors had asked the ATO to "obtain all documentation relating to Mr Hogan from the ACC".[459] Perram J rightly considered that failing to apply the Guidelines without first giving Mr Hogan an opportunity to be heard on that course of action would have been a breach of procedural fairness, if the Guidelines in fact applied to Mr Hogan. If they had not, "there was nothing procedurally unfair about departing from the [Guidelines] because there was nothing within them from which it was possible to depart (their having no application)".[460] His Honour's interpretation of the Guidelines was that they could not apply to documents held by third parties, such as the ACC.[461] The point is that, even if they did apply to him, the fullest extent to which Mr Hogan could ever have compelled the ATO to adhere to the Guidelines was to allow him to be heard before deciding not to apply them. The rights which are provided by the doctrine of procedural fairness in relation to soft law are limited indeed.

Mandatory and forbidden considerations

Taking account of irrelevant and forbidden considerations is a ground of review that is unlikely to affect cases involving soft law. It would be most unusual for a court to construe legislation such that certain material was *forbidden* from consideration because of a soft law instrument to which the legislation itself did not refer.

456 *Stewart v FCT* (2011) 194 FCR 194, [21]-[22].

457 *Stewart v FCT* (2011) 194 FCR 194, [41]-[42].

458 *Stewart v FCT* (2011) 194 FCR 194, [44]. This was because the Guidelines were not capable of applying to a situation in which the disputed documents were already in the possession of a third party, even if that circumstance arose as a result of some compulsory process: *Stewart v FCT* (2011) 194 FCR 194, [61]. That put Mr Hogan in a different position to the other applicants because the ATO team conducting the audit of his affairs had already had access to the documents to which the Guidelines may otherwise have applied.

459 *Stewart v FCT* (2011) 194 FCR 194, [45].

460 *Stewart v FCT* (2011) 194 FCR 194, [49].

461 *Stewart v FCT* (2011) 194 FCR 194, [53]-[61].

Review for failing to take into account a mandatory relevant consideration has been substantially discussed above in Section I in regard to *Khan*.[462] In *Peko-Wallsend*, the High Court extended the process of statutory interpretation involved in determining the issues mandatory for consideration by the decision-maker beyond the express terms of the Act to implications which could justifiably be drawn from them.[463] There is no reason why *Peko*'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)?

Subsequent to the High Court's decision in *Peko-Wallsend*, Davies J stated that:[464]

> 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.

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.[465] This may particularly be so where there is an available inference that a discretion is to be guided by soft law,[466] either as a matter of statutory interpretation or, in the words of French J, 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."[467] Such a commitment must, of course, fall short of estoppel[468] or fettering, making it difficult to know exactly what kind of commitment 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*.[469] 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

462 *Khan v MIAC* 192 FCR 173. See the text accompanying nn 356 - 378 above.

463 *Peko-Wallsend* (1986) 162 CLR 24, 39-40 (Mason J). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.40]. As to implications which could not justifiably be drawn from legislative instruments to make the terms of soft law instrument binding upon a decision-maker, see *Dunkerley v Comcare* (2012) 58 AAR 287, (Lander, Logan & Barker JJ, '*Dunkerley v Comcare*'); cf *Attorney General of New South Wales v Chiew Seng Liew* [2012] NSWSC 1223 [71].

464 *Gerah Imports* (1987) 17 FCR 1, 15.

465 *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, (Full Federal Court, '*MIEA v Conyngham*').

466 "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*').

467 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 v Commissioner of Taxation* (1998) 84 FCR 154, 169 (Hill, Sundberg & Goldberg JJ) ('*Bellinz*'). See *BHP v Duffus* (2007) 99 ALD 149, 171 [102].

468 See Chapter 5 below.

469 *MILGEA v Gray* (1994) 50 FCR 189.

bound to consider although not bound to apply so as to prejudice its independent assessment of the merits of the case."[470] Their Honours had previously stated that:

> where the existence and content of such a policy is to be regarded as a relevant fact which the Tribunal is bound to consider, a serious misconstruction of its terms or misunderstanding of its purposes in the course of decision-making may constitute a failure to take into account a relevant factor and for that reason may result in an improper exercise of the statutory power. If a decision-maker, not bound to apply policy, purports to apply it as a proper basis for disposing of the case in hand but misconstrues or misunderstands it so that what is applied is not the policy but something else, then there may be reviewable error.

Aronson and Groves suggest that subsequent Federal Court authority may require that *Gray* be reconsidered,[471] citing the decision of Tracey J in *AB*.[472] In that case, his Honour said that the passage quoted above:[473]

> 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.

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 conclusion[474] rather than a test by which that conclusion may be reached. 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,[475] noting that French J had himself reached the same conclusion in an earlier case.[476] This departure from *Gray* is explicable, particularly after *Lam*'s rejection of much of the reasoning underlying *Teoh*[477] 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 party and policies and guidelines issued by the same public authority which is then to make a decision to which that soft law applies.

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

471 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.270].

472 *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53, (Tracey J, '*AB v MIAC*').

473 *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53, 62 [25] (Tracey J, '*AB v MIAC*').

474 See M Aronson, 'Jurisdictional Error Without the Tears' in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 330. Basten JA no longer accepts that the term 'jurisdictional error' is no worse for being conclusory: J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' (Speech delivered at the Constitutional and Administrative Law Section, NSW Bar Association, 14 May 2013).

475 *AB v MIAC* (2007) 96 ALD 53, 63 [27].

476 *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875, [61]-[66] (French J) ('*Le v MIMIA*').

477 *Teoh* (1995) 183 CLR 273.

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 any attempt to do away with the prohibition of fettering. On the other hand, and as I will discuss below, this would be a process which would 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.[478] I will examine the potential pitfalls of this approach by reference to *Nikac* and *Re Tracey*.

In *Nikac*,[479] Wilcox J considered applications from three persons who were not citizens of Australia, had committed certain criminal acts and had been the subjects of decisions by the respondent Minister's predecessor in office (Mr Mick Young) that they should be deported, against the advice of the AAT. The government had a Criminal Deportation Policy, which had been tabled in the Commonwealth parliament and which said, at paragraph 4, that the Minister ought to overturn recommendations of the AAT in respect of deporting criminals "only in exceptional circumstances and only when strong evidence can be produced to justify the decision".[480] Wilcox J noted that the Minister's understanding of the word "exceptional" owed much to the interpretive techniques of Humpty Dumpty,[481] but said that the Minister was "not bound by the terms of par 4 of the Criminal Deportation Policy, in the sense that he [was] free to depart from that policy if he [saw] fit."[482] Nor could the Minister's misconstruction of the policy have amounted to jurisdictional error.[483] In any event, the Minister had considered the terms of the Criminal Deportation Policy and this was determinative of the applications put by the first two applicants.

The third applicant (Mr Sorenson) was a convicted murderer. However, unlike the first two applicants who had been born in Yugoslavia and Turkey respectively, he had been born in Scotland and the *Migration Act 1958* had only recently been amended (with effect from 1984) to allow for the deportation of a British subject in Mr Sorenson's circumstances. But for that legislative change, he

478 Although it was found as a fact that Peko Wallsend had not intended to mislead, 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) in effect 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. This led the Full Court to characterise Peko's evidence as "vague, inaccurate and misleading" (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 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.100].

479 *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65, (Wilcox J, '*Nikac v MILGEA*').

480 *Nikac v MILGEA* (1988) 20 FCR 65, 70.

481 "When I use a word, it means just what I choose it to mean – neither more nor less." Lewis Carroll, *Alice Through the Looking Glass*, cited at *Nikac v MILGEA* (1988) 20 FCR 65, 77. The most notorious use of this quotation was by Lord Atkin in *Liversidge v Sir John Anderson and Anor* [1942] AC 206, 245 ('*Liversidge v Anderson*'). See R Creyke and J McMillan, *Control of Government Action* (2nd ed, 2009) 428-9; K Barlow SC, 'Alice, Humpty Dumpty and the Law' (2011) 85 *Australian Law Journal* 365, 366-8.

482 *Nikac v MILGEA* (1988) 20 FCR 65, 78.

483 *Nikac v MILGEA* (1988) 20 FCR 65, 77-8. More recently, Tracey J has approved this finding, going on to state that "[w]here the instrument concerned is an unincorporated international treaty which is subject to interpretation by a potentially wide range of international bodies it will be harder to make good an allegation of error much less jurisdictional error.": *AB v MIAC* (2007) 96 ALD 53, 63 [27].

could not have been deported. At the time of that legislative change, the then Minister had approved the following policy recommendation, described in *Nikac* as the "Transition Policy":[484]

> It is recommended that as a general policy the following persons not be considered for criminal deportation under s 12 of the *Migration Amendment Act* 1983:
>
> Non-citizens convicted of offences committed prior to the date of proclamation of the amended Act and who, although liable for deportation under the amended Act are not liable under present legislation;[485] but excluding cases which come to notice involving very serious crimes and/or where special circumstances exist which warrant your personal consideration.

Minister Young did not take the Transition Policy into account in exercising his discretion to deport Mr Sorenson and Wilcox J held that this failure "vitiated the Minister's decision" because:[486]

> Although a non-statutory policy is not binding upon a decision-maker, in the sense that he or she may decide in the particular case not to act in accordance with that policy, a policy applicable to the case is *always a relevant consideration* in the making of a decision.

This is, on the face of it, an odd conclusion. Wilcox J did not indicate the basis for his finding that the Transition Policy was a consideration that the Minister was bound to take into account other than to say that the Transition Policy was "directly applicable". His Honour accepted that the Minister could revoke the Transition Policy "at any time" but stated:[487]

> It seems to me likely that any Minister with a sense of fairness, confronted with this policy and considering its rationale, would have been extremely reluctant to deport Mr Sorensen for offences committed by him before the amendments took effect.

I disagree with his Honour's reasoning. It cannot be right to say that, simply because a court finds that, had a Minister considered a policy, s/he would likely have decided to exercise a discretion differently, therefore consideration of that policy was mandatory. Unless the requirement to take account of a policy appears on the face of, or could justifiably be implied from, applicable legislation,[488] the conclusion drawn by Wilcox J was irrelevant. His Honour's reasoning did not provide any principled basis for reaching the conclusion that a *directly applicable* policy is also a mandatory consideration.

More recently, in *Re Tracey*,[489] Spigelman CJ found that the trial judge in the District Court had fallen into jurisdictional error by failing to treat the United Nations *Convention on the Rights of the Child* 1989 (CROC) as a mandatory consideration.[490] The trial judge had said that it was irrelevant.[491]

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484 *Nikac v MILGEA* (1988) 20 FCR 65, 75.

485 Ie as it stood prior to amendment.

486 *Nikac v MILGEA* (1988) 20 FCR 65, 81 (emphasis added).

487 *Nikac v MILGEA* (1988) 20 FCR 65, 82.

488 *Peko-Wallsend* (1986) 162 CLR 24, 39-40 (Mason J).

489 *Re Tracey* (2011) 80 NSWLR 261, ('*Re Tracey*').

490 Beazley JA agreed with Spigelman CJ (at [50]). Giles JA declined to decide this point (at [100]).

491 It is clear that the trial judge in this case did not see CROC as being a mandatory (as opposed to relevant) consideration. One might conclude that her use of the word "irrelevant" was an expression of this finding, ie that it was 'other than mandatory'. If so, it is a further example of the confusion caused by using the terms "relevant" and "irrelevant" in relation to grounds of review which have no connection to those terms as they are used by people other than administrative lawyers.

Leaving aside the arguable position that this was, at worst, an error of law made within jurisdiction,[492] the Chief Justice's reasons showed a worrying slippage between consideration of the *Convention* being "permissible"[493] with its provisions "capable of being relevant to the exercise" of the discretion exercised by the trial judge,[494] and consideration of the *Convention* being mandatory in the sense expressed by Mason J in *Peko-Wallsend*. His Honour stated that, because the *Convention* was at least relevant, the trial judge had committed a jurisdictional error by stating that it was an *irrelevant* consideration (in the sense that it was forbidden).[495] If consideration of the *Convention* was not mandatory, does it follow that the trial judge would not have fallen into jurisdictional error had she ignored the *Convention* and not stated explicitly that it was "irrelevant"? The effect of the Chief Justice's reasoning seems to be that this is not the case, since there is a difference between forgetting something which I am under no obligation to remember on one hand and, on the other, making the incorrect statement that I am *not allowed* to take something into account. Such a distinction is understandable, although *Re Tracey* remains, I think, a worrisome case in the sense that it continues the tendency of judges to declare certain issues to be mandatory considerations *ex post facto*, based on requirements inferred from legislation rather than stated explicitly in its terms.

Given the prevalence of this inclusive approach to what constitutes a mandatory consideration, development of this ground of review to compel decision-makers to take account of their own soft law or policies is not, on the face of it, too much to ask. No issue arises as to the separation of powers, since applicable soft law would regardless need to be consistent with any applicable statute[496] and, in any case, mandatory considerations require only "proper, genuine and realistic consideration",[497] not a substantive result. An extension of this ground to cover soft law could mean that the certainty of the current ground of review is reduced, since the practical issue will be whether a given instrument is sufficiently 'law-like' to compel consideration by a decision-maker. I suggest that this will usually be an issue determinable on the facts of each case.

In a passage quoted with evident approval by a unanimous High Court,[498] Basten JA noted that the language of "proper, genuine and realistic consideration" calls for a proper consideration of "the merits of the case".[499] His Honour warned that:[500]

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492 Cf *Craig* (1995) 184 CLR 163. An order in the nature of certiorari would regardless have been available to remedy an error of law on the face of the record (which includes the reasons of a District Court judge: *Supreme Court Act 1970* (NSW) s 69(4)); see per Giles JA at *Re Tracey* (2011) 80 NSWLR 261, 53.

493 *Re Tracey* (2011) 80 NSWLR 261, 23. Spigelman CJ in fact expressly denied that the Court had been presented with any evidence which compelled the conclusion that the relevant legislation included "obligations" under the *Convention*: *Re Tracey* (2011) 80 NSWLR 261, [24].

494 *Re Tracey* (2011) 80 NSWLR 261, [45].

495 *Re Tracey* (2011) 80 NSWLR 261, [32].

496 *Green v Daniels* (1977) 13 ALR 1.

497 *Khan v Minister for Immigration & Ethnic Affairs* (1987) 14 ALD 291, 292 (Gummow J, '*Khan v MIEA*'); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 312-14 [26]-[36] ('*MIAC v SZJSS*').

498 *MIAC v SZJSS* (2010) 243 CLR 164, 313 [30].

499 *Swift v SAS Trustee Corporation* [2010] NSWCA 182 [45].

500 Ibid. (citations omitted). Basten JA also referred to consideration of the "proper, genuine and realistic" formulation in a statutory setting, citing *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 526 [172] (Callinan & Heydon JJ) ('*NAIS v MIMIA*').

> Taken out of context and without understanding their original provenance, these epithets are apt to encourage a slide into impermissible merit review. If it is demonstrated in a particular case that an administrative decision-maker has failed to address a claim properly made, or has failed to identify the statutory power under which the claim should properly be disposed of, there will be a constructive failure to exercise jurisdiction. Relief will be available accordingly. Thus, "to fail to respond to a substantial, clearly articulated argument relying on established facts was at least to fail to accord [the applicant] natural justice". Where a decision-maker does address the claim, by reference to the correct power, asking whether he or she did so "properly" or "genuinely", or "realistically" may be taken, inappropriately, as an invitation to assess the correctness of the result, rather than the legality of the process.

It is evident from these *dicta*, and from the High Court's decisions in *NAIS*,[501] *SZJSS*[502] and *MIAC v Li*,[503] that there is considerable overlap between the considerations grounds of review and those for unreasonableness and irrationality.[504] Indeed, the overlap between these grounds of review and procedural fairness is often implicit,[505] and sometimes explicit,[506] in the reasoning of courts and statements of judicial understanding that the merits of a matter are off-limits are now almost ritual.[507] Without seeking to oversimplify the reasons for the former phenomenon, it is fair to say that where grounds of review take account of qualitative issues,[508] courts are often sufficiently concerned not to "slide into impermissible merit review"[509] that they take especial care to ensure that their reasoning relates only to procedural issues. This confirms the point made above that it is *more* likely that any successful judicial review application involving soft law will be on the ground that procedural fairness was owed and denied. However, there are sufficient grounds for developing a requirement to consider soft law outside the limits of procedural fairness simply by applying the (also procedural) mandatory considerations ground in a symmetrical fashion.

Unreasonableness and irrationality

Wednesbury unreasonableness was always understood in Australia as a ground of review of last resort.[510] Weinberg J said in this regard:[511]

501 *NAIS v MIMIA* (2005) 228 CLR 470.

502 *MIAC v SZJSS* (2010) 243 CLR 164.

503 *MIAC v Li* (2013) 87 ALJR 618, 630 [27]-[28] (French CJ); 639-40 [71], [74]-[75], 641 [84]-[85] (Hayne, Kiefel and Bell); 645 [110] (Gageler J).

504 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.10]. The learned authors deal with all these grounds of review in the same chapter.

505 See G Weeks, 'Expanding Role of Process' (2008) 15 *AJ Admin L* 100, 107-11.

506 In *Swift*, Basten JA stated that "[t]he use of [the language of proper, genuine and realistic considerations] in administrative law is not common, no doubt in large part because of the risks of misapplication. However, understood as a label invoking procedural unfairness or a constructive failure to exercise jurisdiction, its use is unexceptionable.": *Swift v SAS Trustee Corporation* [2010] NSWCA 182 [47].

507 See eg *A v Pelekanakis* (1999) 91 FCR 70, 89 [90] (Weinberg J, '*A v Pelekanakis*'). This point is also made by the frequency with which judgments quote Brennan J in *Quin* (1990) 170 CLR 1, 35-6.

508 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.440]; G Weeks, 'Questions of Quality' (2007) 14 *AJ Admin L* 76.

509 *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277, 298 [79] (Basten JA) ('*Kindimindi Investments*'); *Swift v SAS Trustee Corporation* [2010] NSWCA 182 [45].

510 Professor Aronson characterised it as having been always "the last card in an Australian lawyer's pack – a plea for desperate counsel": M Aronson, 'Statutory Interpretation or Judicial Disobedience?' (3 June 2013) *UK Constitutional Law Group Blog* http://ukconstitutionallaw.org/2013/06/03/mark-aronson-statutory-interpretation-or-judicial-disobedience/. This may no longer be true after the High Court relaxed the standard required before *Wednesbury* would be applied in *MIAC v Li* (2013) 87 ALJR 618.

511 *A v Pelekanakis* (1999) 91 FCR 70, 89 [89]. See also *Taveli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 435, 453 (Wilcox J, '*Taveli v MILGEA*').

> It will, of course, be rare that the decision of an administrative decision-maker will be set aside on the basis of *Wednesbury* unreasonableness. The requirements which must be met to invoke that ground of review are, and ought to be, stringent.

The same became true of review for serious illogicality or irrationality in fact-finding after *S20*.[512] These grounds of review were difficult to establish because they straddled the boundary between merits review and judicial review. They existed to remedy poor quality decisions (usually a question of fact) but only on the basis that they were so bad as not to be proper exercises of the decision-makers' jurisdiction (a question of law).[513] After *S20* established a separate standard for review in regard to poor quality fact-finding, *Wednesbury* unreasonableness became confined to really bad discretionary choices, although the High Court's decision in *MIAC v Li* has now effectively run the unreasonableness and irrationality standards back together.[514] It appears that these standards will now be less demanding than they had been.

On the other hand, it has become practically more difficult than it once was to establish that a decision is unreasonable in the *Wednesbury* sense. Courts used to be able to conclude that a decision was unreasonable if no good reason was provided and none could be observed.[515] However, since most modern decisions come with a statement of reasons, courts now generally have no scope to infer that there cannot have been a reasonable basis for the challenged decision.[516] On the other hand, the High Court has indicated that it now prefers a less restrictive approach to the *Wednesbury* 'absurdity' standard than has been assumed over the last two decades.[517] In *MIAC v Li*, a unanimous Court held that the Migration Review Tribunal was unreasonable to refuse a further delay to Ms Li's hearing in order to allow her to organise proper evidence of her professional qualifications. While the MRT had a statutory power to grant or refuse Ms Li's request for an adjournment, the statute did not indicate how that power should be exercised. The Court held that it did not therefore displace the MRT's common law obligation to act reasonably, and that the reasonableness standard could include consideration of:[518]

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512 *Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002* (2003) 198 ALR 59 ('*Applicant S20*'). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.690]-[4.760]. The authors later commented that, if *Applicant S20* "has sanctioned review of fact-finding which is seriously irrational or illogical, as we have suggested, there seems no need to incorporate fact review into natural justice": ibid, [7.30] (citation omitted).

513 This is not a judicial function which was created by *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, ('*Wednesbury*'). It was understood by judges prior to that case: see eg *Sharp v Wakefield* [1891] AC 173; *Kruse v Johnson* [1898] 2 QB 91; *Moreau v Commissioner of Taxation (Cth)* (1926) 39 CLR 65, 68 (Isaacs J); *R v Connell; ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 432 (Latham CJ) ('*Hetton Bellbird Collieries*'). See *MIAC v Li* (2013) 87 ALJR 618, 638-9 [68]-[70] (Hayne, Kiefel and Bell JJ).

514 *MIAC v Li* (2013) 87 ALJR 618, 631 [30] (French CJ); 639 [79] (Hayne, Kiefel and Bell JJ).

515 This line of thought developed in a series of judgments by Sir Owen Dixon: *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ) ('*House v R*'); *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 (Dixon J); *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473 (Dixon CJ).

516 See *MIAC v Li* (2013) 87 ALJR 618; J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' (Speech delivered at the Constitutional and Administrative Law Section, NSW Bar Association, 14 May 2013).

517 See eg M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013), [6.460]; cf *MIAC v Li* (2013) 87 ALJR 618, 638 [68], 639 [72]-[74] (Hayne, Kiefel and Bell JJ). Gageler J held that the "stringency" of the *Wednesbury* standard would be unchanged and that the frequency with which it falls for judicial determination would not be increased: *MIAC v Li* (2013) 87 ALJR 618, 646 [113]. His Honour's prediction in this regard seems at odds with the reasons of the other members of the Court.

518 *MIAC v Li* (2013) 87 ALJR 618, 639 [74] (Hayne, Kiefel and Bell JJ).

> whether the Tribunal gave excessive weight – more than was reasonably necessary – to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached.

Introducing proportionality reasoning into *Wednesbury* looks decidedly as though the High Court means for that ground to move further than ever before beyond the "porous" boundary between legality and the merits[519] and into substantive review. It is as yet unclear what this will mean on a practical level.

One way in which there may be scope for a court to find jurisdictional error is if a decision-maker reaches a decision which is completely at odds with soft law guidance issued by the decision-maker's public authority. Keyes noted that "administrative guidelines may be 'of great help' in determining the reasonableness of administrative action".[520] In *Taveli*, Wilcox J explained his previous decision in *Prasad*[521] as being a case in which there was "an illogicality in, or misapplication of, the reasoning adopted by the decision-maker; so that the factual result is perverse, by *the decision-maker's own criteria*".[522] Wilcox J was referring to internal inconsistencies which revealed a want of rationality or logic *within* a decision,[523] but his Honour's reasoning could extend to cover *external* soft law, where the decision is at odds with the terms of that soft law and the decision-maker has given no indication why s/he has not applied it.

This sounds very much like review for breach of procedural fairness where an applicant had a legitimate expectation that the soft law would be applied.[524] Since *Lam*, legitimate expectations are only relevant for actual expectations generated by government action, such as promises. However, they are not the major determinant of whether procedural fairness applies. Procedural fairness can apply based upon the existence of a policy about which the subject had not known.[525] This requires at least that soft law be considered before a decision-maker is able to reach a decision contrary to it, and supplements the broader position that soft law is a common law creature which is able to be made and applied on terms set by the common law, including being subject to judicial review.

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519 JJ Spigelman, 'The Integrity Branch of Government' (2004) 78 Australian Law Journal 724, 732.

520 JM Keyes, *Executive Legislation* (2nd ed, 2010) 53. See *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, [72] (L'Heureux-Dubé) ('*Baker v Canada*').

521 *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155, ('*Prasad v MIEA*'). Wilcox J referred also to *Parramatta City Council v Pestell* (1972) 128 CLR 305, ('*Pestell*'). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.200] (n 88).

522 *Taveli v MILGEA* (1989) 86 ALR 435, 453 (emphasis added).

523 *Prasad* would now be decided on the basis of *S20* irrationality or illogicality following *Applicant S20* (2003) 198 ALR 59.

524 The High Court has recently noted that there is significant overlap between concepts of procedural fairness, rationality and reasonableness: *MIAC v Li* (2013) 87 ALJR 618, 636-7 [57]-[60] (Hayne, Kiefel and Bell JJ); 643 [99]-[100] (Gageler J). Indeed, *MIAC v Li* treated unreasonableness as an indicator of breach of procedural fairness.

525 This proposition is not incongruous with the comment by McHugh J in dissent in *Teoh* that it is very hard to speak of a legitimate expectation being disappointed when it was not subjectively held by the applicant for judicial review: *Teoh* (1995) 183 CLR 273, 312-14 (McHugh J). Professor Hoexter noted that "most or even all expectations are fundamentally substantive in nature", which is to say that individuals generally expect an outcome rather than a procedure. Consistently with McHugh J, she did not consider the possibility that an expectation can exist if it is not held subjectively: C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 427.

Take, for example, facts similar to those in *Teoh* and *Lam*. Suppose that the Department of Immigration and Citizenship issued a published Ministerial policy which stated that the Minister would consider the interests of any related children before exercising his statutory power to deport any person who has failed the 'character test' under the *Migration Act*. Specifically, the policy says that any decision to deport will only be made after inquiring into the circumstances of any dependent children of the person who would be subject to deportation. Further suppose that Mr X, the father of two infant children, has been convicted of being knowingly concerned in the importation of heroin and of being in possession of heroin (and is therefore undoubtedly of 'bad character'). Presumptively, the Ministerial policy would apply. However, let us suppose that the Minister exercises his statutory power to deport Mr X without having made the promised inquiries after the circumstances of his children.

Lam tells us that this is a breach of procedural fairness, but that no remedy will follow where there cannot have been any material unfairness.[526] The result in *Lam* was peculiar in as much as neither side contended that Mr Lam would have received any benefit to the merits of his case if the promised inquiries had been made, *because* the carer had nothing more to say. That outcome does not necessarily follow from the hypothetical facts in the paragraph above. If it did, it would be impossible to argue that the decision was unreasonable in the *Wednesbury* sense.[527] If it is correct that reaching a scientific conclusion, albeit a complicated one, on the basis of a guess is not necessarily an irrational process of fact-finding,[528] that outcome indicates the rarity with which the ground will be established absent other imperatives. Is there a basis on which unreasonableness could be made out on these facts?

One way in which unreasonableness may be demonstrated is through the so-called common law duty to make inquiries. There had been some doubt as to whether such a duty was properly an aspect of reasonableness[529] or of procedural fairness[530] or was a mandatory consideration. That debate was settled by the High Court in *SZIAI*,[531] in which a majority held that "[i]t is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law".[532] The court in that case found that in the circumstances there was no need for the

526 See *Stead* (1986) 161 CLR 141. Note however the concerns raised in L Pearson, 'Procedural Fairness: the Hearing Rule' in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 265.

527 See *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, 1129 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*MIAC v SZIAI*').

528 *Director of Animal and Plant Quarantine v Australian Pork Ltd* (2005) 146 FCR 368, 382-3 [63]-[66] (Heerey & Lander JJ). The Full Court reversed *Australian Pork Ltd v Director of Animal and Plant Quarantine* (2005) 216 ALR 549, (Wilcox J, '*Australian Pork*'). The judgment of Heerey and Lander JJ can be seen as an example of the proposition that it is very difficult to persuade a court that persons with relevant expertise have acted in a manner which is *Wednesbury* unreasonable: see *Australian Retailers* (2005) 148 FCR 446; G Weeks, 'Questions of Quality' (2007) 14 *AJ Admin L* 76. Another, perhaps more persuasive approach is that the appellant's officers were called upon to make not only a scientific judgment but also an economic and political judgment which was risk-based. The fact that science is, of its nature, uncertain explains the fact that their process of reasoning involved some guesswork in circumstances where the economic and political considerations required certainty. I am indebted to Elizabeth Fisher for this point.

529 See *Abebe v Commonwealth* (1999) 197 CLR 510, 578 [194] (Gummow & Hayne JJ) ('*Abebe*'); *Prasad v MIEA* (1985) 6 FCR 155, 167-70 (Wilcox J).

530 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.210]-[5.230].

531 *MIAC v SZIAI* (2009) 83 ALJR 1123.

532 *MIAC v SZIAI* (2009) 83 ALJR 1123, 1129 [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Refugee Review Tribunal to make its own inquiries in order to avoid jurisdictional error but commented that:[533]

> The duty imposed upon the [Refugee Review] Tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.

In essence, the court held that there is no general duty to inquire, although a duty to inquire may occasionally arise in specific circumstances, for example as an incident to the duty to 'review' that is imposed on most merits review tribunals. Another example is that it may be unreasonable not to make further inquiries. This is probably not a separate consideration to that referred to by Wilcox J in *Taveli*. Rather, it expresses the result that, where it is unreasonable not to "make an obvious inquiry about a critical fact, the existence of which is easily ascertained", the result of that unreasonableness is jurisdictional error. A decision-maker's failure to adhere to his or her "own criteria" is simply one example of unreasonableness.

Returning then to the hypothetical facts above concerning Mr X (based on *Teoh* and *Lam*), the Minister *might* act unreasonably in failing to apply the terms of his policy. To make that out would require Mr X to establish that the Minister was under a common law duty to make inquiries about whether Mr X has dependent children, a duty which would not be created simply by the terms of the policy itself. It would need to be found that, in all the circumstances, the Minister was unreasonable not to make those inquiries.[534] In the event that the matter subsequently came before the Administrative Appeals Tribunal for review on the merits, the Tribunal's statutory duty to inquire would further bolster that position. It follows that Mr X could enforce the Ministerial policy that decision-makers inquire after his children's welfare before exercising the statutory power to deport him, as a matter of reasonableness rather than of procedural fairness per se, if a failure to do so was so unreasonable that no reasonable decision-maker could have failed to do so. This outcome, which treats unreasonableness as an indicator of breach of procedural fairness, follows from the High Court's analysis in *MIAC v Li*.

II: Procedural remedies: judicial review's traditional remedial scope

As Chapter 4 will reiterate, judicial review's traditional remedial scope is implicitly procedural. The remedies available in public law are restricted to:

- compelling the performance of an unperformed public duty (*mandamus*);
- quashing an invalid decision (*certiorari*);
- declaring the law (declaration); and
- preventing the commencement or continuation of an invalid (prohibition) or unlawful (injunction) action.

533 *MIAC v SZIAI* (2009) 83 ALJR 1123, 1129 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citation omitted).

534 Cf *Prasad v MIEA* (1985) 6 FCR 155.

Statutory reforms have not altered the substance of these remedies, tending merely to replace 'writs' with 'orders' of the same name and effect;[535] statutory judicial review schemes also tend to adhere to the model of procedural remedies.[536] The system of administrative law judicial remedies has not changed substantially from its ancient origins. As a result, judicial review remedies are problematic for a party which has relied on a soft law instrument on at least two bases: they may not be available and they may be of limited utility.

Mandamus does not lie against every public officer – State and Territorial Supreme Court judges, for instance[537] – but it does have the benefit of being able to lie against private persons who have public duties.[538] *Mandamus* enforces the obligation to perform public duties, but not mere powers. Soft law will not generally be able to *create* a public law duty and, for that reason, *mandamus* will not generally lie to compel a public official to comply with a soft law instrument. As we have seen above in relation to *Purdy v DPP* and *Lumba*, there is now judicial recognition in the UK that public officers may come under an obligation to make and publish soft law. It is conceivable that *mandamus* may be sought in order to compel a public officer to issue guidelines in certain circumstances.[539]

To the extent that *mandamus* will lie to compel a decision-maker to exercise his or her duty to exercise a discretion but will not compel that decision-maker to make a specific choice where multiple valid options exist, it is probably inapplicable to soft law. One of the key purposes of soft law is to indicate – both to the delegates who will exercise the power in fact and to those who will be subject to such exercises of power – how the recipient of a statutory grant of power intends to exercise that power. However, *mandamus* will not lie to compel a decision which is inconsistent with parent legislation, nor will it compel a certain decision where the proper interpretation of the statute is that the decision-maker is intended to retain a discretion.[540]

The orders based upon the prerogative writs – *mandamus*, *certiorari* and prohibition – all require as a prerequisite a finding that the challenged administrative action is invalid or a nullity. As Aronson and Groves have noted, this is a task which contains some implicit difficulties:[541]

> Nullification involves the court in overturning some of the effects of the impugned act or decision. In a sense, it involves the court in rewriting history. The further back in time the object of

535 See eg *Supreme Court Act 1970* (NSW) s 69; *Administration of Justice (Miscellaneous Provisions) Act 1933* (UK); *Civil Procedure Rules* (UK) Ord 53 r 1 (now Part 54). The history of the various remedies is set out in S Gageler SC, 'Judicial Remedies' in M Groves and HP Lee (eds), *Australian Administrative Law* (2007) 368.

536 *ADJR Act 1977* (Cth) s 16(1).

537 In practice, judges of the Federal Court are also rarely subject to an order for *mandamus*; see eg *Edwards v Santos* (2011) 242 CLR 421, 441 [53] (Heydon J). In that matter, the Federal Court and its judges had filed an appearance submitting to any order the High Court might make. Heydon J did not elaborate beyond stating that *mandamus* was "not necessary in this case" but it is fair to assume that the High Court did not think it appropriate for *mandamus* to issue against a court and its judicial officers which had already undertaken to act in accordance with the High Court's orders.

538 See the sources cited at M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [13.30] (n 22).

539 *Mandamus* was also the remedy being sought in *Royal Insurance*, which is discussed in Chapter 4 in relation to restitution; see *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, ('*Royal Insurance*').

540 See the examples of where 'may' does not necessarily indicate a discretion in M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [13.110].

541 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [10.370].

> challenge, the more difficult it is for the court surgically to separate the impugned part of history from its ramifications and interconnections.

The availability of *certiorari* relies on establishing that a decision is invalid, but the time travel alluded to above is not the only difficulty created by a system based on nullification of administrative acts. The very point of soft law is that it is not susceptible to *ultra vires* review – those subject to soft law do not generally inquire into its *vires* but comply because its legal standing is assumed. It is likely that *certiorari* will apply only when soft law is inconsistent with the legislative obligations of the decision-maker. This will not assist a person who has *relied* on soft law with which the decision-maker subsequently refuses to comply.

Injunctive relief is more flexible, not being restricted to invalid decisions but focusing instead on acts which would be unlawful and therefore not requiring that a jurisdictional error be proved.[542] This flexibility does not, however, cause the injunction to have the same level of utility as would the equitable jurisdiction discussed below, the enforcement of estoppels against government parties.[543] The injunction has developed several specific applications[544] but is best known for its capacity to forbid certain acts.[545] As such, it suffers extensively from the same limitations as *certiorari* and prohibition, in as much as those remedies cannot compel a decision-maker to adhere to a soft law instrument but merely have the possibility of striking down decisions made under such an instrument. Injunctions are able to issue to compel a party to act, although equity has traditionally been highly reluctant to issue mandatory injunctions. In public law, too, the mandatory injunction is notable for the few occasions on which it has issued and the general dearth of judicial exposition on the subject.[546] On the whole, it is unlikely that an injunction will be of greater utility to a person who has relied on soft law than *certiorari* or prohibition.

That the declaration is the remedy most likely to assist such a person is indicative of the limits of judicial review's traditional remedies. Declaratory relief is a relative newcomer to public law[547] and has long been subject to doubts as to its true utility. Megarry VC expressed his conclusion that:[548]

> there is a real difference between a declaration of right, on the one hand, and an order to pay on the other; and a declaration of obligation (i.e. that the Crown ought to pay something) seems to me to be in essence an order to pay, put in a somewhat pallid, or perhaps I should say respectful,

542 See the sources cited at M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.350].

543 Aronson and Groves noted that "Government parties are frequent users" of injunctions: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [16.10]. This reflects the fact that, unlike the remedies which had originated as writs, the purpose of the injunction is not specifically to prevent public authorities from acting outside their jurisdiction.

544 See RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths, Chatswood, NSW, 2002) Ch 21.

545 The authors of *Meagher, Gummow and Lehane's Equity* took pains to point out that this is an example of what an injunction may do but is accurate only in a general sense and is certainly inadequate as a definition of the injunction: RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths, Chatswood, NSW, 2002) 703. The descriptive approach will, however, suffice for the purposes of this Chapter. See also M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [16.10].

546 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [16.200].

547 For a good history of the declaration as a public law remedy, see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [15.10]-[15.90].

548 *Tito v Waddell (No2)* [1977] Ch 106, 259 (Megarry VC).

> form. At the very least it is morally coercive in effect. It may be that some case will emerge in which it is proper to make such an order: but I do not think that this case is that case.

Aronson and Groves cited his Lordship's *dictum* in making the point that, while injunctive and declaratory relief lie against Crown officers,[549] it appears that they do not lie against the Crown itself,[550] such as State Governors.[551] Even if only used in respect of officers of the Crown, the declaration may sometimes affect rights, but may also be available "even where it grants no new rights, imposes no new obligations, and quashes no adverse decision",[552] as happened in *Ainsworth*.[553] The declaration was considered desirable by the plaintiff in that case because it had the effect, even if only a limited effect, of removing the stain to the plaintiff's reputation which had been placed there by the respondent.[554] However, while a court may have cause to declare that a certain soft law instrument is legally incorrect,[555] it would not, for example, have the power to declare that the plaintiff should have had a certain decision made in his or her case, consistent with the soft law instrument. Aronson and Groves describe the boundaries of the declaratory jurisdiction as being "the boundaries to judicial power more generally".[556] If the complaint about a soft law instrument is that it has not been applied as expected, rather than that it is unlawful or invalid, it is not within the jurisdiction of the court to intervene with regard to the instrument's application as the law stands. Guidance through soft law is not unlawful *per se*; on the contrary, it is usually seen as desirable and is certainly permitted.[557] Courts will generally only uphold challenges to soft law on jurisdictional bases.

Judicial review's traditional remedies were not developed with the modern phenomenon of soft law in mind and this explains why, on the whole, they are inadequate to deal with the specific problems thrown up by soft law. Much of this has to do with the procedural limitations of the existing remedies. Part C of this Chapter and Chapter 4 generally will attempt to consider whether remedies could be developed which will better allow courts to intervene to prevent the misuse of soft law.

C: Substantive Judicial Review Remedies

If the traditional role of judicial review can be typified as employing a light touch to review of administrative decision-making, the following Part deals with "Judicial Review Heavy". The Justice / All Souls Committee recommended in 1988 that "where erroneous advice or misleading assurance is given by a public official and loss is thereby caused to a person who reasonably acts on the advice or

549 The matter has for many years been – and still remains – uncertain; see PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 6. Hogg and his co-authors concluded that declaratory relief is now available against the Crown because it is non-coercive: PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 37-8. Aronson and Groves read the precedents as reaching the opposite conclusion: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [16.60] (see the sources listed at n 28).

550 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [16.60].

551 See *FAI* (1982) 151 CLR 342.

552 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [15.50].

553 *Ainsworth* (1992) 175 CLR 564.

554 Cf *Castle v Director General, State Emergency Service* [2008] NSWCA 231, ('*Castle v SES*'); *Castle v Director General, State Emergency Service* (2007) 98 ALD 78, (Hoeben J, '*Castle v SES*').

555 In practice, there is probably no reason why a plaintiff would not seek an injunction in such a case.

556 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [15.70]; see the *Offshore Processing Case* (2010) 243 CLR 319, 359 [102].

557 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.310].

assurance, that person should have a remedy for his loss without having to prove that the official acted negligently".[558] The Committee's recommendation that compensation should lie as a remedy for the effects of a person being misled to his or her cost by the representative of a public authority will be addressed in detail in Part A of Chapter 4. Relevantly to the following Part, the Committee apparently did not consider it sufficient that public authorities could be bound to their undertakings or bad advice, even where they were under no statutory duty,[559] but recommended substantive protection.

I: Contrasting remedial mechanisms

Aside from damages, there are other methods by which substantial remedies can be awarded in public law. This Part will consider three contrasting mechanisms: public law estoppel, which used reasoning directly transplanted from private law; proportionality, which has developed in public law under the influence of rights-based approaches; and consistency, which may develop as a ground of review within the law of judicial review of administrative action.

Public law estoppel

The greater use of estoppel in public law matters[560] was a development almost entirely driven by Lord Denning over a period of more than thirty years in cases such as *Robertson v Minister for Pensions*,[561] *Wells*,[562] *Lever Finance*[563] and *HTV v Price Commission*,[564] ultimately to be accepted by the House of Lords in *Preston*.[565] There has not been a role for estoppel in English public law since the House of Lords' subsequent decision in *Reprotech*,[566] at which point, as we shall see below, the substantive protection of interests generated by government promises was transferred to the public law doctrine of substantive legitimate expectations. The reason why it is so frequently noted that Lord Denning was the driving force behind these legal developments[567] is that they are indicative of his Lordship's judicial doctrine of doing justice in the case before him, untrammelled by the requirements

558 JUSTICE - All Souls, *Administrative Justice: Some Necessary Reforms - The Report of the Committee of the Justice-All Souls Review of Administrative Law in the United Kingdom* (SP Neill QC (ed), Clarendon Press, 1988) 176 (Chapter 7, Recommendation 1).

559 JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 174. See *Ng Yuen Shiu* [1983] 2 AC 629; cf *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204, ('*Western Fish*').

560 For more detailed discussion, see G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247; G Weeks, 'Holding Government to its Word' in M Groves (ed), *Modern Administrative Law in Australia* (2013) (forthcoming).

561 *Robertson v Minister of Pensions* [1949] 1 KB 227, (Denning J, '*Robertson*'). *Robertson* was overturned shortly afterwards by the House of Lords in *Howell v Falmouth Boat Construction Co.* [1951] AC 837, ('*Howell v Falmouth Boat*').

562 *Wells v Minister of Housing and Local Government* [1967] 1 WLR 1000, (Court of Appeal, '*Wells v Housing Minister*'). A marked preference for the dissent of Russell LJ had caused *Wells* to be now considered "highly dubious": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.630] (n 386).

563 *Lever (Finance) Ltd v Westminster Corp* [1971] 1 QB 222, ('*Lever Finance*'). Lord Denning disapproved, with scant justification, the earlier decision in *Southend-on-Sea* [1962] 1 QB 416. That case, along with *Maritime Electric* [1937] AC 610, still represents the orthodox view in Australia. Paul Brown later commented that in "neither *Lever Finance* nor *Western Fish* is the result satisfactory", concluding that the ombudsman's involvement would have provided an appropriate "middle road": P Brown, 'The Ombudsmen: Remedies for Misinformation' in G Richardson and H Genn (eds), *Administrative Law and Government Action: the Courts and Alternative Mechanisms of Review* (Clarendon Press, Oxford, 1994) 309, 319.

564 *HTV* [1976] ICR 170.

565 *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835, 866-7 (Lord Templeman) ('*In re Preston*').

566 *Reprotech* [2003] 1 WLR 348.

567 His Lordship is usually acknowledged as the source of the phrase "legitimate expectation" in English law: *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170-1 ('*Schmidt v Home Secretary*'). Additionally, given that he disclaimed any continental influence in developing it, Lord Denning has also been credited with giving "the name 'legitimate expectations' to the similar, but not identical, principle that operates in European Law": C Forsyth, 'Lord Denning and Modern Administrative Law' (1999) 14 *Denning Law Journal* 57, 62.

of legal precedent which generally constrain even the most noted 'judicial activists'.[568] Lord Denning was frank about the fact that doing justice in a case was the only way he could "sleep at nights" and that this subjective view of 'justice' was disappointingly absent from "some of the judges".[569] His Lordship further stated that justice was a superior guide to the meaning of legislation than any other interpretive technique and hinted at both regret and indifference that the House of Lords didn't "think that way".[570] Lord Denning had a steadfast belief that he knew the just outcome in any given case, although his views were not universally consistent with those of society at large,[571] much less the Appellate Committee of the House of Lords.

The concept of "heavy" judicial review might also be said to include any review process in which the judiciary is doing more than merely assessing the legality of the challenged decision. It is trite to observe that judicial review on this basis is deeply heterodox in Australia, but it is nonetheless worth noting that the argument is likely to continue regardless of disapprobation from the judiciary. The reason for this is the singular capacity of soft law to create reliance.[572]

Proportionality

Proportionality is a ground of review associated with bills of rights.[573] In countries with statutory or constitutional rights instruments, such as England,[574] South Africa,[575] Canada and New Zealand,[576] the literature on proportionality is voluminous. Such is not the case in Australia,[577] which remains in a pre-*CCSU*[578] state in which *Wednesbury* unreasonableness is the only ground upon which courts will interfere with poor quality decision-making.[579] However, the High Court has recently lowered the

568 This term, once very much in vogue, is now rightly seen as both conclusory and unhelpful; see the discussion in M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 23-8; cf JD Heydon, 'Judicial Activism' (2003) XLVII *Quadrant* 9.

569 J Mortimer, *In Character: Interviews with Some of the Most Influential and Remarkable Men and Women of Our Time* (Allen Lane, London, 1983) 13.

570 Ibid. According to one biographer, "Lord Denning's credo was 'I must do justice, whatever the law may be'": C Stephens, *The Jurisprudence of Lord Denning: a Study in Legal History* (Cambridge Scholars, Newcastle, 2009) Volume 3 - Freedom Under the Law: Lord Denning as Master of the Rolls, 1962-1982, 5.

571 See eg his Lordship's comments about the unsuitability for teaching work of unmarried but sexually active women in *Ward v Bradford Corporation* (1971) 70 LGR 27, ('*Ward v Bradford Corp*').

572 JM Keyes, *Executive Legislation* (2nd ed, 2010) 61-3.

573 To some extent, proportionality overlaps with the variable intensity unreasonableness ground which was championed by Mike Taggart. I do not propose to deal with the latter ground here, which is discussed in detail in the following publications: M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 11-16; M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 11-16, 28-30.

574 In the UK, proportionality applies in relation to EU law and to the *Human Rights Act 1998* to the extent that it is affected by the jurisprudence of the European Court of Human Rights but is of uncertain application in regard to domestic law; see P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223.

575 The right to administrative action which is "reasonable" is entrenched in the *Constitution of the Republic of South Africa 1996* (South Africa) s 33(1). It is broadly accepted in South Africa that reasonableness includes within it the principle of proportionality, see eg *New Clicks* 2006 (2) SA 311 (CC), [637] (Sachs J). However, there is some controversy about proportionality's role in South Africa as a result of the drafting of *Promotion of Administrative Justice Act 2000* (South Africa) s 6(2)(h). That section incorporates Lord Greene's famously circumlocutory test from *Wednesbury* and as a result there is doubt as to whether the test is broad enough to cover the standard of proportionality; see C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 381-90.

576 Albeit Canada and New Zealand have adopted proportionality *only* in regard to rights and not in their administrative law generally: M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 25-6.

577 A fact of which Mike Taggart was critical: M Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] *New Zealand Law Review* 423, 424-5; M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 24-6. In spite of this, Kiefel J has argued extra-curially that the "concept or ideal of proportionality may be seen to pervade our laws": S Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 86. Her Honour's nuanced view on this issue is noted in M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.510] (n 317) and [6.520].

578 Lord Diplock included a reference to the possibility of adopting a proportionality standard in *CCSU* [1985] 1 AC 374. The Australian High Courts has never adopted that passage of his Lordship's speech.

579 The position is otherwise in the UK; see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.510].

standard of this ground from one of absurdity[580] to one which could be met by an "an obviously disproportionate response".[581] Changes to the common law unreasonableness ground, following the decision in *S20*,[582] were considered to be essentially superficial[583] and there are signs that the High Court now sees significant overlap between what is "unreasonable" and what is "irrational".[584] Furthermore, there are indications that several members of the Court are prepared explicitly to adopt proportionality reasoning.[585]

In *MIAC v Li*,[586] the High Court unanimously dismissed an appeal from a finding that the Migration Review Tribunal had been unreasonable in the *Wednesbury* sense not to allow a delay in proceedings so that Ms Li could arrange for proper evidence of her employment qualifications. French CJ explicitly invited proportionality reasoning into Australian law:[587]

> A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable.[588] It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts.[589] Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut,[590] may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves. That approach is an application of the principles discussed above and within the limitations they would impose on curial review of administrative discretions.

The majority of Hayne, Kiefel and Bell JJ also made specific reference to proportionality reasoning:[591]

> Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or

580 See the judgment of Latham CJ in *Hetton Bellbird Collieries* (1944) 69 CLR 407; M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.460].

581 *MIAC v Li* (2013) 87 ALJR 618, 639 [74] (Hayne, Kiefel and Bell JJ).

582 *Applicant S20* (2003) 198 ALR 59.

583 See the account in M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 11-12.

584 *MIAC v Li* (2013) 87 ALJR 618, 630 [28], 631 [30] (French CJ); 638 [68], 639 [72] (Hayne, Kiefel and Bell JJ). This may simply be an example of the High Court manipulating labels, as it did in both *Applicant S20* (2003) 198 ALR 59 and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 349 [76] – 352 [86] (McHugh, Gummow and Hayne JJ). See M Aronson, 'Statutory Interpretation or Judicial Disobedience?' (3 June 2013) *UK Constitutional Law Group Blog* http://ukconstitutionallaw.org/2013/06/03/mark-aronson-statutory-interpretation-or-judicial-disobedience/.

585 Kiefel J has been open to the adoption of a proportionality standard which is appropriate to Australia's Constitutional arrangements: *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 131 [424] – 142 [466] (Kiefel J); *Momcilovic v R* (2011) 245 CLR 1, 209 [541] – 217 [564] (Crennan and Kiefel JJ); S Kiefel, 'Proportionality' (2012) 23 *PLR* 85. See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.510]-[6.560]. There are indications that, along with the *MIAC v Li* majority of Hayne, Kiefel and Bell JJ, French CJ might also be prepared to entertain proportionality reasoning: *MIAC v Li* (2013) 87 ALJR 618, 631 [30]. That would already constitute a majority of the Court before considering Crennan J, who joined with Kiefel J in a lengthy consideration of proportionality in *Momcilovic v R* (2011) 245 CLR 1. By contrast, Gageler J's judgment in *MIAC v Li* stayed closer to the traditional conception of *Wednesbury* unreasonableness, although John Basten has noted in an extra-curial speech that Gageler J nonetheless "sought to establish a s grand unifying theory based on … 'the framework of rationality'": J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' (Speech delivered at the Constitutional and Administrative Law Section, NSW Bar Association, 14 May 2013).

586 *MIAC v Li* (2013) 87 ALJR 618.

587 *MIAC v Li* (2013) 87 ALJR 618, 631 [30].

588 G Airo-Farulla, 'Reasonableness, Rationality and Proportionality' in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 212, 214-15.

589 For an analogous application of reasonable proportionality as a criterion for the validity of delegated legislation see *Attorney-General for the State of South Australia v Corporation of the City of Adelaide* (2013) 87 ALJR 289.

590 G Airo-Farulla, 'Reasonableness, Rationality and Proportionality' in M Groves and HP Lee (eds), *Australian Administrative Law* (2007) 212, 215.

591 *MIAC v Li* (2013) 87 ALJR 618, 639 [72].

> reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

Their Honours referred to Professor Allars' "third paradigm" of unreasonableness,[592] which employed a "proportionality analysis by reference to the scope of the power"[593] and stated, in relation to the facts of the matter, that:[594]

> consideration could be given to whether the Tribunal gave excessive weight – more than was reasonably necessary – to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached.

Gageler J did not deal expressly with proportionality but did comment that:[595]

> the stringency of the [*Wednesbury*] test remains. Judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare. Nothing in these reasons should be taken as encouragement to greater frequency. This is a rare case.

His Honour's *dictum* might have been an accurate expression of the law before *MIAC v Li*, but it cannot be afterwards. A majority of the Court opened the test significantly from the previous "*Wednesbury* lunacy" standard by linking disproportionality to unreasonableness and has, as a result, "lower[ed] … the barrier to judicial review of administrative decisions".[596] The joint judgment explicitly stated that the former standard no longer applies:[597]

> The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.

This represents a startling change of gear for the High Court. Professor Aronson has noted that the outcome in *MIAC v Li* "has pushed the High Court into frankly substantive review. This might be only at the margins, but it was something the court had previously denied doing".[598] For the High Court to start applying the unreasonableness ground for anything short of a decision-maker no longer being able to be characterised as performing his or her statutory function amounts to an admission that the decision-maker's discretion can now be over-ridden on judicial review in circumstances which would

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592 M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990), 190-1. This passage was approved by Gummow J in *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Livestock Corporation* (1990) 96 ALR 153, 167-8.

593 *MIAC v Li* (2013) 87 ALJR 618, 639 [73].

594 *MIAC v Li* (2013) 87 ALJR 618, 639 [74]. Their Honours noted that "the submissions in this case do not draw upon such an analysis."

595 *MIAC v Li* (2013) 87 ALJR 618, 646 [113].

596 J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' (Speech delivered at the Constitutional and Administrative Law Section, NSW Bar Association, 14 May 2013).

597 *MIAC v Li* (2013) 87 ALJR 618, 638 [68] (Hayne, Kiefel and Bell JJ).

598 M Aronson, 'Statutory Interpretation or Judicial Disobedience?' (3 June 2013) *UK Constitutional Law Group Blog* http://ukconstitutionallaw.org/2013/06/03/mark-aronson-statutory-interpretation-or-judicial-disobedience/. He noted that even Kirby J characterised judicial review for illogicality or irrationality as looking at a process of reasoning rather than at the quality of the decision: *Applicant S20* (2003) 198 ALR 59, [132]. See generally G Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *AJ Admin L* 100.

not previously have given rise to jurisdictional error. There is now some substance in Australia to the concern that review for unreasonableness is merely "merits review in drag".[599]

The decision to replace *Wednesbury* with a proportionality standard for rights protected by the *European Convention for the Protection of Human Rights* was imposed on English courts from without when the European Court of Human Rights declared that *Wednesbury* was an inadequate standard for protecting Convention rights.[600] However, the more generous standard of proportionality appears to have been broadly accepted since in regard to matters under the *Human Rights Act*,[601] the authors of *de Smith* going so far as to note that proportionality can be observed within English law as far back as *Magna Carta*.[602] What has remained uncertain is whether the proportionality standard is to be applied only where Convention rights are affected or whether proportionality is now part of English domestic law.[603] The *ABCIFER Case*[604] is sometimes cited to the effect that it remains orthodox that "proportionality is not strictly part of English law",[605] although the decision of the House of Lords in *Daly*[606] indicates that "the principle of proportionality is a principle of public law" applicable at least in human rights cases.[607]

Lord Steyn's speech in *Daly* stated that proportionality is "more precise and more sophisticated than the traditional grounds of review".[608] His Lordship was referring specifically to criteria set out by Lord Clyde in *de Freitas* as follows:[609]

> In determining whether a limitation is arbitrary or excessive he said that the court would ask itself:

599 This phrase appears to have originated in New Zealand: *Powerco Ltd v The Commerce Commission* [2006] NZHC 662, [24]. Like so many good things from that country, it has since been adopted in Australia: *Real Estate and Business Agents Supervisory Board v Carey* [2010] WASCA 109, [58] (Owen JA).

600 Further details of this shift are given in M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.390], [6.510].

601 H Woolf et al, *De Smith's Judicial Review* (6th ed, 2007) 590-1. See n 574 above.

602 H Woolf et al, *De Smith's Judicial Review* (6th ed, 2007) 586.

603 Paul Craig counted himself as one of a number of scholars "who contend that 'bifurcation' [between human rights and other cases] should be resisted": PP Craig, 'Proportionality, Rationality and Review' [2010] *New Zealand Law Review* 265, 266. In this list, he also included David Mullan, Murray Hunt and Philip Joseph; see: D Mullan, 'Proportionality: A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?' [2010] *New Zealand Law Review* 233; M Hunt, 'Against Bifurcation' in D Dyzenhaus, M Hunt and G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 99; PA Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007); cf the comment of Sir Philip Sales that "the bigger the gap between the standards [of proportionality and rationality], the stronger the arguments required to justify bridging it": P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *LQR* 223, 226.

604 *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, ('*ABCIFER v Defence Secretary*').

605 C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 344 (n 117); and see H Woolf et al, *De Smith's Judicial Review* (6th ed, 2007) 590. It might also be interpreted as saying merely that proportionality is not yet part of English law and will not be until the Supreme Court addresses the issue: P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *LQR* 223, 224.

606 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, ('*Daly v Home Secretary*').

607 T Hickman, *Public Law after the Human Rights Act* (2010) 173. Lord Bingham explained extra-judicially that the specific text of Article 8(2) of the *European Convention on Human Rights* compels a proportionality approach since it asks courts to compare the right to respect for family and private life to the benefits which may accrue to the wider community if such rights are infringed in individual cases: TH Bingham, *Rule of Law* (2010) 74-6. The history of proportionality is, of course, much older than that; see A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 175-86.

608 *Daly v Home Secretary* [2001] 2 AC 532, 547 [27]. This pretence of sophistication does not entirely convince. Harlow and Rawlings have noted that both proportionality and unreasonableness can open the way to judicial review, although they are not co-extensive in their capacity to do so, but the real issue is the intensity of the consequent review: C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009), 120-6.

609 *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Privy Council, '*de Freitas*'). His Lordship was quoting from the judgment of Gubbay CJ in the Zimbabwean case of *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, 75 ('*Nyambirai v NSSA*'). See also P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *LQR* 223, 226.

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

One suspects that the basis on which Lord Steyn was able to describe this test as having greater sophistication than *Wednesbury* is much the same as others may use to justify the claim that it gives much greater scope for the judiciary to impose its views on the executive. Sir Philip Sales regarded the proportionality standard thus articulated as "clearly contemplat[ing] a more intensive form of judicial review than the rationality / *Wednesbury* reasonableness standard" but was concerned rather than impressed by this "divergence".[610]

Denunciation of the *Wednesbury* standard's descriptive inarticulacy is nothing new,[611] and Lord Diplock's attempt at reworking the standard made famous by Lord Greene MR in his speech in *CCSU* was scarcely an improvement on that front.[612] The real issue that the English judiciary had with *Wednesbury* was its restrictiveness.[613] Lord Diplock felt that whether a decision should be held invalid for unreasonableness was "a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system".[614] Lord Steyn denied that the use of proportionality reasoning would precipitate "a shift to merits review", since "the respective roles of judges and administrators are fundamentally distinct and will remain so".[615]

This approach to proportionality is reminiscent of the English treatment of *Wednesbury* in the 1980s. The English courts started to take a far more permissive approach to *Wednesbury* than had previously been the case[616] or, one might add, could be justified by Lord Greene's *dicta*. Although Australian courts initially followed this approach, the High Court soon made it clear[617] that its preferred interpretation of the *Wednesbury* ground was more restrictive.[618] It was generally expected that the response of Australian courts to the claim that proportionality review has no effect on the roles of

610 P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *LQR* 223, 226.

611 Lord Cooke was one who frequently returned to denouncing *Wednesbury* on a semantic basis, including in *Daly v Home Secretary* [2001] 2 AC 532, 549. He was not alone, however; see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.440].

612 His Lordship defined irrationality as referring to "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it": *CCSU* [1985] 1 AC 374, 410. See T Poole, 'The Reformation of English Administrative Law' (2009) 68 *Cambridge Law Journal* 142, 143. Sales commented that "adoption of the proportionality standard as a possible general principle of public law [which Lord Diplock had raised in *CCSU* as a possibility] would be in substitution for the standard of rationality, so Lord Diplock's speech does not take matters very far": P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *LQR* 223, 223.

613 This issue was "more contentious": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.440].

614 *CCSU* [1985] 1 AC 374, 410.

615 *Daly v Home Secretary* [2001] 2 AC 532, 548 [28]. One senses some of this feeling in the Australian High Court decision in *MIAC v Li*; see the text accompanying n 599 above.

616 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.440].

617 See eg *Eshetu* (1999) 197 CLR 611; *Applicant S20* (2003) 198 ALR 59.

618 Consistently with Latham CJ's pre-Wednesbury decision in *Hetton Bellbird Collieries* (1944) 69 CLR 407.

judges and administrators would be similarly restrictive,[619] but the decision in *MIAC v Li* has confounded those expectations, as noted above.

One aspect of the test of proportionality in England, at least as conceived by Lord Steyn, that remains unlikely to be emulated in Australia is the involvement of courts in weighing competing interests to reach a decision:[620]

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

Hickman argued that this reasoning results inevitably in courts substituting their decisions for those of administrators and thereby engaging in merits review.[621] This observation foreshadows the likely Australian judicial response, which one might expect to be substantially the same in effect, if not vehemence, as it was to the notion of judicial balancing of interests raised in *Coughlan*.[622] Even a suggestion that *Coughlan*'s reasoning would be applied only in extreme cases, and therefore on a basis almost the same as *Wednesbury*, would be unlikely to mollify Australian courts.[623] Even following the more relaxed approach demonstrated in *MIAC v Li*, Australia's far more rigid doctrine of the separation of judicial powers than that which exists in England is likely to be determinative of this issue.

I do not propose to deal here with the many persuasive arguments in favour of adopting a standard on proportionality review. The High Court's gesture in *MIAC v Li* towards developing the *Wednesbury* ground along proportionality lines is more than anyone outside the Court had expected. It is hard to predict how the issue will develop past this point and whether Australia will see the creation of a free-standing proportionality ground of review in the absence of statutory or constitutional rights protection.[624] The recent examination of *Federal Judicial Review in Australia* gave very little space to considering whether it was desirable for Australia to move to a proportionality standard.[625] It noted baldly that "Australia does not have a statutory list of human rights, meaning that proportionality would not have the same certainty in terms of what rights, interests or freedoms would give rise to a consideration of the proportionality of an executive action".[626] This dismissive remark is revelatory of

619 Hickman has noted the fundamental tension between propositions which state that "proportionality review requires courts to roll up their sleeves and examine the substance of a decision" on one hand but that courts must not engage in merits review on the other: T Hickman, *Public Law after the Human Rights Act* (2010) 175.

620 *Daly v Home Secretary* [2001] 2 AC 532, 547 [27] (Lord Steyn).

621 T Hickman, *Public Law after the Human Rights Act* (2010) 175. See Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50, (2012) 135 [7.42].

622 See *Lam* (2003) 214 CLR 1.

623 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.650].

624 One issue in this regard is that, unlike jurisdictions like the UK, New Zealand, South Africa and Canada, an Australian proportionality ground would lack the anchor of starting with the breach of a person's rights and would therefore also lack even the relatively weak level of objectivity that proportionality can claim in those jurisdictions.

625 See Administrative Review Council, *Federal Judicial Review in Australia* (2012), 135-6.

626 Administrative Review Council, *Federal Judicial Review in Australia* (2012), 135 [7.44].

the fact that, whatever arguments may be made against the adoption of proportionality review in Australia, the entire debate is somewhat premature in the absence of an instrument setting out rights, such as exists in every other common law country.

Consistency

Consistency is generally seen as a desirable attribute of judicial or executive decision-making where similar cases are being considered. This principle is often put on the basis that inconsistency tends to indicate arbitrariness, which is at the least a bad look[627] and at most an affront to the rule of law.[628] However, consistency is not an absolute good: the secret policy in *Lumba* was no less obnoxious for having been applied with almost total consistency. Therefore, consistency has generally been seen as an antidote to another long-standing administrative law principle, that each decision must be made on its merits. Like the principle in favour of consistency, the requirement that every decision be made on the merits of the case before the decision-maker cannot and ought not to be applied as it reads. The greatest reason for this is that decisions made by multiple decision-makers in high volume areas (such as immigration and taxation) are likely to be wildly inconsistent with each other if they are not fettered to some degree.

There is a need to strike a balance between the principles of consistency and merits-based decision-making,[629] although this dichotomy is not universally applied; Brennan J in *Drake (No2)* placed consistency within the merits.[630] One of the issues which is most apparent in this regard when considering soft law is that the requirement to have regard to the merits of every case is a stand alone ground of judicial review,[631] whereas the principle in favour of consistency is not. Submissions to the Administrative Review Council's recent inquiry into *Federal Judicial Review in Australia* argued that the ADJR Act should be amended to include reference to the principles of consistency discussed by Brennan J in *Drake (No2)*.[632] Mark Aronson recommended that the current text of ADJR Act s 5(2)(f) be replaced with the words "applying a rule or policy that invalidly purports to narrow the breadth or content of an applicable discretionary power",[633] a recommendation with which I agreed. My submission further stated that:[634]

> published soft law and policies must mean *something*; in other words, that those who use them as a regulatory tool ought not lightly to be able to apply any other standard. On the other hand, soft law cannot be applied as though it were hard law. The problem, in essence, is not simply regulation with soft law but the fact that the soft law applies asymmetrically: it operates as *de facto* hard law on those who are being regulated but is decidedly soft in its effect on the regulators.

627 The inconsistency in *Segal* was certainly a very bad look. The NSW Court of Appeal conceded as much but held regardless that it was open to the two decision-makers in question to reach opposite results in circumstances which were so similar as to be virtually identical: *Segal* (2005) 64 NSWLR 177.

628 See Brennan J's discussion of this point in *Drake (No2)* (1979) 2 ALD 634. His Honour took exception to inconsistency on the basis that it is "inelegant".

629 See E Johnson, ''Inconsistency' of Administrative Decisions' (2013) 72 *AIAL Forum* 50.

630 *Drake (No2)* (1979) 2 ALD 634, 639.

631 See eg *Green v Daniels* (1977) 13 ALR 1; *ADJR Act 1977* (Cth) s 5(2)(f).

632 *Drake (No2)* (1979) 2 ALD 634.

633 M Aronson, *Submission No 1 to Administrative Review Council Consultation Paper Judicial Review in Australia* (2011).

634 G Weeks, *Submission No 8 to Administrative Review Council Consultation Paper Judicial Review in Australia* (2011).

The ARC was not sufficiently persuaded that it needed to recommend the amendment to the ADJR Act that had been advocated, noting instead that "the courts are currently dealing with these issues".[635] I do not share the ARC's confidence in this regard.

Most of the attempts to deal with the issues thrown up by the tension between consistency and decision-making on the merits of each case have emerged from the academy rather than the courts. Bringing compromise between the two principles within the list of judicial review's grounds has not been easy;[636] others have preferred to see compromise reached outside judicial review.[637] What is clear is that attempts to compel an Australian public authority to act consistently with its soft law will, for the time being, succeed only where failure to do so is in breach of one or more other grounds of review. The readiness of English courts to direct the publication of guidelines and prevent departure from their terms, demonstrated in *Purdy v DPP* and *Lumba*, is yet to be followed in Australia.[638] It is unlikely that consistency will develop as a ground of review in Australia on that basis, given the generally minimalist approach of Australian courts to interfering in administrative decision-making.[639]

II: Substantive enforcement of legitimate expectations

Lord Denning MR first coined the term "legitimate expectation" in *Schmidt v Secretary of State for Home Affairs*,[640] at a time when English courts "were developing the modern law with respect to standing and the range of circumstances which attracted the rules of natural justice."[641] His Lordship's purpose in that case was to extend the coverage of procedural fairness to a deportee with an unexpired visa.[642] As a concept which confers merely procedural rights, 'legitimate expectation' now has little work to do[643] since the threshold test of the duty to accord procedural fairness is extremely broad;[644] indeed, sometimes in relation to domestic bodies[645] and in the so-called "club cases"[646] it is broader than the coverage of judicial review's remedies.

635 Administrative Review Council, *Federal Judicial Review in Australia* (2012), 139.

636 See eg L Zelenak, 'Should Courts Require the Internal Revenue Service to be Consistent?' (1985) 40 *Tax Law Review* 411; R Clayton, 'Legitimate Expectations, Policy and the Principle of Consistency' (2003) 62 *Cambridge Law Journal* 93.

637 See eg HJ Krent, 'Reviewing Agency Action for Inconsistency with Prior Rules and Regulations' (1997) 72 *Chicago Kent Law Review* 1187.

638 See Administrative Review Council, *Federal Judicial Review in Australia* (2012), 139.

639 The decision of the High Court in *MIAC v Li* (2013) 87 ALJR 618 may however present a glimmer of hope in this regard.

640 *Schmidt v Home Secretary* [1969] 2 Ch 149, 170-1. Brennan J subsequently noted, drily, that "this seed … has grown luxuriantly in the literature of administrative law": *Kioa* (1985) 159 CLR 550, 617. By contrast, Sir Anthony Mason considered that the concept "marked one of the significant advances of the past three decades" in administrative law: A Mason, 'Judicial Review' in P Keyzer and R Creyke (eds), *The Brennan Legacy* (2002) 38, 49.

641 *Lam* (2003) 214 CLR 1, 16 [47] (McHugh & Gummow JJ). See also A Mason, 'Procedural Fairness: its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 106.

642 At that time, this was not a legal entitlement which amounted to a "right or interest" in respect of which procedural fairness was owed, although Professor Aronson has noted that *Kioa* has long since extended procedural fairness to putative deportees, even if they have expired visas: M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 5. See also *Teoh* (1995) 183 CLR 273, 311-12 (McHugh J).

643 *NAFF v MIMIA* (2004) 221 CLR 1, 23 [68] (Kirby J). See also *Lam* (2003) 214 CLR 1, 16 [47]; 27-28 [81]-[83] (McHugh & Gummow JJ); 45-46 [140] (Callinan J); cf A Mason, 'Continuing Role of Legitimate Expectation' (2005) 12 *AJ Admin L* 103, 106.

644 See *Administrative Law Act 1978* (Vic) s 2 (definition of "Tribunal"); M Groves, 'Should the *Administrative Law Act 1978* (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451, 460-6.

645 JRS Forbes, *Justice in Tribunals* (3rd ed, Federation Press, 2010) Ch3.

646 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) (4th ed, 2009) [7.410].

The term ‘legitimate expectation’ has itself been judicially criticised as a “fiction”.[647] Professor Aronson commented on this topic that usually:[648]

> the subject could more accurately be said to have 'naturally'[649] or 'reasonably' assumed a certain course of conduct on the decision-maker's part or taken it for granted”[650] and would be better described as 'reasonable assumptions'. Therefore, the ‘legitimacy’ of the expectation is not relevant and therefore the “focus should be on whether the decision-maker's conduct in making and then breaching the expectation was fair in the circumstances.

In Australia, “there will usually be no unfairness if the subject was adequately forewarned of the decision-maker's change of course”, as was the case in *Quin*.[651] This outcome is possible even where no warning is given.[652]

Even prior to this modern criticism, Barwick CJ had stated that, while ‘legitimate expectation’ was an “eloquent phrase”, “I am bound to say that I appreciate its literary quality better than I perceive its precise meaning and the perimeter of its application”, indicating strong disapproval for its legal purpose.[653] His criticism did not meet with the Privy Council’s approval,[654] but Brennan J later concluded in *Kioa v West* that the term ‘legitimate expectation’ added nothing to the concepts of rights and interests for the purposes of determining to whom a duty of procedural fairness is owed,[655] noting that the appellant’s infant child could scarcely be said to have any ‘expectation‘ of a particular outcome. Perhaps it is this very awkwardness of expression which has seen the public law doctrine in England for *enforcing* ‘legitimate expectations‘ described more usually as ‘substantive unfairness’. It is certainly fair to say that whatever controversy remains around the term ‘legitimate expectation’ is now focused on the suitability of giving such expectations substantive effect rather than whether the term is a suitable guide to the circumstances in which procedural fairness is owed.

The following sections will analyse the approach to the substantive enforcement of legitimate expectations in several different jurisdictions.[656]

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647 *Teoh* (1995) 183 CLR 273, 310-14 (McHugh J); cf *NAFF v MIMIA* (2004) 221 CLR 1, 22 [67] (Kirby J).

648 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 5. In *Kioa,* Gibbs CJ stated simply that “the expression ‘legitimate expectation’ means ‘reasonable expectation’”: *Kioa* (1985) 159 CLR 550, 563.

649 *Lam* (2003) 214 CLR 1, 30-2 (McHugh & Gummow JJ).

650 *Lam* (2003) 214 CLR 1, 45-7 (Callinan J).

651 *Quin* (1990) 170 CLR 1.

652 *Lam* (2003) 214 CLR 1, 9-14 (Gleeson CJ).

653 *Salemi v Mackellar (No2)* (1977) 137 CLR 396, 404 (‘*Salemi (No2)*’).

654 In *Ng Yuen Shiu*, Lord Fraser of Tullybelton (on behalf of the Privy Council) said that “‘legitimate expectations’ in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis”: *Ng Yuen Shiu* [1983] 2 AC 629, 636. In *Kioa,* Gibbs CJ appeared to accept this reasoning and stated simply that “the expression ‘legitimate expectation’ means ‘reasonable expectation’”: *Kioa* (1985) 159 CLR 550, 563.

655 *Kioa* (1985) 159 CLR 550, 617-22.

656 These are by no means the only jurisdictions in which the concept of legitimate expectations has been influential; see A Brown, 'Justifying Compensation for Frustrated Legitimate Expectations' (2011) 30 *Law and Philosophy* 699, 700-1; M Cohn, 'Pure or Mixed? The Evolution of Three Grounds of Judicial Review of the Administration in British and Israeli Administrative Law' (2012) 6 *Journal of Comparative Law* 86, 99; G Quinot, 'Substantive Legitimate Expectations in South African and European Administrative Law' (2004) 5 *German Law Journal* 65, 68; S Schønberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, Oxford, 2000); R Flanagan, 'Legitimate Expectation and Applications: An Outdated and Unneeded Distinction' (2011) 17 *Canterbury Law Review* 283.

English developments

Going beyond the genesis of 'legitimate expectation' to define when a duty of procedural fairness is owed, a substantive element to the doctrine of legitimate expectations has developed in the UK, which nonetheless features a substantial conceptual overlap with the private law doctrine of estoppel as it applies to public authorities.[657] Harlow and Rawlings characterised this development as "procedure plus", in which procedural failures were corrected by courts with "the implication that the new decision must be favourable".[658] In *Reprotech*, Lord Hoffmann made the enigmatic statement that "public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet".[659] Furthermore, English cases have argued that it should do so, since the doctrine of substantive unfairness is more sensitive, and tailored to, the particular context of public law.[660] It may therefore be considered that, in the UK at least, the two doctrines will henceforth develop along essentially different paths.[661] Sir Anthony Mason has commented that Lord Hoffmann's *dictum*:[662]

> suggests that the role of private law estoppel in English public law, to the extent to which a private law estoppel would not be *ultra vires* the statute, is now subsumed in the doctrine of legitimate expectation, notably in the substantive protection of legitimate expectation, a concept which has no counterpart in Australian public law.

That there is common ground between the doctrines of equitable estoppel and substantive legitimate expectations is nonetheless implicit in Lord Hoffmann's approach.[663]

The watershed case for recognition in England that the holder of a legitimate expectation may sometimes be entitled to substantive protection of that expectation was *Coughlan*.[664] Miss Coughlan

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657 The development of this body of law was driven in the UK by migration, revenue and planning cases. In regard to the last of these, this development is contrary to the warning of Lord Scarman that "[i]n the field of property law, equity is a potent protection of private rights, operating on the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone.": *Newbury DC* [1981] AC 578, 616. See A Mason, 'The Place of Estoppel in Public Law' in M Groves (ed), *Law and Government in Australia: Essays in Honour of Enid Campbell* (2005) 160, 178.

658 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 224.

659 *Reprotech* [2003] 1 WLR 348, 66 [35].

660 *R (on the application of Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755, [40] ('*Bhatt Murphy*'); *Reprotech* [2003] 1 WLR 348, [6] (Lord Mackay of Clashfern); [33]-[35] (Lord Hoffmann). This claim is difficult to reconcile with the *dictum* of Lord Wilson that, if a public authority makes representations which lack clarity and are confusing, it may thereby fail to trigger the doctrine of legitimate expectations at all, regardless of whether or not the representations are relied upon: *Davies v HMRC* [2011] 1 WLR 2625, 2642 [39].

661 In Australia, where the doctrine of substantive legitimate expectations has been conclusively rejected by the High Court, this question is probably moot since at least one (and perhaps both) of those doctrines is not developing in Australia at all; see *Lam* (2003) 214 CLR 1. In the UK, by contrast, a doctrine of substantive unfairness evolved from the procedurally-focused legitimate expectation": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [7.150]. See M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470; C Stewart, 'Substantive Unfairness: a New Species of Abuse of Power?' (2000) 28 *Federal Law Review* 617; C Stewart, 'The Doctrine of Substantive Unfairness and the Review of Substantive Legitimate Expectations' in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge, 2007) 280; K Stern, 'Substantive Fairness' (2007) 29 *Aust Bar Rev* 266.

662 A Mason, 'Estoppel in Public Law' in M Groves (ed), *Law and Government in Australia* (2005) 160, 179.

663 Most notably, substantive effect can only be given to either an estoppel or a legitimate expectation if to do so would neither be *ultra vires* the relevant legislation nor impinge on the scope of a statutory discretion. See A Mason, 'Continuing Role of Legitimate Expectation' (2005) 12 *AJ Admin L* 103, 108. Matthew Groves has noted that Lord Templeman's speech in *Preston* states that, in special circumstances, it would be open to a court to hold that a tax authority could not collect revenue if it would be unfair or unjust to enforce that duty: *In re Preston* [1985] AC 835, 339 (Lord Templeman). See M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470, 476.

664 *Coughlan* [2001] 3 QB 213. Since *Coughlan*, the doctrine of substantive legitimate expectations has been considered repeatedly in the Court of Appeal: R Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Sweet & Maxwell, 2009), 44 (n 6). It has not been

was a severely disabled patient who, along with other similarly disabled patients, was moved to a purpose-built facility run by the National Health Service called Mardon House. These patients were told that this would be their home for life or as long as they chose. However, within five years, the NHS had made the policy decision that it would close Mardon House and instead transfer the care of Ms Coughlan to the defendant local health authority. Prior to making this decision, the NHS had consulted with the patients and had allowed them to voice their opposition to the proposed change. When the NHS decided to close Mardon House despite the promise made to the patients, Ms Coughlan sought judicial review of the decision and was successful at first instance in obtaining an order of *certiorari* to quash the decision to close Mardon House.

The Court of Appeal unanimously[665] dismissed the appeal brought by the North and East Devon Health Authority. In doing so, it outlined three "categories" of case in which a court exercising a judicial review function is able to provide a remedy for the disappointment of a legitimate expectation.[666] The first two of these categories – the court either having the capacity to require a public authority to reconsider its previous policy on the *Wednesbury* ground or ordering that there be an "opportunity for consultation where the policy in question has created a legitimate expectation – are not controversial.[667] The court held, however, that *Coughlan* fell into the third category,[668] as an "unjustified breach of a clear promise given by the health authority's predecessor to [Ms] Coughlan that she should have a home for life at Mardon House, [which] constituted unfairness amounting to an abuse of power by the health authority".[669] It therefore upheld the order of *certiorari* granted in the court below and thereby remedied the "unfairness" to Ms Coughlan by substantively enforcing her legitimate expectation that Mardon House would be her home for life.

In the years since *Coughlan*, the English courts have refined the principles expressed by the Court of Appeal in that case.[670] These propositions modify *Coughlan* by further conditioning any substantive enforcement of a legitimate expectation. The principles articulated in *Coughlan* have in some respects been wound back, but the basic principle remains that public law remedies will be available[671] where a public authority reneges on a representation in a way that is so unfair as to amount to an abuse of power.[672] What constitutes an abuse of power in any given circumstance is

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expressly approved by the House of Lords or the Supreme Court, but has been at least impliedly approved; see eg *Lumba v Home Secretary* [2012] 1 AC 245, 275 [69] (Lord Dyson).

665 Lord Woolf MR delivered the judgment of the court on behalf of himself and Mummery and Sedley LJJ.

666 *Coughlan* [2001] 3 QB 213, 241-2. See M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470, 478-9.

667 M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470, 478.

668 "Where the court considers that a lawful promise or practice has induced a legitimate expectation of *a benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.": *Coughlan* [2001] 3 QB 213, 242 (emphasis in original).

669 *Coughlan* [2001] 3 QB 213, 889.

670 Judge Langan set out a series of propositions which were said to represent the current state of the law in the UK on substantive unfairness in the course of his judgment in *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin). These are considered in detail in G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247, 264-7.

671 Albeit "[v]ery occasionally": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.160].

672 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) [89].

less than clear,[673] a large part of the reason why the term is treated with such suspicion[674] – or outright hostility[675] – particularly (but not only)[676] in Australia.

Prior to the Court of Appeal's decision in *Coughlan*, English cases had been edging towards allowing public law enforcement of legitimate expectations,[677] a process in which Lord Denning was particularly prominent.[678] *Coughlan* represented a leap, with the court recognising a substantively unfair outcome as a ground of judicial review. Professor Stewart has remarked that the facts of *Coughlan* were "perfect" for developing the nascent doctrine of substantive unfairness,[679] an assessment with which this author does not argue; Miss Coughlan was certainly a more sympathetic claimant than the applicant in *Lam*. Seen from another angle, however, they also demonstrate the shortcomings of using unfairness of a particular outcome as a determinant of whether there has been abuse of power sufficient for the decision of a public authority to be invalid.[680]

Professor Endicott examined this issue in the context of the related doctrine of proportionality,[681] which is a required feature of UK judicial reasoning at least in regard to human rights matters.[682] In short, Endicott argued that where courts are called upon to reconcile issues which are "incommensurable",[683] the courts are not truly engaged in a process of *balancing* the interests of the greater number against the damage done to the rights of the fewer because the material that would be placed on either side of the scales cannot effectively be compared with each other.[684] Some things which Endicott classifies as incommensurable can *never* be compared (because they are essentially different, or *radically* incommensurable) and some can be compared *sometimes* but it is often unclear in such cases what result a balancing exercise will reach (these are classified as *vaguely* incommensurable). Some comparisons are easy to reconcile (he uses the example that there is no public benefit that can justify acts of torture on individuals), others much more difficult or even

673 Although a helpful starting point, maladministration is not of itself a ground for judicial review: the question is only "has the public body acted unlawfully?": *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) [111]. See also M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470, 487-9.

674 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.100], [5.330], [6.650].

675 *Lam* (2003) 214 CLR 1, 23-4 [73], [76] (McHugh & Gummow JJ).

676 Laws LJ's exposition of the 'abuse of power' concept in *Nadarajah* [2005] EWCA Civ 1363 has endured plenty of criticism within the UK; see eg T Poole, 'Between the Devil and the Deep Blue Sea' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 15, 39-40; T Hickman, *Public Law after the Human Rights Act* (2010) 279-81; cf Lord Phillips' ringing endorsement in *Lumba v Home Secretary* [2012] 1 AC 245, 344-5 [311]-[312].

677 See the account in C Stewart, 'Substantive Unfairness' in M Groves and HP Lee (eds), *Australian Administrative Law* (2007) 280, 283-5.

678 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.630] and the text accompanying nn 560 - 572 above.

679 C Stewart, 'Substantive Unfairness' in M Groves and HP Lee (eds), *Australian Administrative Law* (2007) 280, 286.

680 See M Groves, 'The Surrogacy Principle and Motherhood Statements in Administrative Law' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008) 71, 90-7. Professor Groves describes many of the English cases which use the concept of abuse of power as a determinant of validity as "result in search of a principle": M Groves, 'The Surrogacy Principle and Motherhood Statements in Administrative Law' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State* (2008) 71, 92.

681 T Endicott, 'Proportionality and Incommensurability' (Paper presented at the Public Law Discussion Group, Oxford Law Faculty, 2 February 2012).

682 *Daly v Home Secretary* [2001] 2 AC 532, 546 [26] (Lord Steyn). See the text accompanying nn 600 - 623 above.

683 For example, whether rules issued by the Home Office with the purpose of reducing incidences of forced marriage by restricting the issue of visas to married couples unless both are over the age of 21 result in acts which are invalid for breach of the *Human Rights Act*, or whether a broken promise to a few people should prevent administrative changes which are intended to benefit the community as a whole. The first example refers to *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, ('*Quila v Home Secretary*'). Specifically, the breach alleged (and found) in *Quila* was of Article 8 of the *European Convention on Human Rights*. The second example refers broadly to the facts of *Coughlan* [2001] 3 QB 213.

684 Cf A Barak, *Proportionality* (2012) Ch12.

impossible. The point is that judicial attempts to reconcile the loss suffered by an individual as against the benefit to society caused by the same conduct is generally fraught with uncertainty because, even if the two are not incommensurable, it is always difficult to *measure* one against the other.[685] This reality was not obvious on the face of Lord Steyn's unadorned statement that "the intensity of review is somewhat greater under the proportionality approach" than under the traditional grounds of judicial review.[686]

There is no doubt that Ms Coughlan had every reason to feel that she had been treated rather badly by the NHS, which had reneged on its offer of a "home for life" within five short years. In other circumstances, she may have been able to argue successfully that she was entitled to an equitable remedy, although on the facts she would not have been able to demonstrate detrimental reliance on the NHS' representation, since she had not altered her position on the faith of it.[687] That she sought substantive redress through judicial review for the disappointment of her legitimate expectation meant that her interests would need to be 'weighed' by the court against the public interest more generally, raising Endicott's concerns about incommensurability. The court held that this could be done by assessing the fairness of the *outcome* to Ms Coughlan against the public interest.[688] Necessarily, however, this pits the immediately apparent disappointment of a severely disabled woman against the somewhat more abstract interest that the public had in the NHS being run efficiently and cost effectively.[689]

It is scarcely surprising that when a comparison of that sort is made, it becomes more difficult to find an "overriding public interest" to justify the breach of the NHS promise,[690] although Endicott pointed out that difficult or impossible comparisons (in the sense of a court having trouble "finding rational grounds for choosing between two alternatives") is not necessarily the same as incommensurability, which describes a situation where two considerations do not belong in the same 'set of scales'. Where there is no clear guidance about the elements which will ground a finding of abuse of power, there is always a chance that such a finding is not made upon only objective considerations, but Endicott argued that "we actually need a system that authorises judges to balance the unbalanceable." Indeed, we have a judicial system which does not spare judges from the duty of

685 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 226.

686 *Daly v Home Secretary* [2001] 2 AC 532, 547 [27]. Lord Steyn had noted the fundamental differences between proportionality reasoning and the common law *Wednesbury* ground, as to which see A Barak, *Proportionality* (2012) 192-3. These differences had kept proportionality out of UK law altogether until the passage of the *Human Rights Act 1998* (UK).

687 This was held to be the position of the applicant in *Kurtovic* (1990) 21 FCR 193, 196 (Neaves J); 218 (Gummow J). In this case, the Full Court of the Federal Court of Australia rejected the respondent's argument that the appellant Minister had, in effect, promised not to deport him if he was convicted of no further criminal offences. See G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247, 252-9. However, the Court of Appeal expressed a different view on the facts of *Coughlan* [2001] 3 QB 213, 882 (Lord Woolf MR). With respect, it is not clear from the facts that Ms Coughlan had any genuine alternative to the course of action which she in fact adopted on the faith of the NHS' representation; see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.640].

688 *Coughlan* [2001] 3 QB 213, 876.

689 "Where one is dealing with a promise made by an authority a major part of the problem is that it is often not adequate to look at the situation purely from the point of view of the disappointed promisee who comes to the court with a perfectly natural grievance": *Bibi* [2002] 1 WLR 237, [35].

690 *Coughlan* [2001] 3 QB 213, 883.

reaching a decision, even where there is no rational basis for doing so[691] or where finding an answer is beyond the capacity of science or medicine.[692] The concept of "legal certainty" is entirely different from objective certainty, a legal fiction which has been appreciated at the highest level of the Australian judiciary for many decades.[693] Endicott argued that allowing the judiciary sufficient flexibility to decide difficult matters is something we ought to celebrate.

To the extent that he is positing that to leave these matters to the courts is the least worst option, Endicott makes a sound case. The opposing case, however, is one with which he does not deal: must this be the job of the courts? To put the problem another way, why should government *not* legitimately be able to put rules in place which exercise its discretion to prosecute a certain policy goal which it has decided is of greater importance than the infringements upon the rights of a smaller group of people? Does the fact that a choice has been made deliberately by our elected representatives count for something when reconciling the (largely abstract) public interest against the (immediate and apparent) breach to the rights of an individual?

A final point worth making in relation to *Coughlan* is that the English recognition of "substantive unfairness" as a form of maladministration deserving of a judicial review remedy has not led to the recognition of a tort of frustrating legitimate expectations.[694] As Chapter 4 makes clear, the fact that there has been maladministration – or even an 'abuse of power' – is yet to translate reliably into a right to compensation for the losses incurred thereby. Given the immense capacity for the "substantive unfairness" ground as it has developed in England to result in expense for the defendant public authority, it is arguable that both parties would often be better served by a remedy in compensation.[695] At any rate, courts ought to be given the option of choosing the most efficacious remedy for the applicant, given the relative costs to the public authority, from ordering compensation or "allowing the representation to bind".[696]

691 In a time when contractual damages were still assessed by juries, Street CJ held that the mere fact that damages would be difficult to assess on a rational basis was insufficient to excuse the jury from performing its obligation of assessing damages: *Howe v Teefy* (1927) 27 SR (NSW) 301, (Supreme Court of New South Wales). This principle has long been accepted as applying to judges.

692 *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111, 121-2 [6] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel & Bell) ('*Amaca v Ellis*').

693 "There are few, if any, questions of fact that courts cannot undertake to inquire into. In fact it may be said that under the maxim *res iudicata pro veritate accipitur* courts have an advantage over other seekers after truth. For by their judgment they can reduce to legal certainty questions to which no other conclusive answer can be given.": *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 340 (Dixon J) ('*Bank Nationalisation Case*'). The unanimous High Court cited this passage with approval in *Amaca v Ellis* (at 122 [6]). Dixon J went on to point out that "[it] would, I should imagine, be necessary completely to satisfy a court of the legal, factual and [relevantly to the case before him] economic considerations which made it inevitable" that a certain proposition should be reduced to legal certainty.

694 A Brown, 'Frustrated Legitimate Expectations' (2011) 30 *Law Philos.* 699, 700 (text accompanying n 2).

695 PP Craig, *Administrative Law* (7th ed, 2012) 715.

696 PP Craig, *Administrative Law* (7th ed, 2012) 716.

Responses in Canada and South Africa

Canada

The Supreme Court of Canada rejected the variation of the legitimate expectation doctrine articulated in *Coughlan* in *Mount Sinai*,[697] albeit neither as forcefully nor as completely as the High Court of Australia was later to do.[698] Specifically, the Supreme Court rejected the notion that it should be the judiciary, rather than the Minister, which determines whether the public interest overrides substantive enforcement of a legitimate expectation. The majority judgment, given by Bastarache J, relied essentially upon the interpretation that the Minister's statutory discretion had already been exercised,[699] and consideration of whether that exercise of discretion had been validly reversed,[700] therefore making it unnecessary to decide whether the doctrines of substantive unfairness or public law estoppel had any application. Binnie J, whose judgment was also delivered on behalf of McLachlin CJ, preferred to view the relationship (and, crucially, the communications) between the Minister and the respondent Hospital Centre as the vital issue.[701] Like Bastarache J, his Honour found for the Hospital Centre and joined in dismissing the Minister's appeal, leaving in place the order of *mandamus* issued by the Court of Appeal for Quebec requiring the Minister to issue the permit which had been promised to the Hospital Centre.

Binnie J reached this conclusion without resort to the reasoning used in *Coughlan*, although his Honour did so on the ground of *Wednesbury* unreasonableness,[702] which has traditionally been very nearly as contentious in Australia.[703] Moreover, upon closer inspection it becomes clear that Binnie J was still prepared for the courts to intervene to correct executive decision-making.[704] The difference between *Mount Sinai* and *Coughlan* was that the court's intervention depended not on the existence of a legitimate expectation but on the court finding that the decision of the Minister or other executive officer was patently unreasonable (which is to say unreasonable in the *Wednesbury* sense).

Binnie J was at pains to deny this, stating that:[705]

> Where Canadian law parts company with the developing English law is the assertion, which lies at the heart of the *Coughlan* treatment of *substantive* fairness, of the centrality of the judicial role in regulating government policy.

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697 *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281, ('*Mount Sinai v Quebec*'). Keyes cited a case which pre-dates *Mount Sinai v Quebec* in which the Federal Court of Appeal held that "statements outlining procedural steps in an administrative process … bind government officials through the doctrine of legitimate expectations": JM Keyes, *Executive Legislation* (2nd ed, 2010) 53. This precedent must now be understood in light of the Supreme Court's decision in *Mount Sinai v Quebec*.

698 The Supreme Court's refutation of *Coughlan* did not allay completely the suspicions of the Australian High Court that it had not done so sufficiently; McHugh and Gummow JJ later commented that the "Supreme Court of Canada appears to have gone further in allowing … a doctrine [of substantive legitimate expectations]" than either Australia or the United States: *Lam* (2003) 214 CLR 1, 22 (n 49) (McHugh & Gummow JJ).

699 *Mount Sinai v Quebec* [2001] 2 SCR 281, [101]-[107].

700 *Mount Sinai v Quebec* [2001] 2 SCR 281, [108]-[114].

701 *Mount Sinai v Quebec* [2001] 2 SCR 281, [4].

702 Binnie J in fact found that the Minister's decision "was 'patently unreasonable in terms of the public interest": *Mount Sinai v Quebec* [2001] 2 SCR 281, [64].

703 See G Weeks, 'Expanding Role of Process' (2008) 15 *AJ Admin L* 100, 107-11; cf *MIAC v LI* (2013) 87 ALJR 618.

704 See G Huscroft, 'From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review' in C Flood and L Sossin (eds), *Administrative Law in Context* (2nd ed, Emond Montgomery Publications, 2012) 147, 169-70.

705 *Mount Sinai v Quebec* [2001] 2 SCR 281, [62] (original emphasis).

His Honour quoted Lord Woolf's *dictum* from *Coughlan* that the doctrine of legitimate expectation would only sound in substantive relief "if there is an overriding public interest. Whether there is an overriding public interest is a question for the court."[706] Binnie J then stated that:[707]

> In Canada, at least to date, the courts have taken the view that it is generally the Minister who determines whether the public interest overrides or not. The courts will intervene only if it is established that the Minister's decision is patently unreasonable in the sense of irrational or perverse or (in language adopted in *Coughlan*) "so gratuitous and oppressive that no reasonable person could think [it] justified".[708]

Binnie J rejected the explicit language and overtly interventionist approach of *Coughlan* but at the same time allowed for judicial intervention into executive decision making under another process. His Honour rejected a system under which the courts could enforce promises which it was rational to break, settling for the established *Wednesbury* ground, which allows courts to intervene only when a decision-maker has made a decision so bad that it amounts to a failure to exercise his or her jurisdiction at all.

This was immensely clever, because it did not look like Binnie J was rending Canada's constitutional principles asunder in order to garner ever more power to the courts. His Honour was swift to note that "[a]t the high end [the English cases on legitimate expectations] represent a level of judicial intervention in government policy that our courts, to date, have considered inappropriate in the absence of a successful challenge under the *Canadian Charter of Rights and Freedoms*."[709] Binnie J did not argue for intervention in these terms but ensured that a court following his decision in *Mount Sinai* could nonetheless use the flexibility of the *Wednesbury* unreasonableness doctrine to intervene on principled grounds where the court thought it appropriate to do so.

Could Australia follow this reasoning to allow for a level of judicial intervention notwithstanding the constitutional problems identified in *Lam*? As with so many innovations, it has been assumed that the High Court might but probably wouldn't.[710] Many of the same constitutional considerations which caused the High Court to conclude that it is impossible for Australia to adopt the doctrine of substantive unfairness had also led it to adopt a highly restrictive approach to *Wednesbury* unreasonableness, which was only applicable to 'absurd' decisions and, in practice, had virtually ceased to be applied at all.[711] This is no longer the position following *MIAC v Li*, which saw the High Court apply a much broader conception of the *Wednesbury* ground of review. If the breadth of

706 *Coughlan* [2001] 3 QB 213, 249.

707 *Mount Sinai v Quebec* [2001] 2 SCR 281, [63]. His Honour cited the circumstances in which "unreasonableness" had been found in *Baker v Canada* [1999] 2 SCR 817.

708 *Coughlan* [2001] 3 QB 213, 247. Lord Woolf MR was referring to the decision of Lord Russell of Killowen CJ in *Kruse v Johnson* [1898] 2 QB 91. His Lordship made it clear, however, that these descriptors all now fall within the meaning of *Wednesbury* unreasonableness.

709 *Mount Sinai v Quebec* [2001] 2 SCR 281, [27].

710 The remark in *Lam* that the "Supreme Court of Canada appears to have gone further in allowing … a doctrine [of substantive legitimate expectations" than Australia clearly took account of this expansionist employment of *Wednesbury*; see *Lam* (2003) 214 CLR 1, 22 (n 49) (McHugh & Gummow JJ).

711 See G Weeks, 'Questions of Quality' (2007) 14 *AJ Admin L* 76.

Wednesbury's coverage is more elastic than had been believed, there is no reason why it should not be used in Australia to support reasoning of the sort advanced by Binnie J in *Mount Sinai v Quebec*.

South Africa

The doctrine of legitimate expectations was officially adopted into South African law in *Administrator, Transvaal v Traub*,[712] but it has been advanced particularly by the more recent creation of rights under the 1996 *Constitution*[713] and the constitutionally mandated PAJA.[714] Section 3(1) of the PAJA expressly requires that "administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair", which would seem to guarantee the role of legitimate expectations in South African law. It does not follow that South African courts will give *substantive*, rather than merely procedural, protection to legitimate expectations. Professor Hoexter noted that they have done so on a number of occasions,[715] but suggested that these instances seem to have been unconscious.[716]

The current state of South African law[717] in this regard is summarised in the Supreme Court of Appeal's decision in *Duncan*.[718] In that case, the appellant had operated as a line fisherman since 1995 but, in 2005, had his application for a long-term licence to undertake commercial fishing for traditional line fish rejected by the Chief Director of the Department of Environmental Affairs and Tourism (the second respondent), a decision which was later affirmed by the Minister (the first respondent), on the basis that his vessel, *MFV Endeavour*, was not a "suitable line fish vessel" as that term was defined in guidelines issued by the Department. The appellant's judicial review application in the Cape High Court was unsuccessful.

Before the Supreme Court of Appeal, the appellant argued that he had a legitimate expectation that he should continue to have a fishing licence granted to him based upon several circumstances. The first of these was that he had held a licence since 1995 and had, until 2001, fished both for line fish and squid. However, at that time the Minister imposed restrictions which obliged the appellant to choose whether he would seek a licence in respect of either line fish or squid, but would not allow him to hold both. He chose to seek a medium-term line fishing licence, which was granted for a period ending in December 2005. Secondly, the grant of a medium-term licence created the legitimate

712 *Administrator of the Traansvaal v Traub* [1989] 4 All SA 924 (AD), ('*Traub*'). See C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 363, 394-5.

713 *Constitution of the Republic of South Africa 1996*.

714 *Promotion of Administrative Justice Act 2000* (South Africa). The PAJA is an Act to "give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the *Constitution of the Republic of South Africa1996*".

715 C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 421.

716 C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 432.

717 See generally C Hoexter, *Administrative Law in SA* (2nd ed, 2012) 432-6.

718 *Duncan v Minister of Environmental Affairs and Tourism* 2010 (6) SA 374 (SCA), ('*Duncan*'). About six months earlier, O'Regan J commented in the Constitutional Court: "In our law, where an applicant can show that government has acted in a manner inconsistent with the existence of a legitimate expectation (whether the expectation is an expectation of a fair process or a substantive benefit) without giving the applicant an opportunity to be heard, the applicant may launch review proceedings to set aside the government conduct. Our courts have expressly refrained from determining the question whether a legitimate expectation might give rise to a substantive benefit, although the English courts have developed a doctrine of substantive legitimate expectation.": *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC), [306] (O'Regan J, citations omitted).

expectation that the respondents considered the *Endeavour* to be a 'suitable vessel'. Thirdly, while the guidelines indicated that a suitable vessel would be fewer than 10 metres long, and the *Endeavour* was over 16 metres long, the appellant alleged that his treatment was inconsistent with the fact that the operator of the *Kowie*, a vessel over 13 metres long, had been granted a long-term line fishing licence. Furthermore, the guidelines indicated that the requirement of access to a suitable vessel would be applied "flexibly".

Giving the judgment of the Court,[719] Brand JA remarked that the time would presumably come, in an appropriate case, "for our courts to cut the Gordian knot" regarding whether the recognition of legitimate expectations in *Traub* and the PAJA would allow for such expectations to be enforced substantively:[720]

> But this is not that case. Even if substantive protection of legitimate expectations were to be recognised as part of our law, the appellant has in my view failed to lay the foundation for his claim of a legitimate expectation to acquire a long term licence in respect of the *Endeavour*.

His Honour rejected each of the appellant's contentions. The first, that he was obliged to choose between having a chance to obtain a licence to fish for line fish or squid but not both, did not include:[721]

> any intimation by the Department that if he gave up squid he could expect to acquire a right to catch line fish. Giving up squid was a precondition for his application in 2001, not a guarantee that the application would be granted. Hence the appellant gave up squid at his own risk and because he thought that line fish would be more profitable.

Brand JA considered that only the second and third contentions could even possibly amount to expectations created by the Chief Director or the Department. His Honour rejected the view that the earlier grant of a medium-term fishing right created a reasonably-held legitimate expectation that a long-term licence would subsequently be granted. His Honour noted that the appellant "knew that the concept of a medium term licence had been introduced as a precursor to long term licences and to provide the Department with a window of observation and research" to assess the extent and consequences of over-fishing off the South African coast.[722] Additionally, any legitimate expectation that the medium-term licence would automatically be converted into a long-term licence would be in direct conflict with the applicable statute, which stated that a licence "shall be valid for the period determined by the Minister . . . whereafter it shall automatically terminate and revert back to the State to be reallocated".[723]

The third contention in truth made two separate points, although this analysis is not made explicit in the reasons of Brand JA. The first is that the guidelines as to what would be a 'suitable vessel' would be applied flexibly and that, therefore, the fact that the *Endeavour* was substantially longer than 10

719 Streicher, Mlambo, Malan JJA and Leach AJA concurred in the judgment delivered by Brand JA.

720 *Duncan* 2010 (6) SA 374 (SCA), [14].

721 *Duncan* 2010 (6) SA 374 (SCA), [18].

722 *Duncan* 2010 (6) SA 374 (SCA), [17].

723 *Duncan* 2010 (6) SA 374 (SCA), [19].

metres ought not to prevent it from being considered 'suitable'. The second was that the appellant had been treated inconsistently with the operator of the *Kowie*. The latter point fell apart once the specifications and capabilities of the respective vessels, and those that are presumptively 'suitable' under the guidelines, were considered. The *Endeavour* was a 'freezer boat', with significantly larger gross tonnage, hold capacity and crew than either ski-boats or traditional wooden deck boats (or 'chukkies'), like the *Kowie*.[724] Whereas ski-boats and chukkies need to return to shore each night and therefore have a maximum range of 80 kilometres, freezer boats can stay at sea for up to two weeks, with a maximum range of 2,000 kilometres.[725] Any inconsistency in the treatment of the *Endeavour* in comparison to the *Kowie* was therefore explicable by the fact that they were very different vessels.

The 'flexible' application of the guidelines was always subject to the fact that the Chief Director had a discretionary power to grant long-term licences. That discretion was not fettered by the guidelines and was able to be exercised with regard to departmental policy. By 2005, the Department's policy with regard to granting long-term line fishing licences took into account the pressure placed on fish stocks by vessels with the range of the *Endeavour* and had the objective of allowing fish stocks to replenish beyond the range of ski-boats and chukkies.[726] To enforce a substantive legitimate expectation that the appellant be granted a long-term line fishing licence would amount to the court overturning that policy and removing that discretion from the executive. *Duncan* represents a fairly traditional approach to the possibility that legitimate expectations might be substantively enforced, although this conclusion owes much to the fact that the facts were scarcely likely to tempt the court to intervene.[727]

Interestingly, Brand JA also took a conservative approach to the appellant's secondary argument that, having held a licence for the *Endeavour* since 2001, he was entitled to be heard prior to any finding that that vessel was no longer 'suitable', notwithstanding the fact that it did not strictly comply with the guidelines.[728] For Australians, this is immediately reminiscent of the successful argument made by the appellant in *FAI v Winneke*.[729] However, this argument was rejected by Brand JA on the basis that "any legitimate expectation of an opportunity to persuade the respondents that the *Endeavour* was a suitable vessel, had been satisfied" when the Chief Director considered the appellant's submissions that the criteria within the guidelines ought not to be applied to the *Endeavour*.[730]

Despite treating the doctrine of substantive legitimate expectations "cautiously"[731] so far, it seems likely that South Africa will sooner or later accept that legitimate expectations are capable of

724 *Duncan* 2010 (6) SA 374 (SCA), [4], [11].

725 *Duncan* 2010 (6) SA 374 (SCA), [9].

726 *Duncan* 2010 (6) SA 374 (SCA), [10].

727 Cf *Coughlan* [2001] 3 QB 213.

728 *Duncan* 2010 (6) SA 374 (SCA), [21].

729 *FAI* (1982) 151 CLR 342.

730 *Duncan* 2010 (6) SA 374 (SCA), [22].

731 C Hoexter, *Administrative Law in SA* (2nd ed, 2012), 432.

substantive enforcement.[732] This result will probably flow from the express constitutional recognition of legitimate expectations, but will cause South African law to need to deal with a variety of consequential legal problems.[733] As we will see below, Australian courts will avoid these problems altogether due to an emphatic rejection of substantively enforceable legitimate expectations, also for constitutional reasons.

Australian resistance to the development of substantive fairness

It seems most unlikely that an Australian court could agree with the proposition that "the requirements for legitimate expectation in public law [should] stand separately from private law doctrines such as estoppel ... being more sensitive, and tailored to, the particular context of public law".[734] Indeed, for the reasons stated by the High Court in *Lam*, it is impossible for an Australian court to weigh substantive unfairness done to an individual against an "overriding interest" in a public authority being able to disappoint a legitimate expectation as a matter of public law, at least without a "revolution in Australian judicial thinking".[735] The English courts, by contrast, see issues like whether the decision challenged is in the macro-political field;[736] and / or whether the decision challenged involves social or political value judgments as to priority of expenditure;[737] and / or the nature and clarity of the promise or prior practice in question[738] as factors shaping the discretion to grant relief, rather than a bar to jurisdiction. One may well ask whether a public law remedy for disappointment of a legitimate expectation is necessary at all, particularly if alternative remedies are available, for example in equity.[739]

There is a tension between the doctrine of substantive enforcement of legitimate expectations and the rule against fettering discretions,[740] which is essentially the same as the tension between an estoppel and a statutory discretion of a public character.[741] The *Southend-on-Sea* principle prevents a court from enforcing an estoppel such as to fetter a statutory discretion. It is difficult to see, as a matter of principle, why the equivalent position in public law should be otherwise. The factor that is conclusive of this issue in Australia is the constitutional entrenchment of the separation of powers doctrine, which defines and confines judicial power in equal measure.[742]

732 C Hoexter, *Administrative Law in SA* (2nd ed, 2012), 431; G Quinot, 'Substantive Legitimate Expectations in South African and European Administrative Law' (2004) 5 *German LJ* 65, 66.

733 J Campbell, 'Legititmate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 120 *South African Law Journal* 292, 294-5.

734 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) [90]; cf K Stern, 'Substantive Fairness' (2007) 29 *Aust Bar Rev* 266. Dr Stern appeared as junior counsel for the intervening Royal College of Nursing in *Coughlan* [2001] 3 QB 213.

735 A Mason, 'Continuing Role of Legitimate Expectation' (2005) 12 *AJ Admin L* 103, 108.

736 *Bibi* [2002] 1 WLR 237, [23]; *R (on the application of Begbie) v Department Of Education & Employment* [2000] 1 WLR 1115, 1131 (Sedley LJ) ('*Begbie*').

737 *Bibi* [2002] 1 WLR 237, [64].

738 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No2)* [2009] 1 AC 453, [182] (Lord Mance, dissenting as to the result).

739 See G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247.

740 P Sales and K Steyn, 'Legitimate Expectations in English Public Law: An Analysis' [2004] *Public Law* 564. See above in Part II.

741 *Southend-on-Sea* [1962] 1 QB 416, 423 (Lord Parker CJ).

742 M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470, 507.

The classic modern exposition of the legal principle involved is that of Brennan J in *Quin*.[743] Brennan J's reasoning is fundamentally at odds with the proposition of the Court of Appeal in *Coughlan* that a court can weigh "the requirements of fairness against any overriding interest relied upon for [a] change of policy".[744] Rather, on this orthodox view, an Australian court exercising judicial review cannot simply "cure administrative injustice", regardless of whether it outweighs the benefits of valid administrative action, because the merits of a decision fall outside its jurisdiction.[745] This reasoning was not applied directly to the issue of substantive unfairness as a ground of judicial review in *Lam*. Rather, it was held that the constitutional issues did not arise because of the limited scope of 'legitimate expectations'.[746]

In 1990, judgments by the Full Federal Court in *Kurtovic*[747] and the High Court in *Quin*[748] rejected cases brought by two very different applicants who each sought to have a public authority estopped from resiling from a representation it had made to them. Those cases, and particularly the judgments of Gummow J (in *Kurtovic*) and Mason CJ (in *Quin*), are the last of any note to have considered the concept of public law estoppel in Australia and they are generally viewed as standing against its availability.[749] However, neither case in fact rejected the possibility of an estoppel being raised against a public authority out of hand.

Professor Allars has argued that the "clear message of *Kurtovic* and *Quin* is a judicial discomfort"[750] with the principle that an estoppel can *never* be "raised to prevent the performance of a statutory duty or hinder the exercise of a statutory discretion".[751] She argues that "both Gummow J and Mason CJ sought to preserve the separation of powers", whose protection is inherent in the principle that an estoppel cannot be enforced such as to require the performance of an *ultra vires* act, "but to leave the door open to do individual justice".[752] While, in the two decades since the decisions in *Kurtovic* and *Quin*, there has not been an Australian case which explores the possibility of a residual jurisdiction to raise an estoppel against a public authority in regard to the exercise of a statutory power, nor has there been a case which shuts the door that was left open in *Kurtovic* and *Quin*.[753] In appropriate

743 *Quin* (1990) 170 CLR 1, 35-6. This passage is extracted at n 208 above. Brennan J further stated that "if an express promise be given or a regular practice be adopted by a public authority, and the promise or practice is the source of a legitimate expectation, the repository is bound to have regard to the promise or practice in exercising the power, and it is unnecessary to enquire whether those factors give rise to a legitimate expectation. But the court *must stop short of compelling fulfilment* of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power.": *Quin* (1990) 170 CLR 1, 40 (emphasis added). See *Lam* (2003) 214 CLR 1, 16-17 [48] (McHugh & Gummow JJ).

744 *Coughlan* [2001] 3 QB 213, 872.

745 See M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470, 507.

746 *Lam* (2003) 214 CLR 1, 21 [65] (McHugh & Gummow JJ).

747 *Kurtovic* (1990) 21 FCR 193.

748 *Quin* (1990) 170 CLR 1.

749 G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247, 254.

750 M Allars, 'Tort and Equity Claims Against the State' in PD Finn (ed), *Essays on Law and Government - Volume 2: The Citizen and the State in the Courts* (1996) vol 2, 49, 93.

751 M Allars, 'Tort and Equity Claims ' in PD Finn (ed), *Essays on Law and Government - Vol 2* (1996) vol 2, 49, 86.

752 M Allars, 'Tort and Equity Claims' in PD Finn (ed), *Essays on Law and Government - Vol 2* (1996) vol 2, 49, 93.

753 "The possibility that estoppels may apply in public law is not foreclosed by the current state of authority in Australia": RS French, 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *AIAL Forum* 1, 11.

circumstances, a court is still able to provide a remedy[754] where an equitable estoppel has been raised against a public authority.[755]

The same cannot be said of the substantive enforcement of legitimate expectations in Australian courts as a matter of public law: the High Court in *Lam* slammed that particular door very firmly indeed,[756] despite the fact that Mr Lam had not attempted explicitly to rely on *Coughlan*.[757] The High Court's disapproval of the "legitimate expectation" doctrine has not changed in the decade since *Lam*; indeed, recent judicial statements of the subject have been even sterner.[758] If the High Court adopts proportionality reasoning or develops the *Wednesbury* ground to cover instances of massive injustice, it will still not be able to substitute its decision for that of the holder of the statutory or prerogative discretion under consideration.[759] It is arguable that, unless the Court has heard argument to the effect that it should give substantive effect to a legitimate expectation,[760] the point is now sufficiently clear that further judicial exposition serves only as a distraction from the real issues. While the courts may still have some scope to provide an equitable remedy where an estoppel has been raised against a public authority, *Lam* means that the parallel remedial jurisdiction in judicial review is definitively off the table in Australia, at least for the foreseeable future.

One basis upon which the court rejected Mr Lam's application for *certiorari* quashing the decision to cancel his visa was that he had not been shown procedural unfairness simply because he had a legitimate expectation that the respondent Minister's delegate would contact the carer of Mr Lam's children and this expectation was disappointed. Mr Lam had a right to a fair hearing before the decision to cancel his visa was made.[761] This he received, notwithstanding the disappointment of his expectation that the delegate would contact his children's carer. As Gleeson CJ noted, there was no suggestion that Mr Lam was deprived of the opportunity to put his full case and, therefore, no practical injustice had resulted from the disappointment of his expectation.[762]

754 Ibid.

755 The nature of the available remedy is considered in G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247.

756 Since then, Finn J has held in the Federal Court that it was not open to him even to entertain any cause of action based on a claim that a substantive legitimate expectation was not satisfied: *Rush v Commissioner of Police* (2006) 150 FCR 165, 185 [75] (Finn J, '*Rush*').

757 *Lam* (2003) 214 CLR 1, 9-10 [28] (Gleeson CJ). Mike Taggart commented that the court had "done about as much as judges can by way of *obiter dicta* in a case where the point was not argued to overrule" *Teoh* (1995) 183 CLR 273. However, the precedent value of *Teoh* and *Lam* must now be understood in light of the High Court's view that "seriously considered *dicta* of a majority of this Court" ought not to be overruled by intermediate appellate courts: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 ('*Farah Constructions v Say-Dee*').

758 See *Kaur v MIAC* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ); cf the comments of the High Court on the procedural protection that may be granted to legitimate expectations in the *Offshore Processing Case* (2010) 243 CLR 319, 352 [75]. These comments are consistent with *Lam* (2003) 214 CLR 1. However, their tone is considerably more neutral than the approach of members of the court either in that case or in *Kaur*.

759 *MIAC v Li* (2013) 87 ALJR 618, 637-8 [66] (Hayne, Kiefel and Bell JJ).

760 In *Kaur*, while French CJ and Kiefel J also referred to legitimate expectations, it is notable that they did so only to describe the coverage of the doctrine of procedural fairness: *Kaur v MIAC* (2012) 246 CLR 636, 642 [3].

761 *Ng Yuen Shiu* [1983] 2 AC 629, 636

762 *Lam* (2003) 214 CLR 1, 13-14 [36]-[38] (Gleeson CJ).

Additionally, the joint judgment of McHugh and Gummow JJ noted explicitly the nature of the Australian *Constitution* in comparison to the constitutional arrangements of the UK. Their Honours considered[763] the comment of Laws LJ in *Begbie* that:[764]

> Abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law. It may be said to be the rationale of the doctrines enshrined in the *Wednesbury* and *Padfield* [*v Minister of Agriculture, Fisheries and Food* [1968] AC 997] cases, of illegality as a ground of challenge, of the requirement of proportionality, and of the court's insistence on procedural fairness. It informs all three categories of legitimate expectation cases as they have been expounded … in *Coughlan*.

McHugh and Gummow JJ commented that:[765]

> The notion of 'abuse of power' applied in *Coughlan* appears to be concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards now identified by the English common law. These standards fix upon the quality of the decision-making and thus the merits of the outcome.

Their Honours expressly contrasted the English and French public law systems with that which exists under the Australian *Constitution* and held that the "distinction between jurisdictional and non-jurisdictional error which informs s 75(v)"[766] provides a further reason why the role of Australian courts "does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration".[767] By way of contrast, Kirby J had earlier floated the idea of judicial review for "serious administrative injustice" in his dissenting judgment in *Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002*,[768] which would operate as a minimum normative standard, in the manner of "abuse of power". Professor Groves has argued convincingly, however, that this suggestion, although "interesting", cannot be applied in Australia while the doctrine of jurisdictional error is so firmly embedded in the jurisprudence of the High Court.[769] That is a process which shows no signs of imminent reversal.[770] *Lam*'s reasoning cannot co-exist with a ground of review such as that expressed by Kirby J.

The best understanding of the approach to substantive unfairness expressed by the High Court in *Lam* should therefore be seen as twofold: first, 'legitimate expectations' may have a role to play in determining when a duty of procedural fairness is owed but, in that case, the focus of the court will be on the fairness of the procedure and not on the legitimacy of the expectation[771] or the substantive fairness of the outcome; and secondly, the *Constitution* restricts the availability of remedies under s 75(v) to occurrences of jurisdictional error, meaning that courts lack the jurisdiction to grant a remedy

763 *Lam* (2003) 214 CLR 1, 23 [72].

764 *Begbie* [2000] 1 WLR 1115, 1123 [76].

765 *Lam* (2003) 214 CLR 1, 23 [73]. This comment, however, should not be taken to express any doubt about the validity of *Wednesbury* unreasonableness or *S20* illogical fact-finding; see G Weeks, 'Questions of Quality' (2007) 14 *AJ Admin L* 76, 81.

766 *Lam* (2003) 214 CLR 1, 25 [77].

767 *Lam* (2003) 214 CLR 1, 24-5 [76].

768 *Applicant S20* (2003) 198 ALR 59, 91-3; 98.

769 M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470, 512.

770 See *Kirk v IRC* (2010) 239 CLR 531.

771 *Lam* (2003) 214 CLR 1, 36 [111] (Hayne J).

in respect of a legally valid exercise of power, even if it results in substantive unfairness. The door to relief in public law for the disappointment of a legitimate expectation is firmly closed in Australia for the immediate future.

However, as Taggart argued, this conclusion rests on conclusions about the influence of the *Constitution* on judicial review that need not be as permanent as currently assumed. Taggart took the view that Australia's insistence that s 75(v) demands a division of errors of law into jurisdictional and non-jurisdictional piles is a leading contributor to Australia's 'exceptionalist' status:[772]

> Retention of jurisdictional error contributes, I think, to the often-Byzantine quality of much of the Australian judicial and academic analysis. Moreover, it means Australian courts are not speaking the new international language of judicial review and that sets its jurisprudence apart, and over time may create something of a 'time warp' effect.

Taggart was unconvinced that the *Constitutional* entrenchment of s 75(v)'s remedies meant that the "historical baggage" would be difficult to dispense with, reasoning that all that is enshrined in the *Constitution* are the remedies, not the grounds of review.[773] To adopt an argument from Tom Poole,[774] might Australian courts start by working substantive interests into judgments under cover of procedural issues,[775] and from there achieve normative purchase and greater honesty in judicial reasoning? This would rely, as a method of securing long-term development of Australian administrative law, on some flexibility in the application of the grounds of judicial review. Australia may rightly be accused of having a "judicial reluctance to explore principle",[776] despite the availability of broad (but largely unused) catch-all statutory grounds within the ADJR Act.[777] Nonetheless, the history of administrative law in the UK contains examples of "structural and fundamental" changes,[778]

772 M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 9.

773 Ibid. Taggart conceded that others did not share his optimism in this regard, see eg P Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 116.

774 T Poole, 'Reformation' (2009) 68 *Cantab LJ* 142, 143-4. Professor Poole has expressed concerns elsewhere about the High Court's 'formalism'; see T Poole, 'Between the Devil and the Deep Blue Sea' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 15. Mark Aronson argued, however (albeit not in direct response to Poole's arguments), that the "vague" charge of formalism is in essence simply a complaint that the High Court lacks "style and transparency", followed by a demand that the Court develop "judicial review grounds [which are] more directly normative or principles-based": M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 23-4. On this analysis, there is every chance that the development described by Poole may in fact look like a regression into "formalism" in Australia before the High Court achieves "normative purchase", as he acknowledged.

775 Some may see nothing new in this. Professor Aronson thought that for all that the much-quoted *dicta* of Brennan J in *Quin* (see the text accompanying n 743 above) expressed a view that courts lack the "jurisdiction simply to cure administrative injustice or error", Brennan J's judgments nevertheless achieved that result "with remarkable consistency": M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 21.

776 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.170].

777 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [4.750]; Administrative Review Council, *Federal Judicial Review in Australia* (2012), 137.

778 The examples come from T Poole, 'Reformation' (2009) 68 *Cantab LJ* 142, 142.

such as Dicey tempering his hostility to administrative law as anything other than a French notion[779] and the "fairness revolution".[780]

The possibility of development under a written constitution was Taggart's central point:[781]

> [M]y point here is simply that the Australian *Constitution* is not a conversation stopper. Simply citing the 'memorable words' in the venerable US Supreme Court decision of *Marbury v Madison*[782] - that '[i]t is, emphatically, the province and duty of the judicial department to say what the law is' – is too simplistic.

The High Court appears to have moved away from its 'absurdity' standard of *Wednesbury* unreasonableness[783] and may have taken early steps towards embracing proportionality review.[784] Whether this will lead to an acceptance of variable intensity unreasonableness review, or the doctrine of substantive enforcement of legitimate expectations, or to Australia developing a doctrine of deference, or making any of the other changes which would supposedly bring Australia into conformity with the rest of the "common law world" is to a large extent beside the point. Professor Taggart used these examples but they are essentially no more than emblematic; different jurisdictions can legitimately come to different conclusions on all these points.[785] What Taggart opposed was Australians figuratively shrugging their shoulders and stating that nothing could be other than the way it was because the *Constitution* demands that it be that way. He believed that there was greater scope for change provided that the High Court would accept that it was, at least, Constitutionally possible.

Is it possible? Aronson and Groves remarked that "Australia's judicial review arrangements *intersect* with the Constitution" and pointed out that while the "constitutional writs are tethered to those judicial review grounds which constitute jurisdictional error, … s 75(v)'s injunction is not".[786] In regard to retaining the concept of jurisdictional error, they said:[787]

> We think that *by itself*, the English answer [of making all errors of law jurisdictional] solved nothing. It assumes the equal importance of all questions of law. It further assumes that all

779 AV Dicey, 'The Development of Administrative Law in England' (1915) 31 *Law Quarterly Review* 148. Before this, Dicey had not even been able to refer to "administrative law" in English, such was the depth of his opposition to the French *droit administratif*; see HW Arthurs, 'Rethinking Administrative Law: a Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1.

780 Poole referred to the "Holy Trinity" of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, ('*Padfield*'); *Anisminic* [1969] 2 AC 147; *Ridge v Baldwin* [1964] AC 40, ('*Ridge v Baldwin*').

781 M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 11 (citations omitted). In response to Stephen Gageler's claim that the Brennan J's '*ultra vires* approach' now holds sway in the High Court, Taggart remarked "*Marbury v Madison*, of course, has not prevented the US courts adopting a version of the deference doctrine in their administrative law" (at 11, see also at 23). See S Gageler SC, 'Sir Gerard Brennan and Some Themes in Judicial Review' in P Keyzer and R Creyke (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002) 62; S Gageler SC, 'Legitimate Expectation: comment on the article by the Hon Sir Anthony Mason AC KBE' (2005) 12 *Australian Journal of Administrative Law* 111.

782 *Marbury v Madison* (1803) 1 Cranch 137.

783 Or "bizarreness": *MIAC v Li* (2013) 87 ALJR 618, 638 [68] (Hayne, Kiefel and Bell JJ); cf 646 [113] (Gageler J).

784 See the text accompanying nn 586 - 599 above.

785 "Exaggerations can be useful. It is an exaggeration to say that Australia's judicial review cases are long on rules but short on principles, and that England's judicial review cases have reversed that order. To the extent that these exaggerations are true, each system is defective.": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.170].

786 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.50] (emphasis added). The broader basis for the availability of injunctive relief under s 75(v) is important to the arguments made about equitable remedies in Chapter 5 below.

787 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.120] (original emphasis).

> doubts, all genuine questions of law, need resolution at superior court level. Further again, it assumes that unresolved differences of legal interpretation within an authoritative hierarchy are always intolerable, with the consequent need for all questions of law to bear the same answer. And finally, it assumes that there can be only one right answer to every question of law.

Their point was that, if a legal system defines *all* legal errors as deserving judicial review, it must necessarily develop filters to distinguish the important from the trivial. Australia does this through a number of mechanisms, including reserving judicial review for errors of law going to jurisdiction.[788] It is commonly accepted that jurisdiction "is a slippery term with different meanings according to the context"[789] but it serves a purpose.[790] That purpose also needs to be served in the UK but is dealt with there as a matter of judicial discretion.[791] Not *every* error of law needs to be corrected; the 'need' in any given case is instead balanced against the "functionality" of the court or tribunal.[792] Therefore, Lord Bingham's *dictum* that "it would require very potent considerations of public policy … to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied"[793] cannot be literally true, if it ever was.[794]

On the orthodox Australian view, it is one thing for the UK courts to recognise that there is some flexibility in the way that they apply discretion to the question of which matters receive judicial review. In is quite another for Australian courts to exercise a similar discretion, given that it is commonly understood to be minimal under Australia's written Constitution. However, it is beyond the scope of this thesis to settle that question here; the point is that there is something to gain by the High Court *considering* these questions and not treating the *Constitution* as automatically negating every argument for change. Doing so will not necessarily see Australian courts engaged in "outcome review" as courts in the UK are.[795]

Conclusion

This Chapter demonstrates that the possibilities for enforcing the terms of soft law through legal processes in Australia are few and indirect at best. The situation is different in England, although there are still legitimate concerns that the English approach to substantive legitimate expectations is too broad (at least for Australia) and retains in any case a worrisome capacity to be ineffective.[796] What is clear is that soft law cannot be dealt with through legislative responses. Ultimately, legal responses to reliance on soft law need to be left in the hands of the judiciary. Jurisdictions which

788 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.130]-[1.150].

789 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.350].

790 If nothing else, the concept that some errors of law can be made within jurisdiction has given Australian courts greater facility in dealing with privative clauses; see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [17.40], [17.140]; cf the English position: HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009), 615-16.

791 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.120].

792 *Cart v Upper Tribunal* [2012] 1 AC 663, 688-9 (Baroness Hale of Richmond).

793 *X v Bedfordshire CC* [1995] 2 AC 633, 663 (Sir Thomas Bingham MR).

794 Lord Hoffmann doubted it, finding Lord Bingham's *dictum* to be "as question-begging a statement as you could find.": L Hoffmann, (Bar Council Law Reform Lecture, 17 November 2009) [20].

795 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.160].

796 See *Davies v HMRC* [2011] 1 WLR 2625.

have come to peace with high levels of judicial autonomy and capacity to intervene in exercises of executive power, like England, are much more likely to be able to deal with the challenges thrown up by soft law than jurisdictions which remain, for a host of reasons, much more conservative, such as Australia.

Chapter Four

Court-based Remedies: Money Remedies for Invalidity

Introduction

This chapter will look at money remedies for 'invalid' decision-making. It will first consider whether compensatory damages can or should ever be available for breaches of public law duties and, further, whether such a remedy is best provided through tort or as a supplement to existing public law remedies. It will then consider the availability of restitution consequent on invalid administrative action. It will not deal with possible general law liability where a decision has been made validly in the public law sense; Chapter 5 will address that type of liability. Nor will it examine the possibility of "reparation" in circumstances where "it would be manifestly unjust to allow the injured person alone to bear the damage"[1] but where the relevant public authority has neither acted invalidly nor has any liability under relevant private law. Rather, this chapter will confine itself to the possibility that public authorities may be required to pay a money remedy solely as a result of having acted invalidly as a matter of public law.

The correlation between a right to compensation and the invalidity of a decision is sometimes relevant to the availability of compensation for a government act which causes loss to an individual. Invalidity and liability are not co-extensive concepts: liability in tort, for example, leads to an obligation to compensate an individual who has suffered loss but that liability need not result from a decision being 'invalid'. Relief may still be available if the decision is valid but nonetheless tortious[2] or remediable in equity. The relationship between validity and liability has provoked contrasting views, such as those held by Tom Cornford and Robert Stevens respectively. Part A of this chapter will address that relationship.

Invalidity is the basis of most judicial review remedies. Judicial review's grounds and remedies are also essentially procedural; they do not focus on the damage suffered by a victim in the same way that tort does.[3] However, academic authors, including Carol Harlow and Peter Cane have argued that there is no reason why losses caused by government action generally might not be compensated in

1 Council of Europe, '*Recommendation no. R (84) 15 of the Committee of Ministers to Member States relating to Public Liability*' (R (84) 15, 1984). The Council's recommendation was modified by the requirement the reparation only be made "having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act." See also T Cornford, *Towards a Public Law of Tort* (Ashgate, Aldershot, 2008) Ch5&9; P Cane, *Administrative Law* (5th ed, 2011) 312-13 (on the 'risk theory' of public law damages). Compensation for losses incurred *despite* valid administrative action will be considered in chapter 6.

2 Although there are limits on the extent to which remedies in tort will be available for purely economic loss.

3 M Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' [2003] 8 *Judicial Review* 104, 106.

damages. More recently, Tom Cornford has argued[4] for an extensive public law of tort which would include the availability of compensation for those who suffer loss as a result of invalid public decisions, although reaction to his provocative thesis has been mixed.[5]

The Justice-All Souls Committee also recommended that it be open to a court to award damages to compensate for loss flowing from the breach of a public law duty (for example, to provide procedural fairness).[6] The Committee considered this preferable to the attempts of various courts to graft private law duties in tort onto the administrative law system.[7] Traditionally, compensatory damages have been considered a "purely" private law remedy[8] and have not been available as a remedy for breaches of public law. The question that will be addressed is whether this position, described by Cane as the "fundamental tenet",[9] is still supported by the case law and, if so, whether it is still justifiable normatively.

Much has been written about the theory behind the liability to private law actions of individuals and bodies exercising public functions. Dicey propounded the equality principle, which aspired to holding government liable in precisely the same way that an individual would be for any beach of the law. Cornford, by contrast, has argued that liability of governments for unlawful acts should be a matter of public, rather than private law. The law itself has moved independently of either theory and a significant body of case law has developed around the liability of public bodies in negligence.[10] Part A of this chapter will attempt to reconcile the case law to the theory.

There are some debates with which I do not propose to engage in this chapter; primarily, this chapter will not discuss damages other than as a compensatory mechanism. Of course, 'damages' is a term which encompasses much more than compensation, as Professor Cane has reminded us:[11]

> Damages, it will be recalled, perform four main functions: compensatory damages compensate for losses, restorative damages reverse shifts of resources, disgorgement damages require gains to be given up, and punitive damages punish. These four remedial functions seem just as appropriate in relation to breaches of public law as in relation to breaches of private law. If a breach of public law causes loss, compensation seems an appropriate legal response; if a gain is made out of a breach of public law, disgorgement seems an appropriate response; and so on.

There is a body of literature on punitive or exemplary damages.[12] Their availability and application are contentious. Furthermore, they are not essential to the points which I will seek to make in this

4 T Cornford, *Towards a Public Law of Tort* (2008).

5 See M Aronson, 'Book Review: *Towards a Public Law of Tort* by Tom Cornford' (2009) 20 *Public Law Review* 79; G McLay, 'Book Comment: What are We to Do with the Public Law of Torts?' (2009) 7 *New Zealand Journal of Public and International Law* 373; G Weeks, 'Book Review: *Towards a Public Law of Tort* by Tom Cornford' (2009) 17 *Torts Law Journal* 311; SH Bailey, 'Publication Review: *Towards a Public Law of Tort* by Tom Cornford' [2009] *Public Law* 869; PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 208-11.

6 JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 360-1.

7 JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 358-9.

8 P Cane, *Administrative Law* (5th ed, 2011) 310. While the declaration and injunction are also private law remedies, they are generally congruent with the aims and limitations of public law's remedial structure and have long operated as both public and private law remedies.

9 P Cane, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489, 489. In support of this proposition, Cane cites H Woolf and J Jowell, *De Smith, Woolf & Jowell's Principles of Judicial Review* (5th ed, Sweet & Maxwell, London, 1995) 758.

10 The interaction between tort law and public authorities is discussed predominantly in Chapter 5.

11 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 499.

chapter. On this basis, I have decided to set aside any damages other than compensatory damages for another day.

Part B of this chapter is dedicated to the principles for obtaining a money remedy from a party which has been unjustly enriched at the plaintiff's expense without an applicable defence.[13] While these principles are in general more established than those under consideration in Part A, they are problematic where the party which has been unjustly enriched is the state. Part B will examine whether and how the principles developed in the UK since *Woolwich*[14] may apply in Australia and whether they are capable of providing an effective remedy to a private actor which has relied to its loss on a public authority's soft law instrument.

One issue that will not be addressed by this chapter, focused as it is on remedies, but which is nonetheless of great practical importance, is the manner in which soft law can help to secure better decision-making from the 'front end' of every interaction between government and citizens. As Professor Harlow puts it, "good disputehandling starts *within the administration* with consistent, principled and rational decision-making based upon accessible and well-publicised guidelines. These, rather than the formal machinery for handling disputes, form the proper entry point for a satisfactory system of redress."[15] This is also known as the 'bottom up' approach to administrative justice.[16] What is interesting is that soft law can in fact be used as a simple and effective tool for public authorities to deal with citizens in a manner *less likely to cause, and better able to handle, disputes*. Certainly, the soft law instruments by which this goal is realised must be available and must, in practice, bind both parties. Professor Hogg has noted in regard to *ex gratia* payment schemes that "governments cannot easily resile from such policies", even where the legal power to do so exists.[17] Within those limitations, such measures should be effective. It is worth remembering that a dispute avoided is a better outcome than any of the remedies discussed in this chapter.

A: Compensatory damages for invalid administrative action

Actions for damages in tort were the "original vehicle for obtaining judicial review of administrative action as we know it".[18] Eventually, they gave way to the ascendant prerogative writs and the concept of nullity as the primary method of judicial review and, later still, it became orthodox that damages were a private law remedy and not available in judicial review matters. However, although the possibility of a money remedy for maladministration has been considered over recent years by

12 See eg J Edelman, 'In Defence of Exemplary Damages' in CEF Rickett (ed), *Justifying Private Law Remedies* (Hart, 2008) 225; A Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis' in CEF Rickett (ed), *Justifying Private Law Remedies* (Hart, 2008) 249.

13 See the discussion at *Equuscorp Pty Ltd v Haxton* (2012) 86 ALJR 296, 306-12 (French CJ, Crennan & Kiefel JJ) ('*Equuscorp v Haxton*'). See also AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart, Oxford, 2012) 6.

14 *Woolwich* [1993] AC 70.

15 C Harlow, 'Rationalising Administrative Compensation' [2010] *Public Law* 321, 325 (original emphasis).

16 The "seminal" study was by JL Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, New Haven, 1983); see C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 446-50.

17 P Hogg, 'Compensation for Damage Caused by Government' (1995) 6 *National Journal of Constitutional Law* 7, 12 (n 6).

18 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [10.130].

academics, in inquiries, and occasionally in judgments, little has changed since Ganz was moved to comment, in 1973, that "compensation is the step-child of administrative law" which generally "receives little attention".[19] The traditional position in regard to compensatory damages is that they are available only for breaches of the law actionable by individuals *inter se*. Carol Harlow summarised the effect of this legal tenet by noting that common law practitioners are trained to focus on remedies and pointing out the fact that, prior to reforms which took effect in the UK in 1978, compensatory damages could not be obtained in the same court as the public law remedies of *certiorari*, *mandamus*, prohibition or *habeas corpus*.[20] Harlow concluded that:[21]

> This procedural distinction allows us to say that an act is 'invalid' although it does not create 'liability'; in reverse, to give rise to a right of damages, an act must create 'liability'. So a link between liability and damages is created in the legal mind.

It is instructive to consider that liability in tort leads to compensatory damages, whereas invalidity in public law usually[22] leads to nullity, a result that does not carry a substantive consequence of the same nature for the 'victim' of the invalid administrative action.[23] In other words, a judicial finding that a decision is invalid[24] says nothing about whether the same decision, *properly made*, would be correct.[25] Thus, even if an invalid decision were to lead to a payment of money in compensation, it is entirely possible that the decision may be remade validly.[26] To work from Gould's analogy,

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19 G Ganz, 'Compensation for Negligent Administrative Action' [1973] *Public Law* 84, 84. Forty years later, this metaphor looks rather quaint.

20 Immediately following this reform, *The Rules of the Supreme Court (Revision) 1965* Order 53, rule 7 read:

Claim for damages

(1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if:

(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and

(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

…

See *O'Reilly v Mackman* [1983] 2 AC 237, ('*O'Reilly v Mackman*'). This reform did not create a new or additional right to damages, which were only payable under Ord 53, r 7 if "the wrong in question would found an independent action for damages": E Campbell, 'Liability to Compensate for Denial of a Right to a Fair Hearing' (1989) *Monash University Law Review* 383, 387. See *Calveley v Chief Constable of the Merseyside Police* [1989] QB 136, 151-2 (Lord Donaldson MR), 154 (Glidewell LJ). The Court of Appeal's decision was affirmed by the House of Lords in *Calveley v Chief Constable of the Merseyside Police* [1989] 1 AC 1228. The relevant rule is now found at *CPR* (UK) Part 54.

21 C Harlow, *Compensation and Government Torts* (Sweet & Maxwell, London, 1982) 87. For an example of the practical distinction between invalidity and liability, see *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, 1163 (Lord Hailsham LC), 1175 (Lord Brightman) ('*North Wales Police v Evans*').

22 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) Ch10.

23 Ford noted that "[i]n some circumstances, unhappy parties would likely prefer monetary relief to any remedy they could receive under judicial review.": C Ford, 'Dogs and Tails: Remedies in Administrative Law' in L Sossin and C Flood (eds), *Administrative Law in Context* (2nd ed, Emond Montgomery Publications, 2012) 85, 120.

24 This result was often previously expressed in terms of a decision being or void or a nullity, although the former term has now long been out of favour for its descriptive inaccuracy and the latter is not always the result of invalidity; see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [10.130]-[10.190]; M Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012) 48, 70; *Kable (No2)* [2013] HCA 26, [20]-[23] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

25 *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708, 723-5 (Kirby P) ('*Mayze*'). The classic instance of this point is now found in *Lumba v Home Secretary* [2012] 1 AC 245. In *Mayze*, Mahoney JA (with whom Priestley JA agreed) came to a different conclusion to Kirby P, reasoning that the Court of Appeal (and by extension Needham J at first instance) had before it no evidence of the damage which had been sustained by Dr Mayze, but that this issue could properly be settled by referring the matter to a Master of the Supreme Court (now, an Associate Justice) for further inquiry: *Mayze* (1987) 10 NSWLR 708, 731-2.

26 See C Harlow, *Compensation and Government Torts* (1982) 93.

compensatory damages may be "the icing on the cake" following a finding of invalidity,[27] but it is always possible that a once successful litigant may yet be judicially prevented from having the cake or eating it. In such circumstances, the icing is often elusive.

Additionally, on this view, an award of compensatory damages (or a declaration that compensatory damages are payable and should be assessed)[28] might well exceed the judicial function if it presumes to decide the substance of the question before the original decision-maker, rather than whether the decision-maker answered that question validly.[29] It takes no account of the fact that a judicial finding of invalidity usually causes the original decision-maker to remake the decision according to law. If a decision which was procedurally flawed but was correct as a matter of substance is remade such that it is now entirely valid, upon what basis can a court award compensatory damages?[30] This is the central stumbling block for any conception of public law compensatory damages being awarded for illegality,[31] although other difficulties are bound to arise as a consequence of any attempt to turn back time.[32] Hogg and his co-authors noted that, under a doctrine which allowed compensatory damages to be awarded because of a finding of invalidity, either the court would confer a windfall benefit upon a plaintiff who has lost nothing or fine distinctions would need to develop as to what kinds of invalidity could result in compensatory damages. In the latter case, they reasonably asked whether this would constitute a "significant advance over the existing requirements".[33]

Much as volcanoes are the result of a collision of tectonic plates, this problem can be seen as one created by the collision of large and established opposing forces.[34] Compensation is the purpose of damages in tort,[35] but tort law often fits uneasily with situations in which loss is suffered as a result of government action. While compensatory damages in tort do not follow from illegality or invalidity alone,[36] the level of uneasiness with extending compensatory damages in tort into 'public law areas' is never greater than when we are not additionally able to say that the action impugned in tort is also "invalid". By contrast to lawyers who practise predominantly in tort law, public lawyers are

27 BC Gould, 'Damages as a Remedy in Administrative Law' (1972) 5 *New Zealand Universities Law Review* 105, 105.

28 *Mayze* (1987) 10 NSWLR 708, 723 (Kirby P); cf *Williamson v The Commonwealth* (1907) 5 CLR 174, (Higgins J, '*Williamson v Cth*'). In *Mayze* (at 725), Kirby P distinguished *Williamson v Cth* from the general principle on the basis that the claim for damages "was expressly identified and particularised". Mr Williamson's claim that he had been unfairly dismissed from a government post would not likely be dealt with today, as it was in *Williamson v Cth*, through an action seeking declaratory relief.

29 Cf *Roncarelli v Duplessis* [1959] SCR 121, ('*Roncarelli*'). Mark Aronson has noted that, for all that *Roncarelli* has been seen as a ground-breaking case in developing the tort of misfeasance in public office and (more controversially) giving normative effect to the rule of law, in Australia it has usually attracted attention only "for its award of damages where judicial declaration of invalidity would usually be the only remedy": M Aronson, 'Some Australian Reflections on *Roncarelli v Duplessis*' (2010) 55 *McGill Law Journal* 615, 615.

30 See PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 207; C Harlow, *Compensation and Government Torts* (1982) 94-7.

31 P Cane, *Administrative Law* (5th ed, 2011) 311. Cane made the point that, if the issue of damages were "postponed" until after the decision were remade, the effect would be that the public authority would now have an incentive to make the same decision, which may in turn "create an apprehension of bias".

32 See eg *North Wales Police v Evans* [1982] 1 WLR 1155, 1163 (Lord Hailsham LC).

33 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 207.

34 Professor Harlow characterised this as "a clash of concepts": C Harlow, *Compensation and Government Torts* (1982) 51.

35 See eg K Barker et al, *The Law of Torts in Australia* (5th ed, Oxford, 2011) 693-7. I do not propose to enter into the broader debate about whether damages follow from liability as a reaction to the wrongful conduct of the defendant or to the loss incurred by the plaintiff. For a brief introduction to these issues, see C Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, New York, 2004) 12-13.

36 Cane said that this is by way of "contrast" to restitution: P Cane, *Administrative Law* (5th ed, 2011) 310 (n 46). I will discuss this issue in Part B of this chapter.

accustomed to looking for invalidity rather than loss and to seeking a remedy which is designed to identify the flawed nature of the invalid act or to right an administrative action which was "wrong".[37] Administrative law does not focus on the *victim* of maladministration in the direct way that tort law would.

When calls are made, as they are from time to time, for a money remedy to be made available where maladministration[38] falling short of misfeasance in public office[39] has caused loss, they inevitably run up against either tort law's traditional difficulties with state liability (and with compensation for pure economic loss) or with public law's traditional difficulties with substantive or pecuniary remedies. The issues faced before compensation will be available for public law breaches are addressed below.

I: The current state of the law

The Diceyan approach to tort law was that liability should be co-extensive for public officials (personally) and private actors. The suggestion that public authorities be held liable in tort for public law invalidity would therefore fall immediately foul of the equality principle, since private individuals tend not to be invested with powers whose invalid use is remediable in public law. However, Dicey's equality principle has always operated on the basis that, if the defendant's public status is a good claim for different treatment, there is no more than a requirement that the defendant be treated "as nearly as possible"[40] the same as a private litigant. In any case, the Diceyan equality principle has not operated in a strict sense for a very long time, if it ever did, but it retains respect as a worthy aspiration[41] and is institutionalised on a qualified basis in Australian *Crown Proceedings* legislation.[42] As the following section will show, any proposal which essentially brings public law principles into tort law, or vice versa, is an option for reform which would require fairly radical change.[43]

In *Towards a Public Law of Tort*, Tom Cornford strongly favoured implementing a compensatory remedy for invalid action by public authorities through public law, on the basis that it is a more principled vehicle for imposing liability on authorities which essentially hold their power on trust for the

37 Additionally, Professor Harlow suspected that "public lawyers may sometimes have a dangerously limited vision of tort law": C Harlow, *Compensation and Government Torts* (1982) 11.

38 It is outside the scope of this thesis to examine damages incurred where the state has acted lawfully or otherwise without fault. See generally JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 348-51, 354, 357-8; T Cornford, *Towards a Public Law of Tort* (2008) Ch9.

39 The issues are different with regard to the only 'public' tort, misfeasance in public office. See *New South Wales v Paige* (2002) 60 NSWLR 371, 400 [157] (Spigelman CJ) ('*NSW v Paige*'); M Aronson, 'Misfeasance in Public Office: a Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1; P Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in S Degeling, J Edelman and J Goudkamp (eds), *Torts in Commercial Law* (Lawbook Co, 2011) 221.

40 See the discussion of this term in Chapter 5 below.

41 Professor Hogg and his co-authors have been steadfast over four editions in rejecting any special doctrine of governmental liability; see now PW Hogg et al, *Liability of the Crown* (4th ed, 2011) iv; cf the unease shown in G van Harten, G Heckman and D Mullan, *Administrative Law: Cases, Text and Materials* (6th ed, Emond Montgomery Publications, Toronto, Canada, 2010) 1208.

42 See eg *Judiciary Act 1903* (Cth) s 64. This is discussed further in Chapter 5.

43 I have commented elsewhere that such a proposal (made by Tom Cornford) "represents an enormous paradigm shift for public law": G Weeks, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 17 *Torts LJ* 311, 315. See also PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 210 (n 284).

public.[44] This flies in the face of the established orthodoxy in Australia and the UK, which was expressed by Collins J in *Quark Fishing*:[45]

> English law does not provide a remedy in damages for a breach of a public law right. There must exist a private law cause of action…

Chapter 5 discusses the difficulties which arise from transposing public law standards onto private law causes of action.[46] The difficulties are essentially the same when it is proposed that a private law remedy be absorbed into public law. This is because public law, at least in countries which have drawn from the English legal tradition, is at its heart residual:[47] it is what remains when the specified terrain and enumerated doctrines of private law are removed from consideration. I understand Carol Harlow's comments to carry the same substantive meaning when she says that "state liability remains for me a problem of tort law, for which tort law must provide the conceptual answers"[48] and that tort law should "retract … towards a residual position".[49] For that reason, I have chosen to focus in this thesis on the question of whether *private law* compensatory damages should be available for public law failures. It is worth recognising, as a starting position, that "damages against public bodies are far from unknown".[50]

As discussed above, the validity of an administrative act is generally irrelevant to tort law liability; in the words of Lord Goff "there is no general right to indemnity by reason of damage suffered through invalid administrative action".[51] Sometimes the fact that an act has been performed without legal justification will assist in making out the necessary elements of a claim of action in tort,[52] but the fact that an act or decision is invalid in the public law sense is never sufficient *per se* to ground liability in tort. This has long been the orthodox position. One suggestion for extending the capacity to obtain money remedies from public authorities is to remove the bar on compensation being available for invalid acts, rather than only for acts which disclose a known private law cause of action.[53]

Does the concept of invalidity provide any assistance in determining the circumstances under which a monetary remedy should be available for maladministration? There are a number of factors which may contribute to reducing its relevance. For example, the necessity to make a finding of invalidity before an affected person receives compensation might be removed where the state addresses the claim by demonstrating moral leadership. This might occur in circumstances where the state accepts that its powers are strictly for use in the public interest, which is to say that there is no capacity to say

44 See G Weeks, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 17 *Torts LJ* 311, 313-14.

45 *R (Quark Fishing Ltd) v Secretary of State for Foreign & Commonwealth Affairs* [2003] EWHC (Admin) 1743, [14] (Collins J, '*Quark Fishing*').

46 See also G Weeks, 'A Marriage of Strangers: the *Wednesbury* Standard in Tort Law' (2010) 7 *Macquarie Journal of Business Law* 131.

47 C Harlow, ''Public' and 'Private' Law: Definition without Distinction' (1980) 43 *Modern Law Review* 241, 241-2.

48 C Harlow, *State Liability* (2004) 6.

49 C Harlow, *State Liability* (2004) 132.

50 See the examples provided at M Fordham, 'Reparation for Maladministration' [2003] 8 *JR* 104, 104-5 [4] (and the cases cited in n 6).

51 *R v Secretary of State for Transport; ex parte Factortame Ltd (No2)* [1991] 1 AC 603, 672 ('*Factortame (No2)*'). Michael Fordham expressed no surprise at this: M Fordham, 'Reparation for Maladministration' [2003] 8 *JR* 104, 104 [1] (footnote omitted). See the text accompanying n 171 below.

52 Such as for false imprisonment; see *Lumba v Home Secretary* [2012] 1 AC 245; cf *Kable (No2)* [2013] HCA 26.

53 *Dunlop v Woollahra* [1982] AC 158; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314, ('*Takaro v Rowling*').

that the state would be justified in acting in its own interests. To some extent, these concerns are now institutionalised where government is a litigant[54] but a public authority may go further and simply agree to provide a sum by way of compensation in clear cases of administrative errors or misdeeds. Furthermore, this is a course of action which need not rely on the altruism of the state in the case of soft law but may be based on purely strategic reasons. As I have discussed in Chapter 2 above, soft law is a powerful tool for regulating behaviour without the formal requirements of passing legislation. Its benefits are reduced, and may be lost altogether, if the state breaks its own soft law without good cause. For this reason alone, the state may conclude that it is better to compensate people who have suffered loss through relying on soft law rather than risk losing its benefits.[55] These considerations are relevant to Professor Harlow's comment that:[56]

> the failure to distinguish clearly between compensation in the context of legal liability and responsibility in the wider context of distributive justice has done much to fuel the litigation fever that is a mark of contemporary society.

There is much to be gained by the state if it is prepared to unhitch compensation from issues of legal liability and validity. It is within the power of the state to change the 'compensation culture' bemoaned by Harlow.[57]

Compensation for non-negligent, valid administrative action is, in practical terms, inconsistent with the state of the law in countries such as Australia and the UK. Lord Blackburn said in *Geddis v Bann Reservoir* that it was "thoroughly well established" that valid administrative acts attract no liability unless performed negligently[58] and this has been an orthodox statement of the law since. Mason J applied the same reasoning to the case of a valid failure (or omission) to act when he noted that "generally speaking, a public authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so".[59] It seems unlikely, given these statements of the law, that compensation would become available in Australian proceedings to remedy a valid exercise of power by a public authority which is not negligent. In the main, as discussed in Chapter 5 below, this is because invalidity is irrelevant to proving negligence (and sometimes other actions, like defamation and nuisance). Negligent actions are never interpreted as being authorised by statute,[60] but by the same token, their negligence does not make them invalid. More simply, statutory authority is never a defence to a negligence action.

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54 See eg the 'Model Litigant Obligations' which appear as Appendix B to the *Legal Services Directions 2005* (Cth).

55 Dowsett J made a similar point in regard to payments under the CDDA Scheme (considered in Chapter 6 below), arguing that it "is perhaps not unduly cynical to say that the CDDA scheme is designed to avoid public-relations problems involving public bodies and the political consequences of such problems.": *Smith v Oakenfull* (2004) 134 FCR 413, 418 [20] (Dowsett J, '*Smith v Oakenfull*').

56 C Harlow, *State Liability* (2004) 90-1.

57 See also C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 791-3.

58 *Geddis v Proprietors of Bann Reservoir* (1878) LR 3 App Cas 430, 455 ('*Geddis v Bann Reservoir* ').

59 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 459-60 ('*Sutherland SC v Heyman*'). Mason J was citing the decision of the Full Court of the Supreme Court of NSW in *Revesz v Commonwealth of Australia* (1951) 51 SR (NSW) 63, ('*Revesz v Cth*'). See also JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 345.

60 This point can be traced back to *Geddis v Bann Reservoir* (1878) LR 3 App Cas 430. See also M Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 53.

Money remedies to compensate for maladministration are not unknown in the public law of other countries.[61] There is only one source of liability for public authorities which cannot attach to private parties[62] on the Diceyan basis[63] that public officials are liable for tortious acts in the same way that private individuals would be. This is the tort of misfeasance in public office, which is almost prohibitively difficult to make out because it requires proof of malice, or:[64]

> 'conscious maladministration', a concept which catches abuses of power by public officers who either knew they were breaking the law or recklessly decided not to care that this might be so.

As a practical matter, it tends to be an evidential problem as much as a legal one to establish liability under this tort. Robert Stevens considered the tort of misfeasance in public office to be both exceptional, in as much as it is the only tort which may result in liability for the deliberate infliction of loss "absent the violation of a right",[65] and comprehensive, in that he saw it as the only method by which *ultra vires* decisions are able to give rise to compensatory damages.[66] It is therefore not surprising that academic considerations of compensatory damages as a remedy for 'wrongful' administrative action or maladministration are frequently drawn to the misfeasance tort. Several[67] were published in Australian journals in the aftermath of the High Court's decision in *Mengel*,[68] each of them using misfeasance as a jumping off point to discuss compensatory damages for invalidity.[69]

While this chapter will not delve into the murky waters of that "very peculiar tort",[70] it is salutary to recognise that a cause of action in tort already exists to remedy a certain variety of maladministration. Doubtless, it is a cause of action heavily beset with limitations; it does not cover *ultra vires* acts performed in good faith (or anything falling short of malice or 'conscious maladministration')[71] where liability may deter public officials from acting in the public good on other occasions.[72] The

61 An entire chapter is dedicated to the topic in a leading Canadian Administrative Law text: G van Harten et al, *Administrative Law* (6th ed, 2010) Ch19.

62 Mark Aronson notes that malicious prosecution actions are usually against public officials, but that it nonetheless retains its character as a private law tort: M Aronson, 'Australian Reflections on *Roncarelli*' (2010) 55 *McGill LJ* 615, 631 (n 78).

63 See G van Harten et al, *Administrative Law* (6th ed, 2010) 1207.

64 M Aronson, 'Misfeasance in Public Office' (2011) 35 *MULR* 1, 3 (citation omitted).

65 R Stevens, *Torts and Rights* (2007) 242.

66 R Stevens, *Torts and Rights* (2007) 243.

67 L Roots, 'Damages for Wrongful Administrative Action: a Future Remedy Needed Now' (1995) 2 *Australian Journal of Administrative Law* 129; G McCarthy, '*Mengel*: a Limited Remedy in Damages for Wrongful Administrative Action' (1996) 4 *Australian Journal of Administrative Law* 5; R Panetta, 'Damages for Wrongful Administrative Decisions' (1999) 6 *Australian Journal of Administrative Law* 163.

68 *Northern Territory v Mengel* (1995) 185 CLR 307, ('*Mengel*'). Other articles published in Australia in the same period which discussed *Mengel* included T Cockburn and M Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 1' (2001) 9 *Torts Law Journal* 80; T Cockburn and M Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 2' (2001) 9 *Torts Law Journal* 245; A Robertson, 'Liability of Public Officers' (2002) 34 *AIAL Forum* 25. These articles did not place the same emphasis on the need to develop a damages remedy. Earlier articles routinely looked at the matters of damages for invalidity and the tort of misfeasance in public office together, see eg BC Gould, 'Damages in Administrative Law' (1972) 5 *NZ Univ LR* 105; CS Phegan, 'Damages for Improper Exercise of Statutory Powers' (1980) 9 *Sydney Law Review* 93.

69 See also the sources cited at PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 197 (n 218). There is a frequent tendency to elide consideration of the tort of misfeasance in public office and the availability of damages against public authorities more generally.

70 M Aronson, 'Misfeasance in Public Office' (2011) 35 *MULR* 1.

71 *Mengel* (1995) 185 CLR 307.

72 *Sanders v Snell* (1998) 196 CLR 329, ('*Sanders v Snell*'); M Aronson, 'Misfeasance in Public Office' (2011) 35 *MULR* 1, 7. In *Sanders v Snell*, Gleeson CJ, Gaudron, Kirby and Hayne JJ noted (at 344 [37]) that "[m]isfeasance in public office is concerned with misuse of public power. Inappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them when their exercise would be for the public good. But too narrow a definition of the ambit of liability may leave persons affected by an abuse of public power uncompensated. The tort of misfeasance in public office must seek

misfeasance tort has in fact been refined to take account of competing policy values. It requires more than simply to establish that a public official has acted beyond the scope of his or her powers, but less than making out any alternative ground of liability. The misfeasance tort is residual in its application and, leaving aside the imposing standard of proof required to make out the cause of action,[73] courts are therefore reluctant to redefine it such that it would overlap other causes of action.[74]

Any tort action for compensatory damages caused by the failure of a public authority to adhere to its soft law would need to take account of this restrictive interpretation of the misfeasance tort. On the current legal orthodoxy, there is little room for a tort action to develop which would allow for compensatory damages to remedy mere maladministration without some active abuse of public power. The majority in *Sanders v Snell* seemed to indicate that the range of relevant policy issues are already more or less covered.[75] Additionally, the Australian High Court had previously attempted, in *Beaudesert Shire Council v Smith*,[76] to develop a free-standing tort, such that "independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful,[77] intentional and positive acts of another is entitled to recover damages from that other".[78]

While some may have been justifiably "greatly encouraged" by *Beaudesert* because the High Court had enunciated a "general principle of liability for invalid administrative action",[79] the general reception was "icy".[80] Academic criticism was almost immediate;[81] the first judicial revisions came shortly

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to balance these competing considerations. … Equating the tort of misfeasance with a tort of wrongful interference with economic interests or subsuming the tort of misfeasance in that latter tort would pay too little regard to the different considerations that we have mentioned."

73 "Because abuse of public office remains an intentional tort requiring proof of bad faith, it will in the minds of most observers carry the 'stench of dishonesty'. This court has suggested that where bad faith on the part of a public official is alleged, clear proof commensurate with the seriousness of the wrong should be provided.": *Powder Mountain Resorts Ltd v British Columbia* (2001) 94 BCLR (3d) 14, [8] (Newbury JA) (Court of Appeal for British Columbia, '*Powder Mountain Resorts*').

74 *Sanders v Snell* (1998) 196 CLR 329, 346 [40] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

75 *Sanders v Snell* (1998) 196 CLR 329, 345-6 [39] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

76 *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, (Taylor, Menzies & Owen JJ, '*Beaudesert*').

77 The majority in *Mengel* noted that the statement of principle in *Beaudesert* left it inherently ambiguous whether "unlawful" referred to "an act forbidden by law or, simply, an unauthorised act in the sense of an act that is *ultra vires* and void": *Mengel* (1995) 185 CLR 307, 336 (Mason CJ, Dawson, Toohey, Gaudron & McHugh JJ). See also M Aronson and H Whitmore, *Public Torts and Contracts* (Law Book Co., Sydney, 1982) 132-3; G Dworkin and A Harari, 'The *Beaudesert* Decision - Raising the Ghost of the Action upon the Case (Part II)' (1967) 40 *Australian Law Journal* 347, 347. By contrast, Barton suggested that the Privy Council in *Dunlop v Woollahra MC* had been in no doubt at all in regard to this point: GP Barton, 'Damages in Administrative Law' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986) 123, 133. The High Court concluded that the preferable view was that the Court in *Beaudesert* had intended to refer to an act forbidden by law, rather than a merely invalid act. Accordingly, "this embryonic or emerging tort does not extend to all unlawful acts and that, at least in that regard, it is in need of further definition": *Mengel* (1995) 185 CLR 307, 343.

78 *Beaudesert* (1966) 120 CLR 145, 156. The tort described by the Court in *Beaudesert* was sometimes referred to as an "innominate tort"; see *Dunlop v Woollahra* [1982] AC 158, 170; *Lonrho Ltd v Shell Petroleum Co (No2)* [1982] AC 173, 187 (Privy Council, '*Lonrho v Shell (No2)*'). This recalls the song "A Horse With No Name" (Dewey Bunnell), recorded by the band America in 1972; hence the joke "I went to *Beaudesert* for a tort with no name".

79 GP Barton, 'Damages' in M Taggart (ed), *Judicial Review in the 1980s* (1986) 123, 131.

80 GP Barton, 'Damages' in M Taggart (ed), *Judicial Review in the 1980s* (1986) 123, 132. Harlow said with some understatement that "the case is not beloved of the judiciary": C Harlow, *Compensation and Government Torts* (1982) 67.

81 G Dworkin and A Harari, 'The *Beaudesert* Decision - Raising the Ghost of the Action upon the Case (Part I)' (1967) 40 *Australian Law Journal* 296; G Dworkin and A Harari, 'Raising the Ghost (Part II)' (1967) 40 *ALJ* 347. Aronson and Whitmore thought that these articles were "influential in generating such mistrust of the [*Beaudesert*] decision as to bring into serious question the very existence of the new cause of action.": M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 132 (footnote omitted). Phegan cited Dworkin and Harari in support of his statement that the *Beaudesert* principle was "suspect from its inception": CS Phegan, 'Damages for Improper Exercise of Statutory Powers' (1980) 9 *Syd LR* 93, 119.

after;[82] and less than a decade after that, the Privy Council first cast fairly emphatic doubt on the *Beaudesert* principle[83] and, four months later, rejected it altogether.[84] It was, then, wholly unsurprising when the High Court in *Mengel* overturned *Beaudesert* less than three decades after it had first been decided, but surprising only that it had taken so long at all.[85] It is unlikely that a similar principle will emerge from the common law in the near future;[86] indeed, one may reasonably ask whether *Beaudesert* established anything so conclusively as that reforms of this magnitude face immense difficulties when they emerge from a judgment limited (as it must be) to a single set of facts. Dr Barton remarked almost a decade before *Beaudesert* was finally terminated in *Mengel* that:[87]

> Those cases that have considered *Beaudesert* have stripped it of any real impact. As a result of twenty years' explaining and distinguishing, *Beaudesert* now stands for little more than an example of the distinction between an action in trespass and an action upon the case.

Dr Barton retained some optimism as to the overall effect of the *Beaudesert* project, stating that it had, at least, been "a catalyst in the process of evolving some new principle" and had sparked "discussions and debates" which assist in defining the principles at stake "with greater clarity".[88] This was doubtless true, although a quarter of a century later the judicial discussion of this legal principle is virtually silent.[89] The point that emerges is that we are better off relying on Law Reform bodies to ventilate the case for reform than courts, which have limited suitability for the role and an evident (and justifiable) reluctance to take it on.[90]

It follows that, were liability in tort to be the basis on which loss caused by maladministration is compensated, such liability would need to be legislatively created. It has been much more usual in

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82 "It seems to me that for the plaintiff to succeed in his special action on the case he must show something more than a mere breach of the statute and consequential damage; he must show something over and above what would ground liability for breach of statutory duty if the action were available. As I see the case, he has not succeeded in showing that the act was tortious (and not merely a contravention of the statute), that its inevitable consequence was to cause damage to the plaintiff, or that there was an intention to cause harm to the plaintiff.": *Kitano v The Commonwealth* (1973) 129 CLR 151, 174-5 (Mason J) ('*Kitano v Cth*'). Menzies J, who was part of the *Beaudesert* Court, joined in approval of Mason J's judgment on appeal "without criticism or comment": GP Barton, 'Damages' in M Taggart (ed), *Judicial Review in the 1980s* (1986) 123, 132.

83 *Dunlop v Woollahra* [1982] AC 158, 170-1. The *Beaudesert* principle had previously been doubted by the New Zealand Court of Appeal in *Takaro v Rowling* [1978] 2 NZLR 314, 317 (Richmond P), 328-9 (Woodhouse J), 339 (Richardson J).

84 *Lonrho v Shell (No2)* [1982] AC 173. As in *Dunlop v Woollahra*, Lord Diplock's speech was given on behalf of the entire Privy Council.

85 That it had taken almost thirty years for the High Court to act upon this realisation was due, simply, to the fact that *Beaudesert* had never been applied before the Northern Territory Court of Appeal had done so in *Northern Territory v Mengel* (1994) 83 LGERA 371, ('*Mengel (NTCA)*'). See K Mason, 'The Rule of Law' in PD Finn (ed), *Essays on Law and Government - Volume 1: Principles and Values* (1995) 114, 133-4; M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 132 ("Certainly, there is no reported case of a plaintiff winning a *Beaudesert* claim, notwithstanding the great breadth of the *Beaudesert* principle."). Barton listed other Australian decisions which had considered *Beaudesert* but did not take it up "with any enthusiasm": GP Barton, 'Damages' in M Taggart (ed), *Judicial Review in the 1980s* (1986) 123, 133. A search of an internet database of cases indicates that *Beaudesert* was applied in *Shooter v Commissioner of Irrigation and Water Supply* (1972) 39 QCLLR 11. This hardly alters the point.

86 See *Sanders v Snell* (1998) 196 CLR 329, 344 [36] (Gleeson CJ, Gaudron, Kirby & Hayne JJ).

87 GP Barton, 'Damages' in M Taggart (ed), *Judicial Review in the 1980s* (1986) 123, 135.

88 Ibid.

89 Hayne J referred to *Beaudesert* as a "temporary diversion" in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 306 [347] ('*Perre v Apand*'). Gleeson CJ, Gaudron, Kirby and Hayne JJ referred briefly to the reasons for which *Mengel* had overturned *Beaudesert* in *Sanders v Snell* (1998) 196 CLR 329, 343-4 [35]. Leaving aside these exceptions, no Australian court has mentioned *Beaudesert* since the High Court's decision in *Mengel* (and it was not mentioned frequently before *Mengel* either).

90 In Australia, the chilling effect of developing the law through judicial proceedings below the level of the High Court can most directly be traced to *Farah Constructions v Say-Dee* (2007) 230 CLR 89. See M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 26-7.

recent times for legislatures to reduce public authorities' tort liability than increase it.[91] Hogg and his co-authors further noted that it is true that torts of strict liability (such as any tort based upon attaching liability to *ultra vires* action would necessarily be) are exceptional and the trend has been to limit the operation of such torts, such as breach of statutory duty,[92] where they place liability on public authorities which is not or cannot be borne by individuals.[93] At the outset, therefore, it is clear that any adoption of a principle under which tort liability is connected directly to the validity of decision-making will indicate a fundamental change of direction for countries in the 'Anglosphere' (including Australia, Canada, New Zealand and the UK), where "illegality is not a form of 'fault'".[94]

The Justice-All Souls Committee argued that many potential remedies for pecuniary loss caused by invalid decision-making may ultimately prove unsatisfactory.[95] Even if the invalid decision is quashed (or merely has its invalidity declared by the court), a person may still suffer loss which is caused in the period between the invalid decision being made and its subsequent annulment.[96] This is not the same as a claim that delay is itself sufficient to invalidate a decision,[97] nor that loss caused by a delay in providing to a citizen a licence, for example, that s/he had not previously possessed is compensable. In the situations described above, the delay exacerbates the loss that is being suffered by the citizen but is not, itself, the point. Rather, the point is that the declaration of a decision's invalidity does not change the fact that it operated, for a time, as though it were entirely valid and the period of its operation had consequences.[98] This is perhaps the most persuasive circumstance in favour of conceding that compensatory damages have a place in public law.

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91 See eg D Ipp, P Cane, D Sheldon and I Macintosh, (Panel of Eminent Persons), *Review of the Law of Negligence: Final Report*, (2002) Part 10; *Civil Liability Act 2002* (NSW) Part 5.

92 In Australia, see D Ipp et al, *Ipp Report* (2002), 161-3; *Civil Liability Act 2002* (NSW) s 43. The same feat was achieved without legislative assistance by the Canadian Supreme Court, which held that breach of statutory duty should be subsumed into the general law of negligence in *The Queen v Saskatchewan Wheat Pool* [1983] 1 SCR 205, ('*Saskatchewan Wheat Pool*').

93 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 206-7.

94 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 206 (n 268). Hogg and his co-authors noted that "liability founded upon illegality is thought of as a species of strict liability". In *Takaro v Rowling* [1978] 2 NZLR 314 at 324, Woodhouse J cited Professor Davis as saying that "Invalidity is not the test of fault and it should not be the test of liability": KC Davis, *Treatise* (1st ed, 1958) 487. This statement of the orthodoxy as it stood in the USA in 1958 and since has gone from looking "succinct" (in Woodhouse J's expression) to somewhat simplistic. See also M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 59.

95 "When a citizen has been adversely affected by administrative action which he considers to be wrong, the primary redress which he seeks will often be the reversal of the offending decision; thus, he will wish to secure the payment of a grant which has been withheld, the repayment of money wrongfully demanded, the abandonment of an excessive claim for tax, the granting of a licence which has been refused, the withdrawal of an order requiring him to discontinue his business activities, and so on. Yet in many cases, the offending administrative act may cause the citizen pecuniary loss before it is reversed; for example, the market-stall holder whose licence is revoked in breach of natural justice may succeed in getting his licence restored by the court, but, on the law as it stands, he cannot recover in respect of the loss of income which he suffered while he had no licence, unless he can prove a tort such as negligence. So if a planning authority imposes a restriction in good faith, but unjustifiably (perhaps under a mistake of law), the person aggrieved can no doubt get the court to set aside the decision but even if he has suffered heavy financial loss he has no remedy for that.": JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) p 344.

96 See eg the facts of *Takaro v Rowling* [1978] 2 NZLR 314, 318-19 (Woodhouse J).

97 *Revesz v Cth* (1951) 51 SR (NSW) 63. This case will be addressed further below.

98 The validity of judicial decisions unless and until they are set aside has been confirmed by the Australian High Court: *Kable (No2)* [2013] HCA 26, [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [55] (Gageler J).

One of the most famous judicial statements about compensation for invalid administrative action was made in *Hoffman La Roche* by Lord Wilberforce, who said (in dissent):[99]

> In truth when the court says that an act of administration is voidable or void but not *ab initio* this is simply a reflection of a conclusion, already reached on unexpressed grounds, that the court is not willing *in casu* to give compensation or other redress to the person who establishes the nullity. Underlying the use of the phrase in the present case … is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action. It is this which requires examination rather than some supposed visible quality of the order itself.

Lord Wilberforce's dissenting speech in *Hoffmann La Roche* was made against the background of continuing judicial manipulation of the void / voidable test,[100] here in relation to a pharmaceutical company which was forced to lower its prices and was furthermore prevented from maintaining them at the higher rate while it challenged that decision. The crucial issue for the House of Lords, which is not immediately relevant, was whether the Trade Secretary should be refused an interim injunction unless he gave the "usual undertaking"[101] to pay compensatory damages if the company were able successfully to challenge the decision that it must lower its prices. The point under discussion here does not concern the outcome of *Hoffmann La Roche*, since the injunction was never going to be invalid,[102] it was simply the trigger for the availability of damages if it had been unnecessary and the "usual undertaking" had been provided. Lord Wilberforce's *dicta* nonetheless remain interesting, since his Lordship recognised, as the rest of the Appellate Committee did not, that the pharmaceutical company stood to lose a substantial amount, even if vindicated in its challenge, if it were not able to secure compensatory damages from the government. However, the notion that an ultimate recognition of a decision's invalidity will not necessarily compensate for the loss that it caused before it had been recognised as a nullity was yet to have its day. Indeed, such a notion is directly at odds with *dicta* of Lord Diplock, made several years later on behalf of the Privy Council in *Dunlop v Woollahra*:[103]

> Yeldham J held that failure by a public authority to give a person an adequate hearing before deciding to exercise a statutory power in a manner which will affect him or his property, cannot by itself amount to a breach of a duty of care sounding in damages. Their Lordships agree. The effect of the failure is to render the exercise of the power void and the person complaining of the failure is in as good a position as the public authority to know that that is so. He can ignore the purported exercise of the power. *It is incapable of affecting his legal rights.*

Nobody would say such a breathtaking thing any more.[104] Dr Barton stated that there was "a sense of unreality" about a line of reasoning that essentially says that a builder who is invalidly denied the licence s/he needs to construct a building will nonetheless find it possible to convince architects and

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99 *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 298, 358-9 ('*Hoffmann La Roche*'). See also C Harlow, *Compensation and Government Torts* (1982) 98-9; *State of New South Wales v Kable* [2013] HCA 26, [52] (Gageler J) ('*Kable (No2)*').

100 C Harlow, *Compensation and Government Torts* (1982) 99.

101 See eg *CPR 1998* (UK) Practice Direction 25A, s 5.1A; *Uniform Civil Procedure Rules 2005* (NSW) r 25.8 (Meaning of "usual undertaking as to damages").

102 See *Kable (No2)* [2013] HCA 26.

103 *Dunlop v Woollahra* [1982] AC 158, 172 (emphasis added).

104 Professor Forsyth has noted that the void / voidable distinction "is now obsolete, the House of Lords having written its obituary notice decisively": HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 255.

contractors to join in on "ignoring" the invalid decision,[105] although, in fairness, the Judicial Committee was not saying that an invalid refusal of a licence equals a licence. The High Court has recently held, without citing *Dunlop*, that an order of a superior court of record must be treated as valid until set aside. The consequences of the alternative position would be that such a judicial order:[106]

> would have no more than provisional effect until either the time for appeal or review had elapsed or final appeal or review had occurred. Both the individuals affected by the order, and in this case the Executive, would be required to decide whether to obey the order made by a court which required steps to be taken to the detriment of another. The individuals affected by the order, and here the Executive, would have to choose whether to disobey the order (and run the risk of contempt of court or some other coercive process) or incur tortious liability to the person whose rights and liabilities are affected by the order.

In other words, an individual's *response* to an exercise of judicial or administrative power is not "incapable of affecting his [or her] legal rights", regardless of any subsequent findings as to the legal validity of such an exercise of power.

The Justice-All Souls Committee also took issue with the Privy Council's reasoning, stating that it could not:[107]

> understand how someone in the position of Dr Dunlop can be expected to 'ignore' a resolution of the local authority … When challenged, the local authority did not immediately admit that what they had done was void. Indeed, they resisted until the trial judge ruled against them. However 'void' in law the resolution may have been, it had practical effects in the real world and was capable of causing damage…

The Committee did make the concession of referring to the "conflicting" authorities on the subject of ignoring an invalid decision in the (then current) fifth edition of HWR Wade's *Administrative Law*.[108] The present edition betrays no doubt about the fact that "an invalid act may not appear to be invalid; and persons will act on the assumption that it is valid".[109] The same is true in Australia, notwithstanding the celebrated case of *Bhardwaj*,[110] in which a decision-maker successfully treated an invalid decision as a nullity before a court had had a chance to examine it. Gaudron and Gummow JJ stated that "[a] decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all".[111] *Bhardwaj* is good authority and is likely to remain

105 GP Barton, 'Damages' in M Taggart (ed), *Judicial Review in the 1980s* (1986) 123, 142. Latham CJ made a similar point about the entitlement of individuals to disregard laws made in excess of power: *South Australia v The Commonwealth* (1942) 65 CLR 373, 408. Gageler J has recently clarified this *dictum* by stating that "a purported but invalid law, like a thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences.": *Kable (No2)* [2013] HCA 26, [52] (Gageler J); citing C Forsyth, "The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford, 1998) 141, 147-8.

106 *Kable (No2)* [2013] HCA 26, [39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Their Honours went on to note that, on the facts of the case, "[t]he decision to disobey the order would have required both the individual gaoler and the Executive Government of New South Wales to predict whether this Court would accept what were then novel constitutional arguments", which is clearly not a tenable argument: *Kable (No2)* [2013] HCA 26, [40]. Gageler J would not have extended this point to cover inferior courts: *Kable (No2)* [2013] HCA 26, [56].

107 JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 347.

108 HWR Wade, *Administrative Law* (5th ed, Clarendon Press, Oxford, 1982) 308-10.

109 HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 250.

110 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, ('*Bhardwaj*').

111 *Bhardwaj* (2002) 209 CLR 597, 614-15 [51]. Their Honours listed extensive authority for this proposition.

so but it is understandable that very few decision-makers choose to follow the conduct which was examined in that case. Usually, only a court will say whether an act or decision is invalid and, regardless of whether it is, "a thing done in the purported but invalid exercise of a power conferred by law remains at all times a thing in fact."[112]

Aronson and Groves put the matter as follows:[113]

> [A] jurisdictional error usually produces nullity. But it takes a court to say so, and what is more, a court equipped with the right remedial powers. Further, the court's own jurisdiction must have been properly invoked by the right person, on the right grounds, seeking the right remedy, and within any statutorily valid deadline. The bottom line, therefore, is that nullity is relative to context. It can be one or more of a number of legal consequences.

It is uncontroversial that establishing invalidity leads usually, but not inevitably, to nullity[114] and that the language of 'void' and 'voidable' is "definitely out of fashion"[115] in public law.[116] Some have gone so far as to query, somewhat belatedly, "what actually does 'void' mean anyway?".[117] The trend had been set fairly definitively by Professor Wade[118] and even noted enthusiasts for the void / voidable distinction, such as Lord Denning, eventually came around:[119]

> Assuming that he did fail to take into account a relevant consideration, the result is that, in point of legal theory, his consent was "void." It was made without jurisdiction. It was a nullity. Just as if he had failed to observe the rules of natural justice. But, in point of practice, it was "voidable." I have got tired of all the discussion about "void" and "voidable." It seems to me to be a matter of words – of semantics – and that is all. The plain fact is that, even if such a decision as this is "void" or a "nullity", *it remains in being unless and until some steps are taken before the courts to have it declared void*.

Once it is accepted that, regardless of its status after a court has made findings as to its validity and (perhaps) orders consequential on those findings, a decision affected by jurisdictional error had force, as a matter of practical effect, during the intervening period, it necessarily follows that citizens are able to sustain substantial loss as a direct result of invalid administrative action. Invalidity is no bar to alleging a loss, nor should it be a bar to obtaining compensation for that loss. That case has been put by a number of people and is considered below.

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112 *Kable(No2)* [2013] HCA 26, [52] (Gageler J).

113 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [10.100].

114 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) Ch10.

115 M Aronson, 'Nullity' in M Groves (ed), *Law and Government in Australia* (2005) 139, 145. Lord Hailsham LC had said: "Personally, I find difficulty in applying the language of 'void' and 'voidable' (appropriate enough in situations of contract or of alleged nullity of marriage) to administrative decisions which give rise to practical and legal consequences which cannot be reversed.": *North Wales Police v Evans* [1982] 1 WLR 1155, 1163. Lord Wilberforce had earlier commented that "[t]here can be no doubt in the first place that an *ultra vires* act is simply void": *Hoffmann La Roche* [1975] AC 298, 358. See also *Kable (No2)* [2013] HCA 26, [20]-[23] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

116 By contrast, the law of unjust enrichment has seen a renewed necessity to deal with the concepts of voidness and nullity in the last two decades, since the decision of the House of Lords in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, ('*Hazell v Hammersmith and Fulham LBC*'). See Birks' analysis of the 'Swaps Cases' in P Birks, *Unjust Enrichment* (2nd ed, Oxford University Press, Oxford, 2005) 108-13.

117 M Leeming, *Authority to Decide* (2012) 49. Such a query is well-justified, given that 'void' states a conclusion but does not indicate how it was reached: *Kable (No2)* [2013] HCA 26, [21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

118 HWR Wade, 'Unlawful Administrative Action: Void or Voidable? (Part 1)' (1967) 83 *Law Quarterly Review* 499; HWR Wade, 'Unlawful Administrative Action: Void or Voidable? (Part 2)' (1968) 84 *Law Quarterly Review* 95. See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [10.210].

119 *Lovelock v Minister for Transport* (1980) 40 P&CR 336, 345 (Lord Denning MR) (emphasis added). More detail on the Damascene conversion that his Lordship experienced can be found at HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 255 (n 149).

II: The case in favour of tort liability for invalid administrative action

Any argument made in favour of extending the available remedies for invalid administrative action to include compensatory damages will likely share considerable common ground with Lord Bingham's much-quoted *dictum*:[120]

> [I]t would require very potent considerations of public policy … to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied.

This simple statement has provoked dissent from those who remain unconvinced that every wrong must be remedied, or at least that it must be remedied with an order for compensatory damages.[121] The principled scepticism which drives this dissent is the force that must be overcome before there will be a compensatory damages remedy in public law.

The 1988 report of the Justice-All Souls Committee recommended that it be open to a court to award compensatory damages to compensate for loss flowing from the breach of a public law duty (for example, to provide procedural fairness). The Committee considered this to be preferable to the attempts of various courts to graft private law duties in tort onto the administrative law system.[122] Its criticism was essentially of the legal requirement that public authorities' legal liability be forced into existing categories of tort liability. Hence:[123]

> It may be right to say that 'no duty *of care*' is owed to give a fair hearing, but in public law there is *a duty* to do just that. We believe that it should be open to a court to award damages if loss actually flows from the breach of such a duty.

What that passage hints at was made explicit in Tom Cornford's book, *Towards a Public Law of Tort*.[124] Cornford's argument rested firmly on an outright rejection[125] of Dicey's 'equality principle',[126] which he regarded as "discredited" both normatively and descriptively, in favour of demanding more from the state than that it not commit private torts against us.[127] On Cornford's analysis, if a public authority exercises its powers in a way which is both *invalid* and *unreasonable*, it follows that it has withheld a benefit which the public, or at least certain individuals within the public, had a right to receive.[128] He used as his basis for this conclusion the first of two principles (Principle I) developed by the Council of Europe in its examination of administrative liability in 1984:[129]

120 *X v Bedfordshire CC* [1995] 2 AC 633, 663 (Sir Thomas Bingham MR).

121 "I yield to no one in my admiration for Lord Bingham, but I am bound to say that is as question-begging a statement as you could find. By what procedure should they be remedied; what should the remedy be; at whose expense should they be remedied? Should the law provide that every wrong should be remedied from the public purse? Because we are lawyers, does that mean that an action for damages is obviously the only right way of remedying a wrong?": L Hoffmann, (Bar Council Law Reform Lecture, 17 November 2009) [20].

122 JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 347.

123 JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 347 (original emphasis).

124 T Cornford, *Towards a Public Law of Tort* (2008).

125 T Cornford, *Towards a Public Law of Tort* (2008) Ch2.

126 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915) 198-9. See also P Cane, 'Damages' (1999) 9 *Otago LR* 489, 490-1.

127 eg T Cornford, *Towards a Public Law of Tort* (2008) 11 (and generally chapters 6 & 7). See also M Aronson, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 20 *PLR* 79, 79.

128 See G Weeks, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 17 *Torts LJ* 311, 311-12.

129 Council of Europe, '*Recommendation on Public Liability*' (R (84) 15, 1984). See also T Cornford, *Towards a Public Law of Tort* (2008) xxi.

> Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.

Cornford's preference was that any remedy on this basis be provided in public law rather than private law, since he considered public law to be the more principled vehicle for dealing with administrative injustice.[130]

Tom Cornford's arguments were anathema to Robert Stevens, who dismissed the concept that the state's failure to confer a benefit to which a disappointed party did not have *an enforceable right* could ever result in the disappointed party having a cause of action which could be remedied with compensatory damages.[131] Stevens construed every interaction between the State and individuals (and indeed every private law interaction between individuals) as requiring that the individual have a pre-existing right to any benefit that s/he would have conferred. It is not sufficient, on this construction, for the individual to have suffered loss in order to obtain a remedy; this much is undoubtedly orthodox[132] and fits neatly with the position that liability requires more than simply that the state has acted invalidly, as I have discussed above. However, Stevens discounts completely any obligation for the state to confer benefits upon its citizens in the absence of a right.[133] In this sense, his book was an exercise in arch-Diceyanism: it argued that the relationship between two parties where one claims a remedy from the other is the same whether both parties are individuals or if one of them is the state.[134]

Whether or not it is true that the state owes certain *activity* to its citizens,[135] there can be little doubt that, just as the state has capacities not possessed by individuals to benefit citizens collectively,[136] it also has a greater capacity to inflict harm on its citizens than other individuals have because, in general, we do what the state through its officers tells us to do. To take a simple example of this tendency, consider an instruction to a motorist to drive away from his or her intended route. Such an instruction is almost certain to be obeyed without question if delivered by a uniformed police officer; it is much more likely to be ignored if delivered by most other members of the public. Where, for some reason, compliance with an invalid instruction which, on its face, has been made by the state causes loss, why should it not carry with it an entitlement to compensation for that loss?

Furthermore, the fact that the state owes certain duties to its citizens is not the same as to say that *any individual citizen* has an action against the state for breach of such a duty. The way in which the

130 T Cornford, *Towards a Public Law of Tort* (2008) Ch6.

131 R Stevens, *Torts and Rights* (2007) Ch10.

132 See also D Priel, 'That Can't Be Rights: a Review of Robert Stevens' *Torts and Rights*' (2011) 2 *Jurisprudence* 227, 228.

133 Specifically, as 'claim rights': P Cane, 'Book Review of *Torts and Rights* by Robert Stevens' (2008) 71 *Modern Law Review* 641, 641.

134 Cf T Cornford, *Towards a Public Law of Tort* (2008) 57. Cornford sought, in Mark Aronson's view, to "reverse" the Diceyan model by having much of it operate as an element of public, rather than private, law: M Aronson, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 20 *PLR* 79, 80.

135 Cornford believes that it does: T Cornford, *Towards a Public Law of Tort* (2008) 79-82.

136 "The point is, is that when we succeed, we succeed because of our individual initiative, but also because we do things together. There are some things, just like fighting fires, we don't do on our own. I mean, imagine if everybody had their own fire service. That would be a hard way to organize fighting fires.": B Obama, 'Remarks by the President' (Speech delivered at the Campaign Rally in Roanoke, Virginia, 13 July 2012).

state holds power has long been analogised to a trust,[137] with the citizenry being in the position of beneficiaries. Few people treat this analogy as being a literal description of the relationship between the state and its citizens,[138] but it is certainly instructive, as French CJ has noted extra-judicially:[139]

> The application of the metaphor of a trust, to holders of public office, can readily be understood. The office holder has power invested in him or her by law for the purposes of the law and only for the purposes of the law.

Cornford's proposed model of providing compensation would allow individuals to bring an action against the state for losses suffered by them personally as a result of the state acting invalidly in an administrative law sense. This view assumes that the concept of a public duty owed to *the people* equates to a public duty owed to individuals severally, although Professor Endicott has argued that individual rights and the 'common good' "cannot actually be weighed with each other in any sort of scales".[140] Part of what the 'public trust' metaphor implies is that it is the task of the state to act in the best interests of the people collectively.[141] The problem with reducing such a broad and polycentric concern to adversarial litigation has long been recognised.[142] Further, as Hogg and his co-authors noted, this form of public law compensation "comes close to turning administrative law judicial review principles (of procedural fairness and so on) into legally enforceable individual rights",[143] which would in turn threaten to "overwhelm the traditional remedies of administrative law".[144] Creating equality between the state and its citizens in all legal proceedings by removing the distinctive principles of public law is unlikely to be what Dicey had in mind for his 'equality principle'.[145] However, as I will discuss below, Dicey's invalidity standard for legal proceedings against Crown officials[146] had a function of ensuring that liability of the Crown (which invariably stood behind its officers) would remain *affordable*.

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137 Some of the relevant sources are summarised at G Weeks, 'SCT and the Public / Private Distinction' (2006) 13 *AJ Admin L* 147, 161-2. See also RS French, 'Public Office and Public Trust' (Speech delivered at the Seventh Annual St Thomas More Forum Lecture, Canberra, 22 June 2011).

138 Finn J comes closer than most; see most recently PD Finn, 'Public Trusts, Public Fiduciaries' (2010) 38 *Federal Law Review* 335.

139 RS French, 'Public Office and Public Trust' (Seventh Annual St Thomas More Forum Lecture, 22 June 2011). Interestingly, French CJ seems in this package to have altered subtly the usual formulation of the public trust metaphor by making *the law* rather than *the people* the beneficiary.

140 T Endicott, 'Proportionality and Incommensurability' (Paper presented at the Public Law Discussion Group, 2 February 2012).

141 The concept of a "public trust" is used in a subtly different way in regard to the judiciary, which are said to need the *confidence* of the public in order for judicial decisions to be respected: HP Lee and E Campbell, *The Australian Judiciary* (2nd ed, Cambridge University Press, Melbourne, 2012) 308 (and Ch 10 generally). What is being described is not "*a* public trust", which draws on the equitable trust by way of analogy, in the same way as that term is often used of the other branches of government.

142 LL Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

143 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 209.

144 *NSW v Paige* (2002) 60 NSWLR 371, 404 [173] (Spigelman CJ).

145 Not for nothing does Mark Aronson's review of Cornford's book begin "Dicey would not have written this book.": M Aronson, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 20 *PLR* 79, 79.

146 Aronson and Groves explained that "Dicey treated public officials who exceeded their authority as if they were private persons. In that way, officials acting without authority became personally amenable to damages actions, despite the maxim that the King could do no wrong. That is, the official's conduct became unofficial for the purposes of the damages action. Being unofficial, the defendant's public status could not count as a defence to a damages action and had therefore to be disregarded. But the practical effects of the conduct were not disregarded, and they became compensable as in an action between subjects.": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [10.50] (citation omitted).

Peter Cane was the foremost Australian scholar to consider a public law damages remedy,[147] which could make monetary awards available for public law breaches.[148] His argument was based at least in part on the fact that he does not automatically share in the "unthinking identification of damages with certain causes of action and not others".[149] Cane stated that "excluding damages from the public law remedial repertoire puts victims of public law wrongs at a significant disadvantage which requires justification"[150] but has nonetheless expressed an understanding that, whatever the merits of a compensatory damages remedy for invalid government action in principle, we ought not to ignore the deleterious impact that such a remedy may have upon the government's capacity for public spending.[151] This is the essential conundrum of the public law compensatory damages remedy: the direct and substantive results it could achieve for applicants are enticing for the reason that they could significantly improve the delivery of just outcomes to individuals, but these would potentially be delivered at the expense of the law's existing protections, developed over centuries, against excessive judicial interference with government financial management and in favour of a less intrusive[152] brand of accountability.[153]

Cane argued that compensatory damages are, in terms of substance, no more intrusive (and perhaps less, in as much as "they do not prohibit or require action but only penalise action or inaction after the event") than remedies like *mandamus*, prohibition and injunctions.[154] He concluded that since an order for compensatory damages is no more intrusive a remedy than several existing public law remedies, therefore "damages are not, on balance, obviously more objectionable than certain other public law remedies which are freely available."[155] This reasoning is compelling but I am critical of Cane's apparent conclusion that, since the *substance* of the proposed damages remedy is not intrusive to a problematic degree, therefore there is no difficulty with public law taking on a *substantive* remedy. In other words, there are ways in which a remedy can be intrusive that are difficult to measure by assessing merely the substance, enforceability and capacity of the parties to bargain out of a remedy;[156] a remedy can also be intrusive based, for example, on the level of change it imposes

147 See eg P Cane, 'Exceptional Measures of Damages: A Search for Principles' in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press, Oxford, 1996) 301, 319; P Cane, 'The Constitutional Basis of Judicial Remedies in Public Law' in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press Ltd, London, 1997) 242, 257-60; P Cane, 'Damages' (1999) 9 *Otago LR* 489; P Cane, *Administrative Law* (5th ed, 2011) 310-13.

148 Note that Cane did not restrict his argument to compensatory damages: P Cane, 'Damages' (1999) 9 *Otago LR* 489, 499.

149 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 489.

150 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 493.

151 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 491. Professor Cane was a member of the Panel of Eminent Persons which wrote the *Ipp Report* (2002).

152 Cane defines intrusiveness as depending "on how much freedom the addressee of the remedy has in deciding how to react to the remedy. A remedy which leaves its addressee a significant amount of freedom in deciding how to comply with it is less intrusive than one which leaves the addressee little or no such freedom.": P Cane, 'Damages' (1999) 9 *Otago LR* 489, 493.

153 See eg R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) Ch1.

154 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 494 (n 16). Cane was not using the term "penalise" to refer specifically to punitive or aggravated damages but in the more colloquial sense.

155 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 495.

156 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 494.

on other, established remedies and the damage it does to the overall coherence of a body of law.[157] By providing a substantive, compensatory remedy, damages could render every other public law remedy otiose and throw into confusion much of the existing law about the operation of the separation of powers doctrine in Australia. Damages could open a lucrative new front for plaintiff law firms, and corresponding expense to the public sector, by encouraging speculative claims which carry a heavy inducement to settle.[158] These are not *per se* good reasons *not* to have a compensatory damages remedy in public law, but they are powerful arguments which need to be countered in detail before such a development can occur.

At law, damages are available as of right[159] once the cause of action is established to the relevant standard of proof (usually on the balance of probabilities),[160] including the fact that loss has been suffered (allowing the court to assess the sum of damages in consideration of that loss).[161] The result of the fact that common law damages are not discretionary is that courts do not have the same level of control over the award of damages in private law that typifies each of the public law remedies.[162] Cane did not foresee a public law compensatory damages remedy operating in this fashion but, rather, as a discretionary remedy in the form of every other public law remedy.[163] This proposed remedy would not therefore operate conformably with the established rules of awarding compensatory damages in private law, but would be open to judicial interpretation of public policy in a way that the existing, procedural public law remedies are not. A public law compensatory damages remedy would almost certainly be hedged with legislative restrictions.[164] Cane made the point that fear of "overkill" or a "chilling effect",[165] causing public officials to act defensively from fear of "incurring liability to

157 *NSW v Paige* (2002) 60 NSWLR 371, 400 [156] (Spigelman CJ). I will suggest below that one of the "coherence" issues with a public law damages remedy occurs within the remedy itself. Another potentially occurs within the law of negligence, as to which see Cane's argument that a decision which is *Wednesbury* unreasonable in public law must therefore also be negligent: P Cane, 'Damages' (1999) 9 *Otago LR* 489, 506-7. This premise ignores the fact that it is possible to exercise a public law duty invalidly on the *Wednesbury* standard without first having a common law duty of care to exercise that duty at all. The example of incoherence that is relevant to this paragraph is that the proposed remedy would focus almost exclusively on compensation and would not include considerations familiar to private law damages, such as deterrence; see P Cane, 'Damages' (1999) 9 *Otago LR* 489, 499-500. I do not argue that it ought. My point is simply that the remedy being discussed for public law is not "damages" as private lawyers know it. See also R Bagshaw, 'Monetary Remedies in Public Law - Misdiagnoses and Misprescription' (2006) 26 *Legal Studies* 4, 17-19.

158 It is very rare for class action law suits to proceed to trial, and even rarer for judgment to be delivered, in Australia.

159 Technically, this statement is true only of nominal damages, since highly malleable issues of causation and remoteness, as well as obligations like mitigation, tend in practice to stand between an otherwise well-founded claim and an award of damages. In this sense, damages may be available as of right but they are certainly not as 'automatic' as that statement suggests.

160 See eg S Sugarman, 'Damages' in C Sappideen and P Vines (eds), *Fleming's The Law of Torts* (10th ed, 2011) 261, 264; N Seddon, *Government Contracts: Federal, State and Local* (5th ed, Federation Press, Annandale, NSW, 2013) 42-5; P Cane, *Administrative Law* (5th ed, 2011) 310.

161 See P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008) 295.

162 Equitable compensation, by contrast, is highly discretionary; see G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247, 278-9. That form of compensation is not being discussed here; see below in Chapter 5.

163 He remarked that "since the purpose of damages is not deterrence, the probability of [deterrent effects] should not be taken into account *in individual cases* where liability is established, either in deciding whether damages (as opposed to any other type of remedy) ought to be awarded or in assessing any damages to be awarded.": P Cane, 'Damages' (1999) 9 *Otago LR* 489, 499 (original emphasis). A court hearing a private law action would not have to inquire whether "damages … ought to be awarded" once the liability of the party by whom damages would be payable was established.

164 The Law Commission has noted the "unusual" unanimity (not to mention strength) with which a similar reform was dismissed by the government in the UK: Law Commission, *Administrative Redress* (2010). The history of Australian *Civil Liabilities* legislation following the publication of the *Ipp Report* (of which Cane was an author) creates a sense of lively expectation that a similar fate would await the recommendation of a public law damages remedy in this country.

165 Jaffe once speculated as to whether liability to suit would "chill the ardour" of officials charged with exercising public power: LL Jaffe, *Judicial Control of Administrative Action* (Little, Brown, Boston, 1965) 245. Examples of this reasoning are listed in M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 42 (n 30).

individuals" to the detriment of "vigorous performance of governmental functions", has also been used to oppose the development of public law estoppel and the establishment of an Ombudsman (the former with apparent success).[166] It is almost certain that the same "chill factor" would be prominent in mobilising legislative restriction of a public law compensatory damages remedy.

There is a second point which is notable in this regard, reinforcing the view that, if a possible chilling effect is neither "important [nor] determinative" in certain legal fields,[167] it is (at least potentially) both in regard to public law compensatory damages. The "chill factor" as it occurs in the law of negligence is to a large extent able to be factored into consideration of whether a duty of care is owed in the first place; in other words, the question of what consequences liability would have for the operations of public authorities in a general sense is considered at the point of the court deciding whether the defendant owes a duty of care in the first place. The public law compensatory damages remedy would, however, run the risk that the claimant would make his or her case and establish the liability of the defendant public authority, only to be denied damages on discretionary grounds. The impact of the "chill factor" in public law has the potential to be far greater than in tort law.[168]

A concern that this remedy would be subject to a legislative and / or judicial response based on fear of a "chilling effect" is entirely warranted. Furthermore, such a response would likely have a significantly greater effect than in other areas of law. Cane's submission that the "overkill argument" ought not to be given "too much weight" because it is "ultimately a question of fact about which we know very little" was fairly made on its face. However, there are a couple of issues about which we do know – namely, the general modern approach to limitation of public liability and the differences between the discretionary nature of public law remedies and private law damages, particularly in tort – which make it entirely reasonable to predict that the "chill factor" could prove highly relevant to the development of a public law compensatory damages remedy. Whether such a remedy will be too expensive and a deterrent to vigorous government, what is telling is the likelihood that it will be *perceived* that way regardless.[169]

The question of a remedy's expense is, of course, relevant to compensation by the state to the extent that liability is on broader grounds than the usual principles of tort law (under which the defendant's means are almost always irrelevant to the question of his or her liability). Lord Goff remarked in *Factortame* that whether an administrative act is valid is generally irrelevant to tort law liability because "there is no general right to indemnity by reason of damage suffered through invalid administrative action".[170] This contained an obvious subtext, according to Michael Fordham:[171]

166 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 500. The issue of public law estoppel is discussed in Chapters 3 and 5; see also G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247.

167 M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 42.

168 Cf P Cane, 'Damages' (1999) 9 *Otago LR* 489, 501.

169 As to which, see the response of the UK government to the Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187, (2008).

170 *Factortame (No2)* [1991] 1 AC 603, 672.

> Stated in that way, it is no surprise. A "general right to indemnity" would be a disaster. It would turn judicial review into medical negligence-style bingo. We know that judges make choices with resource implications in mind. Imagine recovery of damages for all foreseeable losses arising whenever a public body acts unlawfully, unreasonably or unfairly. The bill to the taxpayer would be huge.

Invalidity, it is true, is a fairly blunt tool for determining when a person should receive compensation for loss inflicted by the state. Furthermore, it is implicit in Lord Goff's *dictum* that supplementary principles would also be required in any case. These would probably be supplied by either (or both) legislation or development of the common law, which is to say judicial discretion.

Judicial discretion is at the heart of Cane's conception of the public law compensatory damages remedy because he argues that "something more than breach of a public law rule is needed to justify awarding damages".[172] He denied that there is any theoretical reason why the public law remedy need "be dependent upon or an adjunct to" the private law damages remedy[173] and argues that a strict liability regime may be justified for governmental infliction of economic harm (as opposed to the fault-based regime for personal injuries inflicted by government) "as a means for controlling abuse of government power".[174] Cane was, in short, realistic about the fact that the remedy he advocated has little more in common with private law compensatory damages than its name:[175]

> Our public law of damages need not consist of 'hand-me-down' causes of action which were not developed to deal with the exercise of governmental powers and which need to be qualified and modified in order to do so.

But of course such a remedy will need to be "qualified and modified", either by binding decisions of higher courts or, much more likely, by highly prescriptive legislative regulation, since it depends on courts deciding whether compensatory damages are suitable in the case, and their quantum, based upon open-ended concepts such as whether there has been an "abuse of government power". The ancient public law writs, and for that matter equitable remedies, that were 'handed down' to section 75(v) of Australia's *Constitution* in fact *benefit* from the fact that they are not bespoke remedies, since they are able to draw upon centuries of judicial *dicta* as to when and how they are to be applied.[176] A public law compensatory damages remedy which places a broad discretion in the hands of the judiciary to award compensatory damages against public authorities with little to no binding guidance as to how that discretion will be exercised will – rightly – be of deep concern to the other arms of government. The most likely outcome is that a public law compensatory damages remedy will not be allowed on those terms. The next most likely is that it will be so heavily ringed around with limitations

171 M Fordham, 'Reparation for Maladministration' [2003] 8 *JR* 104, 104 [1] (footnote omitted).

172 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 507.

173 Ibid.

174 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 508.

175 Ibid.

176 Cane characterised this as "the burden of legal history": ibid.

imposed by a concerned legislature that it will be all but a dead letter.[177] The third is a retraction of the grounds of invalidity.

The argument put by Professor Cane in favour of developing a public law compensatory damages remedy is powerful, thoughtful and idealistic (an epithet I use with significant admiration and without criticism). His own statement in favour of the development he was advocating is worth quoting at length:[178]

> What I am arguing in this article is that if we make explicit the conceptual and juristic elements of the causes of action to which the fundamental tenet[179] refers and of the rules of public law, we find that they share all the basic building blocks of damages liability. Abandonment of the fundamental tenet would leave us free to put those building blocks together in order to construct a public law of damages which met whatever policy objectives we chose. There is no need to be slaves to existing causes of action in the way the fundamental tenet requires because we are masters of the building blocks out of which they were constructed. We can use those blocks to build whatever new causes of action are needed for the important task of holding government accountable to its citizens in the 21st century.

I have expressed above my doubts about the practicality of achieving the goals spelled out in this passage but the goals themselves are worth pursuing. There is no reason why compensatory damages ought to be excluded from the suite of remedies available for breaches of public law if, as the passage above from Cane suggests, the common law is *logically* free to create public liability as it created private liability. The most difficult part of pursuing the goals enumerated in Cane's article is to ensure that the law as a whole remains both coherent and affordable; the former requirement usually means that change will be slow and incremental, and which carries with it the problem of defining, measuring and ensuring 'coherence'. It should not prevent us from continuing to attempt reforms that will cause the law to meet the policy objectives we choose.

The passage from *Kruger* cited by Cane[180] in his discussion of the 'fundamental tenet' is one of the sources in favour of the proposition that Australian law, like English law,[181] includes no damages

177 Look at the example of the tort of breach of statutory duty following the enactment of *Civil Liability Act 2002* (NSW) s 43. See E Carroll, '*Wednesbury* Unreasonableness as a Limit on the Civil Liability of Public Authorities' (2007) 15 *Tort Law Review* 77, 81-3; G Weeks, 'Marriage of Strangers' (2010) 7 *Mq JBL* 131, 143; cf Mark Aronson's argument that the tort was already all but dead in Australia: M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 76. It is absolutely dead in Canada, but it was the Supreme Court which held the knife, not the legislature: *Saskatchewan Wheat Pool* [1983] 1 SCR 205.

178 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 508-9.

179 Cane began the article by stating that the 'fundamental tenet' was typified by the following passage:

> "The causes of action enforceable by awards of damages are created by the common law (including for this purpose the doctrines of equity) supplemented by statutes which reveal an intention to create such a cause of action for breach of its provisions. If a government does or omits to do anything which, under the general law, would expose it or its servants or agents to a liability in damages, an attempt to deny or to escape that liability fails when justification for the act done or omission made depends on a statute or an action that is invalid for want of constitutional support. In such a case, liability is not incurred for breach of a constitutional right but by operation of the general law. But if a government does or omits to do something the doing or omission of which attracts no liability under the general law, no liability in damages for doing or omitting to do that thing is imposed on the government by the Constitution.": *Kruger v Commonwealth* (1997) 190 CLR 1, 46 (Brennan CJ) ('*Kruger*').

180 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 489.

181 Although theoretically the English courts could choose to establish a damages remedy for breach of a constitutional (human) right by following the reasoning of the New Zealand Court of Appeal in *Simpson v Attorney-General* [1994] 3 NZLR 667, ('*Baigent's Case*'). Given the UK's European obligations, there is probably greater force behind treating the *Human Rights Act 1998* (UK) as constitutional than its merely statutory New Zealand equivalent.

remedy for breaches of the Constitution,[182] unlike the USA,[183] New Zealand,[184] Ireland[185] and Canada;[186] nor does Australian law provide a damages remedy for breaches of the rule of law *per se*.[187] On one view, this makes it all the more important that Australia and the UK include any public law compensatory damages remedy as an element of the law of tort, since it seems unlikely (as I will discuss below) that either will soon embrace such a remedy as an element of their public law.

Carol Harlow's history of considering the possibility of a public law remedy of administrative compensation is even longer than Peter Cane's, stretching all the way back to her PhD thesis.[188] While she has stated that she "deplore[s] the litigation tactics that have set the state squarely within the sights of lawyers tempted by its apparently bottomless coffers", she also favours "a measure of compensation, promptly, and voluntarily proffered" as being integral to principles of "collective responsibility and social solidarity".[189] Implicit in this philosophy is that some of the concerns which 'tort law reform' processes[190] sought to resolve with regard to public authorities are caused not by a surfeit of compensation but by the fact that not just tort law, but its claim procedures, are ill-suited to resolving many kinds of claim against public authorities.

This is not to suggest that Professor Harlow is an advocate for the development of an administrative law tort.[191] Much of the analysis of proposed compensatory administrative law remedies in *Compensation and Government Torts* was addressed to the doctrinal difficulties that the suggested reforms would cause.[192] However, Harlow recognised that those who sought reform of the system of administrative law judicial review remedies are on the horns of a dilemma:[193]

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182 *BAT v WA* (2003) 217 CLR 30, 52 [40] (McHugh, Gummow & Hayne JJ); cf 75 [118] - 81 [137] (Kirby J); *Kruger* (1997) 190 CLR 1, 46 (Brennan CJ). See also the references in PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 202 (n 251). Cane has indicated that he views such a remedy as being "undesirable": P Cane, 'Damages' (1999) 9 *Otago LR* 489, 499 (text to n 24) and generally at 502. In Cane's view, public law damages would only ever be compensatory, and judicial statements about the nature of the breach should be made through existing remedies, such as the declaration. See also E Campbell, 'Compensation for Denial of a Fair Hearing' (1989) *Monash ULR* 383, 426-9.

183 *Bivens v Six Unknown Federal Narcotics Agents* 403 US 388 (1971), ('*Bivens*').

184 *Baigent's Case* [1994] 3 NZLR 667. The action in New Zealand is based upon breach of the *Bill of Rights Act 1990* (NZ). That Act does not, however, include a remedial clause. While it is true that the US Constitution does not explicitly authorise a judicial remedy for breach of the Constitution, it appears uncontroversial now that the capacity to grant such a remedy is implicit. Such reasoning has further to go where, as in New Zealand's case (in contrast to Canada's), the relevant constitutional document is not constitutionally entrenched: *Baigent's Case* [1994] 3 NZLR 667, 703 (Gault J). See PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 202.

185 See JM Kelly, *The Irish Constitution* (4th ed, GW Hogan and GF Whyte (eds), LexisNexis, 2003) 2138-41.

186 *Vancouver (City) v Ward* [2010] 2 SCR 28, ('*Vancouver v Ward*'). See generally G van Harten et al, *Administrative Law* (6th ed, 2010) 1299-1303; LJ Mrozinksi, 'Monetary Remedies for Administrative Law Errors' (2009) 22 *Canadian Journal of Administrative Law and Practice* 133, 161-73.

187 *Mengel* (1995) 185 CLR 307, 352-3 (Mason CJ, Dawson, Toohey, Gaudron & McHugh), 373 (Deane J). The High Court was refuting the claim made in the Northern Territory Court of Appeal that "in the circumstances of this case, the liability of the defendants for the plaintiffs' losses properly rests upon broader considerations than the identification of a personal action on the case. It rests rather, I think, on the place of individual liberty of action within our society under the constitutional principle of the rule of law": *Mengel (NTCA)* (1994) 83 LGERA 371, 373 (Angel J).

188 C Harlow, *Compensation and Government Torts* (1982) v.

189 C Harlow, *State Liability* (2004) 8.

190 In Australia, see D Ipp et al, *Ipp Report* (2002). Harlow regarded somewhat wryly the fact that Australia was the only country to tackle the problems of government liability decisively, only to "move back towards immunity": C Harlow, 'Rationalising Administrative Compensation' [2010] *PL* 321, 323.

191 She commenced her first book by querying whether "we really need [a] 'special' administrative law tort" at all: C Harlow, *Compensation and Government Torts* (1982) 2.

192 C Harlow, *Compensation and Government Torts* (1982) 87-101.

193 C Harlow, *Compensation and Government Torts* (1982) 100 (original emphasis, footnote omitted).

> As Lord Wilberforce insisted [in his dissenting speech in *Hoffmann La Roche*], all that is needed to put an end to legal casuistry [of the type seen in that case and specified others] is acceptance of the principle that *all loss resulting from invalid administrative action falls on the administration which acts at 'its risks and perils'*. In principle we, the citizens, accept this as desirable; in practice we, the taxpayers, are afraid of the consequences. Would the cost be too great, would unmeritorious claimants succeed in speculative claims, would our public servants be deterred from enforcing the law? We must devise limitations. But what limitations? Too narrow a test excludes the very cases we hoped to cover, too wide a test lets in the speculators whom we cannot identify but hope to exclude.

Of course, Harlow's (and Lord Wilberforce's) point was that the bold attempt to cut the Gordian knot, represented in the italicised words in the quotation above, must inevitably fail and descend back into the eternally frustrating realm of "legal casuistry" while there is a compromise that must be made between ourselves as citizens seeking justice and ourselves as taxpayers seeking to devise a test that will foil 'speculators' out to take advantage of our generosity. Harlow gave examples of how the fear of abandoning the 'fault principle' had previously played out,[194] and commented presciently that:

> the economists cannot persuade us wholly to accept a principle of liability which, although logical and predictable, may result in windfalls to scroungers. Unfortunately, the more we limit the criteria in order to bar scroungers, the more likely it is that our reform will, in practical terms, achieve absolutely nothing.

Harlow's ultimate conclusion in *Compensation and Government Torts* was that "neither a general remedy in damages nor a general power to compensate based on the equality principle"[195] would prove a "very efficient" way of dealing with claims for money against the government.[196] Rather, she argued, we ought not to be afraid to "experiment with a discretionary power to award compensation for '*abnormal loss*' in '*exceptional circumstances*' where it seems '*just and equitable*' to [a] Divisional Court to do so."[197] This bold suggestion was based on the opinion that we can only "provide for hard cases while shutting the door to unmeritorious claims" by relying on judicial discretion. Harlow's later book, *State Liability*, contained the claim that the Administrative Court in the UK is (or at least should be) empowered under the *Civil Procedure Rules* to "order the payment of compensation" in administrative law matters and should also be granted such a power in human rights matters. However, she expressed understanding of the Administrative Court's tendency to refer matters in which damages are sought back to the High Court to be heard by writ.[198]

The history of the intervening three decades since the publication of *Compensation and Government Torts* has shown that judicial discretion is now seldom given much rein. Overwhelmingly, particularly in a jurisdiction like Australia which has no constitutional or statutory rights protection, the role of the

194 C Harlow, *Compensation and Government Torts* (1982) 100-1. A similar preoccupation with unmeritorious claimants was seen in the legislative 'reforms' which followed D Ipp et al, *Ipp Report* (2002).

195 Illustrated by Lord Moulton's *dictum* that "the feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment": *Attorney-General v De Keyser's Royal Hotel Limited* [1920] AC 508, 553 ('*De Keyser's Royal Hotel*'). This *dictum* was approved by Lord Reid in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 104 ('*Burmah Oil*'). See C Harlow, *Compensation and Government Torts* (1982) 107; C Harlow, 'Rationalising Administrative Compensation' [2010] *PL* 321, 326.

196 C Harlow, *Compensation and Government Torts* (1982) 113.

197 C Harlow, *Compensation and Government Torts* (1982) 113 (original emphasis).

198 C Harlow, *State Liability* (2004) 115-16.

judiciary is to interpret and apply highly prescriptive statutes. This is the case even in areas which were previously the predominant domain of the common law, such as negligence.[199] Exercises of judicial discretion risk being met with accusations of "judicial activism",[200] particularly if they are based on a process of 'top-down' legal reasoning.[201] The process of strict legal reasoning which is the modern preference represents much that Harlow and Lord Wilberforce deplored as "legal casuistry". In short, the judiciary wouldn't know how to employ such a broad and simply defined discretion[202] and the legislature is unlikely to give them a chance to find out.

This kind of scheme is not, in any case, what Professor Harlow would prefer, based on her more recent writing on the subject. In *State Liability*, she expressed the view that:[203]

> many hard choices in compensation are best left to government and legislatures. Legislators remain the *legitimate* arbiters between collective and individual interests where resources are in issue; administrators are best placed to calculate financial implications and take corrective action, though always under the ultimate supervision of courts and ombudsmen.

Harlow's main point was that compensation should be clearly distinguished from liability, such that it would not be linked to proof of fault on the part of a public officer or body. Such a system would amount to a rejection of the 'compensation culture' and its attendant demands by removing the judicial focus from compensation processes. I suspect that, at least in the initial stages, a scheme which awarded compensation based on administrative or legislative calculations as to what could be afforded and how much money would compensate the loss complained of would lead to great dissatisfaction. Without a specific oversight jurisdiction for the courts, the ombudsman would wind up with a very great deal to do.

In a 2010 article, Harlow again did not advocate compensation based upon proof of a "judicially enforceable right, [since] such claims are really best handled by ombudsmen who … normally apply some variant of the entitlement principle formulated in Treasury guidance", which illustrates factors to be considered in making a decision whether to provide compensation and has as overarching principles that the compensation be "fair, reasonable and proportionate" but should neither provide the recipient with a "financial advantage" nor set an "expensive precedent".[204] The merits of providing redress for a public authority's departure from its soft law through such a scheme will be addressed in Chapter 6.

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199 See now eg *Civil Liability Act 2002* (NSW); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2002* (WA); *Civil Liability Act 2003* (Qld); *Wrongs Act 1958* (Vic); *Civil Law (Wrongs) Act 2002* (ACT).

200 JD Heydon, 'Judicial Activism' (2003) XLVII *Quadrant* 9. Heydon J's view seems to have been more prevalent on the High Court in recent times, but Kirby J (although he would have rejected the label 'activist') had an avowed preference for developing the law consistently with the justice of the individual matter. Indeed, his Honour wrote more than once of his admiration for Lord Denning, probably the judge most associated – and most justifiably associated – with judicial activism; see M Kirby, 'Lord Denning: An Antipodean Appreciation' (1986) 1 *Denning Law Journal* 103; M Kirby, 'Lord Denning and Judicial Activism' (1999) 14 *Denning Law Journal* 127. Lord Denning was not reticent in admitting to his preparedness to set aside precedent to do justice in the case before him and be able to "sleep at nights"; see J Mortimer, *In Character* (1983) 13.

201 K Mason, 'Do Top-down and Bottom-up Reasoning Ever Meet?' in E Bant and M Harding (eds), *Exploring Private Law* (2010) 19, 20-1.

202 More generously, this may be characterised as 'caution'; see C Harlow, 'Rationalising Administrative Compensation' [2010] *PL* 321, 324.

203 C Harlow, *State Liability* (2004) 122 (original emphasis).

204 C Harlow, 'Rationalising Administrative Compensation' [2010] *PL* 321, 330; citing HM Treasury, *Managing Public Money*, (2007) 123 (para A4.13.6), 128 (paras A4.14.9, A4.14.10 and Box A4.14A).

III: The case against tort liability for invalid administrative action

While there is a case in favour of creating a compensatory remedy in tort *per se* for invalid administrative action, there are overwhelming conceptual barriers against such a reform which have hitherto never seriously looked like being overcome. In *NSW v Paige*, Spigelman CJ examined this issue at length and commented that "[p]roposals for the development of an administrative tort have been made from time to time, so far without success." His Honour's concern was that administrative law may, in effect, simply become another subset of the law of negligence,[205] in regard to which he made express note of perhaps "the most significant characteristic of our system of administrative law", being that the "courts do not determine, either directly or indirectly, the substantive issue" between the parties.[206] Rather, judicial review has as its normal result that the court simply returns the matter to the original repository of statutory (or, sometimes, prerogative) power to make the decision again according to law. By extension, it is possible to state that: [207]

> The purpose of judicial review of administrative decisions is not compensatory. Its purposes include such objectives as upholding the rule of law and ensuring effective decision-making processes. … The end result of proceedings for judicial review is not the exercise of a statutory function by the courts. Generally, the courts require the statutory function to be performed in accordance with the law by the person in whom the statutory function has been reposed.

Continuing, Spigelman CJ argued that, not only is it inappropriate and unwise to develop a public law remedy which might "overwhelm the traditional remedies of administrative law", it is furthermore unwise effectively to allow courts performing judicial review to operate what amounts to a novel form of the negligence principle:[208]

> An award of damages based on defective decision-making will often be explicable only on the basis that the decision ought to have been made in favour of the person who suffered damage. The effect of extending the law of tort to permit recovery of damages for errors subject to judicial review will therefore often be, in substance, to remove to the courts the determination of matters that a statute reposes in another. In my opinion, the courts should be very slow to extend the law of negligence to a new category that has such a consequence.

Spigelman CJ concluded that to recognise a "duty of care in the conduct of investigations, the laying of charges and the hearing of disciplinary proceedings", as were proposed in *Paige*, would lead to "a real issue of coherence with administrative law" in the absence of judicial restraint.[209]

As *Paige* makes clear, the problem at the heart of any proposal to allow compensation for invalidity is that to do so challenges the common law separation of powers doctrine by having a court impose its view not only as to how the decision may be made validly but also as to what that decision ought to have been. This is all the more so where the original decision is successfully challenged on

205 *NSW v Paige* (2002) 60 NSWLR 371, 404 [173].

206 *NSW v Paige* (2002) 60 NSWLR 371, 404 [174].

207 *NSW v Paige* (2002) 60 NSWLR 371, 404 [175].

208 *NSW v Paige* (2002) 60 NSWLR 371, 404 [176].

209 *NSW v Paige* (2002) 60 NSWLR 371, 404 [177].

qualitative grounds (like *Wednesbury* unreasonableness or the considerations grounds)[210] rather than what used to be called grounds of simple *ultra vires*. It is easier for a court to provide compensation on the basis that there should never have been a decision because the court would not thereby be making a substitute decision.[211] Phegan considered this issue using the language of separation of powers; Barton, by contrast, expressed it as a question of causation.[212] The distinction between the two modes of expression is probably not significant; Harlow noted that any requirement for a court performing judicial review to assess questions of causation "would necessarily involve the court in substituting its own discretion for that of the deciding body",[213] something which runs against the common law tradition of judicial review, *a fortiori* in countries like Australia where the separation of powers is a constitutional concept. The broader point is that, however much parties may want for there to be a monetary remedy available for *ultra vires* acts by public authorities, any development of such a remedy divorced from existing legal principles risks allowing "the tail of remedies … [to wag] the dog of legal doctrine."[214]

It is also worth noting that there has been a general expansion in the number and scope of grounds of review over the course of the last fifty years[215] and the pace of this expansion is accelerating with the passage of time. There are now many ways to attack the validity of administrative decision making but, importantly, the expansion of judicial review has not resulted in great cost to the government. Procedural fairness is the main exception to this rule, as well as the duty to provide reasons where such a duty is provided under statute,[216] but even there, the financial cost to government is usually modest.

The Justice-All Souls Report cited *Revesz*,[217] in which the Supreme Court of New South Wales rejected a claim for compensatory damages as disclosing no cause of action where the plaintiff had suffered loss as a result of his application for a licence not being processed with sufficient expedition.[218] Mason J summarised the point of *Revesz* in *Heyman*:[219]

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210 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) ch 5; G Weeks, 'Questions of Quality' (2007) 14 *AJ Admin L* 76, 76-81. Lord Browne-Wilkinson had said in *X v Bedfordshire CC*, "I do not believe that it is either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence.": *X v Bedfordshire CC* [1995] 2 AC 633, 736. In his discussion of this passage of Lord Browne-Wilkinson's speech, Spigelman CJ seemed to say that he understood his Lordship's references to "reasonableness" (and specifically to liability for a decision "so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority") as not being confined to *Wednesbury* unreasonableness: *NSW v Paige* (2002) 60 NSWLR 371, 403 [168]. The issue of the possible connections between the availability of *mandam*us and tort liability is a related issue which I address in detail below in Chapter 5.B.V.

211 CS Phegan, 'Damages for Improper Exercise of Statutory Powers' (1980) 9 *Syd LR* 93, 116. At least this is one variety of decision which avoids the possibility of the same decision being remade following a lawful procedure: P Cane, *Administrative Law* (5th ed, 2011) 311. Of course, the scenario is incredibly rare because most officials have power to decide the issue of whether or not they have power, and any such decision is valid until it is set aside: *Kable (No2)* [2013] HCA 26.

212 GP Barton, 'Damages' in M Taggart (ed), *Judicial Review in the 1980s* (1986) 123, 143.

213 C Harlow, *Compensation and Government Torts* (1982) 94. She illustrated the traditional distaste for this method of judicial review by citing *Wednesbury* [1948] 1 KB 223.

214 C Ford, 'Dogs and Tails' in L Sossin and C Flood (eds), *Administrative Law in Context* (2nd ed, 2012) 85, 121.

215 Think, for example, think of the changes to the doctrine of procedural fairness since *Ridge v Baldwin* [1964] AC 40.

216 The duty to provide reasons does not exist at common law: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, ('*Osmond*').

217 *Revesz v Cth* (1951) 51 SR (NSW) 63.

218 JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 344-5.

> Generally speaking, a public authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so.

Hence, if there is no statutory time limit before which a statutory power must be exercised, the common law will not impose an obligation to exercise that statutory power within a certain time. There is a long history of public authorities escaping liability for causing damage through a lack of expedition.[220]

In *Revesz*, Street CJ stipulated that, even though the internal rules of the Department may have been broken by the individual officer who lost the plaintiff's licence application, this still didn't amount to breach of a common law duty.[221] The best that one could say is that there is a general expectation that good administration will require administrative decision making to be expeditious rather than excessively slow. However, "the constitutional [judicial review] jurisdiction does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration."[222] It is not generally for the judiciary to decide what is "too slow" to be considered a valid administrative decision, with the result that, even where delay is the substance of an applicant's complaint, it must be asserted through one or more specific, established heads.[223]

Excessive delay can have consequences. It can sometimes amount to a refusal to exercise jurisdiction (where the decision-maker has not, in fact, made a decision at all) and is in that case remediable with *mandamus*. On other occasions, excessive delay in making a decision can lead to a finding that the decision ultimately made is invalid on the basis that it lacks any credible claim to rationality, as was the case in *NAIS*.[224] That case did not hold that "delay totally invalidates an administrative decision",[225] but stands only for the more limited proposition that a decision will be invalid where the decision-maker's capacity to assess the case before it is so impaired that the decision-maker is effectively unable to exercise his or her jurisdiction.[226] In other words, as with any other form of jurisdictional error, what matters is whether or not the decision-maker has performed or

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219 *Sutherland SC v Heyman* (1985) 157 CLR 424, 459-60. This is essentially another species of the argument that a statutory power does not amount to a common law duty: *Revesz v Cth* (1951) 51 SR (NSW) 63, 65 (Street CJ); 70 (Maxwell J); 71-2 (Owen J). While this point was also relevant to the matter before the High Court in *Stuart*, *Revesz* was not cited in argument and the Court ultimately reached its decision on other grounds: *Stuart* (2009) 237 CLR 215. See the extended discussion of these issues in Chapter 5.

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

221 *Revesz v Cth* (1951) 51 SR (NSW) 63, 67.

222 *Lam* (2003) 214 CLR 1, 12 [32] (Gleeson CJ); cf W Lacey, 'A Prelude to the Demise of *Teoh*: The High Court Decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*' (2004) 26 *Sydney Law Review* 131, 151; Council of Europe, '*Recommendation CM/Rec (2007) 7 of the Committee of Ministers to Member States on Good Administration*' (CM/Rec (2007) 7, 2007).

223 See eg *Mohammed v Home Office* [2011] 1 WLR 2862, ('*Mohammed v Home Office*'). The claimants contended that they had suffered loss, compensable in damages, as a result of the respondent's delay in granting them indefinite leave to remain in the UK by either applying an unlawful policy or failing to implement the appropriate ministerial policy.

224 *NAIS v MIMIA* (2005) 228 CLR 470.

225 Cf K Werren, 'Delay Totally Invalidates an Administrative Decision: *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171' (2006) 3 *University of New England Law Journal* 91.

226 *NAIS v MIMIA* (2005) 228 CLR 470, 476 [10] (Gleeson CJ; Kirby J and Callinan & Heydon JJ agreeing).

is able to perform his or her function.[227] Delay of itself cannot be sufficient to prove that a jurisdictional error has been committed because what constitutes excessive delay is generally beyond the scope of courts to assess; it is by its nature a consideration better suited to resolution by the decision-makers or their managers.[228]

In their most recent edition, Peter Hogg and his co-authors expressly addressed the arguments made by Cornford in favour of adopting the Council of Europe's Principle I.[229] They made four specific criticisms of Cornford's thesis. The first of these is that Cornford's case in favour of adopting a principle which states that "reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person" founders on the assumption that:[230]

> public authorities owe *individuals* a duty to comply with the principles of administrative law judicial review when exercising their duties and powers in relation to them, and that individuals have an entitlement that public authorities so comply.

Hogg et al pointed out that the view that invalid decisions which are not compensated are a cause of unequal treatment and are therefore contrary to the rule of law is not widely shared, "not least because it comes close to turning administrative law judicial review principles … into legally-enforceable individual rights".[231] How, they continued, does a public authority's invalid decision which causes loss to an individual equate to a failure "to conduct itself in a way which can reasonably be expected from it in law *in relation to the injured person*"?[232] Hogg et al noted simply that Cornford does not make a case for any other interpretation of Principle I from the Council of Europe's Recommendation on Public Liability.

The point, however, is worth making explicitly, since this is one of the most significant drawbacks of Cornford's thesis. A public authority's acts and decisions may affect individuals but are generally not made *in relation to* particular individuals; rather, they are made in the exercise of power for the whole of a society. It follows that the validity or invalidity of any one of these acts or decisions are not circumstances specifically *in relation to* an individual, regardless of the fact that s/he may be affected more than others, since *everyone* has an interest in the public authority acting within power. These are fundamental principles of public law and Cornford's book never really made the case for changing

227 This is a somewhat more precise point than to say that the result in *NAIS* was due to the fact that "[j]urisdictional error totally invalidates an administrative decision because it involves the administrative body taken [sic.] on powers that it does not properly possess": K Werren, 'Delay Totally Invalidates an Administrative Decision' (2006) 3 *UNELJ* 91, 93.

228 *NAIS v MIMIA* (2005) 228 CLR 470, 503 [106] (Kirby J); cf 510 [136] (Hayne J).

229 Council of Europe, '*Recommendation on Public Liability*' (R (84) 15, 1984).

230 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 209 (original emphasis).

231 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 209. Hogg et al made this criticism with specific reference to R Stevens, *Torts and Rights* (2007), 218 and adopted similar reasoning; see also the text accompanying nn 131 - 134 above. Such an approach is at least difficult to reconcile with negligence liability; others say it is impossible: P Cane, Review of *Torts and Rights*' (2008) 71 *MLR* 641, 644.

232 Council of Europe, '*Recommendation on Public Liability*' (R (84) 15, 1984), (emphasis added). See PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 209-10. It has long been orthodox in Australia that the role of judicial review is to enforce the law, a task whose limits are determined not by the limits to an individual's rights but by limits to the law: *Quin* (1990) 170 CLR 1, 35 (Brennan J). This point seems obvious when considered in light of the steady expansion of procedural fairness and standing, for example. It is not, by contrast, a neat fit with assessment of damages for breach of a public law duty owed either to the claimant or to a class including the claimant.

them, just as it never sought to justify the Council of Europe's two principles, accepting them instead as normative axioms.

The second "difficulty" with Cornford's proposal according to Hogg and his co-authors regards the appropriate roles of the courts and the political process respectively,[233] and essentially has to do with Cornford's claim that issues of justiciability cause no problem to his thesis because they are dealt with in the course of a court finding that a certain decision is invalid. One example that Hogg et al gave is that Cornford was prepared to contemplate a system under which compensatory damages may be payable for the frustration of a substantive legitimate expectation "whether or not the court reached the conclusion that the claimant's legitimate expectation entitled her, in the final analysis, to receive the benefit she expected".[234] There is no detail about how such damages might be quantified. Cornford would, in short, overturn the reasoning which had been developed in equity over many decades,[235] later to be "absorbed" into public law,[236] to the effect that an estoppel will not operate to give effect to a promise made *ultra vires* or which would have the effect of fettering the discretion of a public authority.[237] He advocated a system where legitimate expectations would inevitably[238] lead to compensation if they were unreasonably and invalidly frustrated.

This example is of a piece with Cornford's general thesis, which is that duties are owed by public authorities to individuals rather than to the public as a whole. This reasoning carries with it the implication that the two categories are mutually exclusive, a conclusion with which I disagree since (as I have argued above) a decision to cancel a person's visa is made in relation to *both* that person and the public at large. To say that their interests are different does not change anything. Arguably Cornford's proposed development above has the most adverse consequences, for a number of reasons. One is that the compensation would be payable "whether or not the court reached the conclusion that the claimant's legitimate expectation entitled him or her, in the final analysis, to receive the benefit he or she expected".[239] This is a step beyond the Australian legal orthodoxy, for a start, which says that any representation can be withdrawn with notice and, regardless, a legitimate expectation can have nothing more than a procedural effect.[240] Even in jurisdictions where the utility of substantive protection of legitimate expectations has been accepted, courts have not universally accepted the breadth of the doctrine laid down by the Court of Appeal in *Coughlan*.[241] Binnie J stated

233 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 210.

234 T Cornford, *Towards a Public Law of Tort* (2008) 201.

235 See generally S Schønberg, *Legitimate Expectations in Administrative Law* (2000) 108-9; G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247, 248-59.

236 *Reprotech* [2003] 1 WLR 348, 66 [35] (Lord Hoffmann).

237 For a fuller examination of this issue, see below in chapter 5.A.IV: Can public authorities be liable in equity where an estoppel is raised?

238 This is subject to circumstances in which allowing the relevant representation to bind would cost less than to pay compensation to the claimant: PP Craig, *Administrative Law* (7th ed, 2012) 716.

239 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 210 (n 284).

240 *Lam* (2003) 214 CLR 1, 20-1 (McHugh & Gummow JJ).

241 For example, the Canadian Supreme Court rejected the approach espoused by the Court of Appeal in *Coughlan*, albeit while leaving the way open for increased judicial intervention into administrative decision-making on the basis of "patent [*Wednesbury*] unreasonableness": *Mount Sinai v Quebec* [2001] 2 SCR 281, [64] (Binnie J). This provoked comment from the Australian High Court: *Lam* (2003) 214 CLR 1, 22 (n 49) (McHugh & Gummow JJ).

that there is "a public law dimension to the law of estoppel which must be sensitive to the factual and legal context" of the facts of any given case.[242] I would argue that this statement of the law cannot be reconciled with Cornford's preferred approach, in which losses incurred by an individual are seen as having greater importance than a public authority's more general public duties.

A second reason why I have described Cornford's views on legitimate expectations as leading to adverse consequences is that they are incompatible with the separation of judicial power, as that term is understood in countries which have written Constitutions. The balancing exercise which is required of judges under the English doctrine of substantive legitimate expectations was explained by Lord Woolf MR in *Coughlan*:[243]

> Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

Schønberg made the additional point that a party's reliance on a public authority's representation, while not of "absolute" significance, is nonetheless a "very important consideration in the [EC] courts' balancing of public and private interests".[244] These remarks flew in the face of the traditional English approach,[245] but that is largely their point. The notion that Australian courts could enter into a process whereby they were required to "balance" public and private interests is shocking, under the current orthodoxy. Absent a bill of rights,[246] a "balancing" exercise would *prima facie* represent an unauthorised excursion into the merits by the judiciary.[247] Both Australia and Canada recognise the risk of unfairness in policy changes,[248] but characterise that as a political risk which carries political consequences. The plaintiff in *Quin* was in a comparable position to Ms Coughlan but a majority of the High Court was prepared to recognise the right of the executive to change its policy.[249] The English cases following *Coughlan* have come to an essentially different view.[250]

The third "difficulty" that Hogg et al noted with Cornford's proposal is that it does little to counter the argument that compensatory damages may prove an inappropriate remedy where a public authority is able to remake its decision in order to fix a procedural wrong. Cornford argued that breaches of

242 *Mount Sinai v Quebec* [2001] 2 SCR 281, [51].

243 *Coughlan* [2001] 3 QB 213, 871-2 (emphasis in original). See M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *MULR* 470, 478-9.

244 S Schønberg, *Legitimate Expectations in Administrative Law* (2000) 128-9.

245 Eg *Howell v Falmouth Boat* [1951] AC 837, 845 (Lord Simonds).

246 Which all but two Australian jurisdictions lack: *Human Rights Act 2004* (ACT); *Charter of Human Rights and Resposibilities Act 2006* (Vic).

247 Cane has pointed out that awarding damages, which is in essence an act of substituting the court's decision for that of the defendant public authority, in public law may amount to a form of merits review in any case: P Cane, *Administrative Law* (5th ed, 2011) 310.

248 *Mount Sinai v Quebec* [2001] 2 SCR 281, [24], [26] (Binnie J).

249 It was relevant in *Quin* that a change of government (and therefore of Attorney-General) had led directly to the change of policy; cf Binnie J's comments at *Mount Sinai v Quebec* [2001] 2 SCR 281, [28].

250 One might query what result this legal interpretation would have on the separation of powers doctrine, particularly in places where it is constitutionally entrenched. However, given that every country (including the UK) has a separation of powers doctrine and these differ mainly in regard to *where* the separation occurs, this may be an insoluble issue.

procedural fairness may "cause anxiety, distress or financial loss without infringing any entitlement to the benefit in question".[251] Hogg's response was that these are varieties of harm for which courts are *always* reluctant to award compensatory damages,[252] which is correct to the extent that they fall short of psychiatric harm. However, the truth of that statement *per se* does little to combat Cornford's repeated lament that the judiciary is in a position to develop the law as he suggests but is held back by judges' insistence on making every public law basis for awarding compensatory damages have an existing private law analogue.

The point, as I have discussed above, is that there are cases in which a private actor may incur financial loss consequent on a decision which was procedurally flawed. Even if the decision is able to be remade according to law after it has been set aside by a court exercising judicial review powers, there is no reason why we must assume that losses incurred consequent on the initial decision should simply be set aside. Indeed, if the damages action were postponed until after the invalid decision were remade, the decision-maker may be tempted to decide the same way but to do so validly. The power to award compensatory damages to a person who has suffered loss and is able to satisfy a 'but for' test (i.e. "*but for* the procedurally flawed decision, would this person have suffered financial loss?") ought in no way to cause a problem to the coherence of the law, any more than is currently the case with causes of action in private law which depend upon the proof of a public law breach.[253] Hogg and his co-authors ended by pleading that the metaphorical 'floodgates' may open if such an extension to state liability is permitted, but noted[254] that "ironically" the broader and more liberal French system of regulating state liability has been more effective at controlling the cost of such liability to the state than has the English system of imposing policy restraints "in order to avoid imposing a duty of care upon public authorities".[255] This is less an irony than an indication that the possibility of a compensatory damages remedy for some forms of procedurally unfair decision making need not be held back merely on the suspicion that it will "expose public authorities to sizeable damages awards".[256]

Hogg et al concluded their consideration of Cornford's thesis by expressing doubt that "it would properly fall to the courts to develop the law of negligence to permit recovery" under Principle I from the Council of Europe's Recommendation on Public Liability because the necessary reforms would be far too extensive.[257] They were clearly correct that this is properly a job for the legislature,[258] and that

251 T Cornford, *Towards a Public Law of Tort* (2008) 101.

252 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 210-1. This is as true of Australia as it is of Canada; see K Barker et al, *The Law of Torts in Australia* (5th ed, 2011) 59-62, 228-9, 479-505.

253 eg *Entick v Carrington* (1765) 2 Wils KB 275, ('*Entick v Carrington*'); *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, ('*Cooper v Wandsworth*').

254 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 211 (n 288).

255 D Fairgrieve, *State Liability in Tort: a Comparative Law Study* (Oxford University Press, Oxford, England, 2003) 261.

256 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 211.

257 Ibid.

258 Hogg had previously noted that "there are limits to the scope of judicial law-making", not least for the reason that large scale changes are achieved with greater democratic accountability through the parliamentary process: P Hogg, 'Compensation from Government' (1995) 6 *NJCL* 7, 10. Lord Bingham looked at the issue in reverse, citing the "undesirability of introducing by judicial decision, without consultation, a solution which the consultation and research conducted by the Law Commission may show to be an unsatisfactory solution to what is in truth a small part of a wider problem.": *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 409 [26] (Lord Bingham) ('*Watkins v Home Secretary*'). One assumes that Lord Bingham was not

any denial of this statement is "swimming against the tide",[259] for instance because the trend is for legislation to expose public authorities to less rather than more liability in tort. Furthermore, there is no less vindication of a legal reform if it is adopted by the legislature ahead of the judiciary; indeed, such a course of action neatly heads off the usual concerns that the judiciary is in "activist" mode and that democratic values have been threatened.[260]

I have recorded elsewhere that I am not convinced by the broad sweep of Tom Cornford's arguments in *Towards a Public Law of Tort*;[261] nor are Hogg and his co-authors. It is the nature of bold visions that they provoke profound disagreement. Yet, the movement towards a compensatory damages remedy for public law looks to be gathering momentum rather than losing it; the weight of academic comments[262] in favour of such a remedy has increased annually since the report of the Justice-All Souls Committee in 1988. Cornford's argument may be doubted but cannot easily be dismissed.

To the extent that the recommendations of the Law Commission shared common ground with the arguments put by Cornford, they *were* easily – and unceremoniously – dismissed[263] by the audience to whom they were primarily addressed, the UK Government.[264] In the face of this opposition, the Law Commission ultimately pursued only its recommendations in regard to Ombudsmen,[265] but arguably chose to 'keep its powder dry' by recommending that the costs of compensation payments from government be "regularly collated and published" by HM Treasury because:[266]

> the lack of such clearly accessible data means that the current regime fails to fulfill the requirements of accountability and transparency that are key to our system of governance. The lack of data is also a problem for practitioners, judges and policy-makers in this area. Fears of defensive administration cannot be confirmed or refuted, and administrators are unable to assess policy on the basis of properly formulated impact assessments.

The recommendations for the collation and publication of compensation figures by central and regional governments were the only recommendations that the Law Commission made in its

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particularly concerned with the democratic implications of 'judicial legislation' but recognised that bodies such as the Law Commission are much better placed than courts (especially in an adversarial system) to reach a detailed understanding of all of the policy implications of any proposed change to the law.

259 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 211 (n 289). See eg D Ipp et al, *Ipp Report* (2002).

260 See eg JD Heydon, 'Judicial Activism' (2003) XLVII *Quadrant* 9; cf AC Hutchinson, 'Heydon Seek' (2003) 29 *Monash ULR* 85; M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 25-8.

261 G Weeks, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 17 *Torts LJ* 311, 311. I am in good company: SH Bailey, 'Review of Cornford's *Towards a Public Law of Tort*' [2009] *PL* 869, 873; G McLay, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 7 *NZJPIL* 373, 385; M Aronson, 'Review of Cornford's *Towards a Public Law of Tort*' (2009) 20 *PLR* 79, 79.

262 The Law Commission's preference for a public law damages remedy was rebuffed in no uncertain terms by the government but the response to the Law Commission's *Administrative Redress Project* over the course of six years from the academy and the profession has been somewhat more mixed; see eg M Fordham QC, 'Monetary Awards in Judicial Review' [2009] *Public Law* 1; R Bagshaw, 'Monetary Remedies in Public Law - Misdiagnoses and Misprescription' (2006) 26 *LegSt* 4; T Cornford, 'Administrative Redress: the Law Commission's Consultation Paper' [2009] *Public Law* 70. There has been little judicial comment on the subject of the Law Commission's project and ultimate report. In the only instance of which I am aware, Sedley LJ's description of the end result as a "débâcle" was not intended as a criticism of the Law Commission: *Mohammed v Home Office* [2011] 1 WLR 2862, 2870 [23]. See also Editorial, 'Damages for Maladministration: The Law Commission Débâcle ' [2012] 17 *Judicial Review* 211.

263 Sedley LJ was in no doubt as to where the blame for this result should be placed. His Lordship said that the Law Commission's recommendations had not so much "foundered" as they had been "sent to the sea-bed by central government": *Mohammed v Home Office* [2011] 1 WLR 2862, 2870 [22].

264 Described as "the key stakeholder": Law Commission, *Administrative Redress* (2010), 1 [1.3].

265 Law Commission, *Public Services Ombudsmen*, Report No 329, (2011). A detailed analysis of this issue will be undertaken in Chapter 6.

266 Law Commission, *Administrative Redress* (2010), 69.

Administrative Redress report but they may have been made to leave the way open for the issue of government compensation to be re-examined in the future.

Several years before the Law Commission's ill-starred report into *Administrative Redress*, Michael Fordham had stated that the topic was "public law's final frontier" and argued that "the time is coming to grasp this nettle".[267] Fordham saw the likely options for development as being: a statutory development of the law, whether or not based on a report from the Law Commission; a "true public law" development at common law, in which public law would "discover its revolution, its *Donoghue v Stevenson*";[268] or a tort law response, "along the lines of a medical negligence-style lottery".[269] As I have noted above, in Australia, the development of a common law compensatory remedy is all but unthinkable and no reform of the law on this or any other issue is remotely likely unless it is driven by the legislature. That caution, for good or ill, may have made its way to the UK: in a later piece, Fordham conceded that, against the background of the Law Commission's work, the House of Lords in *Watkins*[270] had "pressed the pause button on the further development of public tort law" and that a legislative response was therefore the method most likely to see the Law Commission's proposals adopted into law.[271] Fordham was absolutely right but doubtless would prefer not to have been, since it now seems unlikely that there will be either legislative or judicial movement on this issue.

One of the most intriguing suggestions made by the Law Commission was that public bodies should only be liable for damages where the claimant's loss was caused by an administrative decision which involved "serious fault".[272] For the purposes of obtaining compensation for government negligence, the statutory scheme would only cover acts which are "truly public".[273] These concepts were included in the Law Commission's Consultation Paper in order to encourage a "real debate on the issues" and one can appreciate the broad purpose behind them, being to ensure that the bar for obtaining compensatory damages from government was sufficiently high to prevent the 'floodgates' opening and the taxpayer being obliged to fund vast numbers of claims. The essential problem, however, is that standards which ask courts to identify "serious fault" and whether a function is "truly public" are question begging in the extreme.[274]

The difficulty of establishing legislative intention in tort matters is demonstrated, as Aronson noted, by the long and convoluted history of the tort of breach of statutory duty.[275] The disuse or outright

267 M Fordham, 'Reparation for Maladministration' [2003] 8 *JR* 104, 108 [20].

268 *Donoghue v Stevenson* [1932] AC 562.

269 M Fordham, 'Reparation for Maladministration' [2003] 8 *JR* 104, 108 [19]-[20].

270 *Watkins v Home Secretary* [2006] 2 AC 395.

271 M Fordham QC, 'Monetary Awards' [2009] *PL* 1, 1.

272 Law Commission, *Administrative Redress Consultation Paper* (2008), 84-90.

273 Law Commission, *Administrative Redress Consultation Paper* (2008), 79-81.

274 Professor Aronson's criticisms were reported by the Law Commission, *Administrative Redress* (2010), 32.

275 See N Foster, 'The Tort of Breach of Statutory Duty' in C Sappideen and P Vines (eds), *Fleming's The Law of Torts* (2011) 423; K Barker et al, *The Law of Torts in Australia* (5th ed, 2011) 674-91.

disappearance of that tort is no accident. Fordham argued that, rather than binding the courts hand and foot with an unwieldy legislative formula, we should simply allow public law judges to be:[276]

> entrusted with responsibly using a residual monetary remedy of this kind. They can be expected to find their way, in a principled and step by step manner. The sky will not fall in, the floodgates will not open, any more than they have with *Human Rights Act* "just satisfaction". There is no need for a superimposed framework of confining legal principle: no doubt, context will be everything. There is no cause for a legal precondition involving heightened legal impropriety. *The relevant unlawfulness is the same unfairness, unreasonableness or unlawfulness which will have meant that the judicial review claim is being allowed and appropriate remedies are being considered.* Requirements of "serious" breach or "manifest" error should be avoided.

In other words, Mr Fordham still wanted a common law solution, developed incrementally in the courts, where compensatory damages would be presumably be payable for *invalid* administrative action causing loss. This proposition would encounter all of the same counter-arguments canvassed above. It may be, however, that Fordham was suggesting something more radical:[277]

> What would it mean? It means that the taxi driver whose licence is unreasonably suspended or unfairly delayed can receive a monetary order. It means the public authority which inexcusably ignores its statutory duty to provide disabled facilities within the home can be ordered to make a monetary order. It means the education authority who wants to defeat school pupils' legitimate expectations on overriding policy grounds can be required to make a payment to those affected. None of this would involve a public law entitlement to compensation for losses arising. Maybe it would cover the taxi driver's credit card debt. Maybe it would give the disabled resident a holiday. Maybe it would give the pupils their new school uniform.

This is a remarkable list. The taxi driver's public law action would seek an order quashing the unreasonable suspension but, if the licence were restored, any claim for compensatory damages would necessarily be limited to only some of the loss incurred during the period of the invalid suspension. Such loss would need to be particularised and proved. The example about the failure to provide disabled facilities looks very much like the examples of delay considered above. The legal reasons for resisting liability for delay were canvassed there; the public policy reasons are clear enough from this example, being that it may simply not be possible always to deliver services to the public as quickly as they are wanted. The example about the school students is most unclear but it does seem odd that, having the opportunity to have their legitimate expectations substantively enforced under English law, any delay in getting such a benefit should sound in compensatory damages.

Mr Fordham is a leader of the English public law bar and it can be safely presumed that he knows exactly what he is saying. Doubtless, that is why such apparently modest examples of the sums payable to these claimants were made. However, no government can afford to send large numbers of its citizens on holiday, nor pay their credit card bills. Even the provision of school uniforms to students is an expense which would run into many millions of pounds, and that money must be found

276 M Fordham QC, 'Monetary Awards' [2009] *PL* 1, 3 (emphasis added).

277 M Fordham QC, 'Monetary Awards' [2009] *PL* 1, 3-4. The strongest case for public law damages is always linked to losses following from delay; see eg T Cornford, *Towards a Public Law of Tort* (2008) 102-9, 200, 213-14. However, there is no common law duty of care to act expeditiously; see *Revesz v Cth* (1951) 51 SR (NSW) 63 and the text to nn 217 - 228 above.

somewhere – perhaps by paying fewer contractors to install disabled facilities, meaning that those services are delivered more slowly, creating a liability in compensatory damages, and the vicious circle continues to go around. Apart from these worrying issues, Fordham's examples also bring to the fore the concerns raised above that public law compensatory damages will engulf every existing ground of judicial review. They are a powerful example of why the courts will *not* be trusted to develop a residual monetary remedy without legislative control.

The concept of "serious fault", raised in the Law Commission's Consultation Paper, had been heavily criticised by the time that the *Administrative Redress* report was published.[278] The Law Commission protested that:[279]

> It is important to note that we did not intend it to be a complete replacement. The "serious fault" test was only to apply within our scheme. Outside of this, normal tortious principles would apply. The purpose of the test was to move the liability of public bodies, where they are *acting as public bodies in a unique sense*, into a regime more appropriate to them.

There were indications that the Law Commission's "serious fault" concept was about more than the merely technical point that a certain act was invalid as a matter of law. It contained an element of moral blame. This is very different to making a finding of invalidity, since moral blame is inherently subjective, and has much more in common with the tort of misfeasance in public office.[280]

The Law Commission's intention in proposing the 'serious fault' and 'truly public' tests seems to have been to limit government exposure to negligence liability,[281] although the government submission also criticised the 'serious fault' test. The contrast with the way that Australian jurisdictions successfully limited the negligence liability of public authorities, including by co-opting public law concepts like *Wednesbury* unreasonableness,[282] could not be clearer.[283] My view of why the Law Commission failed where the Ipp Panel had succeeded,[284] and it may be overly generous, is that it was attempting to make cohesive recommendations about public liability in compensatory damages and other forms of monetary payments rather than just about the law of negligence, or "to introduce principled coherency into the law".[285] Ultimately, the Law Commission recognised that it had failed to persuade the vast majority of those it had consulted that its vision for law reform was necessary or desirable; in some respects, this was entirely understandable, although the Law Commission itself did not accept

278 Many examples follow, but for brutal clarity it is hard to surpass the response of Lord Hoffmann who said "I think that this is an absolutely terrible idea and I hope it will be quietly dropped.": L Hoffmann, (Bar Council Law Reform Lecture, 17 November 2009) [2]. His Lordship's hopes were later realised.

279 Law Commission, *Administrative Redress* (2010), 29 [3.32] (emphasis added).

280 I am grateful to Mark Aronson for suggesting this point to me.

281 That is certainly the way that groups like the Association of Personal Injury Lawyers viewed it: Law Commission, *Administrative Redress* (2010), 31 [3.38]. APIL's public statements were extremely robust, casting the Law Commission's proposals in an anti-Diceyan light and stating that there is "absolutely no justification for public bodies to be subject to a different law to everyone else": 'APIL attacks Law Commission's negligence plans', (2008) *Solicitors Journal* <http://www.solicitorsjournal.com/node/5430> at 21 November 2008.

282 As to which, see E Carroll, '*Wednesbury* as a Limit on Liability' (2007) 15 *Tort LR* 77; G Weeks, 'Marriage of Strangers' (2010) 7 *Mq JBL* 131.

283 The authors of the *Ipp Report* did not seek the specific legislative changes which were ultimately made, although Part 10's consideration of *Wednesbury* certainly gave the drafters of the new legislation room to move; see D Ipp et al, *Ipp Report* (2002).

284 The "success" of the *Ipp Report* is contestable. Certainly, the legislation which followed it often went beyond the Panel's recommendations.

285 Law Commission, *Administrative Redress* (2010), 34 [3.54].

that its case for reform was "fundamentally flawed".[286] Tom Cornford, on the other hand, who differed from many of those who responded to the Consultation Paper by accepting the premise that "the absence of damages for administrative wrongs is a lacuna in English law which needs to be filled",[287] stated that "the serious fault requirement … is the core of the [consultation] paper's proposals" and "the deficiencies of the other elements of the scheme can best be understood in the light of its inadequacies",[288] which rather suggests that the notion of 'serious fault' is complicit in the paper's every flaw.

If the history of the Law Commission's *Administrative Redress* project demonstrates anything it is that law reform is seldom more difficult than when it looks at compensatory damages for public liability. It is therefore with a justified sense of trepidation that I will attempt, in the next section, to make some recommendations of my own for reform in this area.

IV: Recommendations for Reform

To some extent, I depart from both the latter-day Diceyans and those who, like Cornford, conceive a greater, more active supervisory role for the courts in distributing losses arising from the activities of government entities. I do not deny that there are occasions, such as when determining the scope of liability in negligence,[289] in which public authorities need to be protected from the full measure of tort damages which may be visited upon an individual,[290] precisely because they have a level of exposure to liability which is greater than that of any individual and would be inhibited from exercising their powers to the benefit of the public *as a whole* if the burden of compensating certain individuals were to become too high. I would also argue that there are occasions when *more* should be expected of public authorities and their officers simply because their *capacity* to intervene to the benefit of private actors is so great, not to mention that such a standard asks no more than that public officers do their jobs. Seen in this way, it is apparent that the liability of public authorities in tort does not always equate to that of private actors per the Diceyan ideal; it is longer at one end but shorter at the other. I will expand upon this reasoning in Chapter 5.

The problem is that broad statements of principle, like those above, translate badly into law reform. If we accept[291] that reform in this area is better achieved legislatively than in the slow, incremental fashion of the common law, then we are bound to make suggestions for reform which are capable of being articulated as legislative terms. We have seen from the unfortunate experience of the Law Commission that almost blank cheques to the judges are no substitute for precision; terms like "truly public" and "serious fault" are question begging and bring confusion in their train where they ought to

286 Law Commission, *Administrative Redress* (2010), 37 [3.76].

287 Cornford made specific mention of C Harlow, *State Liability* (2004); R Bagshaw, 'Monetary Remedies in Public Law - Misdiagnoses and Misprescription' (2006) 26 *LegSt* 4; S Bailey, 'Public Authority Liability in Negligence: the Continued Search for Coherence' (2006) 26 *Legal Studies* 155.

288 T Cornford, 'Administrative Redress' [2009] *PL* 70, 77.

289 See Chapter 5 and, more generally, D Ipp et al, *Ipp Report* (2002), Chapter 10; *Civil Liability Act 2002* (NSW) Part 5. I don't agree with every aspect of the *Civil Liability* legislation enacted in Australia following the publication of the Ipp Report; see G Weeks, 'Marriage of Strangers' (2010) 7 *Mq JBL* 131.

290 Harlow takes a similar view: C Harlow, *State Liability* (2004) 1-9; cf T Cornford, *Towards a Public Law of Tort* (2008) 220.

291 As not everybody does, see eg M Fordham QC, 'Monetary Awards' [2009] *PL* 1.

bring greater clarity.[292] If legislation is the only way to achieve reform, there is no excuse for withholding detail. Legislative reform has no reason to be as incremental as the common law. However, the difficulty the Law Commission had in expressing the conceptual props to its vision of reform was understandable, since it was proposing fundamental changes to a genuinely ancient system so established that to suggest any alteration at all left the Law Commission open to accusations that its plan would leave the law 'incoherent'.

I begin from the position of needing to say nothing about reforming the system of public authority liability in negligence (and other unintentional torts), since tort law reform has been a fact of life in Australia for the last decade and the limitations on public authorities' liability are now deeply embedded. This leaves me free to suggest a possible reform with regard to compensatory damages in administrative law without concern that it will overlap existing heads of liability in tort. How can a compensatory damages remedy in public law complement the established private law heads of liability for public authorities?

The starting point should be to recognise that the public law remedy will not be 'damages' as that term exists to describe a remedy at common law, which is to say that it will bear so little resemblance to common law damages that to give it that label will only serve to confuse. Unimaginatively, I have chosen to describe the remedy I have in mind as an 'administrative compensation order' (ACO). It would be discretionary, to a far greater extent than is the case for common law damages,[293] so as to make it consistent with the existing judicial review remedies without overwhelming them. It would require that a justification for compensation be made out before the court would have the discretion to award a monetary payment, although this need not be on the usual administrative law basis of invalidity[294] but could be for mere unlawfulness. If an applicant chose to seek an ACO, compensation could also be awarded thereby for conduct which would otherwise attract an equitable remedy, although a court would be likely to refuse an ACO (or award compensation in a nominal sum only) in circumstances where equitable compensation would not be available. Finally, it would require an applicant to particularise and quantify his or her loss and to establish causation to the satisfaction of the court.[295] The award of administrative compensation would be compensatory only, not punitive or exemplary. It would be entirely residual and the discretion to make an ACO would be exercised where the applicant had established in the same proceedings the basis for the compensation sought. The applicant would be required to elect at the time of commencing proceedings whether s/he wanted to seek an ACO or damages at common law, if they might be available. The appellant could not seek

292 Although an alternative way of looking at this is that the proposed legislation amounted to an invitation – or a blank cheques – to judges to devise the reform principles for themselves.

293 The proposed remedy would, in this regard, have more in common with the remedy of equitable compensation.

294 Although in practice, even if no other remedy were suitable but the relevant administrative action was invalid, the applicant should be able to obtain a declaration to that effect.

295 It would be both discretionary and small, and in that sense similar to the damages remedy which is available for the breach of Convention rights under the *Human Rights Act 1998* (UK) s 8. See also the general comments about the interplay between rights and administrative law in T Hickman, *Public Law after the Human Rights Act* (2010) 224-5.

both forms of redress and commencing proceedings to seek to obtain one would constitute an election not to be able to seek the other.

I will consider how administrative compensation may work by considering several features which should guide the use of the ACO.

Compensation need not be in money

The first point is that compensation can and should be considered *before* the commencement of proceedings in which a court could grant an ACO. It is usually assumed that compensation must take the form of money. This has long been the orthodox position regarding private law damages, such as for breach of contract[296] or upon proving liability for the commission of a tort.[297] However, courts are not the only entities capable of providing a compensatory remedy. As Halliday, Ilan and Scott have recently pointed out:[298]

> Although it is tempting to think about courts as the principal institutional mechanism for the delivery of civil justice, it is well established that the vast majority of decisions concerning legal rights are made by bureaucrats in both public and private organisations.

Therefore, the first step towards reducing the 'compensation culture'[299] is to realise that compensation may be no less effective for not being the result of a judicial order. In turn, compensation might not be in the form of a payment of money, or not only in that form, and might be for a lower sum than might have been ordered following litigation (even leaving aside the financial, temporal and other costs inherent in that process, regardless of which party 'wins'). For example, a damages order may be of questionable utility where a public authority has already taken steps to correct the source of the complaint made against it for the future.

Over recent years, there has been an increased recognition of the significance and effectiveness of apologies as remedies to maladministration. The Commonwealth Ombudsman noted that:[300]

> Complaints to the Ombudsman often stem from simple but unwarranted agency errors - such as delay, misleading advice, inexplicable reasons, lost paperwork and discourtesy. Often the most appropriate and accepted remedy for this default is an explanation or an apology. Ombudsman offices have given added emphasis over time to the role that apologies can play in addressing grievances. An apology is a common measure of respect in society, and should be applied just as readily in interactions between the public and public administrators. Apologies can contribute to civilising the system of government and making it attuned to its accountability and responsibility to the public. The office sometimes makes an explicit recommendation to an agency to apologise to a person who has been inconvenienced or wronged by agency action or inaction. The office also draws the attention of agencies to statements made in service charters that the agency will apologise for its mistakes.

296 "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, *so far as money can do it* to be placed in the same situation, with regard to damages as if the contract had been performed.": *Robinson v Harman* (1848) 1 Exch 850, 855 (Parke B) (emphasis added).

297 "What remedy does (and should) the legal system provide to tort victims? Although they may occasionally obtain injunctions intended to prevent ongoing harm, *almost all successful tort claimants obtain money damages*.": S Sugarman, 'Damages' in C Sappideen and P Vines (eds), *Fleming's Law of Torts* (10th ed, 2011) 261, 261 (emphasis added, citation omitted).

298 S Halliday, J Ilan and C Scott, 'Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making' (2012) 75 *Modern Law Review* 347, 347 (citations omitted).

299 See the text accompanying footnotes 56 and 57 above.

300 Commonwealth Ombudsman, *Annual Report 2006-07*, (2007) 122.

One suspects that there is a greater likelihood that a complainant will be satisfied with a mere apology for an administrative mistake if it is made promptly by the bureaucrat responsible. This suspicion is reinforced by the observation that, far from resembling "the 'gladiatorial contests' which populate the law reports and most textbooks", such as *Stovin v Wise*[301] or *Gorringe v Calderdale MBC*,[302] the reality is that:[303]

> the vast majority of claims made against local authority roads departments are rather prosaic and routine … Indeed, most claims are not even the 'trips and slips' suggested by common parlance. Most claims relate to vehicle damage rather than personal injury and are for small sums…

This is despite the fact that "the provision of a roads service is amongst the riskiest of all activities" conducted by local authorities, attracting "the highest volume of claims".[304]

There is an extensive literature on corrective justice and the issues regarding and effectiveness of apologies in a legal context.[305] While I do not propose to conduct a detailed analysis of the subject here, it suffices to note that there are occasions where a timely concession of maladministration by a public authority will make it less likely that that authority will ultimately need to defend itself in legal proceedings, which are always more expensive both in terms of resources and time. Professor Vines related that "people often sue wrongdoers because they are so enraged by the lack of an apology that a wrong which they would otherwise suffer without recourse to law becomes intolerable and litigation follows".[306] On the other hand, a timely apology may "equalise" the relationship again by returning dignity to the complainant.[307] A public authority ought at least to consider making an apology where the complaint made against it has some basis.

This course of action, however, goes against the deeply ingrained instincts of most lawyers; there is a collision of norms.[308] To advise a public authority, as its legal adviser, to issue an apology which will be acceptable to the complainant is necessarily to leave it exposed to some legal liability,[309] or at the very least remove some of the flexibility from how you might choose to defend that liability. This is not

301 *Stovin v Wise* [1996] AC 923, ('*Stovin*').

302 *Gorringe v Calderdale Metropolitan Borough Council* [2004] WLR 1057, ('*Gorringe v Calderdale MBC*').

303 S Halliday et al, 'Street-Level Tort Law' (2012) 75 *MLR* 347, 348 (citations omitted).

304 S Halliday et al, 'Street-Level Tort Law' (2012) 75 *MLR* 347, 348.

305 See the bibliography provided in P Vines, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena' (2007) 1 *Public Space: The Journal of Law and Social Justice* 1, 44-51.

306 She said that this view was "firmly supported anecdotally if not empirically": P Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27 *Sydney Law Review* 483, 483.

307 P Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27 *Sydney Law Review* 483, 503.

308 P Vines, 'The Power of Apology' (2007) 1 *Public Space* 1, 41.

309 Probably the most notable insistence by a lawyer that an apology would result in intolerable exposure to litigation was when Australian Prime Minister John Howard refused for the best part of a decade to apologise to members of the 'Stolen Generations' of indigenous people. Upon replacing Howard as Prime Minister, Kevin Rudd made such an apology on the first sitting day of Parliament (unlike either his predecessor or successor as Prime Minister, Rudd is not a lawyer). There were, of course, political reasons for both Howard and Rudd acting as they did but the incident remains illustrative of the issues at play where an apology is sought by a complainant or is being considered by a party against whom a complaint is made. See generally J Corntassel and C Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru' (2008) 9 *Human Rights Review* 465, 475-8.

just a paranoid concern of lawyers; there is a view that conditional[310] or partial apologies (and perhaps apologies protected by legislation from forming the basis of legal liability) will generally be unacceptable to a complainant, whereas:[311]

> It may well be that, paradoxically, the apology which is most likely to be effective is the riskiest apology. That is, the apology which admits fault and where the person being apologised to knows that the apology is *not* protected by legislation

The effectiveness of apologies as a method of providing redress to complainants is inseparable, then, from the risk that is inherent in making the kind of apology which is likely to prove satisfactory. Such an apology amounts to the public authority virtually throwing itself on the mercy of the complainant, which is a good illustration of why lawyers are so frequently nervous about this process by comparison to litigation, which they generally know and understand well. An apology might not be appropriate to every situation but wise public authorities should at least consider them as a possibility before moving to an arena where they may be subject to harder edged remedial options, including the ACO.

Compensation should be residual and small

The ACO that I propose would share much in common with section 8 of the UK *Human Rights Act 1998* (HRA), which relevantly reads as follows:[312]

> *Judicial Remedies*
>
> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including:
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining:
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the *Convention*.
>
> (5) A public authority against which damages are awarded is to be treated … as liable in respect of damage suffered by the person to whom the award is made. …

310 Within the genre of apologies issued (frequently unwillingly) by disgraced sportsmen, one often hears apologies worded in this style: "I'm sorry *if* my conduct upset anyone". This is not an apology for *my* wrongdoing (as to which no admission is really made at all) but at best an expression of regret for *your* reaction to that wrongdoing.

311 P Vines, 'Apologising to Avoid Liability' (2005) 27 *Syd LR* 483, 504-5 (original emphasis).

312 *Human Rights Act 1998* (UK) s 8.

The Supreme Court has recently expressed the view that, although sub-sections 8(3) and (4) are "inspired by article 41 of the *Convention*", they have now been domesticated from their "native habitat" in the European court:[313]

> I would however observe that over time, and as the practice of the European court comes increasingly to be absorbed into our own case law through judgments such as this, the remedy should become naturalised. While it will remain necessary to ensure that our law does not fall short of Convention standards, we should have confidence in our own case law under section 8 once it has developed sufficiently, and not be perpetually looking to the case law of an international court as our primary source.

The *HRA* provides for a damages remedy which is residual only and will only ever be minimal in quantity (although this is itself a flexible standard, subject to the views of the tribunal of fact as to what constitutes an appropriate award).[314] This reflects the requirements of article 13 of the *European Convention on Human Rights* (to which sections 7 and 8 of the *HRA* give effect) that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an *effective remedy* before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. (emphasis added)

A remedy is available under the *HRA* but there is no concomitant right for the remedy to be in the form of a substantial monetary award. There will frequently be other options open to someone whose *Convention* rights have been infringed which are of greater practical utility. This is more readily to be expected of actions under the *HRA* "than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages".[315] Damages under section 8 (or commencing proceedings under section 7) are "a longstop"[316] or "a remedy of 'last resort'"[317] rather than an automatic entitlement.[318] While there have been attempts to analogise the damages remedy to an action for breach of statutory duty, or some other tort action,[319] Professor Craig suggested (I think wisely) that the case law indicates a significant difference between tort actions and those under section 8, meaning that it is better to regard the latter form of action as *sui generis*.[320] This is not to say that it is impossible to recover substantial and significant damages under the *HRA*, given that the

313 *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [29] (Lord Reed).

314 In a different regime allowing for damages for the infringement of human rights, L'Heureux-Dubé and Bastarache JJ said: "The damages awarded were $2,000, which seems high. It must be recognised, however, that it is always difficult to assess moral damage and that such a decision is up to the trier of fact.": *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591, [72] (judgment of L'Heureux-Dubé, Gonthier, Cory, Iacobucci and Bastarache JJ). Difficulty in assessing damages is not, of course, a problem restricted to statutory regimes to compensate for rights infringements; consider for example the different views expressed with regard to the damages payable for false imprisonment by the majority judges in *Lumba v Home Secretary* [2012] 1 AC 245.

315 *Anufrijeva v Southwark London Borough Council* [2004] QB 1124, 1153 [52] (Lord Woolf CJ) (Court of Appeal, '*Anufrijeva v Southwark LBC*'). His Lordship made several additional points about why human rights litigation differs from claims in relation to private law obligations (WLR 1154 [55]).

316 *In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] 2 AC 291, 318-9 [60]-[62] (Lord Nicholls) ('*In re S (Minors)*').

317 *Anufrijeva v Southwark LBC* [2004] QB 1124, 1155 [56] (Lord Woolf CJ).

318 It is worthy of note that Harlow and Rawlings claimed that the use of "internal, departmental policy-making to supplement or subvert the law" appears to be "common within the Home Office immigration service": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 193. One case cited in support of this claim is *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, ('*Anufrijeva v Home Secretary*'). The conclusion is open that the damages remedy under the *HRA* is of particular significance where public authorities make extensive use of soft law.

319 The Supreme Court has recently confirmed that the remedy under section 8 "is described as damages but is not tortious in nature": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 193; cf *Faulkner v Secretary of State for Justice* [2013] UKSC 23, [29] (Lord Reed).

320 PP Craig, *Administrative Law* (7th ed, 2012) 926; cf JNE Varuhas, 'A Tort-Based Approach to Damages Under the *Human Rights Act 1998*' (2009) 72 *Modern Law Review* 750.

Court of Appeal has held that, where pecuniary losses consequent on the violation of an applicant's rights are capable of being assessed, they should be recoverable on the same basis as damages in tort[321] of *restitutio in integrum*.[322]

Not long after the *HRA* took effect, in a speech with which the rest of the House of Lords agreed, Lord Nicholls explained that, while section 8 enables a court to make such orders "as it considers just and appropriate", it "enables the court to grant relief only in respect of conduct of a public authority made unlawful by section 6" of the *HRA*, and:[323]

> Section 6 is not the source of any such power. Section 6 is prohibitory, not enabling.

Furthermore, in the more recent case of *Sturnham v Parole Board*, the Court of Appeal heard an appeal from a decision of a judge of the Administrative Court to award the claimant compensation in the amount of £300[324] for the violation of his right, under article 5.4 of the *Convention*, to have "proceedings by which the lawfulness of his detention shall be decided speedily by a court". It was not disputed in the Court of Appeal that the claimant's right under this article had been violated.[325] Laws LJ, with whom McFarlane and Patten LJJ agreed, held however that taking account of "all the circumstances of the case" as required by s 8(3) of the *HRA*, including whether an award of damages was "necessary to afford just satisfaction" to the claimant, it was not necessary to award damages to the claimant, although Mr Sturnham's appeal against his damages award being quashed was subsequently allowed by the Supreme Court.[326] Laws LJ described certain "principles which are to be applied for the resolution of the damages issue"[327] to which Lord Reed added on appeal in a summary of his conclusions.[328] The critical points were that:

> 1. Where it is established on a balance of probabilities that a violation of article 5(4) has resulted in the detention of a prisoner beyond the date when he would otherwise have been released, damages should ordinarily be awarded as compensation for the resultant detention.

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321 See K Barker et al, *The Law of Torts in Australia* (5th ed, 2011) 695-7.

322 *The Gas and Electricity Markets Authority v Infinis plc & Infinis (Re-Gen) Ltd* [2013] EWCA Civ 70 [27]. In *Ofgem v Infinis plc* [2013] EWCA Civ 70, the damages were indeed significant; Hart QC reported that the "order below was for £93,454.38, with a further £2,656,743.84 subject to any further argument": D Hart QC, 'Lost renewables subsidies successfully claimed as human rights damages' (13 February 2013), *UK Human Rights Blog*, http://ukhumanrightsblog.com/2013/02/13/lost-renewables-subsidies-successfully-claimed-as-human-rights-damages/.

323 *In re S (Minors)* [2002] 2 AC 291, 321-2 [80].

324 The award related specifically to the stress and anxiety which the claimant was held to have suffered. The claimant sought to cross-appeal on the basis that the quantum of the award should have been £1,000. Permission to do so was denied: *R (Sturnham) v Parole Board* [2012] 3 WLR 476, 480 [2] (Laws LJ) (Court of Appeal, '*Sturnham v Parole Board*').

325 *R (Sturnham) v Parole Board* [2012] 3 WLR 476, 482 [10] (Laws LJ) (Court of Appeal, '*Sturnham v Parole Board*').

326 *Faulkner v Secretary of State for Justice* [2013] UKSC 23. In the case whose appeal was reported with the appeal from *Sturnham v Parole Board*, Mr Faulkner was awarded damages of £10,000: *R (on the Application of Daniel Faulkner) v The Secretary of State for Justice and The Parole Board* [2011] EWCA Civ 349 [22]. On appeal, this was reduced by the Supreme Court to £6,500.

327 "1) Damages are only to be awarded where that is necessary to afford just satisfaction under the *Human Rights Act 1998* section 8(3). 2) In an Article 5.4 delay case the *Convention* right will ordinarily be vindicated and just satisfaction ordinarily achieved by a declaration. The focus of the *Convention* and of the court is on the protection of the right rather than compensation of the claimant. 3) But if the violation involves an outcome for the claimant in the nature of a trespass to the person, just satisfaction is likely to require an award of damages. The paradigm of such a case arises where the claimant's detention is extended by reason of the delay. Another case might be where the delay occasions a diagnosable illness in the claimant. 4) Other cases where the outcome or consequence of the delay is stress and anxiety but no more, will not generally attract compensation in the absence of some special feature or features by which the claimant's suffering is materially aggravated.": *Sturnham v Parole Board* [2012] 3 WLR 476, 486 [22] (Laws LJ).

328 *Faulkner v Secretary of State for Justice* [2013] UKSC 23, [13].

2. The only compensable losses are a loss of freedom (not just a chance of freedom) and feelings of frustration and anxiety, the latter resulting in an award of damages on a modest scale and even then only for delays of three months or more.

Lord Reed indicated that further guidance could be expected from either the ECtHR or the Supreme Court. Extrapolating from these principles and the case generally, we can make several observations. First, the initial damages award was objectively small. Tom Hickman has concluded from the case law[329] on section 8 of the *HRA* that damages will "rarely be awarded … and then only of modest amounts [which seems] to emphasise that the common law [will] remain the default position".[330] Harlow and Rawlings observed that the meanness of the damages awards would drive claimants back "within the compass of domestic tort law".[331] There are occasions on which particularly bad breaches of Convention rights occur and may justify a higher quantum of damages.[332] However, section 8 damages will generally be "ungenerous", to the point of being "insubstantial",[333] particularly where the compensation is "for feelings of frustration and anxiety".[334]

Secondly, there is no right to damages where "just satisfaction" can be obtained by a declaration. The court will need to engage in an analysis of how serious the breach of *Convention* rights has been,[335] although a recent case has indicated that, where an applicant has suffered a "readily calculable pecuniary loss", such a loss should be assessed consistently with "the usual approach" and compensated.[336]

Thirdly, there is a considerable discretion invested in the judges as to when damages should be awarded under section 8. Recovering damages under the *HRA* regime is "difficult".[337] Awards are inherently limited by whether "a public authority" has acted "in a way which is incompatible with a *Convention* right",[338] and are furthermore not available "as of right" as they would be in the case of loss caused by a tort.[339] It is therefore unsurprising, perhaps, that judges have a broad discretion whether to award damages under the *HRA* (as well as the quantum of any such damages), which

329 Specifically *Anufrijeva v Southwark LBC* [2004] QB 1124; *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, ('*Greenfield v Home Secretary*'). Lord Bingham's speech in *Greenfield* was quoted at length by Laws LJ in *Sturnham v Parole Board* [2012] 3 WLR 476, 483-4. It was also cited extensively on appeal to the Supreme Court in *Faulkner v Secretary of State for Justice* [2013] UKSC 23, [26]-[40] (Lord Reed), [109]-[114] (Lord Carnwath). Compare, however, the extended critique of *Greenfield v Home Secretary* in A Burrows, 'Damages and Rights' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart, Oxford, 2012) 275, 291-303.

330 T Hickman, *Public Law after the Human Rights Act* (2010) 52 (citation omitted). See also PP Craig, *Administrative Law* (7th ed, 2012) 928-9. Declarations of invalidity under s 4 of the Act are also rare; see R Singh QC, 'The *Human Rights Act* and the Courts: a Practitioner's Perspective' (2010) 6 *European Human Rights Law Review* 589, 590.

331 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 771.

332 See *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72, ('*Rabone v Pennine Care*').

333 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 771-2.

334 *Faulkner v Secretary of State for Justice* [2013] UKSC 23, [67]-[68] (Lord Reed).

335 See PP Craig, *Administrative Law* (7th ed, 2012) 928 (and the cases cited at n 143).

336 *The Gas and Electricity Markets Authority v Infinis plc & Infinis (Re-Gen) Ltd* [2013] EWCA Civ 70 [27]. In reaching this conclusion, Sullivan LJ (writing for a unanimous Court of Appeal) relied expressly on the judgment of Lord Woolf CJ in *Anufrijeva v Southwark LBC* [2004] QB 1124, 1155 [59].

337 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 771.

338 *Human Rights Act 1998* (UK) s 6(1).

339 *Anufrijeva v Southwark LBC* [2004] QB 1124, 1151 [50] (Lord Woolf CJ).

includes balancing the claimants' interests against those of the public generally,[340] although sometimes it will be open to a court to conclude that it is not as well placed as some other institution to conduct that exercise.[341]

This structure obviously does not apply directly to my proposed ACO, which would be available at large in the court's discretion to remedy losses caused by public maladministration rather than tied directly to a violation of human rights.[342] However, there are still useful comparisons to be drawn. Foremost of these is that compensation does not universally require the payment of money. *Sturnham* provides one example; another can be seen in the scenario of a public authority which has been guilty of acts of maladministration but has taken account of the complaints made against it and has already implemented a new system designed to prevent any such acts being repeated in the future. In those circumstances, a complainant who has been the victim of the public authority's maladministration certainly deserves a declaration from the court to acknowledge that s/he has been wronged. It is another thing altogether to say that the complainant will inevitably deserve a damages award where such an award would serve no purpose in sending a message to an authority which has already taken steps to improve its performance. To the extent that the purpose of the complaint is to improve state services, damages should be merely nominal and are unlikely to be the most appropriate remedy. Much like the damages remedy under section 8 of the *HRA*, I would expect the ACO to be used seldom, only in appropriate cases, and for the awards of money to be relatively small on the occasions when it is used.

Compensation might first be considered by the Ombudsman

Much of the success of the ACO would depend on the goodwill and cooperation of public authorities. Specifically, the remedy would risk lapsing into desuetude if public authorities were to approach claims for an ACO in the same adversarial manner[343] which is considered appropriate to traditional litigation. For that reason, I recommend that public authorities should have the opportunity to have claims for an ACO to remedy maladministration considered first by an external body, which could make recommendations as to whether and how those claims could be determined.[344]

This is a role that would best be filled by the Ombudsman, since it fits to a large degree within the functions already performed by that office. As I will discuss in Chapter 6 below, the Ombudsman is in the paradoxically powerful position in Australia of being constitutionally unable to make binding determinations but nonetheless being widely respected, with the result that the Ombudsman's

340 *Anufrijeva v Southwark LBC* [2004] QB 1124, 1154 [56] (Lord Woolf CJ); cf T Endicott, 'Proportionality and Incommensurability' (Paper presented at the Public Law Discussion Group, 2 February 2012).

341 See eg *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, ('*Marcic v Thames Water*').

342 Nor, of course, would the ACO be subject to the restrictions which come from linking damages directly to violations of human rights, under which maladministration alone is generally insufficient to make out a claim for damages: C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 773. See *Anufrijeva v Southwark LBC* [2004] QB 1124, 1149-50 [45] (Lord Woolf CJ).

343 Even tempered by the 'model litigant' obligations in the *Legal Services Directions 2005* (Cth).

344 It is worth noting that some public authorities, like the NHS in the UK, are already routinely handling complaints against them with a view to settling claims out of court, with promising results overall; see C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 777-8.

recommendations are frequently accepted and implemented by public authorities.[345] The office of the Ombudsman also has a broader "province" than courts which perform judicial review, extending to government contracting issues and matters excluded from the ADJR Act.[346] Professor McMillan, a former Commonwealth Ombudsman, has pointed out that the Ombudsman is accustomed to making recommendations which are flexible and which have little in common with orders made in judicial proceedings.[347] It is fair to say that the Ombudsman is an ideal institution to investigate compensation without necessarily recommending that it take the form of damages under an ACO. Furthermore, because the Ombudsman conducts investigations as a matter of course, public authorities which refer claims to the Ombudsman could be confident that recommendations of compensation will result from focused inquiries, by contrast to what Professor Harlow has described as the "haphazard" inquiries which lead to payments of *ex gratia* compensation.[348] In the event that the matter proceeds to court, the Ombudsman's report should be admissible and would, I believe, properly carry significant weight with the judge before whom the matter was to be tried.

If the Ombudsman is to have a role in determining whether compensation should be awarded, it must be appreciated that there is potential for performance of that role to be complicated. For example, Harlow pointed out that:[349]

> Class actions may represent a step in the political battle for compensation, bringing settlements bargained in the shadow of the law. Without admitting responsibility, government is often prepared to compensate, sometimes after a recommendation from the ombudsman. The compensation culture is in this way heightened, as the two systems are played off against each other.

Furthermore, the Ombudsman retains a statutory discretion not to investigate matters at his or her discretion. The Ombudsman could not be compelled to involve him- or herself unless there were legislation to that effect.

The Ombudsman should not be used to provide cover for government decisions taken for essentially political reasons. Harlow's comment above indicates that this is one risk which arises from introducing the Ombudsman into claims for compensation; another is that "the shadow of the law" has a formalising effect which has the effect of forcing the Ombudsman's advice into a judicial paradigm. This problem may be ameliorated by specifying that the Ombudsman's involvement in assessing whether a claimant should receive damages under an ACO is an outcome to which none of the parties involved should be compelled. The Ombudsman's involvement is less likely to be used as a method of heightening the "compensation culture" if the Ombudsman is able to set the terms of his or her office's agreement to investigate a claim. As a consequence, it is to be hoped that all three parties will generally see the advantages to having the Ombudsman involved: the claimant can utilize the

345 See generally J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423.

346 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 436.

347 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 437.

348 C Harlow, *State Liability* (2004) 106. This is a topic which is dealt with in Chapter 6.

349 C Harlow, *State Liability* (2004) 90.

Ombudsman's expertise in investigating government; the public authority can deal with an 'honest broker' in the form of a statutory authority which has some understanding of the issues faced by public authorities; and the Ombudsman's office has an opportunity to achieve its aim of facilitating administrative justice without resort to the legal system.

Compensation need not be wholly consistent with existing remedies

Finally, to the extent that the complainant has suffered loss, whether pecuniary or non-pecuniary,[350] the ACO should compensate that loss once an applicant makes an election against pursuing common law damages.[351] This principle will be consistent with awards of damages under the *HRA*,[352] but will not offer full recovery of damages in the mode of misfeasance in public office, where "[u]pon proof of the tort's fault elements, there beckons a damages vista apparently unconstrained by negligence law's familiar limitations upon claims for purely economic loss."[353] Nor would an ACO attempt to compensate losses in full as tort damages do. For example, losses of future opportunities should not be compensable with an ACO because they are by definition impossible to assess accurately and would detract from the purpose of an ACO to be a swift and final award of compensation.

On the other hand, the quantum of an ACO might include "botheration payments" as a relatively small component. These should be available to "cover cases of grave maladministration, where excessive rudeness and malice were involved or exceptional worry and distress caused".[354] Such payments may also be made in circumstances of humiliation or degradation.[355] These are heads of damage which are generally unknown in private law but are, I would argue, entirely appropriate bases for compensation with an ACO. This is because public authorities both have a greater scope to cause varieties of distress covering the spectrum of mere worry to degradation and an express obligation not to do so, given that public authorities are metaphorically trustees of public welfare, and the public has no interest in seeing its individual members mistreated by public administrators. A "botheration payment" shares some common ground with awards of exemplary or "vindicatory"[356] damages at

350 It would be unusual, albeit possible, for maladministration to cause "pain and suffering and loss of amenity", as is normal for tort actions in regard to physical injuries. The common law in Australia and the UK has traditionally been extremely parsimonious with contractual damages for disappointment, emotional distress or hurt feelings, restricting them to a narrow category of contracts for entertainment or enjoyment; see JW Carter, E Peden and GJ Tolhurst, *Contract Law in Australia* (5th ed, LexisNexis Butterworths, Sydney, 2007) 846-8. In tort, non-pecuniary damages which go beyond pain and suffering, loss of amenities or loss of expectation of life are presently unknown and even the recognition of loss consequent on psychological injury is a relatively recent phenomenon; see P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (2008) entries on 'damages' (295-6), 'pain and suffering' (861) and 'psychiatric damage' (954-5); K Barker et al, *The Law of Torts in Australia* (5th ed, 2011) 715-20. There is, however, the possibility that the common law could make use of the "fertile outside vantage point" of Roman law, in which the concept of *solatium* is able to compensate 'damage' done to a claimant's feelings; see E Descheemaeker, '*Solatium* and Injury to Feelings: Roman Law, English Law and Modern Tort Theory' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, Oxford, 2013) (forthcoming).

351 See the last of Lord Woolf's 'seven principles', quoted at C Harlow, *State Liability* (2004) 111.

352 See *The Gas and Electricity Markets Authority v Infinis plc & Infinis (Re-Gen) Ltd* [2013] EWCA Civ 70 [27].

353 M Aronson, 'Misfeasance in Public Office' (2011) 35 *MULR* 1. See also K Barker et al, *The Law of Torts in Australia* (5th ed, 2011) 302.

354 C Harlow, *State Liability* (2004) 106-7.

355 C Harlow, *State Liability* (2004) 112-13.

356 JNE Varuhas, 'The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages' (Paper presented at the Cambridge Private Law Centre Seminar Series, University of Cambridge Law Faculty, 25 October 2012).

common law and yet it should not be a payment of large quantum[357] but one which signifies the failure of a public authorities standards without providing an applicant with a sum that could more appropriately be reserved for circumstances where losses can be assessed with precision. Frequently, it would be preferable to provide an applicant in these circumstances with the substantive benefit they seek (be it access to housing, prompt assessment of an application for a licence or simply the chance to interact with a public authority without encountering laziness, rudeness or intimidation) rather than a damages payment in anything greater than a token amount.[358]

The compensatory principle should also include legal costs incurred by the claimant, although not necessarily on the same basis as costs are customarily awarded in civil proceedings. While successful parties at common law are able to recover their costs only in respect of disbursements and professional legal services, but not for the time spent by non-lawyers in presenting cases,[359] it would be better to leave the court with a broad discretion as to what amount of legal and other costs should be recoverable (up to and including on a full indemnity basis) given all the circumstances of the case. Costs and expenses are therefore best considered to be simply a category within the complainant's total claimed loss in this circumstance.

The ACO should also be used as another opportunity to consider making orders on a prospective basis in appropriate situations.[360] Where the purpose of orders is not merely to provide compensation for loss but also to ensure that the maladministration which caused that loss is less likely to be repeated, there is nothing wrong with orders operating only on a prospective basis. It is not necessary to expose a public authority to an extensive and ongoing risk of liability to promote the aim of securing better administration; indeed, such a risk may have the opposite effect. The one exception to this rule should always be the party who made the complaint and raised awareness of the relevant maladministration. That person deserves to recover compensation for his or her loss and should generally receive an order which reflects this.[361]

As with the ACO in general, the possibility of making prospective orders should be within the judge's discretion but should not be binding on non-parties. It is foreseeable that occasions may arise where it is not appropriate for the court to make orders which, effectively, grant an indemnity to a public authority which has caused loss of great magnitude, to many people, or to people who may not yet have discovered their loss. In those circumstances, it should be open to a judge to make an ACO on the case before the court and either say nothing about possible further cases or to refer the incident

357 Cf the example of a £10,000 "botheration payment": ibid. Even given the extraordinary administrative failures in the case in question, I would prefer to see "botheration payments" made in an amount which, even if more than nominal, is substantially smaller. Large awards of damages should ideally be reserved for circumstances where losses can be assessed with precision.

358 Cf the discussion of these issues in C Harlow, *State Liability* (2004) 120-1.

359 *Cachia v Hanes* (1994) 179 CLR 403.

360 See K Mason QC, 'Prospective Overruling' (1989) 63 *Australian Law Journal* 526; K Mason, 'Money Claims By and Against the State' in PD Finn (ed), *Essays on Law and Government - Volume 2: The Citizen and the State in the Courts* (1996) 101, 125-7.

361 See eg the plaintiffs in *ex parte Evans (No2)* [2001] 2 AC 19; *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534, ('*Ahmed v HM Treasury*').

back to Parliament, which is the appropriate body to consider issues with the potential to affect a very large number of people.

There are inherent limitations on attempts to include a compensatory remedy in administrative law. Official,[362] unofficial[363] and academic[364] recommendations for reform have been made over the course of several decades but none of these has had an impact on the state of the law. The recommendations above may not be any different. One is forced to speculate whether, rather than being an idea whose time has not yet come, compensation in public law is a manufactured hybrid which is doomed never to live in a highly developed legal environment.

B: Unjust Enrichment and Restitution by Public Authorities

In the UK, restitution is available for the value of taxes paid subject to an *ultra vires* demand.[365] A proposed collection of tax without legislative authority is *ultra vires* due to inconsistency with Article 4 of the *Bill of Rights 1688*.[366] It is not relevant whether or not the taxpayer knows that the demand is illegal. The constitutional element is the unjust factor which leads to the availability of restitution.

Although *Woolwich* has yet to be accepted in Australia,[367] an Australian plaintiff could nonetheless argue for its application. It would first need to prove the requirements of unjust enrichment, which are established by answering the following five questions:[368]

(i) Was the defendant enriched?
(ii) Was it at the expense of the claimant?
(iii) Was it unjust?
(iv) What kind of right did the claimant acquire?[369]
(v) Does the defendant have a defence?

362 Law Commission, *Administrative Redress Consultation Paper* (2008); Law Commission, *Administrative Redress* (2010).

363 JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 353-64.

364 See GP Barton, 'Damages' in M Taggart (ed), *Judicial Review in the 1980s* (1986) 123, 145-52; PP Craig, 'Compensation in Public Law' (1980) 96 *Law Quarterly Review* 413, 435-43.

365 *Woolwich* [1993] AC 70.

366 "That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is Illegal.": *Bill of Rights 1688* (UK) Art.4. This was described as a "fundamental principle of public law" in *Royal Insurance* (1994) 182 CLR 51, 69 (Mason CJ). See also P Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' in PD Finn (ed), *Essays on Restitution* (Law Book Co, Sydney, 1990) 164, 165.

367 Virgo has described the decision in *Woolwich* as an example of "the creativity of the House of Lords": G Virgo, 'The Law of Unjust Enrichment in the House of Lords: Judging the Judges' in J Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart, Oxford, 2011) 169, 189. Australian courts are rarely described in these terms and are more likely to be excoriated for their lack of creativity. Mike Taggart noted that even when "Australia led the common law world in its innovation in administrative law" it was due to "the work of Parliament, not 'adventurous judges' in their judicial capacity": M Taggart, 'Australian Exceptionalism' (2008) 36 *Fed LR* 1, 3. It is possible that *Woolwich* was not due only to creativity but a judicial determination to seize a moment which would otherwise "be gone forever": *Woolwich* [1993] AC 70, 176 (Lord Goff).

368 P Birks, *Unjust Enrichment* (2nd ed, 2005) 39. The taxonomy of unjust enrichment is also explained in *Equuscorp v Haxton* (2012) 86 ALJR 296, 307-8 [30] (French CJ, Crennan & Kiefel JJ).

369 This element was missing from the taxonomy set out by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 ('*Banque Financière de la Cité*'). Lord Hoffmann included an additional element, "whether there are nevertheless reasons of policy for denying a remedy" (at 234). See G Virgo, 'The Law of Unjust Enrichment in the House of Lords' in J Lee (ed), *From House of Lords to Supreme Court* (2011) 169, 180.

The first two elements will generally be made out in an action to recover an overpayment of tax to a revenue authority where there has been a transfer of money from one party to the other.[370]

Application of the *Woolwich* unjust factor means that a plaintiff need not rely on intention-based unjust factors, such as duress[371] and mistake, which focus on the intention of the plaintiff to transfer wealth.[372] It has been clear since *DMG*[373] that "*Woolwich* and mistake claims are independent, have distinct requirements and, potentially …, may lead to different results".[374] The problematic detail of the law regarding mistake will not be relevant since, as was accepted by every single judge who heard argument in *Woolwich*,[375] Woolwich EBS had always had a *correct* understanding of its legal position, in contrast to the Revenue.[376] Even if a plaintiff had made a mistake of law as to the legality of the Revenue's demand, as happened in the *FII Group Litigation*,[377] because the *Woolwich* claim does not rely on the existence of a mistake to establish the presence of an unjust factor, the mistake is not relevant to a *Woolwich* claim.[378] What was disputed in *Woolwich* was whether the Revenue possessed a legislative mandate to impose the tax that it had;[379] the fact that it had understood the law accurately precluded Woolwich EBS from relying on the unjust factor of mistake of fact.[380] Voon has noted that the "difficulty in establishing the causative element of the mistake" remained,[381] as demonstrated in Australia by *Royal Insurance*.[382] In any event, where a mistaken understanding of the law on the part of the Revenue is not shared by the plaintiff, mistake is not an unjust factor that will assist the plaintiff in its claim.

The leading speech of Lord Goff in *Woolwich* held that the plaintiff did not have to rely on an unjust factor which focuses on the intention of the plaintiff to transfer wealth. Rather, *Woolwich* developed the law such that an *ultra vires* demand is sufficient reason for the plaintiff to recover the item given to

370 *Equuscorp v Haxton* (2012) 86 ALJR 296, 306-7 (French CJ, Crennan & Kiefel JJ).

371 This includes a variety of duress which is particular to public authorities is duress through a demand made *colore officii*, referring to pressure which is applied illegitimately under the colour of office and is sometimes described in terms of extortion; see P Birks, 'A Tercentenary Footnote' in PD Finn (ed), *Essays on Restitution* (1990) 164, 178; K Mason et al, *Mason and Carter's Restitution Law in Australia* (2nd ed, 2008) 781-2.

372 P Birks, *Unjust Enrichment* (2nd ed, 2005) 105-6. Where a public authority has exacted payments from a claimant ultra vires, it remains susceptible to "standard unjust factors" such as duress and mistake just as any other party would: A Burrows, *The Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2011) 499.

373 *Deutsche Morgan Grenfell Group plc v Internal Revenue Commissioners* [2007] 1 AC 558, ('*DMG*').

374 E Bant, 'Restitution from the Revenue and Change of Position' [2009] 2 *Lloyd's Maritime and Commercial Law Quarterly* 166, 167. Bant was referring to the possibility that a *Woolwich* claim may be precluded by a statutory limitation, as arose in *Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty's Revenue and Customs* [2008] EWHC 2893 (Ch), (Henderson J, '*FII Group Litigation*').

375 A Burrows, *The Law of Restitution* (3rd ed, 2011) 210 (n 53).

376 *Woolwich (QB)* [1989] 1 WLR 137, 141 (Nolan J).

377 *FII Group Litigation* [2008] EWHC 2893 (Ch), [262].

378 E Bant, 'Restitution from the Revenue' [2009] 2 *Lloyd's M&CLQ* 166, 167.

379 B Fitzgerald, '*Ultra Vires* as an Unjust Factor in the Law of Unjust Enrichment' (1993) 2 *Griffith Law Review* 1, 8.

380 Whereas mistake of law has been an unjust factor in its own right in Australia since *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, that was not yet the case in the UK when *Woolwich* was decided. In the UK, the bar on mistake of law was not lifted until *Kleinwort Benson Limited v Lincoln City Council* [1999] 2 AC 349. In turn, this reform was not extended to tax payments made to public authorities under a mistake of law until *DMG* [2007] 1 AC 558.

381 T Voon, 'Restitution from Government' (1998) 9 *PLR* 15, 16.

382 *Royal Insurance* (1994) 182 CLR 51.

the defendant as of right.[383] This is an example of a separate category of unjust factors which allow a plaintiff to seek restitution on a policy basis. These policy-motivated unjust factors take no account of the claimant's subjective intention.[384] Rather, as the name suggests, they allow restitution for reasons of legal policy in circumstances of necessity identified by the judiciary. Although there are identified examples[385] which are intended as a guide, a system which allows circumvention of the dominant unjust enrichment model (which requires the establishment of a previously identified unjust factor) based upon judicial identification of a compelling policy reason may contain implicit instability.[386] Nonetheless, there does not seem to be any academic consensus to the effect that an *ultra vires* demand for money should not be an accepted unjust factor. Indeed, the reverse is true, with most if not all unjust enrichment scholars over the last two decades embracing the *Woolwich* decision.

The policy-motivated unjust factor which was developed in *Woolwich* had as its basis the finding that the *ultra vires* status of the Revenue's demand was a sufficient unjust factor to ground a claim for restitution.[387] Consequently, it is possible in the UK to obtain compensation from a public authority which has been unjustly enriched,[388] with the plaintiff needing only to establish the *ultra vires* nature of the public authority's act in addition to the usual elements of restitution, namely that the enrichment was at the plaintiff's expense and that there was no defence. To establish this unjust factor, a plaintiff would need first to obtain a declaration that the collection of tax by the Revenue was invalid in as much as it relied on invalid soft law guidelines. It would then need to commence a separate action to recover the money.[389] There is no compelling reason in my view why *Woolwich*, or at least Lord

383 This led Professor Burrows to claim that Woolwich "has subsumed the traditional duress approach" to restitution: A Burrows, *The Law of Restitution* (3rd ed, 2011) 501. This is to say that, in allowing restitution in the absence of the hitherto required unjust factors, *Woolwich* fundamentally altered the law of unjust enrichment. In doing so, Burrows argued, the House of Lords implicitly over-ruled several long standing precedents. NB the approach of Lord Slynn of Hadley: *Woolwich* [1993] AC 70, 204; cf P Birks, *An Introduction to the Law of Restitution* (rev ed, 1989) 297.

384 S Degeling, 'Understanding Policy-Motivated Unjust Factors' in R Grantham and C Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, Oxford, 2008) 267, 274.

385 The example of payments of money to public authorities consequent on an *ultra vires* demand had been identified even prior to the litigation in *Woolwich*; see P Birks, *An Introduction to the Law of Restitution* (rev ed, 1989) 294-9.

386 S Degeling, 'Unjust Factors' in R Grantham and C Rickett (eds), *Structure and Justification in Private Law* (2008) 267, 273-82. In other circumstances, regarding liability for negligence, McHugh J considered at length the language of "commonsense" and its various synonymous words and phrases, which his Honour considered in reality to be simply applied as "a limiting rule [which] is the product of a policy choice": *March v E. & M.H. Stramare Pty Limited* (1991) 171 CLR 506, 530-1 ('*March v Stramare*'). McHugh was suspicious of the (unacknowledged) role of policy in judicial determinations, for example in circumstances when "the educative effect of the expert evidence makes an appeal to commonsense notions of causation largely meaningless or produces findings concerning causation which would often not be made by an ordinary person uninstructed by the expert evidence" (at 533). He accepted that in an "exceptional case" like the one before the High Court, the standard legal test of causation (the 'but for' test) may prove inadequate but in general any other test, such as the proposed 'commonsense test', "should be recognised as a policy-based rule concerned with remoteness of damage and not causation" (at 534).

387 Lord Slynn said that he found it "quite unacceptable in principle that the common law should have no remedy for a taxpayer who has paid large sums or any sum of money to the revenue when those sums have been demanded pursuant to an invalid regulation and retained free of interest pending a decision of the courts.": *Woolwich* [1993] AC 70, 204; cf B Fitzgerald, *'Ultra Vires* as an Unjust Factor' (1993) 2 *Griffith LR* 1, 17.

388 *Woolwich* [1993] AC 70; *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue* [2012] 2 AC 337, ('*FII Group Litigation*').

389 See *Woolwich* [1993] AC 70, 106 (Ralph Gibson LJ). In England, as a result of the ruling in *O'Reilly v Mackman* [1983] 2 AC 237, "there is no power to award restitution on an application for judicial review": *Wandsworth London Borough Council v Winder* [1985] AC 461, 480 (Goff LJ). Until the Court of Appeal decision in *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366, Greenwich EBS would therefore have needed to establish the *ultra vires* status of the request in one set of proceedings, and sought to obtain restitution in another. *British Steel* ended the "inefficiency, cost and clumsiness" of such a 'bifurcated' system: R Williams, *Unjust Enrichment and Public Law* (2010) 49. See also A Burrows, 'Public Authorities' in AS Burrows (ed), *Essays on Restitution* (1991) 39, 62-3.

Goff's speech in *Woolwich*,[390] ought not to be applied in Australian courts, especially if it is narrowly applied as recognising that an *ultra vires* demand by a public authority is a policy-motivated unjust factor capable of grounding a claim for restitution.[391]

A plaintiff's right to restitution under the *Woolwich* policy-motivated unjust factor is contingent upon whether the Revenue authority can make out a defence.[392] Virgo noted that the *Woolwich* majority was aware that "limits would need to be placed on restitutionary claims against public authorities", given that the existing defences may either be inadequate or require reinterpretation, but "preferred to leave this open for future development".[393] A government authority may seek to take advantage of the change of position defence,[394] although, to the extent that the injustice of refusing a remedy to a plaintiff would be caused by stultification of the legal policy which would have allowed that plaintiff to claim restitution in the first place, the government authority will not be allowed to do so. Bant has stated in this regard that:[395]

> the question of stultification … will prove the most significant hurdle to public authorities seeking to rely on the defence in circumstances where they have received a benefit pursuant to an unlawful demand.

McHugh J has expressed a similar view in the High Court,[396] albeit subject to the familiar Australian caveat that the terms of any relevant legislation can be read as disclosing an intention that the defence should be excluded.[397] The stultification bar to the change of position defence, in the case of a *Woolwich*-style claim, rests on the reasoning that the important public policy (that public authorities ought not to benefit from demands made *ultra vires*) upon which the unjust factor that leads to a possible award of restitution ought not to be undermined by allowing a change of position defence.[398] While there may be principled arguments in favour of defences where a defendant has changed his position or disenriched himself,[399] the change of position defence does not extend to undermining the purpose of the very legal policy which would have allowed a claimant to obtain restitution.[400]

The extent to which the *Woolwich* principle applies in Australia is yet to be resolved,[401] since the point has not arisen in subsequent cases decided in Australia.[402] However, given the terms in which this

390 B Fitzgerald, '*Ultra Vires* as an Unjust Factor' (1993) 2 *Griffith LR* 1, 17.

391 See R Moules, *Actions Against Public Officials* (2009) 300.

392 E Bant, *The Change of Position Defence* (Hart, Oxford, 2009) 203.

393 Virgo further commented that the House of Lords' failure to address this difficult issue "certainly illustrates the limitations of so-called 'judicial legislation'": G Virgo, 'The Law of Unjust Enrichment in the House of Lords' in J Lee (ed), *From House of Lords to Supreme Court* (2011) 169, 190-1. The comments at n 367 above should be understood in this context.

394 See the elements of this defence set out in E Bant, *The Change of Position Defence* (2009) 3.

395 E Bant, 'Restitution from the Revenue' [2009] 2 *Lloyd's M&CLQ* 166, 172.

396 *Nelson v Nelson* (1995) 184 CLR 538, 613.

397 Cf E Bant, *The Change of Position Defence* (2009).

398 E Bant, 'Restitution from the Revenue' [2009] 2 *Lloyd's M&CLQ* 166, 172-3.

399 Birks took the view that the claimant ought properly to bear "the ultimate risk of loss": P Birks, *Unjust Enrichment* (2nd ed, 2005) 209.

400 P Birks, *Unjust Enrichment* (2nd ed, 2005) 218; E Bant, *The Change of Position Defence* (2009) 203-4.

401 See T Voon, 'Restitution from Government' (1998) 9 *PLR* 15; D Wong, 'The High Court and the *Woolwich* Principle: Adoption or Another Bullet that Cannot be Bitten?' (2011) 85 *Australian Law Journal* 597; K Mason et al, *Mason and Carter's Restitution Law in Australia* (2nd ed, 2008) Ch20; S Degeling, 'Restitution

proposed development has been discussed, one wonders why following *Woolwich* would cause an Australian court any difficulty at all. Referring to Article 4 of the *Bill of Rights 1688*, Mason CJ stated baldly that it would be "subversive of an important constitutional value if this Court were to endorse a principle of law which … authorised the retention by the executive of payments which it lacked authority to receive and which were paid as a result of causative mistake."[403] In the years preceding Mason CJ's *dictum*, the importance of this "important constitutional value" had already been noted by Birks[404] and Burrows[405] in England, while in Canada, Hogg referred to taxation imposed *ultra vires* as "unconstitutional".[406] Importantly, this commentary also preceded the decision of the House of Lords in *Woolwich* and doubtless influenced the thinking of Lord Goff, himself a restitution scholar of many years' standing.[407] It is in this context that one should read Lord Goff's statement that:[408]

> the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law - enshrined in a famous constitutional document, the *Bill of Rights 1688* - that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right.

Lord Goff did not put this point expressly as a constitutional argument, despite having described the *Bill of Rights* in those terms. Rather, his Lordship spoke of restitution in these circumstances as no more than "a matter of common justice" and a response to "the simple call of justice".[409] This terminology was used in the context of making the point that the Revenue had obtained a benefit "implicitly backed by the coercive powers of the state" at the expense of Woolwich.[410] Lord Browne-Wilkinson also noted the "inequalities of the parties' respective positions" as the basis upon which he was prepared to find an unjust factor which would allow Woolwich to obtain restitution from the Revenue. The purpose of these *dicta* was to justify the policy-motivated unjust factor of payment subject to an *ultra vires* demand.

What is clear is that, when Australia adopts the *Woolwich* principle, it will be on a small-c constitutional basis. By contrast, Canada has embraced the "public law of restitution"[411] on large-C Constitutional grounds. That approach met with the unanimous approval of the Canadian Supreme

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of Overpaid Tax in Australia: The *Woolwich* Principle' in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, Oxford, 2013) 313; cf the pessimism in A Burrows, *The Law of Restitution* (3rd ed, 2011) 35-43.

402 See eg *BAT v WA* (2003) 217 CLR 30.

403 *Royal Insurance* (1994) 182 CLR 51, 69.

404 P Birks, 'A Tercentenary Footnote' in PD Finn (ed), *Essays on Restitution* (1990) 164, 181.

405 A Burrows, 'Public Authorities' in AS Burrows (ed), *Essays on Restitution* (1991) 39, 60-3. Voon expressed this in Diceyan rule of law terms: T Voon, 'Restitution from Government' (1998) 9 *PLR* 15, 18.

406 PW Hogg, *Liability of the Crown* (2nd ed, Carswell, Toronto, 1989) 184.

407 Lord Goff was a co-author of the seminal English restitution text: R Goff and GH Jones, *The Law of Restitution* (Sweet & Maxwell, London, 1966). His Lordship also wrote the Foreword to AS Burrows (ed), *Essays on the Law of Restitution* (1991). Clearly, he was aware of both Burrows' and Birks' views on restitution from government consequent on an *ultra vires* act; see GH Jones, *Goff and Jones*' *The Law of Restitution* (4th ed, Sweet & Maxwell, London, 1993) v; 549.

408 *Woolwich* [1993] AC 70, 172.

409 Ibid.

410 Ibid.

411 R Chambers, 'Restitution of Overpaid Tax in Canada' in S Elliott et al (eds), *Restitution of Overpaid Tax* (2013) 303, 303.

Court in *Kingstreet Investments.*[412] Writing for the Court, Bastarache J held that the *ultra vires* 'user charge' which had been imposed on the appellants' night clubs in New Brunswick, was recoverable "on the basis of constitutional principles rather than unjust enrichment", which was "ill-suited to deal with the issues raised by *ultra vires* taxes".[413] This principle is 'constitutional' in Canada in a way that it has not been recognised to be in Australia,[414] where Article 4 of the *Bill of Rights 1688* is seen as forming only part of Australia's constitutional background (though it nonetheless remains an important part of Australian law). Bastarache J held that the principle equivalent to Article 4 is embedded in section 53 of the Canadian *Constitution Act*.[415]

Unlike the Canadian Supreme Court in *Kingstreet Investments*, the High Court of Australia has not, to this point, recognised the link between the equivalent section of the Australian Constitution and Article 4. Bastarache J's reasoning was that s 53 imposed a "governing constitutional principle"[416] that the Crown requires legislative authority in order to impose taxation, and that therefore it is also a constitutional principle that where the Crown obtains revenue as the consequence of having imposed an invalid tax, it is liable to make restitution of the amount of that revenue and the taxpayers to recover amounts paid under the invalid tax as "a matter of constitutional right".[417]

Hogg and his co-authors included Australia in their proposition that the law as stated in *Kingstreet Investments* "is generally the position outside Canada",[418] citing *Royal Insurance* in support. However, that statement exaggerates the constitutional reasoning employed by Mason CJ in *Royal Insurance* and misunderstands the caution which continues in the Australian judiciary to adhere to the notion of restitution as of right against public bodies for imposing invalid taxation. At any rate, Australian courts have not attempted to separate cases "into wholly separate bodies of law, depending on the reason why the tax is invalid",[419] thereby nullifying the simplicity which the Canadian Supreme Court had intended to institutionalise by eschewing the complexity of the unjust enrichment framework.[420]

The notion of an Australian court treating *ultra vires* taxation as an entirely public event and using the writ of *mandamus* to order the return of monies obtained through the *ultra vires* demand is initially startling, but not unknown. *Mandamus* retains the characteristics of the prerogative writ which allowed a person with sufficient standing to obtain relief against a respondent who has failed or refused to

412 *Kingstreet Investments* [2007] 1 SCR 3. In Canada, the principle rests entirely on constitutional grounds and "has nothing to do with the unjust enrichment principle": G Virgo, 'The Law of Unjust Enrichment in the House of Lords' in J Lee (ed), *From House of Lords to Supreme Court* (2011) 169, 190 (n 110).

413 *Kingstreet Investments* [2007] 1 SCR 3, [12] (Bastarache J). See PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 504-5.

414 Cf *Royal Insurance* (1994) 182 CLR 51, 69 (Mason CJ).

415 "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.": *Constitution Act 1867* (Canada) s 53. By s 90, the *Constitution Act* extends this principle to the Provinces. See *Kingstreet Investments* [2007] 1 SCR 3, [14] (Bastarache J). Of course, this principle is also embedded in the Australian Constitution, and even in the same section: *Commonwealth of Australia Constitution 1900* (UK) s 53.

416 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 353.

417 *Kingstreet Investments* [2007] 1 SCR 3, [34] (Bastarache J).

418 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 353 (n 61).

419 R Chambers, 'Restitution of Overpaid Tax in Canada' in S Elliott et al (eds), *Restitution of Overpaid Tax* (2013) 303, 312.

420 *Kingstreet Investments* [2007] 1 SCR 3, [35].

perform a public duty[421] and is additionally entrenched within s 75(v) of the *Constitution* as a constitutional writ.[422] *Mandamus* issued in *Royal Insurance* to command the repayment of overpaid stamp duties in circumstances where the applicable legislation merely said that the Comptroller 'may' return money overpaid.[423] A majority held that while the relevant section created a discretion rather than a duty to return overpaid stamp duties,[424] an antecedent liability (such as a positive finding that the Revenue had no right to retain the funds) created a duty in the Comptroller to return those funds, which would in turn allow *mandamus* to issue.[425] *Royal Insurance* was essentially a matter about statutory interpretation, albeit one informed by unjust enrichment reasoning, which indicated that "all discretions have boundaries"[426] and that there is therefore a point at which *mandamus* may – theoretically – issue to compel action. I say theoretically because *mandamus*, and the constitutional writ jurisdiction of the Australian High Court generally,[427] is always discretionary. Indeed, the grounds upon which *mandamus* may be refused are many.[428] To regard an *ultra vires* demand as a purely public law event with a purely public law remedy is fraught with risk for this reason.[429]

Although *Woolwich* itself was a case in which soft law was relevant, the Revenue having issued soft law guidelines which were designed to collect more than the tax presently owed, in order to prevent building society taxpayers from receiving a windfall,[430] breaches of soft law are rarely central to taxation matters. Unless *Woolwich* is adopted more broadly in Australia than it has been in the UK, it presents a path to obtaining restitution which is limited to overpaid taxation.[431] For that reason, restitution is unlikely to present a practical remedial option for persons affected by the breach of a public authority's soft law.

421 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [13.10].

422 *Aala* (2000) 204 CLR 82.

423 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [13.110].

424 As did Mason CJ: *Royal Insurance* (1994) 182 CLR 51, 64 (Mason CJ). See also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) 349-50.

425 *Royal Insurance* (1994) 182 CLR 51, 87 (Brennan J, with whom Toohey & McHugh JJ agreed). Dawson J held that "neither the Comptroller of Stamps nor the Treasurer had any discretion once the Comptroller was satisfied that an overpayment had been made: the steps resulting in a refund were required to be taken.": *Royal Insurance* (1994) 182 CLR 51, 96 (Dawson J).

426 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [13.110].

427 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [12.250].

428 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [13.200]-[13.290].

429 Alder's view was that the *Woolwich* principle should be "one sounding only in public law" precisely so it *did not* create "an absolute right" to restitution: J Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (2002) 22 *Legal Studies* 165, 176; cf the reasoning of Bastarache J in *Kingstreet Investments*, who sought to "*guarantee* respect for constitutional principles" (at [14]) and allow recourse as a matter of "*right*" (at [34]) by basing the remedy in the *Constitution Act* (my italics). The position is different in Australia and the UK: see R Williams, *Unjust Enrichment and Public Law* (2010) 33-4.

430 While the collection of monies in *Woolwich EBS v IRC* was *ultra vires* due to the invalidity of the regulations issued by the Revenue, Mason et al have noted that "Federations with controlled constitutions, like Australia, are likely to throw up problems of a completely different order" because a judicial finding of inconsistency between a statute (or regulation) and the Constitution renders the statutory instrument *void ab initio*: K Mason, JW Carter and G Tolhurst, *Mason and Carter's Restitution Law in Australia* (2nd ed, LexisNexis Butterworths, Sydney, 2008) 793. A finding of unconstitutionality does not, on the other hand, result in a judicial order being rendered *void ab initio*: *Kable (No2)* [2013] HCA 26, [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

431 See the essays in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, Oxford, 2013).

Chapter Five

5: Court-based Remedies: Compensation Not Premised On Invalidity

Introduction

The availability of judicial review remedies was explored in Chapter 3. These remedies are not universally appropriate: as Keane J noted extra-judicially, while "one may accept that 'public power begets public accountability' … [it] does not follow … that judicial review is the only mechanism for ensuring public accountability, much less that it is the best available mechanism."[1] This chapter will examine the possibility of obtaining monetary remedies for the application of, or failure to apply, soft law. Specifically, it will examine the possibility of obtaining a remedy in respect of applications of soft law which are probably irremediable by judicial review, but which nonetheless cause loss.

Governments and public authorities have immense practical influence over the decision-making of individuals. People generally are apt to act on the faith of representations or guidance from public authorities without necessarily exercising the same caution that they would (or should) in dealings with purely commercial entities.[2] This is true where the representations in question take the form of soft law, although it is arguable that this circumstance also carries particular risks.[3] Provided that such reliance is reasonable and that the other requisite elements of each cause of action are made out, it may be possible to obtain damages in negligence or compensation or other monetary remedy in equity. These remedies are, however, available against public authorities on a somewhat narrower basis than as against private actors.

The best way to observe the possible remedies available in tort and equity for failure by a public authority to adhere to the terms of a soft law instrument is through the use of examples. In this chapter, I will propose hypothetical scenarios based on the facts of well-known cases. Having first addressed some threshold issues to obtaining private law remedies from public authorities, I will then

1 PA Keane, 'The Courts and the Academy' (2008) 82 *ALJ* 623. His Honour reiterated this opinion in PA Keane, 'Democracy, Participation and Administrative Law' (Speech delivered at the AIAL National Lecture, 2011 National Administrative Law Conference, Canberra, 21 July 2011).

2 In regard to the application of equitable estoppel to commercial circumstances, Lord Neuberger warned that "equity is not a sort of moral US fifth cavalry riding to the rescue any time a court thinks that a defendant has behaved badly and the common law affords the plaintiff no remedy. … The message from the House of Lords in [*Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752] is that it is simply not for the courts to go galumphing in, wielding some Denningesque sword of justice to rescue a miscalculating, improvident or optimistic property developer from the commercially unattractive, or even ruthless, actions of a property owner, which are lawful in common law.": Lord Neuberger of Abbotsbury MR, 'Thoughts on the Law of Equitable Estoppel' (2010) 84 *Australian Law Journal* 225, 229-30.

3 JM Keyes, *Executive Legislation* (2nd ed, 2010) 61-3. See also Lord Neuberger of Abbotsbury MR, 'Thoughts on the Law of Equitable Estoppel' (2010) 84 *ALJ* 225, 229-30.

apply the legal principles of tort and equitable liability to these examples to ascertain what remedy could at present be expected by the reliant party. To the extent that the solutions provided by current legal and equitable doctrines are inadequate, this chapter will make recommendations for reform.

A: Threshold issues

The starting point for any analysis of state liability is dependent on one's conception of the state. Janet McLean has commented that:[4]

> The law contains no single concept of the state. The way that different areas of law conceive of the government as a legal person can be manipulated to achieve different results.

McLean argued that some legal contexts have no need to conceptualise the state and that, in others, the state may not have *all* of the characteristics of a natural person.[5] However, in general, governments and public authorities are able to act in the same manner as private individuals. Like private individuals, they are able to enter into contractual relationships, including contracts of employment, pursue commercial goals and enter into litigation, either to vindicate their own rights or to defend an action instigated by another party. They are subject to equitable remedies, including estoppel.[6] They may also be liable in tort.[7] Each of these statements is equally true of government bodies and natural persons.

However, it is in the very nature of governments and public authorities that they are also able to act in ways that private individuals cannot. Specifically, they may be given special powers by statute which are able to be used for the benefit of the public generally, or a subset thereof, rather than in their own interest. Public authorities may be empowered or compelled by legislation to act in certain circumstances,[8] or may have a broader general discretion to perform certain acts.[9] While any failure by public authorities to act within the limits of their statutory powers is remediable using judicial review,[10] an act having been performed *ultra vires* may also create a 'private law' liability,[11] although

4 J McLean, 'The Transformation from Government to State: Globalisation and Governments as Legal Persons' (2003) 10 *Indiana Journal of Global Legal Studies* 173, 196. See also J McLean, 'The Crown in the Courts: Can Political Theory Help?' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, Oxford, 2008) 161, 174-8.

5 J McLean, *Searching for the State in British Legal Thought* (2012), 165-6; cf AV Dicey, *Introduction to the Law of the Constitution* (10th ed, ECS Wade (ed), 1959) 187-8.

6 Eg *Commonwealth v Verwayen* (1990) 170 CLR 394, ('*Verwayen*').

7 Either directly or vicariously in all Australian jurisdictions except Victoria, but vicariously only in New Zealand and the UK; see *Crown Proceedings Act 1950* (NZ) s 6(1); *Crown Proceedings Act 1947* (UK) s 2(1).

8 Although a statutory power to act does not mean that the authority is necessarily under a common law duty of care to undertake a positive act: *Stuart* (2009) 237 CLR 215.

9 Indeed, Jaffe has noted that one of the issues which has confused the common understanding of the doctrine of sovereign immunity is the tendency to misinterpret the liability of the sovereign on the basis that litigation was not truly on the same terms as between subject and subject. Procedural means had developed which enabled subjects to litigate against the King, but "[a]t the same time, many of the circumstances were already manifest which have always made litigating against public officials very different from litigating against private persons. The desire of the King to supervise his own officials, to protect their discretion, to follow different policies than the courts approved, all appeared, with their counterparts in opposition, shaping the extent to which relief was in fact available against public officials.": LL Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77 *Harvard Law Review* 1, 3.

10 See the arguments made in chapters 3 and 4 above.

11 An *ultra vires* act may result in liability in tort eg *Cooper v Wandsworth* (1863) 14 CBNS 180.

the fact that an act has been performed *ultra vires* is not alone sufficient for this purpose.[12] For example, an *ultra vires* act does not constitute a *per se* breach of a duty of care in negligence, and the fact that an act is *intra vires* provides no defence to a negligence action.

Therefore, obtaining a compensatory remedy from a public authority in either tort or equity requires first that the plaintiff satisfy the threshold requirement of establishing that the public authority's conduct is susceptible to litigation in the circumstances. Before considering the legal outcomes of two example problems, I will address four important threshold issues which determine whether litigation can proceed against public authorities. The first is the extent of public authorities' capacity to be held liable in tort. The second is whether public authorities can ever be liable in circumstances where a private individual would not be. The third is the extent to which public authorities owe a common law duty in respect to both acts and omissions. The fourth is the availability of equitable remedies where an estoppel is raised against a public authority.

I: Can public authorities ever be liable in tort?

The short answer to this question is 'of course'; public authorities can be held liable in tort but the history which leads to this now obvious response is revealing. Traditionally,[13] the English monarch was immune from tort action,[14] supposedly on the basis that, as a matter of procedure, a feudal lord could not be sued in his own court and, therefore, as a feudal lord himself, the King could not be sued at all.[15] The monarch was, however, able to consent to a suit being brought personally against the Crown.[16] Jaffe cites historical authority that the monarch's consent was determined as a matter of law and not subject to regal whim. The somewhat tortured procedural requirement that the King give his consent to a suit being brought against him by name was based on the notion that the Crown "could not refuse to redress wrongs". Hence:[17]

12 "The *ultra vires* test did not *replace* negligence as a test of legality; on the contrary, it has always been the test of administrative legality in English law. Nor has the *ultra vires* test, except in Lord Diplock's mind, ever replaced negligence as a test of administrative liability; negligence has always been, and still remains, the test of *liability*, as the *Dorset Yacht* case itself establishes.": C Harlow, "Public' and 'Private' Law: Definition without Distinction' (1980) 43 *Mod LR* 241, 243 (original emphasis).

13 The doctrine of sovereign immunity from suit has a long history in England; see generally PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 4-11; M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 1-2. Interestingly, this is also true of the republics of France and the United States of America; see J McLean, 'The Crown in the Courts' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 161, 175. Indeed, the doctrine survived in a America long after it had been abandoned in the UK, leading Schwartz and Wade to comment: "It is a source of wonder to an English lawyer that American law should cling so tenaciously to the doctrine of sovereign immunity, battered though it is by statutory inroads, by judicial hostility, and by almost universal disapproval. It seems quite incapable of justification, yet it casts a kind of spell which can produce quite irrational arguments from the greatest American judges": B Schwartz and HWR Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press, Oxford, 1972) 185. The authors were referring specifically to the opinion delivered for the court by Holmes J in *Kawananakoa v Polyblank* 205 US 349 (1907).

14 There is a cogent argument that the effects of the doctrine of sovereign immunity were procedural rather than substantive: LL Jaffe, 'Suits against Governments and Officers' (1963) 77 *Harvard LR* 1, 18.

15 PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 5; C Harlow, *Compensation and Government Torts* (1982) 17.

16 The procedural requirement for suing the Crown by name was therefore to bring a petition of right. The early history of this procedure remains "obscure" but the essence of it was that if the Chancellor, having made inquiries as to the facts of the case, concluded that the plaintiff had a 'right' against the Crown in fact, then "the King would plead to the questions of law" and the petition would be endorsed with the King's fiat, "let right be done": PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 5. This process was ultimately simplified by the passage of the *Petitions of Right Act 1860* (UK) 23 & 24 Vict. C.34. See *Mulcahy v Ministry of Defence* [1996] QB 732, 740 (Neill LJ) ('*Mulcahy*').

17 LL Jaffe, 'Suits against Governments and Officers' (1963) 77 *Harvard LR* 1, 3-4 (footnotes omitted). See also S Gageler SC, 'Judicial Remedies' in M Groves and HP Lee (eds), *Australian Administrative Law* (2007) 368, 369; PW Hogg et al, *Liability of the Crown* (4th ed, 2011) 5 (n 17).

> 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 …'.

On this understanding, the King was under a legal or equitable obligation to remove the procedural barrier to a petitioner bringing suit against the Crown.[18]

The maxim was misunderstood throughout the 19th century, during which influential English judges held that the constitutional independence of the Crown required that it not be held liable in tort.[19] However, this was ultimately recognised as a misapplication of the doctrine,[20] not least because of its consequences for actions against Crown servants for their tortious acts.

The widespread tendency to elide the issues of sovereign immunity from suit and the capacity of the sovereign to violate the law[21] was able to be avoided in England under the approach taken, most famously, by AV Dicey. Dicey insisted that government officials should be accountable for their tortious acts in the same way as any other private individual, through actions brought by private individuals against them *personally* in the "ordinary courts" of law,[22] on the basis that, by acting unlawfully, their actions were in fact unofficial. This insistence reflects more the old-fashioned nature of the common law[23] (at least in the UK) than of Dicey's views.[24] Dicey's approach therefore had no

18 Further support for this position can be found in the early High Court decision of *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358, 365 ('*SHTC v Ryan*'). There, Griffith CJ recorded that Sir Edward Coke had referred to the maxim "the King can do no wrong" in the *Magdalen College Case* that the King "is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong: *solum Rex hoc non potest facere, quod non potest injuste agere*. … And although a right was remediless, yet the Act which provides a necessary and profitable remedy for the preservation of it, and to suppress wrong, shall bind the King.": *Magdalen College* (1615) 11 Co Rep 66, 72a. See also A Gray, 'Options for the Doctrine of Crown Immunity in 21st Century Australia' (2009) 16 *Australian Journal of Administrative Law* 200, 201.

19 See eg *Tobin v The Queen* (1864) 16 CB (NS) 310, ('*Tobin*'). Ultimately, petitions of right were used to enforce rights against the Crown for breach of contract: *Thomas v The Queen (No1)* (1874) LR 10 QB 31, ('*Thomas v R*'). However, while the procedural expedient of a petition of right allowed an individual to seek legal redress against the Crown, it was held not to do so for torts committed by Crown servants: *Feather v The Queen* (1865) 6 B&S 257, ('*Feather*'). See generally C Harlow, *Compensation and Government Torts* (1982) 22-3.

20 In *Mulcahy*, Neill LJ analysed the history of the doctrine of sovereign immunity and confirmed that its application has long been based on a misunderstanding. The Lord Justice commented that "proceedings for damages for tort were inhibited or rather prevented by the application of the ... ancient principle … that the King could do no wrong. It may be that at one time the maxim 'the King can do no wrong' meant that the King was not privileged to commit illegal acts, but it came to be understood to be a rule barring actions in tort against the Crown.": *Mulcahy* [1996] QB 732, 740. In Australia, several respected sources have concurred with earlier authority that the understanding that the sovereign had a common law 'immunity' from suit is misconceived. The issue was settled in *Mewett*, where it was held that the immunity was procedural rather than substantive: *Commonwealth v Mewett* (1997) 191 CLR 471, 502 (Dawson J); 513 (Toohey J); 532 (McHugh J); 550-551 (Gummow & Kirby JJ) ('*Mewett*'). See also G Hill, 'Private Law Actions Against the Government (Part 1) - Removing the Government's Immunity from Suit in Federal Cases' (2007) 30 *Melbourne University Law Review* 716, 725; M Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Australian Bar Review* 215, 216.

21 LL Jaffe, 'Suits against Governments and Officers' (1963) 77 *Harvard LR* 1, 4.

22 See PW Hogg and PJ Monahan, *Liability of the Crown* (3rd ed, Carswell, Ontario, 2000) 1-4.

23 Allison argued that Dicey's analysis of the rule of law perpetuated a common law tradition started by Austin in which the concept of the state was doctrinally neglected: JWF Allison, 'Theoretical and Institutional Underpinnings of a Separate Administrative Law' in M Taggart (ed), *The Province of Administrative Law* (Hart, 1997) 71, 75.

24 The position was stated by Sedley LJ, on behalf of the Court of Appeal, as follows: "[T]he English common law has no knowledge of the state. Public law recognises the Crown as the repository of a range of prerogative and statutory powers. By the prerogative writs and orders, it has for centuries called ministers to account if they abuse the latter, and in recent years if they misuse the former. But the State has no tortious liability at common law for wrongs done by its servants, from ministers down. In England at least (Scottish law has historically differed) either the Crown's servants are personally liable or there is no redress. It was to change this anomalous situation that the *Crown Proceedings Act 1947* was passed. But the 1947 Act does not work by making the state a potential tortfeasor: it works by making the Crown vicariously liable for the torts of its servants. It has only been with the enactment of the *Human Rights Act 1998* that the Crown, in the form of a 'public authority', has acquired a primary liability for violating certain rights. Where, of course, a limb of the state has corporate legal personality – a local authority, for example, or the Bank of England – no such problem arises…": *Chagos Islanders v Attorney General & Anor* [2004] EWCA Civ 997, [20]; see also J McLean, *Searching for the State in British Legal Thought* (2012), 226-32. Dicey was not prepared to

need of the common law maxim that "the King can do no wrong"[25] because public officials were unable to use their public status as a defence to a private law damages action.

Statutory reform had already replaced the Diceyan approach in Australia, where the Crown's specially protected position was removed by statute under a series of Australian *Crown Proceedings Acts*[26] from the 1850s.[27] Paul Finn has stated[28] that the early colonial legislation was not drafted with the intention that it would provide for liability in tort. Nonetheless, the Privy Council held[29] that the terms of the legislation were sufficiently broad to cover claims in tort, and most[30] colonial legislation was ultimately drafted expressly to cover tort claims. The legislation required that suits between a private individual and the Crown be conducted on the 'same' basis as in suits between private individuals. Following federation, this language was replicated at Commonwealth level with the result that the same rights were covered federally as had been the subject of the Privy Council's judgment in *Farnell v Bowman*[31] and therefore the Commonwealth was "in the same position as the colonies had been in prior to Federation".[32] The relevant provision of the *Judiciary Act* reads:[33]

> 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 precise effect of this provision was unclear. It was argued, on the one hand, that liability precedes the statute, which simply removes immunity. On the other hand, it was argued that the statute itself was the *source* of the liability. This argument was settled in *Commonwealth v Mewett*,[34] in which a majority of the High Court[35] held that the Commonwealth government had a common law liability in tort, but was unable to take advantage of a common law immunity from such liability. This was because sovereign immunity had only ever been a procedural bar, which was removed by s

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exclude public authorities from his general principle that individual tortfeasors be liable for their wrongs as a matter of 'private law'. This view may now rightly be regarded as old-fashioned.

25 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [10.50].

26 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 1993* (Tas); *Crown Proceedings Act 1992* (ACT); *Crown Proceedings Act 1993* (NT).

27 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 M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 44; M Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Aust Bar Rev* 215, 217-19; N Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245, 257; M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 3-8.

28 PD Finn, *Law and Government in Colonial Australia* (1987) 143. See also M Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Aust Bar Rev* 215, 218.

29 *Farnell v Bowman* (1887) 12 App Cas 643, (Privy Council, '*Farnell v Bowman*'). See also *SHTC v Ryan* (1911) 13 CLR 358, 370 (Barton J).

30 The terms of the Victorian and Western Australian legislation were somewhat narrower than was the case in other jurisdictions. See M Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Aust Bar Rev* 215, 218.

31 *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397, 427 (Kitto J) ('*Asiatic Steam*').

32 M Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Aust Bar Rev* 215, 221; *Baume v Commonwealth* (1906) 4 CLR 97, ('*Baume*').

33 *Judiciary Act 1903* (Cth) s 64 (emphasis added). The significance of the qualifier "as nearly as possible" will be considered further below, but see generally S Kneebone, 'Claims Against the Commonwealth and States and Their Instrumentalities in Federal Jurisdiction: Section 64 of the *Judiciary Act*' (1996) 24 *Federal Law Review* 93; B Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10 *Tort Law Review* 14, 19-20; M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 9-12.

34 *Mewett* (1997) 191 CLR 471.

35 Gummow and Kirby JJ wrote a joint judgment with which Brennan CJ and Gaudron J each agreed.

75(iii) of the *Constitution*.[36] Consequently, the majority took the view that section 64 of the *Judiciary Act* does not *impose* a liability and define its extent but merely recognises the existence of the Commonwealth's liability in tort. Bradley Selway argued that this changed the law in theory but brought it into line with how it had long been applied in practice and was therefore desirable regardless of the persuasiveness of the constitutional considerations applied by the majority.[37]

Contrary to the view of the majority, Dawson J (with whom Toohey and McHugh JJ agreed in separate judgments) dissented on the basis that the Crown's common law immunity in Australia had been removed by the various *Crown Proceedings Acts* and that these statutes were in turn the source of government liability in tort.[38] At Commonwealth level, therefore, liability was *imposed* by s 64. Further, the minority held that s 75(iii) of the *Constitution* does not affect the issue of immunity from suit *per se*, nor impose liability in private law actions, but simply confers jurisdiction on the High Court to hear such matters.

Since the decision in *Mewett* was handed down, the majority view that government liability in tort is not conferred by statute has become orthodox and has been applied without comment in numerous cases,[39] including the subsequent High Court case of *British American Tobacco v Western Australia*.[40] On either view, government immunity from suit in federal matters is not constitutionally entrenched, and it can therefore be modified or overturned by statute,[41] subject to the *Constitution*.[42] Selway argued convincingly that there is no constitutional imperative for the Commonwealth to be liable in tort under s 75(iii) of the *Constitution* and that the *Mewett* majority's attempt to base its conclusion on constitutional reasoning was "not altogether satisfactory".[43] Nonetheless, he approved of the *result* reached by the majority because the common law doctrine of immunity from suit "was based on a misunderstanding"[44] and ought not, in any case, to be extended vicariously to every agent of the Commonwealth.[45] With respect, this must be correct, since *Mewett*'s result was the only one which is

36 For the reasons given above, the *Constitution* is not wholly compatible with the common law maxim that "the King can do no wrong" in any case.

37 B Selway, 'Liability in Tort of Australian Governments' (2002) 10 *Tort LR* 14, 22. Graeme Hill, by contrast, indicated a greater level of concern that the majority's approach had unduly disturbed the common law doctrine of government immunity from suit, arguing that the plurality should have modified the common law doctrine to make it compatible with Australia's Constitution rather than abolishing it altogether: G Hill, 'Private Law Actions Against the Government (Part 1) - Removing the Government's Immunity from Suit in Federal Cases' (2007) 30 *MULR* 716, 725.

38 *Mewett* (1997) 191 CLR 471, 496 (Dawson J).

39 See the cases listed at G Hill, 'Private Law Actions Against the Government (Part 1) - Removing the Government's Immunity from Suit in Federal Cases' (2007) 30 *MULR* 716, 721 (n 25). In an article published prior to this line of authority developing, Leeming stated the view that judicial support for the majority position in *Mewett* had been "only relatively slight": M Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Aust Bar Rev* 215, 223.

40 *BAT v WA* (2003) 217 CLR 30, 57-8 (McHugh, Gummow & Hayne JJ).

41 See G Hill, 'Private Law Actions Against the Government (Part 1) - Removing the Government's Immunity from Suit in Federal Cases' (2007) 30 *MULR* 716, 721; N Seddon, 'The Crown' (2000) 28 *Fed LR* 245, 257-8.

42 *Mewett* (1997) 191 CLR 471, 531 (Gaudron J). See M Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Aust Bar Rev* 215, 229.

43 B Selway, 'Liability in Tort of Australian Governments' (2002) 10 *Tort LR* 14, 34.

44 By which he was referring to the arguments surveyed above in relation to the maxim "the King shall do no wrong".

45 B Selway, 'Liability in Tort of Australian Governments' (2002) 10 *Tort LR* 14, 34-5.

practical. Crown liability in tort had been a practical reality long before the High Court decided *Mewett*.[46]

II: Can public authorities ever be liable in tort where individuals would not be?

Most current Australian iterations of Crown proceedings legislation continue to qualify the proposition that governments are to be liable to subjects in tort in the same way as in any action between subjects by stating that suits between individuals and government are to be conducted "*as nearly as possible*"[47] on the same basis as between subjects.[48] 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"[49] is an "aspiration" that cannot be realised completely,[50] although it is worth noting Cane's admonition that, to the extent that it cannot, we should not let our focus remain on mere equality but on "the 'right' mix of similar and dissimilar treatment."[51]

The equality principle expressed by Dicey is subject to the reality of limitation expressed by Gleeson CJ, which affects the extent of governments' liability in tort.[52] The problem with this "is that while most people have a sense that governments occasionally warrant different treatment, the commentators have difficulty agreeing on a set of principles to determine when that is the case".[53] Robert Stevens, for example, has espoused the view that public authorities should always be treated in the same manner as private actors, absent some statutory duty or privilege being imposed to alter that state of equality.[54] Where public authorities are held to a lesser standard than private individuals, that is now a consequence of legislation in Australia.[55] The real difficulties lie where there is an argument that public authorities should be held to some *greater* standard.

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46 B Selway, 'Liability in Tort of Australian Governments' (2002) 10 *Tort LR* 14, 35. This goes some way to explaining the minimalist position adopted by the majority, under which liability is imposed by the common law and special exemptions for government are made by statute where required.

47 This form of words is not precisely consistent across every Australian jurisdiction. The NSW, Queensland and Victorian legislation each uses the words "as nearly as possible", as does s64 of the *Judiciary Act*. These qualifying words are not found in the relevant sections of the legislation in the other Australian jurisdictions. Compare *Crown Proceedings Act 1993* (NT) s 5(1); *Crown Proceedings Act 1993* (Tas) s 5(1); *Crown Proceedings Act 1992* (ACT) s 5(1); *Crown Proceedings Act 1992* (SA) s 5(1); *Crown Proceedings Act 1988* (NSW) s 5(2); *Crown Proceedings Act 1980* (Qld) s 9(2); *Crown Proceedings Act 1958* (Vic) s 25; *Crown Suits Act 1947* (WA) s 5(1); *Judiciary Act 1903* (Cth) s 64; *Crown Proceedings Act 1950* (NZ) s 6.

48 The effect of the respective sections is the same in each jurisdiction regardless of whether the same formulation of words is used because the "qualification flows not from statute but from substantive principles of the common law": M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 45.

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

50 "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*').

51 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 490-1.

52 *Graham Barclay Oysters* (2002) 211 CLR 540, 556 (Gleeson CJ). The battleground for testing the extent of the differences between government and private actors has been the law of negligence since the decision of the House of Lords in *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004, ('*Dorset Yacht*').

53 M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 46.

54 R Stevens, *Torts and Rights* (2007) 218-9.

55 See eg *Civil Liability Act 2002* (NSW) Part 5.

Government can be liable for the negligent performance of acts which are never performed by private individuals,[56] which is obvious once one realises that "otherwise, all sorts of governmental activities – such as police, prisons, fire fighters, air traffic control and licensing – would [be] free of any duty of care."[57] Courts have additionally held over the course of the last forty years (since *Dorset Yacht*[58] and, particularly, *Anns*[59]) that public authorities may in some circumstances have a common law duty to perform a *positive* act in order to prevent loss or damage to an individual, even without that individual having any subjective expectation of, or express reliance on, such action. This development has not been met with universal approbation; Professor Harlow noted that "*Dorset Yacht* set the state squarely in the liability frame".[60] She quoted Professor Atiyah to the effect that a belief by the public "that ultimately the government is responsible for everything that happens in society" will result in government and other public bodies getting sued, "whatever they do or fail to do", because it creates a "blame culture".[61] Lord Reid had earlier made an infamous, chest-beating rejection of concerns that the decision in *Dorset Yacht* would lead to an opening of the 'floodgates':[62]

> It may be that public servants of the State of New York are so apprehensive, easily dissuaded from doing their duty and intent on preserving public funds from costly claims that they could be influenced in this way [i.e. into 'defensive' procedures in correctional facilities]. But my experience leads me to believe that Her Majesty's servants are made of sterner stuff. So I have no hesitation in rejecting this argument. I can see no good ground in public policy for giving this immunity to a government department.

Harlow's statement that, contrary to Lord Reid's confidence, "the floodgates, were, however soon to open"[63] in cases like *Sharp*, *Dutton v Bognor Regis* and *Anns*,[64] did not entirely square with his Lordship's point, made immediately before the statement extracted above:[65]

> The basic question is: who shall bear the loss caused by that carelessness [i.e. that of the Home Office's employees to control the Borstal boys effectively] – the innocent respondents or the Home Office, who are vicariously liable for the conduct of their careless officers?

A similar point was made fifty years previously by Lord Moulton,[66] and was ultimately approved by Lord Reid:[67]

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56 In *Indian Towing*, Frankfurter J asked whether there was "a rational ground, one that would carry conviction to minds not in the grip of technical obscurities, why there should be any difference in result" depending "on such a completely fortuitous circumstance - the presence or absence of identical private activity": *Indian Towing Co. Inc. v United States* 350 US 61 (1955), 66-7.

57 M Aronson and H Whitmore, *Public Torts and Contracts* (1982) 42.

58 *Dorset Yacht* [1970] AC 1004.

59 *Anns v Merton Borough Council* [1978] AC 728, ('*Anns*').

60 C Harlow, *State Liability* (2004) 22. Harlow's dim view of the decision in *Dorset Yacht* was earlier given an airing in C Harlow, *Compensation and Government Torts* (1982) 47-50.

61 C Harlow, *State Liability* (2004) 22; citing PS Atiyah, *The Damages Lottery* (Hart Publishing, Oxford, 1997) 139.

62 *Dorset Yacht* [1970] AC 1004, 1033 (Lord Reid).

63 C Harlow, *State Liability* (2004) 19 (sic.).

64 *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223, (Court of Appeal, '*Sharp*'); *Dutton v Bognor Regis* [1972] 1 QB 373; *Anns* [1978] AC 728. See C Harlow, *Compensation and Government Torts* (1982) 49-50.

65 *Dorset Yacht* [1970] AC 1004, 1032 (Lord Reid).

66 *De Keyser's Royal Hotel* [1920] AC 508, 553 (Lord Moulton).

67 *Burmah Oil* [1965] AC 75, 104 (Lord Reid). See also C Harlow, *Compensation and Government Torts* (1982) 107.

> [T]he feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment.

In *Dorset Yacht*, the burden suffered by the respondents was not specifically "for the good of the nation", but it was a burden which it was within the power of the nation (through its employees) to prevent. Just as a "national sentiment" had developed by 1920 that war damage caused by the nation should not be borne by unfortunate individuals alone, so too by 1970 the House of Lords was able to conclude that it was improper for "innocent respondents" to bear alone the cost of the damage caused by boys over whom the state was supposed to exercise control. That is an entirely satisfactory response to Lord Reid's "basic question", which is not to say that issues of state liability which flow from it will ever be easy.

In any case, it is unarguable that public authorities, by their very nature, will sometimes have a greater level of responsibility than a private actor in the same circumstances and ought to take positive action to exercise that responsibility.[68] Mark Aronson has noted that:[69]

> the starting point in most cases involving government defendants is to ask why their status should entitle them to any special dispensation. In other words, the government's civil liability should be judged by the same standards that govern private sector defendants. It is commonplace, however, that people expect positive action from government that they would not demand of a private person or firm,[70] and some of the leading negligence cases have tried to turn that expectation into a common law duty.

In *Stuart*, Crennan and Kiefel JJ were the only members of the court to consider this possibility. Their Honours stated that:[71]

> In principle a public authority exercising statutory powers should not be regarded by the common law any differently from a citizen. It should not be considered to have an obligation to act. *But the position of a public authority is not the same as that of a citizen and the rule of equality is not regarded as wholly applicable. It has public functions and it has statutory powers which the citizen does not.* Some powers might be effective to avert or minimise a risk of harm to particular persons or their property, but the statute might not oblige their use. The relevant concern of the common law is whether a public authority might nevertheless be considered to be under a duty of care which obliges it to exercise its powers in a particular way.

In other words, there is more than one sense in which public authorities and private actors are not 'the same'. I have referred above to the fact that legislation[72] which enshrines the Diceyan concept that a public authority ought not to be exempted from liability merely due to its 'public' status is qualified by the statement that public and private actors shall be treated only "as nearly as possible … the same". This qualification is generally seen as recognising that the liability of public authorities may properly be less than that of private actors in some circumstances, due to the greater demands under which they

68 "Government is different from its citizens in having power which they do not have, and in having responsibilities to the community as a whole which they do not have.": P Cane, 'Damages' (1999) 9 *Otago LR* 489, 490.

69 M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 68 (original footnote).

70 See eg *Graham Barclay Oysters* (2002) 211 CLR 540, 553 (Gleeson CJ).

71 *Stuart* (2009) 237 CLR 215, 259 [129] (Crennan & Kiefel JJ) (citations omitted; emphasis added).

72 eg *Judiciary Act 1903* (Cth) s 64.

operate. Crennan and Kiefel JJ commenced their analysis in *Stuart* with the converse proposition, that more might sometimes be expected of public authorities where they have a capacity to prevent harm which is not possessed by individuals. This is, however, not a position that has yet found majority support in the High Court.

III: Can public authorities be liable for both acts and omissions in breach of common law duty?

Public authorities have long been subject to tortious liability at common law for negligently failing to act in circumstances where a duty of care exists to take positive action despite the "fundamental" distinction between misfeasance and nonfeasance.[73] This is because liability for negligent omissions is one area in which public authorities are sometimes held to a higher standard than a private individual, although the proposition that public authorities may owe a duty of care in respect of failures to act is qualified in certain circumstances by statute.[74]

There is no *general* common law duty to act to prevent another from being harmed,[75] either on a private actor or on a public authority.[76] Common law duty of care in respect of omissions is limited to a few sets of circumstances. First, there is a general common law duty owed by any person or authority to take positive action where he, she or it *creates* a risk.[77] Secondly, any person or authority may come under a duty to take positive action by undertaking "some task which leads another to rely on its being performed".[78] Specifically, a duty of care may be owed by a public authority in circumstances where it has conducted itself in such a way that others have relied on it to exercise its statutory powers.[79] This doctrine has been described as 'specific reliance'[80] and may apply to a public authority because it excites an expectation in individuals that it will exercise a statutory power or discretion.

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73 RP Balkin and JLR Davis, *Law of Torts* (5th ed, LexisNexis Butterworths, Chatswood, NSW, 2013) 207. Claims of this sort are sometimes cast in terms of a negligent failure to exercise a statutory power (rather than a duty), an issue with which I deal in relation to the first scenario below.

74 See eg *Civil Liability Act 2002* (NSW) s 44.

75 *Smith v Leurs* (1945) 70 CLR 256, 262 (Dixon J) ('Smith v Leurs'); *Hargrave v Goldman* (1963) 110 CLR 40, 66 (Windeyer J) ('Hargrave v Goldman'); *Sutherland SC v Heyman* (1985) 157 CLR 424, 444 (Gibbs CJ); 459-60 (Mason J); *Stovin* [1996] AC 923, 943 (Lord Hoffmann); *Stuart* (2009) 237 CLR 215, 258 (Crennan & Kiefel JJ).

76 As Crennan and Kiefel JJ noted in *Stuart*, this is a separate consideration to a *statutory* duty to act which may fall upon a public authority. See *Stuart* (2009) 237 CLR 215, 259 [130] and the cases there cited.

77 Such an omission to take care of others exposed to a risk created by the defendant is contrasted to 'pure' or 'mere' omissions. The line of authority started in the UK by the decision of the House of Lords in *Anns* extended the liability of public authorities by holding, in essence, that not only was a public authority under an obligation not to cause or increase danger or risk, but that it may be exposed to liability in respect of a 'pure' omission if a court held that it owed a common law duty of care to exercise statutory powers available to it which would have reduced or prevented the plaintiff's loss. This line of reasoning was subsequently rejected by the House of Lords in *Stovin* [1996] AC 923. *Stovin* was not followed by the High Court in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 ('*Pyrenees Shire Council*'), which in turn has since been applied in both *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 ('*Crimmins*') and *Brodie* (2001) 206 CLR 512. See S Wotherspoon, 'Translating the Public Law 'May' into the Common Law 'Ought': the Case for a Unique Common Law Cause of Action for Statutory Negligence' (2009) 83 *Australian Law Journal* 331, 334.

78 *Sutherland SC v Heyman* (1985) 157 CLR 424, 479 (Brennan J). There is eminent support in a number of cases for the proposition that a public authority may owe a duty to act where it "has undertaken to do so or induced a person to rely on [it] doing so": *Stovin* [1996] AC 923, 944 (Lord Hoffmann).

79 See *Sutherland SC v Heyman* (1985) 157 CLR 424, 459-60 (Mason J).

80 Brennan and Deane JJ agreed with Mason J that there was a doctrine of specific reliance in separate judgments in *Sutherland SC v Heyman (1985) 157 CLR 424.*

The first and second qualifications above apply in the same manner to public authorities as to any private individual. A third circumstance is applicable only to public actors,[81] even in the absence of specific reliance. A common law duty to act may arise as a result of interaction between certain parties with regard to their relative strengths and weaknesses. This may be because the parties have a relationship of a kind in which it is accepted that one party owes the other a duty to take positive action,[82] although to describe the interaction between parties as a "relationship" often strains the limits of that particular appellation. More generally, a duty of care may arise due either to the control that one party has over the circumstances, or to the vulnerability of the other party in those circumstances.[83] Hence, the result in *Crimmins* may be understood as deriving from a situation in which the Stevedoring Authority had and exerted immense practical control over the circumstances and conditions in which stevedores, vulnerable to exposure to asbestos fibres, were required to work.[84]

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*.[85] The plaintiff suffered flooding to his land as the result of a breach in a sea wall. This was not caused by any positive act of the defendant authority. Rather, Mr Kent sought compensation from the defendant because it had exercised its statutory power 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 categorised this as nothing more than a failure of the Board to confer a benefit to which Mr Kent had no enforceable right.[86] This reasoning would be incontestable, in the absence of an undertaking to the contrary on which the plaintiff had relied, if the party who failed to confer the benefit of repairing the sea wall was Mr Kent's neighbour;[87] regardless, Stevens' statement of the law relating to public authorities is accurate in the UK following *Gorringe*.[88]

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81 Liability in these circumstances is fundamentally different from the first two qualifications, since private actors will not generally be invested with statutory powers. It therefore applies only to public authorities.

82 In *Stuart*, Crennan and Kiefel JJ gave examples of such relationships including "employer and employee, teacher and pupil, carrier and passenger, shipmaster and crew": *Stuart* (2009) 237 CLR 215, 259 [127].

83 *Crimmins* (1999) 200 CLR 1, 24-5 [44] (Gaudron J); 40-1 [100] (McHugh J); 85 [233] (Kirby J); *Pyrenees Shire Council* (1998) 192 CLR 330, 361 [77] (Toohey J); 372-3 [116] (McHugh J); *Stuart* (2009) 237 CLR 215, 260-1 [133] (Crennan & Kiefel JJ); cf *Brodie* (2001) 206 CLR 512, 627 [308] (Hayne J). This was Gould's reading of *East Suffolk v Kent* [1941] AC 74: BC Gould, 'Damages in Administrative Law' (1972) 5 *NZ Univ LR* 105, 109-10.

84 McHugh J saw the relevant breach of duty to be in the fact that the Authority had directed Mr Crimmins, and others like him, to work in circumstances where it knew that he would be exposed to danger in the form of asbestos fibres: *Crimmins* (1999) 200 CLR 1, 28 [58]. With respect, this is the approach that best reflects the reality of the relationship between Mr Crimmins and the Authority, which had both the power to direct Mr Crimmins where to work and the power to cancel or suspend his registration to work as a stevedore if he did not comply with the Authority's directions, although Gaudron J viewed this only as a circumstance going to Mr Crimmins' vulnerability: *Crimmins* (1999) 200 CLR 1, 24-5 [44]. Gummow, Hayne & Heydon JJ seemed prepared to accept in *Stuart* that the Authority had, at least, done something positive; it had "put the workers at risk of harm because it was the Authority that assigned the workers to particular stevedores": *Stuart* (2009) 237 CLR 215, 255 [115]. However, this is expressed as a factor indicating 'control' rather than that the Authority's duty of care was based in the fact that it had directed Mr Crimmins into danger. Importantly, once the relevant breach of duty is characterised as a positive act (a direction) on the part of the Authority, questions of whether and how the liability of public authorities should be limited become moot. See eg *Sutherland SC v Heyman* (1985) 157 CLR 424; *Graham Barclay Oysters* (2002) 211 CLR 540; *Pyrenees Shire Council* (1998) 192 CLR 330; *Stovin* [1996] AC 923.

85 *East Suffolk v Kent* [1941] AC 74.

86 R Stevens, *Torts and Rights* (2007) 221; cf T Cornford, *Towards a Public Law of Tort* (2008) 131.

87 BC Gould, 'Damages in Administrative Law' (1972) 5 *NZ Univ LR* 105, 109.

88 *Gorringe v Calderdale MBC* [2004] WLR 1057.

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 reasonable 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 starting point for liability in negligence has always been articulated in terms of the existence of a moral duty.[89] The absence of a 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.[90]

The dissent of Lord Atkin in *East Suffolk v Kent* provides, at best, a vague basis on which to extend a duty of care to public authorities which have a statutory power to act but not a statutory duty. His Lordship said that the Board in *East Suffolk* should have been liable to Mr Kent for the period after which its failure to relieve the flooding of his land became "unreasonable".[91] This begs the question, which is not answered by his Lordship's analogy to a case of contractual duty.[92] A court charged with interpreting the meaning of an express contractual term that a party "should proceed without unreasonable delay" is engaged in an entirely different process to one which imposes a common law duty to the same effect, primarily because in the latter case the defendant has not consented to the imposition of a legal duty. What is the source of the common law duty that action be undertaken within a reasonable time? A court obliged to ascertain at what point such a duty has been breached has no principles of statutory or contractual construction to fall back on. Lord Atkin's point was that principles of *causation* of damage are the same in contract and tort. Nonetheless, the analogy pursued by his Lordship provides no assistance in determining the *existence* of a duty of care.

IV: Can public authorities be liable in equity where an estoppel is raised?

Equity is sometimes viewed as having little to contribute to public law issues. Spigelman CJ disputed this, noting that the origins of administrative law in England can be traced to Chancery.[93] In regard to equity's application to decision-making by public authorities, the issues are much the same as in regard to tort liability. There is no *prima facie* reason why equitable remedies should not be available against public authorities;[94] indeed, declaratory relief is an available remedy from courts on judicial

89 *Donoghue v Stevenson* [1932] AC 562, 580 (Lord Atkin).

90 "That we do not have a right good against the rest of the world not to suffer economic harm was firmly established in the 1890s in a trio of decisions in the House of Lords: *Mogul Steamship Co v McGregor Gow & Co* [1892] AC 25, *Bradford v Pickles* [1895] AC 587 and *Allen v Flood* [1898] AC 1.": R Stevens, *Torts and Rights* (2007) 21-2. In response to this, Professor Priel has stated that "such statements … suggest that at times Stevens' argument is about legal rights. Whatever one may think of these cases, they do not 'establish', definitely not 'firmly', what *moral* rights we have.": D Priel, 'Review of *Torts and Rights*' (2011) 2 *Juris* 227, 234 (original emphasis). Upon this reasoning, the fact that economic harm has been inflicted due to the negligent failure of a public authority to intervene may well form the legal basis for the payment of damages where the entire purpose of the public authority was to prevent the harm from occurring.

91 *East Suffolk v Kent* [1941] AC 74, 92 (Lord Atkin).

92 *East Suffolk v Kent* [1941] AC 74, 93 (Lord Atkin).

93 See JJ Spigelman, 'The Equitable Origins of the Improper Purpose Ground' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, Oxford; Portland, Or., 2008) 147.

94 *Judiciary Act 1903* (Cth) s 64. See also *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 1993* (Tas); *Crown Proceedings Act 1992* (ACT); *Crown Proceedings Act 1993* (NT).

review applications[95] and the power of the High Court to grant injunctive relief against an officer of the Commonwealth is enshrined in s 75(v) of the Constitution. While there is no difficulty *per se* with equitable remedies being available in litigation against the government, the difficulties arise because private law remedies are inapt to certain functions of government.

There is no specific doctrine of public law estoppel.[96] The fact that public authorities are not truly the same as private individuals means that consideration must be given to the impact of enforcing a promise to an individual on the public at large.[97] Equity is capable of raising an estoppel to create a cause of action where an individual is misled to his or her detriment by a government entity.[98] As with liability in tort, this occurs on the same basis as an estoppel against any other party, subject to some additional considerations peculiar to public authorities.[99] Public authorities "cannot fetter the performance of their duties by contract or estoppel or, without statutory authority, bind themselves to perform them in a particular way".[100] In this respect, the issues mirror those which limit the availability of liability in tort for the otherwise negligent acts of public authorities, although the comparison is not absolute given the greater remedial flexibility possessed by equity.

The limitations on estoppels being enforced against public authorities are largely policy-based or as a function of the authority's empowerment by statute, rather than due to their public *status*. For example, an estoppel cannot be enforced against a public authority where it would have the effect of compelling the authority to act *ultra vires*,[101] although this point is no more than an extension of the principle that an estoppel cannot compel an unlawful act either by a public authority or a private actor

95 Superior courts have an inherent power to grant declaratory relief: *Ainsworth* (1992) 175 CLR 564, 581. Aronson and Groves noted that the declaration was historically only a statutory remedy, albeit one which could only be granted by Chancery, and argued that it remains so, although courts can and do "borrow equitable principles when exercising the discretion to grant or refuse the remedy": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [15.20].

96 *Annetts* (1990) 170 CLR 596, 605 (Brennan J). This is connected to the doctrine of legitimate expectations in judicial review but the differences between the two doctrines have long been noted; see eg *Haoucher* (1990) 169 CLR 648, 669-70 (Toohey J); *Teoh* (1995) 183 CLR 273, 301 (Toohey J); *Mount Sinai v Quebec* [2001] 2 SCR 281, [30] (Binnie J); H Woolf and J Jowell, *De Smith's Judicial Review* (5th ed, 1995) 426. Legitimate expectations, along with the comparatively new English thinking on substantive unfairness as a separate ground of judicial review, are examined in Chapter 3; and see generally G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247.

97 The differences between equity's application to individuals and public entities also arises in other contexts. For example, Mason J, sitting alone in the matter of *Commonwealth v John Fairfax & Sons Ltd*, expressly noted the importance of public interest considerations in applying 'private law' causes of action to public authorities: *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51-2.

98 *Verwayen* (1990) 170 CLR 394.

99 Note the *dicta* of Stevens J for the Supreme Court in *Heckler*: "But however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without *at least* demonstrating that the traditional elements of an estoppel are present.": *Heckler v Community Health Services of Crawford County Inc* 467 US 51 (1984), 60 (emphasis added) ('*Heckler*'). See also *Kurtovic* (1990) 21 FCR 193, 208 (Gummow J).

100 KR Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell Ltd, London, 2006) 22 (citation omitted). The Justice – All Souls Report traced this limitation to the decision in *Western Fish* [1981] 2 All ER 204. The Committee stated that that "comes close to excluding for all practical purposes the law of estoppel from the realm of the exercise of statutory powers": JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 174. The wording of the Committee's conclusion seems to indicate that it thought, as some Australian judges came to do, that the door to equitable relief may still be ajar in the right circumstances. While this has not proved to be true in any practical sense in Australia, it has become irrelevant in the UK as a result of the rise of the doctrine of substantive legitimate expectations; see *Reprotech* [2003] 1 WLR 348, 66 [35] (Lord Hoffmann).

101 *Maritime Electric* [1937] AC 610. See also KR Handley, *Estoppel* (2006) 22-3; *Kurtovic* (1990) 21 FCR 193, 211-16; *Howell v Falmouth Boat* [1951] AC 837, 845 (Lord Simonds); cf *Robertson* [1949] 1 KB 227. Nor may an estoppel be enforced where the enforcement would require the future exercise of a statutory discretion to be fettered: *Southend-on-Sea* [1962] 1 QB 416. These limitations are discussed above in the section of Chapter 3 headed "Public law estoppel".

as a matter of public policy.[102] Therefore, it is uncontroversial that a representation made on behalf of a public authority that it will perform an act that it has neither statutory nor executive power to perform will be substantively unenforceable,[103] particularly since an official cannot even have ostensible authority which is inconsistent with his or her statutory limitations.[104] Refusal to give substantive effect to an estoppel against a public authority is based in the same principle which holds that soft law cannot be given binding force in Australia because decision makers are given their discretion by Parliament and it may not be restricted other than by the terms of the statutory grant of power and the procedural requirements of administrative law.[105]

Nonetheless, I will argue in this chapter that there is need for an equitable remedy where an individual reasonably relies to his or her detriment on a soft law instrument being applied by a public authority. The fact that an estoppel raised in such circumstances cannot be enforced if the public authority would thereby be compelled to act *ultra vires* does not contradict this argument. It is my thesis that the equitable jurisdiction to mould relief leaves open the possibility that justice could frequently be satisfied with a lesser equity,[106] such as equitable compensation.

There is an argument that, given the scope to obtain damages for government misrepresentations in tort, there is no need to stretch equity to provide a monetary remedy.[107] I would make a two-fold response to this line of thinking. First, there is a long-established jurisdiction in equity to provide compensation as a remedy for a misrepresentation which causes the breach of an equitable right.[108] Although Rickett has suggested that it is the very expansion of civil liability in tort which has driven 'modernist' approaches to equity which embrace equitable compensation[109] (and I do not doubt that there is at least some truth to this statement), it is worth noting that it explains only the *expansion* of that remedy. Prior to *Derry v Peek*,[110] equitable compensation was widely used to remedy loss consequent on misrepresentations.[111] Ian Davidson argued that *Derry v Peek* has been misunderstood as restricting equitable compensation to *dishonest* rather than merely negligent misstatements; that is to say, representations falling within the equitable definition of 'fraud'. *Derry v*

102 KR Handley, *Estoppel* (2006) 296. Professor Cane has suggested that reliance on a representation made by a public authority which it cannot be compelled to make good because to do so would entail acting illegally is an example of where a public law damages remedy may be effective: P Cane, *Administrative Law* (5th ed, 2011) 311-12. See generally Part A of Chapter 4.

103 Just as an estoppel cannot give a court or a tribunal jurisdiction that is not permitted by statute: KR Handley, *Estoppel* (2006) 299. Public authorities are, of course, still subject to estoppel where they are exercising powers held in common with natural persons. For example, in *Verwayen*, the Commonwealth Government was able to be estopped from denying its promise to the plaintiff that it would not rely on a statutory limitation defence because this is a representation of a sort that any litigant could have made: *Verwayen* (1990) 170 CLR 394.

104 *Attorney-General for Ceylon v A.D. Silva* [1953] AC 461, 479 (Privy Council, '*A-G v Silva*'). See also *Western Fish* [1981] 2 All ER 204; JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 345.

105 Further, this merely procedural effect of soft law can also be avoided with sufficient warning that the decision maker will disregard it: *Lam* (2003) 214 CLR 1.

106 *Giumelli v Giumelli* (1999) 196 CLR 101, 114 [11] ('*Giumelli*').

107 "Common law developments in negligence have substantially replaced the need for a revival of [equitable] compensation …": IE Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 349, 350.

108 Indeed, Davidson noted that, until 1789, fraudulent misrepresentations were remediable in equity but not at common law: IE Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 349, 356.

109 CEF Rickett, 'Equitable Compensation: towards a blueprint?' (2003) 25 *Sydney Law Review* 31, 31.

110 *Derry v Peek* (1889) 14 App Cas 337.

111 eg *Burrowes v Lock* (1805) 10 Ves 470; 32 ER 927; *Slim v Croucher* (1860) 1 De G.F.&J. 518; 45 ER 462. See IE Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *MULR* 349, 356-62.

Peek resolved uncertainty about liability in the tort of deceit at common law, by holding that it required dishonesty on the part of the representor to be made out, rather than an honest but careless representation. The case was subsequently applied as authority for requiring fraud as a prerequisite for compensation to be payable in equity, although Davidson argued persuasively that this conclusion need not have been reached in applying *Derry v Peek*.[112]

Writing in 1982, Davidson made a strong case that Australia was unlikely to adopt the remedy of equitable compensation because common law duties now exist to cover representations made in the course of special relationships, and these need be neither contractual nor fiduciary. Rather, he considered that the principles which had been applied in equity should play a role only to inform the development of the common law.[113] I respectfully disagree with Davidson's conclusion in this regard. There is no basis in principle why remedies should be reduced in equity simply because the coverage of the common law has expanded elsewhere. The development of the equitable doctrine of estoppel in Australia over the past three decades has broadened the scope of equity to provide a remedy in circumstances where damages in negligence would not necessarily lie.[114] 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. The second response to the proposition that there is no need to stretch equity to provide a monetary remedy is therefore that it is anomalous that behaviour which both breaches a duty of care and creates an equity is remediable in tort but not in equity, unless substantive effect can 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.[115] In *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*, the majority comprising Cooke P, Richardson, Bisson and Hardie Boys JJ stated that:[116]

> There is now a line of judgments in this Court accepting that monetary compensation (which can be labelled damages) 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 dismissed it with the withering comment that "[i]t is difficult to imagine an

112 IE Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *MULR* 349, 368.

113 IE Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *MULR* 349, 370-2. See also CEF Rickett and T Gardner, 'Compensating for Loss in Equity: The Evolution of a Remedy' (1994) 24 *Victoria University of Wellington Law Review* 19, 27.

114 See *Waltons v Maher* (1988) 164 CLR 387; *Foran v Wight* (1989) 168 CLR 385; *Verwayen* (1990) 170 CLR 394. See also KR Handley, *Estoppel* (2006).

115 CEF Rickett and T Gardner, 'Compensating for Loss in Equity' (1994) 24 *Vic U of W LR* 19, 28.

116 *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299; (1990) 19 IPR 527, 528 (emphasis added) ('*Aquaculture*').

'authority' offered for adoption in New South Wales which could be less satisfactory."[117] 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".[118]

The basis of these impassioned criticisms of *Aquaculture* is that the reasoning of the majority is alleged to display evidence of a "fusion fallacy".[119] 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"[120] where a court provides equitable compensation. As I have noted above, this is a remedy which has been available to courts with equitable jurisdiction for centuries.

Following the decision in *Derry v Peek*,[121] the jurisdiction to provide equitable compensation was (mistakenly)[122] 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 the High Court, confronted with the appropriate matter, 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. 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:[123]

> It is not irrational to maintain the existence of different remedies for different causes of action having different threshold requirements and different purposes. The resulting differences are not necessarily 'anomalous'.

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; Mason P dissented. 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,

117 *Harris v Digital Pulse* (2003) 56 NSWLR 298, 393.

118 RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 1140 (see also at 78-83; 1128).

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

120 RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 54.

121 Davidson noted that the members of the Appellate Committee which handed down the decision in *Derry v Peek* were "all common lawyers": IE Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *MULR* 349, 362.

122 IE Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *MULR* 349, 368.

123 *Harris v Digital Pulse* (2003) 56 NSWLR 298, 404 (Heydon JA).

the fact that such disuse has created an anomaly because remedies of similar (but not identical) scope have become, relatively recently, available at 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.

B: Problem example 1

Suppose the following factual scenario:[124]

A. Before dawn, two police officers find a man sitting in his car in a public car-park. The man has taken various steps preparatory to attempting to commit suicide.

B. A police officer has a statutory duty to apprehend a person who is likely to commit suicide. The relevant section of the *Mental Health Act* reads as follows:

> A member of the police force shall apprehend any person who has recently attempted, or undertaken any act preliminary to attempting, suicide or attempted to cause serious bodily harm to herself or himself or to some other person.

C. The police officers subjectively form the view that the man is likely to attempt suicide.

D. The man tells the police officers that he had considered doing "something stupid" but has changed his mind and now wants to go home to talk to his wife. The police officers allow the man to drive away.

E. The man returns home and attempts to commit suicide after his wife leaves the house. He is unsuccessful but his attempt leaves him in a permanent vegetative state. Through his wife as his tutor, he now seeks compensation from the police officers for the injuries he sustained.

Let us consider the facts above and address a series of questions based on different permutations of these facts.

I. First, are the police officers liable for breach of a statutory duty or a common law duty of care owed to the plaintiff?

II. Secondly, suppose that, instead of the text in Fact B, the relevant section of the *Mental Health Act* states that:[125]

124 This scenario is based upon, but departs from, the facts of *Stuart* (2009) 237 CLR 215. The allegation that the appellants ought to have adhered to the relevant terms of the Victoria Police Manual was not pressed before the High Court and was therefore not the subject of consideration in any of the judgments in that court.

125 This is an edited version of *Mental Health Act 1986* (Vic) s 10(1). I have omitted the requirement that the person "appears to be mentally ill". In *Stuart*, the Court held that the power to apprehend Mr Veenstra under this section was never enlivened because, in essence, he had not appeared to the officers to be mentally ill. His right as an apparently sane man to commit suicide trumped the police power to apprehend him.

> A police officer may apprehend a person if the police officer has reasonable grounds for believing that the person is likely by act or neglect to attempt suicide or to cause serious bodily harm to herself or himself or to some other person.

Can the existence of a statutory power to act be converted into a common law duty to act?

III. Thirdly, suppose the following additional facts:

F. The Police Force issues a copy of the Police Manual, a soft law instrument, to each police officer. It is used to ensure that police procedures are internally consistent. The Police Manual contained the following provision:

> A police officer who encounters any person who has recently attempted suicide, or undertaken any act preliminary to attempting suicide, must contact the nearest Crisis Assessment and Treatment service and should, wherever possible, stay with the person until he or she is assessed by that service.

G. The Police Manual is not available to any person other than police officers.

Does the provision in the Police Manual assist the plaintiff in establishing that the officers owed a common law duty of care to him?

IV. Fourthly, suppose that Fact G were instead to read as follows:

> The Police Manual is available for inspection at every police station and may also be downloaded from the Police Force's website.

What would be the result, given that the Police Manual were available to the public, if the plaintiff knew of its terms?

V. Fifthly, would the situation in question 4 be any different if the plaintiff had *not* been aware of the relevant terms of the Police Manual?

Before addressing these questions, I would like to make a preliminary comment on the capacity of soft law to create a duty of care. A full consideration of the tort issues involved in the scenario above is beyond the scope of this chapter. In particular, issues of causation and, if the man's wife were in fact the plaintiff, remoteness would likely be determinative of the case. I wish solely to make some points which are concerned with when and in what circumstances a duty of care may arise on the various sets of facts set out above.

Question I

Would a clear statutory duty to act expose the officers to tort liability?

Assuming that the police officers had a statutory duty, rather than a statutory power, to apprehend the plaintiff, a failure to exercise that duty may be remediable in damages under the tort of breach of statutory duty.[126] To succeed, the plaintiff would need to establish that the duty was imposed on the police officers;[127] that the *Mental Health Act* was enacted to prevent the kind of harm suffered by the

126 The first step to making out this tort is to establish that a common law cause of action was intended to be available under the *Mental Health Act*: *O'Connor v SP Bray Ltd* (1937) 56 CLR 464.

127 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36.

plaintiff;[128] that the plaintiff was a person for whose benefit the *Mental Health Act* was passed;[129] that the officers did in fact breach the statutory duty; and that that breach caused the plaintiff's injuries.[130] Once these elements are established, the tort is usually treated as one of strict liability, although the officers could benefit from a complete defence if they were able to prove that the plaintiff's injuries were caused *solely* by his own conduct, without any independent fault on their part.[131] This would be unlikely where the entire point of the duty was to protect the plaintiff from inflicting harm on himself.

However, the tort of breach of statutory duty is now affected by statutory provisions which apply the *Wednesbury* standard[132] as a minimum basis for liability on the part of public authorities.[133] This development will probably have the practical effect of placing the final nail in the coffin of that cause of action: Mark Aronson contended that it already had "almost no life in this country beyond its original context of workplace injuries", with the implication that the tort reform legislation had little practical effect in this regard.[134] At any rate, it is safe to say that it will never expand to new fields. Indeed, breach of statutory duty does not give rise to a cause of action separate from negligence in either the USA[135] or Canada.[136]

Even if we were to assume that the common law test described above were met and the officers were in breach of their statutory duty to apprehend the plaintiff because he had taken steps towards committing suicide, it is unlikely that their failure to do so would be characterised as so unreasonable that no reasonable police officers in their position would have done the same thing. We can rule out liability for breach of statutory duty.

If the plaintiff sought to establish the officers' liability in negligence, the existence of a common law duty of care would need to be proven separately to showing the existence of a statutory duty, whose breach may be remediable in public law.[137] This will, however, generally be the case absent a clear contrary intention in the terms of the statute.[138] It is unlikely that a duty of care would otherwise be owed by police officers, although this exception applies particularly to circumstances in which the

128 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99.

129 *Read v Croydon Corporation* [1938] 4 All ER 631.

130 See generally *X v Bedfordshire CC* [1995] 2 AC 633.

131 D Mendelson, *The New Law of Torts* (2nd ed, Oxford University Press, South Melbourne, 2010) 695.

132 *Wednesbury* [1948] 1 KB 223. See E Carroll, '*Wednesbury* as a Limit on Liability' (2007) 15 *Tort LR* 77; G Weeks, 'Marriage of Strangers' (2010) 7 *Mq JBL* 131; M Aronson, 'Government Liability' (2008) 32 *MULR* 44. Harlow presaged the legislative adoption of the *Wednesbury* standard by two decades, having argued that the courts already "used this 'public law' test of reasonableness to restrict the growth of liability in negligence": C Harlow, *Compensation and Government Torts* (1982) 53. After the fact, she commented that the Australian experience stood as "a sharp warning that reforms of public liability are not necessarily beneficent": C Harlow, 'Rationalising Administrative Compensation' [2010] *PL* 321, 323.

133 In Victoria, see *Wrongs Act 1958* (Vic) s 84(2). In other Australian jurisdictions, see *Civil Liability Act 2002* (NSW) s 43(2); *Civil Law (Wrongs) Act 2002* (ACT) s 111(2); *Civil Liability Act 2003* (Qld) s 36(2); *Civil Liability Act 2002* (Tas) s 40(2); cf *Civil Liability Act 2002* (WA) s 5Y. By contrast, there is no equivalent section in *Civil Liability Act 1936* (SA).

134 M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 76.

135 See *Sutherland SC v Heyman* (1985) 157 CLR 424, 459 (Mason J).

136 *Saskatchewan Wheat Pool* [1983] 1 SCR 205.

137 *Crimmins* (1999) 200 CLR 1, 18 [25] (Gaudron J).

138 *Sutherland SC v Heyman* (1985) 157 CLR 424, 459 (Mason J).

police are investigating criminal activity.[139] By contrast, if the plaintiff had died and the action were brought by his widow,[140] she would have had a right of action as the deceased's dependent if he would have been able to sue, but for his death.[141]

Question II

Is a mere statutory power to act sufficient to impose a duty of care on the officers?

On the assumed facts, the officers did not create the risk and the plaintiff cannot be said to have relied on them exercising their statutory duty to detain him. It remains to ask whether the officers were in a position of such 'control' over the plaintiff that a common law duty to take care of his safety should be imposed on them.

The question of control arose more squarely in *Crimmins* than it had in *Pyrenees Shire Council*,[142] where, as Mark Aronson has noted with some understatement, the Council "was not in complete control of the situation".[143] It was in fact the steps taken by the Council in *Pyrenees Shire Council* - its "entry into the field"[144] - which led to a finding that it owed a duty of care, since the questions of whether an authority has "control", or whether those who rely on it are relevantly and sufficiently "vulnerable", are only ever relevant to the extent that they establish the existence of a relationship upon which a duty of care can be grounded.[145] The facts in the hypothetical scenario are markedly different from those in *Crimmins*.[146] There was no prior relationship between the plaintiff and the police officers. To whatever extent that the plaintiff was vulnerable, this was not a circumstance within the control of the police officers.[147] A duty of care could not be made out using this reasoning.

A duty of care would, however, have been owed by the police officers in any exercise of their statutory duty. The reasons for this are essentially the same as those for which I conclude below that the police officers would have owed a duty of care if they had only a statutory power to apprehend the plaintiff

139 *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495, 1509 [27] (Lord Steyn) ('*Brooks v MPC*'); cf *Crimes Act 1958* (Vic) s 6A: "The rule of law whereby it is a crime for a person to commit or to attempt to commit suicide is hereby abrogated." The equivalent reform in the UK was effected by the *Suicide Act 1961* (UK). Prior to that, in the words of Lord Denning, "[t]he House of Lords said that suicide, *felo de se*, was the most heinous crime known to our English law. A man rushing into the presence of his maker unasked.": Lord Denning MR, 'This Is My Life' (1986) 1 *Denning Law Journal* 17, 21.

140 As in *Stuart* (2009) 237 CLR 215.

141 See *Crimmins* (1999) 200 CLR 1, 18-19 [26] and the sources there cited by Gaudron J. At common law, no remedy is available where a negligent act leads to the death of the plaintiff; neither the deceased person's estate nor his or her dependents are able to recover damages; cf the position in continental Europe: D Mendelson, *New Law of Torts* (2nd ed, 2010) 85. Remedies where a tortious act results in death have been available under statute since *Lord Campbell's Liability Act 1846*, which has equivalents in every Australian jurisdiction. I mean to refer here to a duty of care which the wife of the deceased man is able to make out consequent to section 16 of the *Wrongs Act 1958* (Vic).

142 McHugh J stated that he did not regard the result in *Pyrenees Shire Council* as being dependent on the Council's "control" of the situation: *Graham Barclay Oysters* (2002) 211 CLR 540, 581.

143 M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 71.

144 *Pyrenees Shire Council* (1998) 192 CLR 330, 372 [115] (McHugh J). See also *Pyrenees Shire Council* (1998) 192 CLR 330, 390[170] (Gummow J).

145 *Crimmins* (1999) 200 CLR 1, 22[36] (Gaudron J); *Stuart* (2009) 237 CLR 215, 254 [113] (Gummow, Hayne & Heydon JJ).

146 *Stuart* (2009) 237 CLR 215, 255 [115] (Gummow, Hayne & Heydon JJ).

147 *Stuart* (2009) 237 CLR 215, 255 [116] (Gummow, Hayne & Heydon JJ).

but were required to do so by the terms of a soft law instrument. Ultimately, in either case, it is unlikely that the police officers would be liable in damages.[148]

Question III

Can a provision in the Police Manual assist the plaintiff in establishing that the officers owed him a common law duty of care?

On the first version of the assumed facts, the plaintiff was unaware of the requirements of the Police Manual and therefore cannot be said to have relied specifically on the officers exercising their statutory power to detain him pursuant to its requirements. He was, however, a member of a class of persons[149] which it is arguable that the police officers should have had in mind in determining whether to exercise their powers. The principle enunciated in *Hill's Case*,[150] as modified in *Brooks v MPC*,[151] that there will generally not be a duty of care owed by police officers to victims and witnesses of crime,[152] should not be understood to extend to circumstances in which such a duty is otherwise anticipated.[153] The question of whether the officers owed the plaintiff a common law duty of care ought not to be decided by applying the principle in *Hill's Case*.

It may be arguable that, having concluded that the man was suicidal, the officers had "entered the field", as the defendant Council was held to have done in *Pyrenees Shire Council*, although that aspect of the case was subsequently overturned by statute in NSW.[154] If that were the case, it could give rise to a common law duty of care to take positive action to prevent the man from taking his own life. This reasoning depends on a finding that the officers had commenced exercising their statutory powers.[155] The relevant statutory power is expressed as follows:

> A police officer *may* apprehend a person if the police officer has reasonable grounds for believing that the person is likely … to attempt suicide … (emphasis added)

The best interpretation of this section is that, although the relevant statutory power to apprehend the plaintiff had become available for the police officers to exercise due to their subjective conclusion that he was likely to attempt suicide, they retained a discretion as to whether they would in fact commence exercising that power. They decided that they would not. This may be because they had concluded, after talking to the plaintiff, that he was no longer likely to attempt suicide in the immediate term. The fact that they were ultimately, tragically incorrect in this assessment does not change the fact that they

148 Regardless of whether a duty of care were owed by the police officers, the plaintiff's case would founder at the causation stage unless he could establish that, had the officers called the CAT service, he would not have succeeded in inflicting harm on himself.

149 *Chapman v Hearse* (1961) 106 CLR 112, ('*Chapman v Hearse*').

150 *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 59 (Lord Keith of Kinkel) ('*Hill's Case*').

151 *Brooks v MPC* [2005] 1 WLR 1495.

152 *Brooks v MPC* [2005] 1 WLR 1495, 1509 [30] (Lord Steyn).

153 In *Brooks*, Lord Steyn noted that "cases of assumption of responsibility under the extended *Hedley Byrne* doctrine fall outside the principle in *Hill's* case": *Brooks v MPC* [2005] 1 WLR 1495, 1509 [29]. This reasoning ought also apply to circumstances in which an intention that police have certain parties in mind is objectively observable. See *Question 4* below in relation to *Hedley Byrne* [1964] AC 465.

154 The statutory provision in question states that "the fact that a public or other authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way": *Civil Liability Act 2002* (NSW) s 46.

155 *Stuart* (2009) 237 CLR 215, 261 [135] (Crennan & Kiefel JJ).

had decided against exercising their power. This discretion was left open to the officers by the terms of the statute. However, the common law has always made an exception to the availability of the defence that the defendant has made no more than a "pure omission" if s/he has *undertaken* to render assistance. If the Police Force has undertaken to render assistance to persons of a certain class, it follows that the Police Force is liable if certain forms of harm happen to those persons.

It remains to be considered whether the soft law requirement that the police officers exercise their discretion in a certain manner has any effect on this situation. Specifically, does the content of the Police Manual form a basis for the existence of a common law duty of care to act, despite the fact that action was not compelled by the terms of the statutory power? 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.[156] 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"[157] can be extended to cover soft law obligations in addition to statutory powers and duties.

An orthodox response to this inquiry is that, if the statutory source of the police officers' power to apprehend does not compel them to act, *a fortiori* a soft law instrument cannot do so. However, the situation should be seen as being more complex than that answer indicates.[158] A finding that the officers owed the plaintiff a common law duty to contact the CAT service would open, despite the officers' statutory discretion to apprehend him. Rather, it would arise subject to a finding that the officers had a moral duty to intervene, as in the hypothetical example above based on *East Sussex Rivers Catchment Board v Kent*, because protection of people at risk was a substantial purpose of their jobs. Such a purpose may be revealed in the terms of the Police Manual, which were as follows:

> A police officer who encounters any person who has recently attempted, *or undertaken any act preliminary to attempting*, suicide *must* contact the nearest Crisis Assessment and Treatment service and should, wherever possible, stay with the person until he or she is assessed by that service. (emphasis added)

The Police Manual is a soft law instrument, of which the plaintiff was subjectively unaware, which was designed to guide the discretion granted to the police officers by statute. It is different 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, the fact that the police officers possessed powers to protect the plaintiff which are not possessed by private actors is implicit in the terms of the Police Manual. Furthermore, the terms of the instruction to officers contained in the Police Manual are not dependent

156 S Wotherspoon, 'Translating the Public Law 'May' into the Common Law 'Ought'' (2009) 83 *ALJ* 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.

157 *Sutherland SC v Heyman* (1985) 157 CLR 424, 458 (Mason J) (emphasis added). See also *Sutherland SC v Heyman* (1985) 157 CLR 424, 467-8 (Mason J). 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.

158 See above at chapter 5.A.II.

on them having "reasonable grounds for believing that the person is likely … to attempt suicide", as the statutory power to apprehend the plaintiff was. Even if they were unable to stay with the plaintiff until the CAT service had assessed him (for example, because the plaintiff declined to remain with the officers and the officers did not exercise any power to apprehend the plaintiff, or because they were required to respond to an emergency situation elsewhere), the Police Manual states that they "must" still contact the CAT service. There is nothing on the facts to suggest that they could not have done so at the time.

The Police Manual reflects the reality that, in addition to being in a unique position to protect people from committing suicide, police officers are also more likely than most people to encounter persons suffering from mental illness. Anthony and Chappell have commented in this regard as follows:[159]

> For most community based Australian police officers encounters with persons suffering from a mental illness or mental disorder form a regular part of the job. In a society which has largely emptied its asylums for the mentally ill, it remains a sad reality that in the absence of adequate alternative care in the community it is the police who are all too often left with the task of assisting and, where necessary, apprehending those lacking the requisite mental capacity or resources to help themselves. It is a task which they often accept with some reluctance because of the drain it creates on police time and personnel, although most commentators agree that the majority of police perform this sensitive work in a humane and appropriate way.

The reluctance of police officers to undertake this work has not prevented mental health issues from becoming a key element in police training.[160] As I have noted above, it is scarcely accurate to analyse the interaction between police officers and a man preparing to commit suicide in terms of their "relationship" for the purpose of determining whether the officers owe a duty of care. Rather, the duty of care on the assumed facts arises from the fact that it was a substantial purpose of the officers' jobs to refer people such as the plaintiff's husband to the CAT service. This common law duty does not arise *from* the terms of the Police Manual but the terms of the Police Manual indicate the basis for the duty being found to exist independently by a court. Any finding that no such duty was owed, if based on a characterisation of the instruction in the Police Manual as something less than 'law', reflects a gap in negligence doctrine which is morally unsatisfying. This is particularly the case given that an operational duty already exists in practice. It is a very small step in these circumstances to impose a common law duty on the officers.

Question IV

What would be the result if the Police Manual were available to the public, and the plaintiff was aware of its terms?

The permutation of this scenario above treated the terms of the Police Manual as indicative of a moral, if not a common law, duty on the part of the police officers to take positive action to protect the plaintiff by calling the CAT service. Broadly speaking, I have looked at the first three permutations as

159 T Anthony and D Chappell, 'Police Care for the Mentally Ill: the restricted vision of the High Court in *Stuart v Kirkland-Veenstra*' (2009) 21 *Current Issues in Criminal Justice* 325, 325 (citations omitted).

160 T Anthony and D Chappell, 'Police Care for the Mentally Ill: the restricted vision of the High Court in *Stuart v Kirkland-Veenstra*' (2009) 21 *Current Issues in Criminal Justice* 325, 329.

examples of negligent omission on the part of the officers. On that analysis, nothing changes by supposing that the Manual were available, whether or not the plaintiff were aware of its terms.

There is another way to approach the soft law Police Manual, however, and that is as a representation. Where the Police Manual was issued only to police officers as a set of operational guidelines and was not available to other persons, there can be no question that it amounted to a representation to the plaintiff. Contrary to the law as regards a duty of care to take positive action, considered above, 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 terms[161] in *Hedley Byrne*.[162] In *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":[163]

> First of all, I think the circumstances must be such as to have caused the speaker or be calculated to cause a reasonable person in the position of the speaker to realise that he is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access or to give advice, about a matter upon or in respect of which the recipient believes the speaker to possess a capacity or opportunity for judgment, in either case the subject matter of the information or advice being of a serious or business nature. It seems to me that it is this element of trust which the one has of the other which is at the heart of the relevant relationship. … Then the speaker must realise or the circumstances be such that he ought to have realised that the recipient intends to act upon the information or advice in respect of his property or of himself in connexion with some matter of business or serious consequence. … Further, it seems to me that the circumstances must be 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. The nature of the subject matter, the occasion of the interchange, and the identity and relative position of the parties as regards knowledge actual or potential and relevant capacity to form or exercise judgment will all be included in the factors which will determine the reasonableness of the acceptance of, and of the reliance by the recipient upon, the words of the speaker.

A majority of the High Court in *San Sebastian* 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] The plaintiff would need to establish that he had relied on the representation that police officers *must always* contact the CAT service if they encounter persons who have undertaken acts preliminary to a suicide attempt. In these circumstances, his reliance (if

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

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

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 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: *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225, 251 ('*Shaddock*'). 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 at 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*').

established) would likely be viewed as reasonable, provided that the soft law in question could be characterised as an unqualified[165] representation made to persons who had read the Police Manual. This conclusion is based, using the test articulated by Barwick CJ in *Evatt*, on fact that the representation was in the form of an official Police document, the seriousness of the subject matter, and the greater position of power held by the police.

However, the plaintiff may not be able to prove that the Police "made the representation with the intention of inducing [people] to act in reliance on the representation".[166] 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".[167] The majority of the High Court held that no representation had been made by making these documents available.[168] 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:[169]

> 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.

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 more direct and personal communication of the relevant representation to the reliant party than is the case here.

All in all, treating the terms of the Police Manual as a representation is a less doctrinally satisfactory method of establishing a duty of care. Resort to this approach would likely be necessary only in the event that a court refused to accept that the police officers had a common law duty to act, regardless of whether the plaintiff was aware of the requirements of the Police Manual.

Question V

What would be the result if the Police Manual were available to the public, but the plaintiff had no subjective knowledge of its terms?

In the event that the plaintiff was unaware of the terms of the Police Manual, the conclusion above is reinforced based on the current state of the law. There are, however, two legal approaches which could get around the requirement of subjective reliance for a duty of care to exist. The first is to

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

166 *San Sebastian* (1986) 162 CLR 340, 358.

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

168 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).

169 *Unilan Holdings Pty Ltd v Kerin* (Unreported, Federal Court of Australia, Lockhart J, 5 February 1993). This is the reason why s 52 of the *Trade Practices Act 1974* (Cth) (now § 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.

breathe new life into the doctrine of general reliance. The second is for the courts to develop a stand-alone principle of compensation for administrative misfeasance.[170]

The principle of specific reliance in creating a common law duty to act on the part of a public authority has been discussed above. In *Heyman*, Mason J proposed the doctrine of general reliance as an extension of this reasoning.[171] His Honour argued that some duties of public authorities are relied upon by the public at large implicitly and without any (or much) subjective consideration because this is the entire reason why some public authorities exist. Mason J offered possible examples, including public authorities charged with "the control of air traffic" and "the safety inspection of aircraft".[172] While it offers a somewhat untidy exception to the neatness of a purely rights-based approach,[173] there is no principled reason why a public authority responsible for air-traffic control ought not to be liable to a plaintiff for breach of a common law duty of care where the plaintiff has suffered loss as a result of the authority's less-than-competent performance of its sole charge.

Mason J stated in *Heyman* that general reliance will rarely generate a duty of care.[174] Any such reliance must be reasonable, and the reasonableness of relying on a soft law instrument will naturally be dictated at least in part by the terms of that instrument and the circumstances in which it has been issued. For example, a soft law instrument may be stated in terms that contain an implicit (or explicit) warning that it should not be relied upon other than at the risk of the reliant party. However, this issue is generally addressed in relation to reliance on a positive, negligently-made statement rather than an omission.

One of the reasons for holding an authority liable in circumstances such as those described above is that individuals will not take any action to protect themselves where it is generally known, or at least assumed, that a public authority has taken charge. More to the point, it will frequently be impossible for individuals to take steps to protect themselves from the relevant form of damage (notably, from unsafely maintained or directed aircraft, as in the two examples cited from Mason J's judgment in *Heyman* above). This will usually be the very reason why a public authority has been given certain

170 This topic has been addressed in detail in Chapter 4.

171 "[T]here will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power … The control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building by a fire authority ... may well be examples of this type of function.": *Sutherland SC v Heyman* (1985) 157 CLR 424, 464 (Mason J).

172 *Sutherland SC v Heyman* (1985) 157 CLR 424, 464.

173 Robert Stevens argued in favour of the general benefits of a rights-based approach to establishing a duty of care, as opposed to a loss-based approach which looks for exceptions to exclude liability in some circumstances, particularly in regard to *X v Bedfordshire CC* [1995] 2 AC 633. See R Stevens, *Torts and Rights* (2007) 224-5; cf P Cane, Review of Torts and Rights' (2008) 71 *MLR* 641, 644; JNE Varuhas, 'The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages' (Paper presented at the Cambridge Private Law Centre Seminar Series, University of Cambridge Law Faculty, 25 October 2012). Note, however, that the opposing theoretical approaches are relevant only in the case of *inaction* by, for example, an air traffic control authority: to carelessly *direct* a collision between aeroplanes would certainly result in liability on either view. The example employed by Mason J is therefore decisive only if the controllers were to abandon their posts during the course of a flight.

174 Demonstrating specific reliance on a soft law instrument being *positively* applied by government may also be difficult; indeed, it was not established in *Heyman*. See *Sutherland SC v Heyman* (1985) 157 CLR 424, 470 (Mason J).

powers in the first place. Even those who reject the concept of a 'general reliance' doctrine accept that a duty of care may arise where the plaintiff is in fact ignorant of the danger against which a public authority owes a duty to protect him or her.[175]

This reasoning underlying the general reliance doctrine is supported by the fact that many of the objections to requiring a defendant to take positive action are inapplicable to public authorities. The refusal to hold the metaphorical Priest and Levite of Christ's parable accountable for their failures to act as the Samaritan did is usually justified on one or more of the following grounds: that it is unfair to require a party who has not caused danger to get his or her "feet wet" by coming to the rescue; that it offends individual autonomy to require private individuals to solve problems not of their making; and the 'why me?' objection. These objections amount to much the same thing, which is to say that in the absence of an enforceable right against the Priest or the Levite, their right to determine how they will and will not act ought not to be interfered with. In respect of individuals, it is difficult to argue against this proposition.[176]

However, as we have seen above, public authorities are not like individuals.[177] Public authorities have different capacities and expectations to individuals and this is an important factor in limiting the extent to which they can be treated in 'the same' way as private actors in private law actions. This ought not to be discounted where it serves to remove some of the objections to finding a positive duty to act. Hence, if a public authority is *not* held to owe a positive duty to take action, this cannot be justified on the basis that it infringes on the autonomy of a certain authority or will cause it to get its metaphorical "feet wet".[178]

Yet, while these objections are phrased such that they refer only to characteristics of private actors, their inapplicability to some public authorities would not alone be enough to compel a public authority to take positive action. For example, one could not commence proceedings against a highway authority for the negligent failure to inspect premises for risk of fire. It would not infringe upon the authority's autonomy, *per se*; it's just nothing to do with that particular authority. Modern government is not a monolith. Many public functions are performed by many different authorities. Therefore, the 'why me?' objection is still relevant, unless the public authority's failure to take positive action relates to the very purpose for which it exists.[179]

Unlike the House of Lords, the Australian High Court has demonstrated, in *Pyrenees Shire Council*, that it is prepared to find that a common law duty of care is owed by public authorities which are able to foresee harm to an individual and also have the capacity to avoid it. By doing so, it has created a

175 *Pyrenees Shire Council* (1998) 192 CLR 330, 390 [170] (Gummow J).

176 Cf *Lowns v Woods* [1996] Aust Torts Reports 81-376, (NSW Court of Appeal).

177 M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 68.

178 M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 69.

179 As in my hypothetical example above based on the facts of *East Suffolk v Kent* [1941] AC 74. If it were a substantial purpose for the existence of the defendant Board that it repair sea walls, a failure to prosecute that purpose with reasonable skill and expedition may indicate to a court that the Board had breached a common law duty to do so.

legal environment in which public authorities do sometimes owe a greater duty than would be owed by a private actor due to a superior capacity to prevent harm.[180] 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.

In articulating the general reliance doctrine in *Heyman*, Mason J was at pains to point out that liability for breach of a duty of care where there has been general reliance on a public authority arises in negligence and not as a matter of public law:[181]

> [A]lthough a public authority may be under a public duty, enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of the power. Mandamus will compel proper consideration by the authority of its discretion, but that is all.

However, courts and legislators are frequently tempted to carry public law notions across to the law of torts.[182] Notwithstanding the view expressed by Mason J, other judges have held that, in order to create a common law duty of care, a power to act held by a public authority must be enforceable by a writ of *mandamus*. In *Pyrenees Shire Council v Day*, Brennan CJ built on Lord Hoffmann's speech in *Stovin v Wise*[183] to state that:[184]

> [A] duty to exercise a power may arise from particular circumstances, and may be enforceable by a public law remedy. Where a purpose for which a power is conferred is the protection of the person or property of a class of individuals and the circumstances are such that the repository of the power is under a public law duty to exercise the power, the duty is, or in relevant respects is analogous to, a statutory duty imposed for the benefit of a class, breach of which gives rise to an action for damages by a member of the class who suffers loss in consequence of a failure to discharge the duty. The general principles of public law establish the existence of the statutory duty to exercise the power and the statute prescribes the class of individuals for whose benefit the power is to be exercised.

Gummow J put the contrary view in the same case that "the liability of the Shire in negligence does not turn upon the further (and public law) question whether (as may have been the case) those who later sued in tort would have had standing to seek against the Shire an order in the nature of *mandamus*. Their actions for damages in negligence are not brought in addition to or in substitution for any public law remedy."[185] McHugh J also later criticised the importation of public law doctrines

180 S Wotherspoon, 'Translating the Public Law 'May' into the Common Law 'Ought'' (2009) 83 *ALJ* 331, 334-5.

181 *Sutherland SC v Heyman* (1985) 157 CLR 424, 465. Lord Hoffmann shared some of Mason J's concerns with a right to a writ of *mandamus* as the source of a common law duty of care: "A *mandamus* can require future consideration of the exercise of a power. But an action for negligence looks back to what the council ought to have done. Upon what principles can one say of a public authority that not only did it have a duty in public law to consider the exercise of the power but that it would thereupon have been under a duty in private law to act, giving rise to a claim in compensation against public funds for its failure to do so?": *Stovin* [1996] AC 923, 950. If a rationality standard applied to public authorities' exercises of power in order to determine whether they owe a duty of care, his Lordship's objection to *mandamus* as a source of such a duty could not be based on the fact that it is a public law remedy. At any rate, Lord Hoffmann appeared less supportive of this proposition in *Gorringe v Calderdale MBC* [2004] WLR 1057, 337.

182 One example of this would be demonstrated if commission of an *ultra vires* act were made the threshold for a finding that a public authority owes a common law duty of care. A second would be if public authorities were held to a public law standard in assessing whether they owe a common law duty of care.

183 *Stovin* [1996] AC 923.

184 *Pyrenees Shire Council* (1998) 192 CLR 330, 347 (Brennan CJ). See M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 67-8.

185 *Pyrenees Shire Council* (1998) 192 CLR 330, 390-1 (citations omitted).

into private law in *Crimmins*.[186] Nonetheless, Brennan CJ's use of *mandamus* to indicate when a statutory power is converted into a common law duty as the result of an implied statutory right of action, while unique in judicial circles, now has a level of statutory response[187] under the *Civil Liability Act 2002* (NSW), which imposes a barrier to the recognition of a common law duty to act on the part of a public authority "if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff".[188]

General reliance was disapproved by a majority of the High Court in *Pyrenees Shire Council v Day*.[189] Brennan CJ would have preferred to make legislative intent the basis for a finding that a duty of care is owed by a public authority. His Honour cited the *dicta* of Lord Hoffmann in *Stovin v Wise* in which his Lordship seemed to doubt[190] that "the general expectations of the community", possibly not shared subjectively by the plaintiff, were an appropriate method of establishing whether a duty of care is owed by a public authority. Indeed, one of the most persuasive objections to the doctrine of general reliance is that to describe the expectations created by the "situation" in which an individual's interests are within the control of a public authority as 'reliance' is slightly misleading.[191] The doctrine, as proposed by Mason J,[192] requires no subjective reliance on the part of a plaintiff. Lord Hoffmann's starting point was to say that it will be rare indeed for a public authority to owe a common law duty of care where "Parliament has conferred a discretion [which] must be some indication that the policy of the act conferring the power was not to create a right to compensation."[193]

The primary objection to the doctrine of general reliance is semantic. It is clear that it does not describe circumstances in which a plaintiff has 'relied' on performance of certain acts by a public authority, as that verb is generally understood. Whatever reliance there has been occurs only in the sense that we all rely on government to undertake some tasks that private actors cannot undertake for themselves due to their "magnitude or complexity",[194] such as air traffic control and fire-fighting. It

186 *Crimmins* (1999) 200 CLR 1, 35-6. In *Pyrenees*, his Honour merely noted that "in many cases where the [general reliance] doctrine applies, the public authority will already have a public duty, enforceable by *mandamus*, to consider whether it should exercise its power or perform its function. In some cases, its knowledge may be such that, though the power or function may be discretionary, it nevertheless has a public duty to act.": *Pyrenees Shire Council* (1998) 192 CLR 330, 371. Remarking that the doctrine of general reliance frequently has a basis which is more than illusory, as the majority held, because public authorities subject to that doctrine may also be subject to a writ of *mandamus* is, with respect, a more benign use of public law than to use it as the basis for finding a common law duty of care.

187 Albeit "in mangled form": M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 68. This is because the Act is a set of *restrictions* on the common law rather than *expansions*.

188 *Civil Liability Act 2002* (NSW) s 44. See the discussion of s 44 at: M Aronson, 'Government Liability' (2008) 32 *MULR* 44, 73-6.

189 *Pyrenees Shire Council* (1998) 192 CLR 330, 344. Gummow and Kirby JJ each agreed with the Chief Justice on this issue. Dissenting on this point, both Toohey and McHugh JJ would have retained the general reliance doctrine on the basis that it remained a useful concept. The doctrine was also was also disapproved by Lord Hoffmann in *Stovin* [1996] AC 923, 953-5.

190 Cf *Pyrenees Shire Council* (1998) 192 CLR 330, 370 [105] (McHugh J). In *Crimmins*, Gaudron J listed Lord Hoffmann amongst the critics of a 'general reliance' doctrine: *Crimmins* (1999) 200 CLR 1, 35-6.

191 As Lord Hoffmann commented in *Stovin v Wise*, "the plaintiff does not need to have relied upon the expectation that the power would be used or even know that it existed. It appears rather to refer to general expectations in the community, which the individual plaintiff may or may not have shared. A widespread assumption that a statutory power will be exercised may affect the general pattern of economic and social behaviour.": *Stovin* [1996] AC 923, 954.

192 Brennan and Deane JJ did not adopt the terms 'general reliance' and 'specific reliance' but used the same approach as Mason J: M Allars, 'Tort and Equity Claims' in PD Finn (ed), *Essays on Law and Government - Vol 2* (1996) vol 2, 49, 61.

193 *Stovin* [1996] AC 923, 953.

194 *Sutherland SC v Heyman* (1985) 157 CLR 424, 464 (Mason J).

should at least be arguable that the plaintiff in the assumed facts 'relied', in this sense, on the police to comply with their soft law obligation to assist persons who had performed acts preliminary to attempting suicide. In fact, the 'reliance' in such a case need be no more than objective, based on "those in the position of the plaintiff".[195] His lack of subjective knowledge of the terms of that soft law would not therefore be to the point if he were able to convince a court that people in his position would generally expect the police to protect the suicidal. It is not a task which could effectively be performed by private actors, and is in this way analogous to the examples provided by Mason J.

This is not necessarily to argue that the plaintiff would be able to establish general reliance on the assumed facts. It is strongly arguable that the role of the police was to supplement, rather than supplant,[196] the care that the plaintiff would be expected to take for himself, given that he was not institutionalised and was therefore held broadly to the standards applicable to other members of society.[197] This view does, however, fail to take account of the fact that the mentally infirm[198] are now very rarely confined to asylums and that the police are more likely than virtually any other group of people to come into contact with them.[199] There is much to be said in favour of finding that the police officers owed a common law duty to the plaintiff on this basis,[200] even if it is unlikely in all the circumstances that the police officers breached that duty or that it was causative of the plaintiff's harm. It is unfortunate that the High Court has held that the doctrine of general reliance cannot assist in reaching a conclusion.

If private law does not provide a satisfactory method of dealing with circumstances such as those in the assumed facts, an alternative would be to create a free-standing body of law to cover the commission of private law wrongs by public authorities. I have considered in chapter 4 above the issues which would arise if there were to be a damages remedy for maladministration by a public authority. For the reasons there stated, I do not favour reform of the existing law in this way.

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195 *Sutherland SC v Heyman* (1985) 157 CLR 424, 463 (Mason J).

196 *Sutherland SC v Heyman* (1985) 157 CLR 424, 462 (Mason J).

197 *Carrier v Bonham* [2002] 1 Qd R 474.

198 French CJ noted that mental health legislation "does not assume a necessary linkage between mental illness and attempted suicide [which] accords with the long-standing resistance of the common law to the proposition that such a connection necessarily exists"; nor does the common law presumptively link mental illness to suicide or attempted suicide: *Stuart* (2009) 237 CLR 215, 236 [44] – 237 [46] (French CJ). Gummow, Hayne and Heydon JJ further noted in *Stuart* that the Victorian legislation was drafted such that, even in a police officer were to apprehend that "a person appears mentally ill and there are reasonable grounds for the officer to believe that the person has recently attempted or is likely to attempt suicide or to cause serious bodily harm to that person or to some other person … there may [nonetheless] very well be circumstances in which a police officer acting reasonably would not exercise the power even if the conditions for its exercise were met.": *Stuart* (2009) 237 CLR 215, 247 [82] (Gummow, Hayne and Heydon JJ). See also S McPhedran, 'Suicide prevention takes more than 'treating depression'' (2013) *The Conversation* http://theconversation.com/suicide-prevention-takes-more-than-treating-depression-13781, 26 June 2013.

199 T Anthony and D Chappell, 'Police Care for the Mentally Ill' (2009) 21 *Current Issues in Crim Justice* 325; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 1985, 77; cited in *Stuart* (2009) 237 CLR 215, 232 [34] (French CJ).

200 This contention is contrary to the current emphasis of the common law on self-reliance, autonomy and personal responsibility: see eg *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, ('*C.A.L. No 14*'); *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, ('*RTA v Dederer*').

C: Problem example 2

Suppose the following factual scenario:[201]

A. Sally proposes to build a housing development on the site of property she owns in Bowral, NSW.

B. She contacts the local government authority ("Council") which has a statutory discretion to approve developments in Bowral. A Council employee directs her to a document on the Council website entitled "Bowral Area Development Approval Guidelines".

C. Sally reads the Guidelines, which include the following statement:

> The Council will approve any development which complies with all applicable NSW planning statutes and regulations.

D. Sally discusses her proposed development with her lawyer, who advises Sally that her proposed development is legally compliant, but comments that he has heard that changes are about to be made to the relevant State Environmental Planning Policy (SEPP), and that her development would not comply with the amended SEPP.[202] Sally's lawyer tells her that she will have no problem provided that she commences work before the changes take effect, since laws are never changed retroactively, whether hard or soft.

E. Sally writes to the Council to ask whether her development has been approved. She receives a written response which states that Council is not due to meet for three weeks, but directs her to the Guidelines.

F. Relying on the term of the Guidelines set out in Fact C, Sally believes that the Council must approve her development. She commences work to ensure that work has commenced on her development before changes to the SEPP, having invested a substantial amount of money and time in obtaining materials and hiring contractors.

G. The first thing that the contractors working for Sally do is to demolish the house that was already on the land. The house had recently been valued at $100,000 without taking into account the value of the land.

H. Council meets and decides not to approve Sally's development. In its written reasons, the Council states that its policy is to disapprove any development which would contravene existing law, or foreshadowed changes to the law. The changes to the SEPP subsequently come into effect.

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201 This scenario is based upon the facts of *Waltons v Maher* (1988) 164 CLR 387. It supposes, however, that the party in the position of Waltons is a public authority.

202 A State Environmental Planning Policy is made by the Governor of NSW "for the purpose of environmental planning by the State": *Environmental Planning and Assessment Act 1979* (NSW) s 37(1). They are designed to deal with significant matters in environmental planning. See R Lyster, Z Lipman, N Franklin, G Wiffen and L Pearson, *Environmental and Planning Law in New South Wales* (3rd ed, Federation Press, Annandale, NSW, 2012).

Can Sally obtain a remedy from the Council? Given that a court cannot now require the Council to approve the development, which would now be in breach of the SEPP, is there an appropriate remedy in common law damages or equitable compensation?

Preliminary comments on private law liability for reliance-based loss

There is a large intersection between equitable estoppel[203] and negligent misstatement. Both doctrines attach liability to a party which has made a representation upon which another has reasonably relied to his or her detriment. In equity, liability accrues as a result of the representor's refusal or inability to adhere to the representation. In negligence, liability is the consequence of the representor breaching a duty of care not to make a representation if reliance upon it will cause loss to the representee. This doctrine covers both inaccurate statements of current fact[204] and the negligent provision of advice.[205] For example, the reasoning of Lord Haldane in *Nocton v Lord Ashburton*[206] reads as a precursor to cases later in the 20th century[207] in which the relationship between parties, being neither contractual nor fiduciary, was able to form the basis of either liability in tort (for negligent misrepresentation) or an estoppel. Neither requires any fraud, in the sense of moral obloquy, on the part of the party which has made the representation relied upon.

Frequently, an individual will either be directed to a certain course of action by a public authority[208] or will rely on a representation of a public authority as the basis for choosing to act. Inducing another party to act to his or her detriment may either create a liability in tort for negligent misrepresentation or raise an estoppel remediable in equity. Deliberate wrongdoing cannot amount to *negligent* misrepresentation.[209] Therefore, to take a well-known example, the plaintiff in *Waltons Stores (Interstate) Ltd v Maher*[210] could not have established that Waltons had made a negligent misrepresentation. Nonetheless, there is sufficient overlap between the two causes of action that either could apply in many circumstances.[211]

For the stated example, I will assess the likelihood of Sally obtaining a substantive remedy for damage caused by her reliance on the Council's Guidelines both in tort and in equity.

I: Tort liability

Whether or not an instrument can be characterised as soft law, it may still amount to a negligent misrepresentation. This doctrine has generally become a less important basis of liability since there

203 At least as regards promissory estoppel and estoppel by representation.

204 *Shaddock* (1981) 150 CLR 225.

205 *Hedley Byrne* [1964] AC 465.

206 *Nocton v Lord Ashburton* [1914] AC 932; [1914-15] All ER Rep 45, ('*Nocton's Case*').

207 Notably, it was applied by the House of Lords in *Hedley Byrne* [1964] AC 465. See RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 58-9.

208 See *Crimmins* (1999) 200 CLR 1, 30 [63] (McHugh J).

209 *New South Wales v Lepore* (2003) 212 CLR 511, 531 (Gleeson CJ); 603 (Gummow & Hayne JJ) ('*Lepore*'). See also *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 485 (Spigelman CJ) (Court of Appeal, '*Naidu*').

210 *Waltons v Maher* (1988) 164 CLR 387.

211 Professor Campbell noted an example of where an action for negligent misrepresentation may have been available although the court would not have enforced an estoppel against the defendant Minister: E Campbell, 'Estoppel in Pais and Public Authorities' (1998) 5 *Australian Journal of Administrative Law* 157, 164. See *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303, ('*MIEA v Petrovski*').

has been a statutory prohibition of misleading and deceptive conduct.[212] However, the terms of the legislation are limited to conduct "in trade or commerce".[213] Consequently, negligent misrepresentation is now more prominent as a doctrine which applies to public authorities, whose negligent misrepresentations will frequently fall outside the limits of the statutory provision.

A public authority will be held liable in negligence for loss caused by the failure to apply a soft law instrument if the soft law in question includes a misrepresentation that the authority would act in accordance with it and an individual has relied reasonably on that representation to his or her detriment. Traditionally, courts were reluctant to impose a duty of care in regard to negligent statements, as opposed to negligent acts. This reluctance was compounded by the fact that negligent misrepresentations result in purely economic loss.[214] The prohibition on recovery for loss caused by negligent misrepresentations has long since been discarded,[215] but it remains the case that there are more impediments to establishing a duty of care for negligent words than for a negligent act. Importantly, although the High Court has pointed out that whether a duty of care is owed for negligent misrepresentation is decided consistently with the general principles of negligence,[216] the fact that the only loss suffered by a plaintiff is economic has meant that the relevant legal principles have developed "relatively independently from the case-law which included *Anns*".[217] They are accordingly much less fraught with debate than, for example, the principles behind liability for nonfeasance by a public authority.

A ready and attentive audience is not limited to those who have requested information,[218] but may include those induced to act. However, inducement is insufficient without more to establish

212 RP Balkin and JLR Davis, *Law of Torts* (5th ed, 2013) 432. This was formally under s 52 of the *Trade Practices Act 1974* (Cth) and its State analogues, but is now under § 18 of *The Australian Consumer Law*, which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

213 They are further limited by the requirement that any application of the Act to the Commonwealth and Commonwealth public authorities be restricted to the extent that they "carr[y] on a business": *Competition and Consumer Act 2010* (Cth) s 2A.

214 *San Sebastian* (1986) 162 CLR 340, 354. Peter Cane has stated that "two principles relevant in many actions against public agencies are, first, that the law of tort in general and the tort of negligence in particular are mainly concerned with personal injury and property damage, and only marginally and exceptionally for economic loss; and secondly that tort law only exceptionally imposes obligations to prevent harm as opposed to an obligation not to cause harm.": P Cane, *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) 202 (footnote omitted).

215 See *Hedley Byrne* [1964] AC 465; *Shaddock* (1981) 150 CLR 225. Note the criticism of the House of Lords' reasoning in *Hedley Byrne* by the authors of the 4th edition of *Meagher, Gummow & Lehane*, who regard it as an example of a "fusion fallacy": RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 58-9; cf *Harris v Digital Pulse* (2003) 56 NSWLR 298, 325-9 (Mason P); 391-2 (Heydon JA).

216 "Since *Hedley Byrne* there has been a tendency, discernible in the judgments of the Court of Appeal in this case, to regard liability for negligent misstatement as standing apart from the general principles expressed in *Donoghue v Stevenson* [1932] AC 562. with respect to the duty of care. … [C]ourts have sometimes dealt with the duty of care in relation to negligent misstatement without relating it to Lord Atkin's exposition in *Donoghue v Stevenson*. However, the correct view is that, just as liability for negligent misstatement is but an instance of liability for negligent acts and omissions generally, so the treatment of the duty of care in the context of misstatements is but an instance of the application of the principles governing the duty of care in negligence generally. The special complications which arise in connexion with the imposition of a duty of care on the author of a statement can only be unravelled in a variety of factual situations. Decisions such as *Hedley Byrne*, *MLC v Evatt* (1968) 122 CLR 556 (on appeal (1970) 122 CLR 628; [1971] AC 793) and *Shaddock* (1981) 150 CLR 225 are therefore to be seen as illustrations of the general duty of care in its application to particular instances of negligent misstatement.": *San Sebastian* (1986) 162 CLR 340, 353-4 (Gibbs CJ, Mason, Wilson & Dawson JJ).

217 M Allars, 'Tort and Equity Claims' in PD Finn (ed), *Essays on Law and Government - Vol 2* (1996) vol 2, 49, 69.

218 "The maker of a statement may come under a duty to take care through a combination of circumstances or in various ways, in the absence of a request by the recipient. The author, though volunteering information or advice, may be known to possess, or profess to possess, skill and competence in the area which is the subject of the communication. He may warrant the correctness of what he says or assume responsibility for its correctness. He may invite the recipient to act on the basis of the information or advice, or intend to induce the recipient to act in a particular way. He may actually have an interest in the recipient so acting.": *San Sebastian* (1986) 162 CLR 340, 357.

negligence in regard to a representation. In *San Sebastian*, the plurality judgment started by saying that while, unlike in *MLC v Evatt* and *Shaddock*, the information alleged to have been provided by the defendant authorities was not in response to a request from the appellants, "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".[219] Their Honours noted that an antecedent request "certainly assists in demonstrating reliance, which is a cornerstone of liability for negligent misstatement",[220] but this is a practical evidentiary issue rather than one of principle. Although courts require something more than reasonable foreseeability of harm before they are prepared to find that the defendant owes a duty of care,[221] there is no reason why a representation upon which a plaintiff relies to his or her detriment must be preceded by a request for that representation to be made, and the maker of such a representation will be liable if it is incorrect and the plaintiff can demonstrate reasonable reliance.

As in *San Sebastian*, the information provided to Sally in the Guidelines was intended to provoke a response. This will generally be the case where a person relies on a representation which can properly be characterised as soft law. To require Sally to have made an antecedent request in order for her reliance to be classified as reasonable would be to misunderstand the regulatory nature of soft law.

The identity of the public entity which makes a representation and the circumstances in which it is made will indicate to some extent which party is expected to bear the risk of that representation ultimately being false. This goes to the reasonableness of the plaintiff's reliance and affects the liability of the defendant. Hence, a representation reasonably relied on will have to be fulfilled or withdrawn with adequate notice. However, 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.[222] Some types of communication from public bodies (for example, published rulings by the Australian Taxation 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.

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219 *San Sebastian* (1986) 162 CLR 340, 356.

220 *San Sebastian* (1986) 162 CLR 340, 356-7.

221 *Sutherland SC v Heyman* (1985) 157 CLR 424, 466 (Mason J). In a practical sense, the key to establishing liability for causing another party to rely on a negligently made representation is the reasonableness of that reliance. Reliance is therefore the crux of the action for negligent misrepresentation, since it is the true cause of loss to the plaintiff, rather than the act of the defendant. This is in contrast to negligent acts, which tend to cause damage directly to the plaintiff: *Shaddock* (1981) 150 CLR 225, 231 (Gibbs CJ); *San Sebastian* (1986) 162 CLR 340, 353 (Gibbs CJ, Mason, Wilson & Dawson JJ).

222 See eg *CPT Manager Ltd (acting as trustee of the Broken Hill Trust) 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.

One way to determine reasonable reliance is 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.[223] Seen through the lens of risk, it is clear that the Minister in *Unilan Holdings*, for example, meant to communicate no such message. Rather, the plaintiff should have known that this was no more than a statement of policy and was therefore subject to change.

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. In the assumed facts, the Guidelines are a representation to Sally that the Council will approve both current and future development applications which are legally compliant. This is not the same as Sally asking, in effect, for the Council to insure any loss she may suffer by relying on the Guidelines. Contrary to the facts in *Unilan Holdings*, it was the entire purpose of the Guidelines that people would act in reliance upon them. This is part and parcel of their character as soft law.

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.[224] Reliance on a representation made to and passed on by a third party is less likely to be reasonable than reliance on a direct communication,[225] 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.[226] On the other hand, a statement of future policy made to the world at large, either by a public authority[227] or a Minister of State[228] 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".[229]

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 are

223 This point was alluded to by Lockhart J in *Unilan Holdings Pty Ltd v Kerin*.

224 *Shaddock* (1981) 150 CLR 225.

225 *Tepko* (2001) 206 CLR 1.

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

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

228 *Unilan Holdings Pty Ltd v Kerin*.

229 *San Sebastian* (1986) 162 CLR 340, 374 (Brennan J). A similar view was expressed 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* 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.

required to pass legislation or even subordinate legislation.[230] 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*,[231] or "of a legislative character" for the purposes of the *Legislative Instruments Act*.[232] 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".[233] A number of factors have been identified as generally being indicative of the character of a decision or instrument[234] but, importantly, none relies on the reasonableness of the reliance of a person regulated by an instrument, focusing instead on the character of the instrument itself.[235] The analogy remains useful as a method of discerning whether an instrument has a regulatory purpose, in which case reliance will generally be seen as reasonable.

On the assumed facts, the regulatory purpose of the Guidelines is clear not only from their terms but also from the fact that Sally is twice referred to the Guidelines in response to her inquiries as to how the Council will exercise its statutory discretion to approve property developments. On its face, the relevant term of the Guidelines appears to state a rule of general application and reflects the broad policy consideration that the Council is in favour of all developments and wishes to encourage them, provided that they meet the applicable legal standards. In short, despite the fact that the Guidelines are not legally binding on the Council, they are a clear example of the Council governing through the use of soft law.

In the circumstances, Sally was reasonable to rely on the statement that the Council would approve any legally compliant development proposal. Any contrary conclusion is morally unsatisfying because

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230 The issues raised here are discussed in detail in Chapter 2.

231 *ADJR Act 1977* (Cth) s 3(1).

232 *LIA 2003* (Cth) s 5(1)(a).

233 In that case, Wilcox, Branson and Lindgren JJ listed the considerations which had been held in previous cases to shed light on whether a given decision was of an administrative or legislative character, although their Honours warned that "no one decision is decisive of the issue": *RG Capital Radio Ltd* (2001) 113 FCR 185, 194 [40]-[42].

234 Aronson and Groves summarised ten factors which are indicative of the character of a decision or instrument, based on whether it:

(i) creates new rules of general application, rather than applying existing rules to particular cases;
(ii) must be publicly notified in the Gazette or similar publication;
(iii) cannot be made until there has first been wide public consultation;
(iv) incorporates or has regard to wide policy considerations;
(v) can be varied or amended unilaterally by its maker, the analogy being to primary legislation;
(vi) cannot be varied or amended by the Executive;
(vii) is not subject to merits review in a tribunal such as the AAT;
(viii) can be reviewed in Parliament (for example, it is a disallowable instrument);
(ix) triggers the operation of other legislative provisions; and
(x) has binding effect.

M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [2.500]. These factors are taken from *RG Capital Radio* (2001) 113 FCR 185; *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451, ('*Roche*'); *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 75 FCR 604, ('*SAT FM*'); *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, ('*Visa v RBA*').

235 A mere representation is strictly neither administrative nor legislative in character, although when made by a public authority it uses "executive" rather than legislative power, in the sense that it does not rely power inherent to government; see eg *Unilan Holdings Pty Ltd v Kerin* (1992) 35 FCR 272, ('*Unilan v Kerin*'). The proper characterisation of the Minister's speech in that matter is that it was a statement of intention which was not intended to create binding rights or liabilities.

it does not take account of the way in which soft law differs from other representations. In many ways, it is the same; for example, just as in *Hedley Byrne*,[236] soft law's effect can be 'ring-fenced' by a disclaimer.[237] However, this is an issue which goes to reasonableness of reliance rather than to the public nature of soft law. The key to establishing liability in a public authority which has issued a soft law instrument on which it declines to rely should be simply whether the party which has relied on the soft law has acted as he or she was encouraged to act by the soft law; that is to say, where there has been a negligent inducement. If this question is dealt with as a matter of construction of the soft law, it requires no adaptation of the private law as it stands, save perhaps to establish an agreed upon test for what constitutes soft law.

II: Equitable liability

While the position in tort will generally be unchanged whether or not the inducing party is a public authority,[238] it is significantly more difficult to obtain a remedy enforcing an estoppel against a public authority. I have noted above that there is no specific doctrine of public law estoppel, although an estoppel may be raised against a public authority either at common law or in equity.[239] Both varieties of estoppel fall under the heading of estoppel *in pais*, described by Mason and Deane JJ as follows:[240]

> Estoppel *in pais* includes both the common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement.

An estoppel at common law where the estoppel is raised by acts performed by the party estopped is contrasted with equitable estoppel, which is raised by a representation which induces another party to act. Additionally, the common law doctrine of estoppel by convention requires that parties adopt a mutual assumption as the conventional basis of their relationship,[241] whereas in estoppels by representation "the relevant detriment has not been accepted by the party estopped as the price for binding himself to the representation".[242] An estoppel *in pais* can therefore be raised against a public

236 *Hedley Byrne* [1964] AC 465.

237 See eg *CPT Manager Ltd (acting as trustee of the Broken Hill Trust) v Broken Hill City Council* [2010] NSWLEC 69.

238 See eg *Shaddock* (1981) 150 CLR 225. Negligent misrepresentations by public authorities are not affected by *Civil Liability Act 2002* (NSW) Part 5.

239 It is frequently generalised that "common law estoppel operates where [an] assumption is one of existing fact, whereas equitable estoppel operates where the assumption relates to the future conduct of the representor or the legal rights of the representee": A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after Verwayen' (1996) 20 *MULR* 805, 807. As to common law estoppel, see generally RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 536-42. This statement of the law is not universally accepted as being comprehensive: see per Mason CJ in *Foran v Wight*: "[W]e should now recognise that a common law estoppel as well as an equitable estoppel may arise out of a representation or mistaken assumption as to future conduct.": *Foran v Wight* (1989) 168 CLR 385, 411. See also RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 570. For current purposes, it is sufficient to acknowledge that estoppel by representation as to a future state of affairs is an equitable doctrine and creates an equity in the party which relies to its detriment upon such a representation.

240 *Legione v Hateley* (1983) 152 CLR 406, 430 ('*Legione v Hateley*'). See also E Campbell, 'Estoppel in Pais' (1998) 5 *AJ Admin L* 157, 158; RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 536-7; *Waltons v Maher* (1988) 164 CLR 387, 413 (Brennan J).

241 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 244 ('*Con-Stan*'); RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 540.

242 RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 540.

authority which does not adhere to the terms of a soft law instrument which has caused an individual to rely to his or her detriment on such adherence.

However, this is not to say that there is now a unified "general doctrine of estoppel by conduct"[243] in Australian law which encompasses both common law and equitable doctrines so as "to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted".[244] Mason CJ and Deane J each proposed a unified doctrine in *Verwayen*, but it was denied by Dawson and McHugh JJ, whereas Brennan J stated only that "*equitable* estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise".[245] Since then, the High Court has left the question open[246] and the proposition has never commanded the support of a High Court majority.[247]

Professor Campbell has pointed out that, while the objects behind estoppel *in pais*[248] and equitable estoppel[249] are the same, the remedies available in equity are significantly more flexible than at common law, which offers only the "all or nothing"[250] remedy of holding the party estopped to his or her representation.[251] McHugh J summarised the authorities on this issue in *Verwayen* as follows:[252]

> What will be required to satisfy the equity which arises against the party estopped depends on the circumstances.[253] Often the only way to prevent the promisee suffering detriment will be to enforce the promise. *But the enforcement of promises is not the object of the doctrine of equitable estoppel.* The enforcement of promises is the province of contract. Equitable estoppel is aimed at preventing unconscionable conduct and seeks to prevent detriment to the promisee. As Brennan J pointed out in *Waltons*, "in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct".[254] Consequently, a court of equity will only require the promise or assumption to be fulfilled if that is the only way in which the equity can be fulfilled.[255] In *Silovi Pty Ltd v Barbaro*,[256] Priestley JA, writing for an unanimous Court of Appeal, said: "The remedy granted to satisfy the equity ... will be what is necessary to prevent detriment resulting from the unconscionable conduct."

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

243 *Verwayen* (1990) 170 CLR 394, 431 (Deane J).

244 *Verwayen* (1990) 170 CLR 394, 410 (Mason CJ).

245 *Verwayen* (1990) 170 CLR 394, 428-9 (Brennan J) (emphasis added).

246 *Giumelli* (1999) 196 CLR 101, 112-13. See RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 535.

247 E Campbell, 'Estoppel in Pais' (1998) 5 *AJ Admin L* 157, 159 (n 14).

248 "The object of an estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption is adhered to, would operate to that other's detriment.": *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J) ('*Thompson v Palmer*').

249 *Waltons v Maher* (1988) 164 CLR 387, 427 (Brennan J).

250 "The result of an estoppel at common law was, viewed as a separate and distinct doctrine from equitable estoppel, to preclude the party estopped from denying the assumption upon which the other party acted to his detriment. It followed that the party who acted to his detriment was, in effect, given the benefit of the assumption. It was all or nothing.": *Verwayen* (1990) 170 CLR 394, 454 (Dawson J).

251 E Campbell, 'Estoppel in Pais' (1998) 5 *AJ Admin L* 157, 167.

252 *Verwayen* (1990) 170 CLR 394, 501 (McHugh J) (emphasis added).

253 *Waltons v Maher* (1988) 164 CLR 387, 404 (Mason CJ & Wilson J).

254 *Waltons v Maher* (1988) 164 CLR 387, 419.

255 *Waltons v Maher* (1988) 164 CLR 387, 416 (Brennan J).

256 *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472 ('*Silovi v Barbaro*').

equity thus created. It is my thesis that 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*[257] or would require the future exercise of a statutory discretion to be fettered[258] does not prevent a court from fulfilling the equity with an award of monetary compensation.[259]

A public authority being estopped from denying a "certain state of affairs"[260] 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 equity 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.

On the assumed facts, an equitable estoppel would be raised against the Council because Sally was induced to act to her detriment (both in her expenditure of money and the demolition of the existing house on her property) by the soft law representation that the Council would approve *all* legally compliant development proposals. To the extent that equitable estoppel is based upon relieving against unconscientious conduct rather than enforcing representations,[261] the relevant conduct by the Council was, as in *Waltons*, to remain silent about Sally's erroneous understanding of the Council's policy in the face of the literal interpretation of its Guidelines. Given that an estoppel has been raised against the Council, the next question is with what equity it can be remedied.

The prevalence of soft law emphasises that an equitable remedy is needed where an estoppel is raised against a public authority, even if substantive enforcement of that estoppel is impossible. Frequently, other remedies will suffice.[262] Sally could have argued for a substantive remedy, before the amendments to the State Environmental Planning Policy (SEPP) took effect, on the basis that she had suffered prejudice as a result of the fact that she had been unaware of the Council's policy "to disapprove any development which would contravene ... foreshadowed changes to the law", given that that policy had not been published.[263] The requirement to make internal policy documents available would not, however, allow Sally to obtain a substantive remedy (i.e. obtaining development approval) after the amended SEPP took effect and is in this sense limited in a similar fashion to equitable remedies.

In the event that the Council were to seek a mandatory injunction to demolish any building work commenced by Sally on the land in resect of which she had not obtained valid development consent,

257 Prohibited by *Maritime Electric* [1937] AC 610.

258 Prohibited by *Southend-on-Sea* [1962] 1 QB 416.

259 E Campbell, 'Estoppel in Pais' (1998) 5 *AJ Admin L* 157, 167.

260 E Campbell, 'Estoppel in Pais' (1998) 5 *AJ Admin L* 157, 166.

261 *Waltons v Maher* (1988) 164 CLR 387, 404-5 (Mason CJ & Wilson J). See *Verwayen* (1990) 170 CLR 394, 501 (McHugh J).

262 For example, on the assumed facts, Sally would likely establish that she had suffered loss as a result of her reasonable reliance on the Guidelines and her loss would be compensated in tortious damages. This would not be the case, however, if the Council's act had been deliberate rather than negligent: *Lepore* (2003) 212 CLR 511.

263 *Government Information (Public Access) Act 2009* (NSW) s 24. At Commonwealth level, the relevant provision would be *FOI Act 1982* (Cth) s 10.

Sally could oppose such an application on the basis that it would cause hardship.[264] A mandatory injunction may be granted in appropriate cases to produce a fair result at the discretion of the court.[265] It will be relevant to the outcome of the application that the Council has acted swiftly to prevent Sally incurring building costs.[266] The issues relevant to whether a mandatory injunction to demolish building work is warranted will also tend to differ where the building has been in breach of a restrictive covenant[267] rather than in breach of a statutory instrument. In *Willoughby City Council*,[268] the third respondent was ordered to demolish and remove partially completed building works which did not comply with statutory requirements, notwithstanding that the local council was aware of the development and had taken no action to prevent it. Sally is likely to face the same result.

The limitations on the remedies available to Sally do not alter the fact that individuals are apt to act to their own detriment on the faith of soft law issued by a public authority. The fact that a request, demand or instruction comes from an official source will frequently result in compliance from a private actor, regardless of that person's subjective opinion. An instruction from a police officer to drive the wrong way up a one way street will inevitably be obeyed because we are used to accepting the authority of the police, particularly in circumstances where there is no practical means of challenging their authority to give a certain instruction.

There is little difference in effect between this example and soft law issued by many types of public authorities. It is unlikely that the effect of a soft law provision issued by a revenue authority to a small business owner would be challenged,[269] although it would have the potential if incorrect to cause substantial loss. Such soft law may, of course, amount to a negligent misrepresentation compensable in tort; such circumstances have been considered above. The necessity for an equitable remedy is to cover situations where the elements of negligence are not made out.

It is possible that one kind of substantive remedy could be available to Sally, and that is the enforcement of an estoppel raised at common law. Professor Enid Campbell noted that:[270]

> To hold a public body estopped from denying the existence of a certain state of affairs will not always be to sanction *ultra vires* action on the part of that body or breach of its statutory obligations. A body which is empowered to grant pensions to former defence personnel who suffer disabilities attributable to war service cannot really be said to have exceeded its powers if it is estopped, by representation, from denying that X's disability is attributable to such service.

264 *Attorney-General (NSW) (ex rel Wentworth) v Woollahra Municipal Council* (1980) 41 LGRA 376, 394 (Powell J) (Powell J, '*Wentworth v Woollahra*'); *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, 673 ('*Wentworth v Woollahra*').

265 *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 412 (Megarry J) ('*Shepherd v Sandham*').

266 *Gafford v Graham* (1999) 77 P & CR 73, 79 (Nourse LJ) ('*Gafford*'); *Jaggard v Sawyer* [1995] 1 WLR 269, 209 (Millett LJ) ('*Jaggard v Sawyer*').

267 See eg *Miller v Evans* [2010] WASC 127.

268 *Willoughby City Council v Minister Administering the National Parks & Wildlife Act* (1992) 78 LGERA 19, (Stein J, '*Willoughby CC*').

269 Cf *Neil Martin Ltd v Revenue and Customs Commissioners* [2007] EWCA 1041 [67]. The reasoning of Chadwick LJ in this regard is doubted by T Cornford, *Towards a Public Law of Tort* (2008) 214.

270 E Campbell, 'Estoppel in Pais' (1998) 5 *AJ Admin L* 157, 166.

Applied to the assumed facts, this would mean that a court would enforce a common law estoppel raised against the Council by holding that it could not deny that Sally's development was legally compliant.[271]

This result may in some circumstances be open to doubt. If a power to grant a pension, in the example used by Professor Campbell, is only activated in relation to persons disabled as a result of war service, the power does not accrue to the decision-maker in question *unless* he or she forms the opinion that the recipient of the pension has *in fact* been disabled as a result of war service. To grant a pension on any other basis is to act *ultra vires*.[272] The matter is less relevant in circumstances where the decision-maker's satisfaction, which grounds his or her jurisdiction, is in relation to a current and changeable state of affairs, rather than an existing fact. A substantive remedy consequent on the Council being estopped from denying the legality of Sally's proposed development would only be possible in the event that the amended SEPP had not yet taken force, and the approval of the development therefore remained *intra vires* the Council.[273]

The fact that a public authority is unable to have an estoppel raised against it where to do so would require it to fetter the future exercise of a statutory discretion may be seen as a matter of public policy.[274] In public law terms, it is also *ultra vires* since substantively to enforce an estoppel would effectively prevent the authority from exercising the power granted to it by Parliament at its own discretion. The result of this is that a private actor mistakenly charged only 10% of the statutorily fixed monthly charge for electricity cannot rely on an estoppel to overcome the price regime set by statute[275] regardless of his change of position in reliance on the amount charged.[276] A public authority is capable of being estopped from denying the veracity of its soft law provided that it is not in conflict with the public law doctrines to which a public authority is subject.[277]

The established reasoning behind the rejection of attempts to extend private law estoppel to the public exercise of statutory powers and discretions is that private actors are capable of being estopped because they are self-regarding, whereas the "public law … binds everyone".[278] With respect, it is

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271 The effect of this is functionally the same as if the court were to apply *FOI Act 1982* (Cth) s 10. That section, and its NSW analogue, have been considered above.

272 The result of a justiciable controversy on these facts would, of course, be highly dependent on the statutory definition of the relevant terms.

273 KR Handley, *Estoppel* (2006) 296. This assumes that the SEPP did not have retrospective operation. Regarding SEPPs generally, see n 202 above.

274 KR Handley, *Estoppel* (2006) 301.

275 *Maritime Electric* [1937] AC 610; cf *Durban City Council v Glenore Supermarket and Cafe* 1981 (1) SA 470 (D), ('*Glencore Supermarket*').

276 See KR Handley, *Estoppel* (2006) 301-2. In contrast, a teacher employed by a local government body, who was mistakenly over-paid and then spent part of the amount overpaid, was able to prevent the employer from recovering the overpayment as moneys had and received by raising an estoppel by representation: *Avon County Council v Howlett* [1983] 1 WLR 605, ('*Avon CC v Howlett*'). The estoppel raised in such a situation will not always entitle an individual to the entirety of the amount overpaid: RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 538-9. Nor will it prevent a payment from Consolidated Revenue from being ultra vires if made without statutory authority: *Auckland Harbour* [1924] AC 318.

277 *Kurtovic* (1990) 21 FCR 193, 208-11 (Gummow J).

278 *Newbury DC* [1981] AC 578, 752. Lord Scarman denied "that 'the general principle' of equitable estoppel is applicable to planning cases", contrary to the statement of Lord Denning MR in the Court of Appeal below that "the general principle of equity considered in *Crabb v Arun District Council* ([1975] 3 All ER 865 at 871-872, [1976] Ch 179 at 187-188) ... is, in my view, particularly applicable in planning cases. At any rate in those cases where the grant of planning permission opens a new chapter in the planning history of the site.": *Newbury District Council v Secretary of State for the Environment* [1978] 1 WLR 1241, 250 ('*Newbury v Environment Secretary*').

difficult to understand why the application of this principle should preclude an estoppel from being raised when, in the UK, it is not an insuperable barrier to the courts giving substantive effect to a legitimate expectation with a judicial review remedy.[279] Regardless of this, there is no *prima facie* reason why, where a plaintiff has made out that an estoppel could be raised if the defendant were a private actor,[280] courts should be prevented from providing an alternative remedy in circumstances where it is inappropriate to enforce an estoppel by preventing the defendant public authority from exercising a statutory power or discretion.

There are, of course, reasons why public authorities and private actors cannot be treated in the same way. This, however, has not operated as a blanket rule to prevent individuals from obtaining remedies against public authorities in tort. Fears that estoppel in public law will result in courts enforcing the substance of promises made to individuals are overstated, provided always that the scope of public law estoppel is appropriately restricted. A better solution would be for equity to exercise its capacity to construct a remedy which is not at odds with the doctrine of *ultra vires*. As Spigelman CJ has noted, "remedial flexibility is a characteristic of equity jurisprudence".[281]

If the only reason that courts do not currently award compensation in such circumstances were purely for reasons of public policy, this obstacle would not be insuperable. After all, strong objections to the extension of equitable estoppel on policy grounds have been overcome. Prior to the decision of the High Court of Australia in *Waltons v Maher*,[282] there were grave concerns that the extension of the doctrine of estoppel to enforce promises as to future conduct outside the realm of contract would have a severely deleterious effect on the contractual doctrine of consideration.[283] More than 20 years after that landmark decision, the law relating to consideration remains recognisable. It has survived the capacity of equity to intervene and enforce[284] a promise upon which another party has relied to his or her detriment.

279 South African courts had also indicated that they were prepared to depart from the traditional position preventing estoppel of public authorities where that would impede the performance of a statutory duty. In *Peter Klein Investments*, Boruchowitz J held, for reasons based on the South African *Constitution*, "that the right to reasonable administrative action, including proportionality, and the culture of justification of which it formed part, would not countenance immunity from estoppel where this would be of minimal benefit to the plaintiff and cause great hardship and injustice to the defendant": C Hoexter, *Administrative Law in SA* (2007) 41. Boruchowitz J concluded that s 39(2) of the *Constitution* required "that the Court should balance the individual and public interests at stake and decide on that basis whether the operation of estoppel should be allowed in a specific case": *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W), [40] ('*Peter Klein Investments*'). However, this position was subsequently abandoned by the Supreme Court of Appeal, which returned to the established principle that "[e]stoppel cannot … be used in such a way as to give effect to what is not permitted or recognised by law. Invalidity must therefore follow uniformly as the consequence. That consequence cannot vary from case to case.": *RPM Bricks* 2008 (3) SA 1 (SCA), [23] (Ponnan JA).

280 NB: this was held not to be so in several of the key cases on this issue. See eg *Kurtovic* (1990) 21 FCR 193, 217-18 (Gummow J); *Reprotech* [2003] 1 WLR 348, 66 [32] (Lord Hoffmann).

281 *Harris v Digital Pulse* (2003) 56 NSWLR 298, 304 [4] (NSW Court of Appeal).

282 *Waltons v Maher* (1988) 164 CLR 387.

283 A Mason, 'Estoppel in Public Law' in M Groves (ed), *Law and Government in Australia* (2005) 160, 162.

284 NB: In *Waltons*, substantial damages were ordered in lieu of an order for specific performance, which was held to be inappropriate in the circumstances.

The Supreme Court in each Australian jurisdiction has the power, granted by statute in terms derived from *Lord Cairns' Act*,[285] to award equitable damages where it would otherwise have had power to grant an injunction.[286] The purpose of *Lord Cairns' Act*, passed in 1858, was stated by Lindley LJ to be "to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act".[287] Additionally, there is an inherent[288] power in the Supreme Courts of each Australian jurisdiction to award equitable compensation, for the breach of a fiduciary duty[289] or other breach of an equitable duty. The difference between damages and equitable compensation has recently been summarised by Owen J, in the course of his Honour's extensive judgment in *Bell Group v Westpac*:[290]

> In their submissions, the plaintiffs use the term "damages" and "equitable damages" interchangeably and in the alternative to equitable compensation. The nomenclature here is notoriously difficult. 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.

In summary, equitable damages are able to be awarded due to a statutory grant of power to courts with equitable jurisdiction whereas equitable compensation can be granted in the inherent jurisdiction of such courts; equitable compensation is to breaches of equitable duty what damages are to breaches of common law duties.[291]

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285 *Chancery Amendment Act* (UK) (21 & 22 Vict c 27) s 2. See RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 842-3. The current scope of this statutory power of the Supreme Court is stated as follows by *Supreme Court Act 1970* (NSW) s 68.

> "Where the Court has power:
>
> (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or
>
> (b) to order the specific performance of any covenant, contract or agreement,
>
> the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance."

See also *Supreme Court Act 1986* (Vic) s 38; *Equity Act 1867* (Qld) s 62.

286 See *Wentworth v Woollahra* (1982) 149 CLR 672, 682 (Gibbs CJ, Mason, Murphy and Brennan JJ); cf PD Finn, 'A Road Not Taken: the Boyce Plaintiff and Lord Cairns' Act (Part I)' (1983) 57 *Australian Law Journal* 493; PD Finn, 'A Road Not Taken: the Boyce Plaintiff and Lord Cairns' Act (Part II)' (1983) 57 *Australian Law Journal* 571.

287 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 316 ('*London Electric Lighting*').

288 See L Aitken, 'Developments in Equitable Compensation: Opportunity or Danger?' (1993) 67 *Australian Law Journal* 596, 596 (n 3). Note that the learned authors of *Meagher, Gummow & Lehane* use the term damages to refer to both the statutory remedy and the remedy available to a court in its exclusive equitable jurisdiction. They state that "there was no need to provide in legislation such as *Lord Cairns' Act* … for 'damages' for breach of purely equitable obligations; there was an inherent power to order restitution in respect of violation of equitable rights.": RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 833. See also CEF Rickett and T Gardner, 'Compensating for Loss in Equity' (1994) 24 *Vic U of W LR* 19, 20-5.

289 See *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, 426-7 (McHugh J) ('*Bennett's Case*'). See also the cases noted in RI Barrett, 'Equitable compensation' (2000) 74 *Australian Law Journal* 228. Additionally, Vann points out that "literature in the field has differentiated between equitable compensation that is *reparation for loss* and equitable compensation that is in *substitution of performance*": VJ Vann, 'Equity and Proportionate Liability' (2007) 1 *Journal of Equity* 199, 212 (original emphasis). The principles involved when a court awards compensation for the breach of a fiduciary duty causing loss are well known but will not be addressed here, since they will not generally apply to departures from representations contained in soft law.

290 *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No9)* (2008) 225 FLR 1, 835 [9698] ('*Bell (No9)*').

291 *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, 478 (Jules Sher QC) ('*Disco Mix*'). Generally, equitable damages will not lie as a remedy to fulfill the equity in circumstances where the conditions exist to raise an estoppel but the public status of the party estopped prevent the estoppel from being enforced. Furthermore, the jurisdiction of the court will not be activated, since neither injunctive relief nor an order for specific performance would be available against the public authority, as required by the statute; see eg *Supreme Court Act 1970* (NSW) s 68. This provision was discussed in *Wentworth v Woollahra* (1982) 149 CLR 672, 676 (Gibbs CJ, Mason, Murphy & Brennan JJ).

The compensatory function of equitable compensation may be understood broadly[292] and it goes beyond the well-understood circumstances where "property held in a fiduciary capacity is misapplied".[293] In his celebrated speech in *Nocton v Lord Ashburton*,[294] Lord Haldane stated that damages are available at common law where loss is consequent on an honest but reckless statement falling short of fraud,[295] in the context of a "special relationship" which is not of a fiduciary character.[296] His Lordship's statement was subsequently used as authority for the recognition of liability for negligent misstatement in *Hedley Byrne*.[297] On the facts of *Nocton's Case* itself, the appellant solicitor was held by the House of Lords not to have been liable to his client, the respondent, in the tort of deceit and therefore damages were not payable at common law. The appellant was, however, liable for breach of a fiduciary duty; this was a matter falling within the exclusive jurisdiction of equity.[298] The learned authors of the 4th edition of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* cite the judgment of Dixon AJ in *McKenzie v McDonald*[299] as stating that *Nocton v Lord Ashburton* stood for the proposition that the equitable jurisdiction to remedy breaches of fiduciary duty extended to making an order for compensation in favour of the party whose confidence had been abused.[300] Such an order would also be available in respect of a "special relationship" which is not fiduciary in nature. In short, "equitable compensation can be awarded for a wide variety of infractions of fiduciary and other 'equitable' duties".[301]

As I have discussed above, the equity created by an estoppel need not be fulfilled by holding the representor to the substance of his or her representation. Rather, a court must award the 'minimum equity' required to do justice in the circumstances, but no more.[302] In *Verwayen*, Dawson J described the legal principle as follows:[303]

> The result of an estoppel at common law was, viewed as a separate and distinct doctrine from equitable estoppel, to preclude the party estopped from denying the assumption upon which the

292 "In my view it is quite fallacious to seek to build an argument upon the premise that equitable compensation is compensatory. That blinding glimpse of the obvious tells you nothing about areas where equity goes further, for example, by granting an injunction, specific performance or account of profits.": *Harris v Digital Pulse* (2003) 56 NSWLR 298, 323 [120] (Mason P). The authors of *Meagher, Gummow & Lehane* agree that "there is much to be said for the view that the primary purpose of equitable damages [sic] is compensatory": RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 837.

293 IE Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *MULR* 349, 349. Note also the comment of Mason P that it is "fallacious to move from a premise such as 'equitable compensation is compensatory' as if that told you something about the limits of the monetary relief capable of being awarded in equity.": *Harris v Digital Pulse* (2003) 56 NSWLR 298, 324 (NSW Court of Appeal).

294 *Derry v Peek* (1889) 14 App Cas 337.

295 Cf ibid. See F Pollock, 'Nocton v. Lord Ashburton' (1915) 31 *Law Quarterly Review* 93.

296 *Nocton's Case* [1914] AC 932; [1914-15] All ER Rep 45, 53.

297 See *Hedley Byrne* [1964] AC 465, 484-5 (Lord Reid); 500-2 (Lord Morris of Borth-y-Gest); 508-9 (Lord Hodson); 519 (Lord Devlin); 533 (Lord Pearce). Note the criticism of this reasoning at RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 58-9.

298 RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 831-2. Mason P commented on this issue that "Viscount Haldane's speech in *Nocton v Lord Ashburton* exposed the error of thinking that equity lacked power to award compensation for infringement of a right which was recognised exclusively in Chancery in the pre-*Judicature Act* era.": *Harris v Digital Pulse* (2003) 56 NSWLR 298, 323 (NSW Court of Appeal).

299 *McKenzie v McDonald* [1927] VLR 134, 146 (Dixon AJ) (Dixon AJ, '*McKenzie v McDonald*').

300 RP Meagher et al, *Meagher, Gummow and Lehane* (4th ed, 2002) 833.

301 *Harris v Digital Pulse* (2003) 56 NSWLR 298, 323 [124] (Mason P).

302 *Verwayen* (1990) 170 CLR 394, 412 (Mason CJ).

303 *Verwayen* (1990) 170 CLR 394, 454 (Dawson J) (some citations omitted; emphasis added). His Honour also stressed the discretionary nature of equitable relief and his comments in this regard were quoted with evident approval in *Giumelli* (1999) 196 CLR 101, 120-1 (Gleeson CJ, McHugh, Gummow & Callinan JJ).

> other party acted to his detriment. It followed that the party who acted to his detriment was, in effect, given the benefit of the assumption. It was all or nothing. By contrast, … an estoppel in equity may not entitle the party raising it to the full benefit of the assumption upon which he relied. The equity is said "not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon" …[304] To avoid the detriment may, however, require that the party estopped make good the assumption … But, depending upon the circumstances of the case, *the relief required may be considerably less.*

While the decision of the High Court in *Verwayen* is often criticised for its lack of a *ratio decidendi*, each member of the Court noted the flexibility with which the equity created by an equitable estoppel was able to be fulfilled as a result of the wide discretion[305] possessed by courts of equitable jurisdiction as to the grant of remedies.[306] Of the available equitable remedies, Deane J noted specifically that in some circumstances "the appropriate order may be an order for compensatory damages".[307] I submit that one set of circumstances in which compensation will be an appropriate remedy is where the representor is a public authority and it is inappropriate as a matter of public law to give substantive effect to the representation in question.

In *Crabb v Arun District Council*, Scarman LJ stated[308] that courts "have to determine not only the extent of the equity, but also the conditions necessary to satisfy it".[309] This 'minimum equity' approach to relief was applied by some members of the High Court in *Waltons* but received detailed consideration only from Brennan J.[310] His Honour 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,[311] although Robertson noted that, in the years immediately following *Verwayen*, courts almost universally satisfied equitable estoppels by granting expectation-based relief.[312]

Two points become important here. The first relates to the quantification of the detriment which a plaintiff has suffered. The major options appear to be to quantify a plaintiff's wasted expense on one

304 *Waltons v Maher* (1988) 164 CLR 387, 423 (Brennan J).

305 A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after Verwayen' (1996) 20 *MULR* 805, 807.

306 *Verwayen* (1990) 170 CLR 394, 411-12 (Mason CJ); 429-30 (Brennan J); 439, 442 (Deane J); 454 (Dawson J); 475-6 (Toohey J); 487 (Gaudron J); 501 (McHugh J).

307 *Verwayen* (1990) 170 CLR 394, 442 (Deane J).

308 The reasoning of Scarman LJ was subsequently approved by a majority of the High Court in *Waltons v Maher* (1988) 164 CLR 387, 404 (Mason CJ & Wilson J); 425 (Brennan J); 460 (Gaudron J). See also A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after Verwayen' (1996) 20 *MULR* 805, 820.

309 *Crabb v Arun District Council* [1976] Ch 179; [1975] 3 All ER 865, 880 ('*Crabb v Arun*').

310 A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after Verwayen' (1996) 20 *MULR* 805, 821.

311 "Equitable estoppel … does not operate by establishing an assumed state of affairs. Unlike an estoppel *in pais*, an equitable estoppel is a source of legal obligation. It is not enforceable against the party estopped because a cause of action or ground of defence would arise on an assumed state of affairs; it is the *source of a legal obligation arising on an actual state of affairs.* An equitable estoppel is binding in conscience on the party estopped, and it is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the assumption or expectation which he has been induced to adopt. Perhaps equitable estoppel is more accurately described as an equity created by estoppel.": *Waltons v Maher* (1988) 164 CLR 387, 416 (Brennan J) (emphasis added).

312 A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after Verwayen' (1996) 20 *MULR* 805, 829.

hand or to quantify a plaintiff's lost expectancy on the other. I have commented elsewhere[313] on the quantification of loss in the context of statutory compensation schemes but express no opinion as to how the High Court might choose to settle the question of how equitable relief is to be calculated.

While the quantification of relief is important, it is also necessary to recognise a second point, being that the statement of principle articulated by Brennan J in *Waltons* is consistent with equitable compensation being available as a remedy to a person who has relied to his or her detriment on a soft law instrument issued by a public authority and amounting to a representation. In such circumstances, the remedy of giving effect to the representation, reliance on which has created the equitable estoppel, will generally be unavailable against the public authority for the reasons surveyed above. However, the minimum equity required to do justice to the reliant individual need not be the substantive fulfillment of the representation.[314]

Vann summarised the issue in the following terms:[315]

> [T]he vast majority of plaintiffs who allege estoppel are seeking to have the defendant's representation to them fulfilled. Frequently, the order finally made reflects this. Sometimes though, it is not possible for the estopped party to perform the promise. This might be because the subject matter of the promise has disappeared, or because the court has taken into account interests of third parties who might be affected by an order specifically performing the promise. In these cases, the court has little alternative but to order the payment of a monetary sum, in order to relieve the detriment suffered by the plaintiff.

I submit that there is no logical difference between a representation which cannot be fulfilled for the reasons suggested by Vann in the quotation above and a soft law instrument whose substance cannot be fulfilled because to do so would require an *ultra vires* act or fetter on the future exercise of a discretion. The equitable estoppel which has been created by the representation remains. The public identity of the representor does not provide any *prima facie* basis for the denial of compensation to fulfill the 'minimum equity'.[316]

Sally cannot obtain a substantive remedy against the Council once the new SEPP has come into effect because to approve Sally's development proposal would be *ultra vires*. An estoppel has nonetheless been raised in favour of Sally by the Council's unconscientious act of inducing her to believe that the terms of the Guidelines would be applied. Furthermore, she has suffered monetary loss as a result of relying on the Guidelines being applied by the Council: she has demolished a house valued at $100,000 and incurred liabilities by hiring contractors. If the Council were a private party, a court would either enforce the estoppel against it or award a lesser equity, such as equitable compensation. Although the former remedy is unavailable where it would cause a public authority to

313 See chapter 4.A.IV above.

314 Cf *Verwayen* (1990) 170 CLR 394, 443 (Deane J).

315 VJ Vann, 'Equity and Proportionate Liability' (2007) 1 *JEq* 199, 218 (citations omitted). NB: this quotation does not refer specifically to the situation in which the representor is a public authority.

316 There are other issues in relation to making out that equitable compensation is payable, notably the requirements of establishing causation and remoteness; see M O'Meara, 'Causation, Remoteness and Equitable Compensation' (2005) 26 *Australian Bar Review* 51. These issues will not be addressed in this thesis.

act *ultra vires*, a court should nonetheless award equitable compensation in the amount of Sally's loss.

Conclusion

This Chapter demonstrates that, although private law remedies are in some circumstances available for the failure of public authorities to adhere to their own soft law, the examples where this is so are severely limited. On the whole, the existence of such remedies is inadequate protection for individuals who have acted on the faith of soft law. A statutory remedy will likely be required in order to address a problem like reliance on soft law, given that it does not conform to any existing body of legal or equitable doctrine.

Chapter Six

Non-judicial Remedies

Introduction

It is no great leap, in light of the previous chapters of this thesis, 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 potential judicial remedies described in the chapters above amount to work-arounds[1] rather than affirmative 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, some remedies are granted by consent rather than as of right. I propose to discuss two such remedies in this chapter: investigation by the Ombudsman,[2] who may then recommend that a substantive remedy be granted in the form of a payment of *ex gratia* compensation by the government. Indeed, the two will vey frequently be linked to one another.

A: The Ombudsman

The office of the Commonwealth Ombudsman operates as a mechanism for holding executive decision makers accountable. It does this under statute through two different but complementary roles, the first a complaint-handling function and the second an own-motion investigatory function. There are numerous 'independent oversight agencies' which now operate according to this model.[3]

This section will examine how the Ombudsman's accountability role may be of use to a person who has suffered loss due to a public authority's departure from its own soft law.

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1 This is in effect a reversal of the circumstances described in M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.730].

2 The word "ombudsman" is Scandinavian in origin and is gender neutral in those languages, meaning 'representative', 'agent' or 'commissioner'; see L Brown (ed), *The New Shorter Oxford English Dictionary* (4th ed, Oxford University Press, Oxford, 1993) 1993-4. The French use the term 'mediator', with the sense that the office aims for negotiated solutions: C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 529. The office of Ombudsman, which originated in Sweden, took its name from the Scandinavian word. Common usage in both Australia and the UK is to employ this term regardless of the gender of the office-holder and to render the plural of ombudsman as "ombudsmen"; see A Stuhmcke, 'Ombudsmen and Integrity Review' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, Oxford, 2008) 349, 349 (n 1); T Buck, R Kirkham and B Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, Farnham, 2011) 3 (n 1); P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (2008) 851-2. This thesis will adhere to that custom, not least because the official description of ombudsmen in legislation and formal titles is usually still rendered as "Ombudsman", although some perceive a "gender-specific connotation": R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 204. An increasing number of people have taken to using the term "ombudspersons" and the *OED* recognises the word "ombudswoman", although both are technically redundant on the traditional translation of 'ombudsman'; cf Harlow and Rawlings' translation of the word as "complaints man": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 529.

3 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 435.

I: The dual roles and Constitutional location of the Ombudsman

The Commonwealth Ombudsman is part of the Executive branch of government in Australia but it is more or less the standard practice in Australia to note that the office of the Ombudsman is "alien" to the established divisions under the separation of powers doctrine,[4] and is as a result some sort of "Constitutional misfit".[5] In other words, the Ombudsman is part of the Executive branch because the Constitution was not drafted to include a fourth branch which would have served as a more appropriate location for the Ombudsman.[6] As one of Australia's "non-judicial accountability bodies",[7] the Ombudsman is frequently described as an element of a notional fourth or "integrity" branch of government.[8]

What is meant by the description 'integrity branch' varies. While the Swedish origins of the institution are often emphasised,[9] Spigelman CJ has noted that, as a genus, guardians of integrity in government have a strong resemblance to what Western scholars generally describe – inaccurately – as the "censorial" or "supervising" branch of the Chinese civil service,[10] at least by analogy.[11] Spigelman CJ did not regard the Ombudsman as a central feature of the integrity branch,[12] in as much as the office's role was one of complaint handling:[13]

> 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.

4 See eg A Stuhmcke, 'Changing Relations between Government and Citizen: Administrative Law and the Work of the Australian Commonwealth Ombudsman' (2008) 67 *Australian Journal of Public Administration* 321, 322.

5 See R Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma' in C Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (AIAL, Canberra, 2000) 188; D Pearce, 'The Commonwealth Ombudsman: Right Office in the Wrong Place' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark* (1998) 54, 72; T Buck et al, *Ombudsman Enterprise* (2011) 15.

6 In the USA, the 'fourth branch' refers to agencies; see eg SA Shapiro and RE Levy, 'Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions' (1987) 36 *Duke Law Journal* 387. It follows that, if the USA were to have an ombudsman, that office would be part of a nominal *fifth* branch.

7 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 423. Buck et al described the Ombudsman as "one of the essential institutions that a constitution should possess": T Buck et al, *Ombudsman Enterprise* (2011) 3. As to the Ombudsman's Constitutional position in the Australian government framework, see R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 220-3.

8 JJ Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724, 729; JJ 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 A Stuhmcke, 'Ombudsmen and Integrity Review' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 349, 349 (n 6); cf WMC Gummow AC, 'The 2012 National Lecture on Administrative Law: A Fourth Branch of Government?' (2012) 70 *AIAL Forum* 19. Aronson and Groves saw integrity more as a "theme" than as a single system: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.90].

9 See R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 202; T Buck et al, *Ombudsman Enterprise* (2011) 3.

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

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

12 Cf A Stuhmcke, 'Ombudsmen and Integrity Review' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 349, 354. Whether or not the Ombudsman is "central" to integrity review, it is certainly "a central component of administrative justice": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 480. As to the 'integrity branch of government' generally, see AJ Brown, 'Putting Administrative Law Back into Integrity and Putting the Integrity Back into Administrative Law' (2007) 53 *AIAL Forum* 32; D Solomon, 'What is the Integrity Branch?' (2012) 70 *AIAL Forum* 26; R Creyke, 'An 'Integrity' Branch' (2012) 70 *AIAL Forum* 33; J Wenta, 'The Integrity Branch of Government and the Separation of Judicial Power' (2012) 70 *AIAL Forum* 42; J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423.

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

His Honour saw the integrity function as being exercised in the main through judicial review (which is to say through the Constitutionally recognised third branch),[14] which has the function of ensuring the legality of the actions of public authorities.[15] By contrast, Professor Stuhmcke has argued that:[16]

> [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 typical of ombudsmen from an active "system-fixing" role.[17] While the first of these roles is the traditional focus of the Ombudsman's office, the latter is assuming an ever greater importance,[18] 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.[19] This active investigative function conforms more fully to the notion of integrity review.[20]

The Ombudsman's system-fixing role is relevant to an analysis of soft law because soft law remains a legally under-theorised 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,[21] bear a responsibility for making sure that the steps required "to ensure that administrative law values are upheld" are properly understood.[22] In helping to define the norms in accordance with which activity is regulated, the Ombudsman fills a protective, rather than a remedial, role.

The real issue with the fact that the Ombudsman is positioned outside the tripartite Constitutional separation of powers model is that it lacks the determinative power which is possessed by the judicial branch of government. As a result, the Ombudsman's office cannot impose binding declarations of

14 NB however the view considered below that the Ombudsman is essential to upholding the rule of law.

15 Aronson and Groves commented to the contrary that "fourth branch institutions have a daily impact far beyond that of the courts": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.90].

16 A Stuhmcke, 'Ombudsmen and Integrity Review' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 349, 353-4.

17 This latter role is provided for by the *Ombudsman Act 1976* (Cth) Pt II Div 2.

18 J McMillan, 'Future Directions 2009 - The Ombudsman' (2010) 63 *AIAL Forum* 13, 14-15; A Stuhmcke, 'Ombudsmen and Integrity Review' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 349, 365. The Commonwealth Ombudsman in fact finalised a greater number of complaints in 2011/12 than in the previous year: Commonwealth Ombudsman, *Annual Report 2011-12*, (2012) 41. However, the Commonwealth Ombudsman also released five reports in 2011/12 and made a further 13 submissions to Parliamentary Committees or government inquiries: Commonwealth Ombudsman, *Annual Report 2011-12*, (2012) 98-102. The latter activity is expressly for the purpose of promoting "good public administration".

19 R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 209. The Commonwealth Ombudsman has an unreviewable discretion to refuse to investigate a complaint: *Ombudsman Act 1976* (Cth) s 6. In 2008, the Commonwealth Ombudsman's office investigated only one in every nine complaints: J McMillan, 'Future Directions' (2010) 63 *AIAL Forum* 13, 14.

20 A Stuhmcke, 'Ombudsmen and Integrity Review' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 349, 355.

21 An example is the Administrative Review Council, which is established under the *AAT Act 1975* (Cth). The ARC has recently considered soft law issues in Administrative Review Council, *Complex Regulation Report* (2008).

22 J McMillan, 'Future Directions' (2010) 63 *AIAL Forum* 13, 18.

right on the public authorities which it investigates.[23] However, as I will discuss below, ombudsmen are no less effective for their incapacity to exercise determinative powers and, in fact, "have a potential for *systemic* impact beyond any court's capacity".[24]

Lawyers, however, tend to examine issues through a formal lens. When that lens is the Constitution, the consequence is a common perception amongst lawyers that the Ombudsman is a "toothless tiger".[25] This allegation lacks imagination, since Ombudsmen usually find ways to be very effective even though they lack 'teeth' in the sense that courts and tribunals possess them – there is still much to fear from a tiger before one confronts its teeth. Perhaps the effectiveness of the 'ombudsman model' is precisely *because* of this lack of teeth, and the consequent necessity to find other methods of getting results. A body with the metaphorical teeth of a tiger may become complacent in the efficacy of those teeth; an Ombudsman does not have this luxury but finds ways around his or her dental deficiencies such that s/he may in fact possess "some advantages over courts in securing the rule of law".[26]

Buck and his co-authors regard as "uncontentious" the proposition that "the ombudsman is now an established feature not just of systems of administrative and civil justice, *but also of the constitution*", subject only to the difficulty of "establishing the full strength of the ombudsman's constitutional worth".[27] They appear to contend that "integrity" is simply another way to describe the broad rule of law values which underpin the constitution and, on that basis, because the Ombudsman embodies those values, the office is thereby "constitutional".[28] In the *Communist Party Case*, Dixon J made the point that:[29]

> government [is] under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

However, Dixon J did not propose that assumptions such as the rule of law be given immediate normative operation in the manner of the separation of powers and other traditional conceptions which

23 See the High Court's decision with regard to the analogous position of the Human Rights and Equal Opportunity Commission (HREOC) in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, ('*Brandy v HREOC*').

24 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [1.90] (emphasis added).

25 R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 217. Groves has suggested that this "may illustrate that the culture of the adversary system is not receptive to other forms of dispute resolution": M Groves, 'Ombudsmen's Jurisdiction in Prisons' (2002) 28 *Monash University Law Review* 181, 201. See also D Pearce, 'Right Office in the Wrong Place' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law* (1998) 54, 65. The JUSTICE – All Souls Committee made a plaintive claim that "members of the legal profession have a special responsibility to be well informed about the assistance which an ombudsman may be able to give to their clients", although it is open to question a quarter of a century later to what extent lawyers act upon that responsibility: JUSTICE - All Souls, *Administrative Justice* (SP Neill QC (ed), 1988) 137.

26 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 435 (and see references at n 59). In response to the Law Commission's *Administrative Redress* Consultation Paper, "Lord Justice Sullivan agreed with the underlying premise that 'a significant proportion of certain types of claim in the Administrative Court would be equally well, if not better, dealt with by ombudsmen'": Law Commission, *Administrative Redress* (2010), 55 [5.16].

27 T Buck et al, *Ombudsman Enterprise* (2011) 4 (emphasis added).

28 T Buck et al, *Ombudsman Enterprise* (2011) 24.

29 *The Communist Party Case* (1951) 83 CLR 1, 193 (Dixon J).

are given effect by the text of the Constitution.[30] Rather, he appears to have held that assumptions underlying the Constitution, such as the rule of law, have a role limited to informing Constitutional interpretation. Nonetheless, Buck and his co-authors argue persuasively (and specifically in regard to jurisdictions without a written constitution) that the Ombudsman's role must be viewed in constitutional terms simply because of the objective importance of its capacity to review proper conduct as a supplement to the more limited supervisory jurisdiction of the courts, which looks generally only at whether conduct is lawful.[31] To the extent that the Ombudsman can be described as having constitutional status,[32] this is mainly due to acceptance of the Ombudsman's functions and role advancing the aims of the rule of law rather than because the Ombudsman's decisions and recommendations carry immediate legal normative force.[33] That is not, after all, the model for the Ombudsman's office, which tends to achieve much without having determinative powers *because* rather than in spite of their absence.

In addition to being unenforceable, however, recommendations made by the Ombudsmen are also most unlikely to be the subject of judicial review proceedings in Australia.[34] This is due in part to the nature of the Ombudsman's function but also in part to the limited range of matters over which judicial review's supervisory jurisdiction extends in practice[35] and the limited range of judicial review's remedial options.[36] By contrast, Harlow and Rawlings have noted a "creeping spread of judicial review" over ombudsmen and like bodies in the UK, usually on the ground of procedural fairness having been denied, and contrary to the common assumption "that ombudsman systems [are] not amenable to judicial review".[37] The result of this approach to judicial review of ombudsmen has been that recommendations of the Parliamentary Ombudsman in the UK have become presumptively binding[38] in a way that those of the Commonwealth Ombudsman in Australia are not. The most significant case in the evolution of this judicial approach is *Bradley*,[39] in which for the first time the proceedings were not by way of a *challenge* to a discretionary choice made by the PCA but "effectively asking for her findings to be enforced".[40] In a unanimous decision,[41] the Court of Appeal

30 The strict application of the separation of powers doctrine to the judiciary in Australia is oft noted; see eg J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 424-7.

31 T Buck et al, *Ombudsman Enterprise* (2011) 24-5.

32 The Victorian Ombudsman has Constitutional status under the *Constitution Act 1975* (Vic) s 94E. However, the protections that this status provides appear to be minimal; the Ombudsman's designation as "an independent officer of the Parliament" and the conferral of "complete discretion in the performance or exercise of his or her functions or powers" are subject to legislative amendment. Furthermore, to say that a body is 'independent' says little about *from what* it is supposed to be independent, which is not the same as being 'impartial': C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 531.

33 Decisions of ombudsmen do, of course, carry non-legal normative force.

34 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 427.

35 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 427-8.

36 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 436. See also Chapter 4 above.

37 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 482.

38 In this respect, they are somewhat analogous to the compensation scheme's non-statutory rule book in *ex parte Lain* [1967] QB 864. Aronson and Groves noted that, although "the rules were not binding, … the government would in fact honour their application by the board": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.250].

39 *R (Bradley) v Secretary of State for Work and Pensions* [2009] 1 QB 114, (Wall LJ, Blackburne J and Sir John Chadwick, '*Bradley*'). Harlow and Rawlings have stated that *Bradley* has "changed the ballgame": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 564.

40 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 564.

41 The judgment of Sir John Chadwick was agreed with in full by the other members of the court.

held that the defendant Secretary of State could not reject the PCA's finding that government maladministration had been the cause of certain pension schemes being underfunded if s/he lacked "cogent reasons" to do so.[42] This reasoning was based on the close relationship, enshrined in statute, between the PCA and the House of Commons.[43]

The result of *Bradley* is that administrative decision makers are now open to challenge if they reject the findings of ombudsmen[44] unless they are able to justify such a decision "cogently". This legal position is not universally popular in the UK, and has been described as a rare example of a legal development that nobody wants.[45] Some, however, are very pleased with the result in *Bradley*: Buck and his co-authors recorded their view that it is most significant for providing "further evidence of the enhanced status of the modern ombudsman enterprise within the constitution"[46] and that the "rebalancing of the constitutional balance of power" is "entirely appropriate". This conclusion, of course, has no application in Australia, but even leaving aside Australia's strict approach to the separation of powers, it is a conclusion which is hard to support on a number of bases. First, far from being a cause for celebration, the conclusion that "public bodies cannot simply choose to agree to disagree with the ombudsman"[47] begs the question *why* the elected and politically responsible Work and Pensions Secretary ought not to be allowed to say "I have read the PCA's report; I disagree; and I will proceed as follows …". Such a course of action would leave the Secretary of State exposed to questions as to why s/he had rejected the PCA's findings but the consequences of such a course of action should be decided in the political realm, rather than in the courts based upon a judicial determination of the cogency of the Secretary of State's reasons. Any contention that this ought not to be the case must be justified. Second, leaving aside the questions of whether ombudsmen can or should be invested with power that they can use to bind elected officials, it is likely that ombudsmen would not readily trade their influence and the accumulated goodwill upon which it relies for mere constitutional recognition. Ombudsmen are effective within the current understanding of their powers; the impact of their findings does not need to be strengthened. Third, giving ombudsmen determinative powers and the attendant constitutional status makes nothing so likely as that they will spend a great deal more of their time and resources[48] defending judicial review actions. Buck and his co-authors appear to be well aware of the opposition to *Bradley* and it is fair to say that they occupy a

42 The reasoning of the trial judge, Bean J, was somewhat different to that of the Court of Appeal. His Honour would have held that the Work and Pensions Secretary had been *Wednesbury* unreasonable: *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC (Admin) 242 [66]. An Australian court would not even have applied the high threshold *Wednesbury* standard as it is understood there in circumstances where there is at best a convention the findings of ombudsmen are accepted but they have no binding force and a Minister is under no legal obligation to accept them. Indeed, Bean J slipped easily from a finding that the PCA's findings were "reasonably open" to the finding that no reasonable Secretary of State could rationally disagree with them.

43 See Law Commission, *Administrative Redress* (2010), 65 [5.76]-[5.78].

44 Harlow and Rawlings have pointed out that it is conventional to accept the findings of ombudsmen and, where the convention fails, "parliamentary pressure usually prevails": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 564.

45 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 564-5. The unconcealed distress of the PCA that her report had been "misrepresented" was recorded by Wall LJ in *Bradley* [2009] 1 QB 114, 203.

46 T Buck et al, *Ombudsman Enterprise* (2011) 216.

47 ibid.

48 This may be where the real battle would be fought, if it came to that. Constitutional recognition of ombudsmen would be entirely counter-productive if it were to lead to increased pressure on their time and budgets.

space towards the end of the spectrum of academic responses to the Court of Appeal's decision. I suspect that the concerned statement of Harlow and Rawlings that the courts have been taking an "activist line" is closer to the middle.[49]

This is all to the point that, in both Australia and, at least until the decision in *Bradley*,[50] the UK, the constitutional status of the Ombudsman has largely been nothing more than a point of academic interest.[51] Options for holding public bodies accountable which fall outside the traditional scope of judicial review are increasing,[52] rather than falling prey to legislators and members of the executive who would take advantage of their lack of formal constitutional status to abolish them. Harlow and Rawlings have described as "Ombudsmania" the "rapid spread of the ombudsman technique" of complaints-handling[53] which has resulted in a variety of ombudsmen created either under statute or in certain industries by analogy to public ombudsmen in both England[54] and Australia.[55] The inescapable conclusion seems to be that the Ombudsman's somewhat precarious constitutional position neither prevents the office from being effective nor poses any imminent threat to its survival.

II: The Ombudsman and the rule of law

The question of whether ombudsmen are 'effective' usually carries the unspoken subtext that effectiveness is, in their case, measured against the fact that they lack determinative powers. I have sought to point out above that such an approach is driven by constitutionalism of the most formal, 'capital-C' variety. Whether or not ombudsmen are able to be located within a constitutional framework, however, they are clearly part of the machinery of the rule of law.

Professor John McMillan served as Commonwealth Ombudsman between 2003 and 2010, after which he took up the newly created position of Australian Information Commissioner. He has argued over the course of several years that the Ombudsman ought not to be forgotten in considerations of how

49 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 565. Australia has a significant and generally "acrimonious" recent history with accusations of judicial activism; see eg JD Heydon, 'Judicial Activism' (2003) XLVII *Quadrant* 9; M Aronson, 'Process, Quality, and Variable Standards' in D Dyzenhaus et al (eds), *A Simple Common Lawyer* (2009) 5, 25-8. Professors Lee and Campbell would sooner have categorised many of the flashpoint moments as examples of "judicial adventurism" rather than activism *per se*: HP Lee and E Campbell, *Australian Judiciary* (2nd ed, 2012) 2. Sackville J thought "judicial activism" to be no more than a "slogan", and generally an unhelpful one, usually employed pejoratively and behind the assumptions of which one must look for the true meaning of what is being alleged: R Sackville, 'Activism' in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 6. It is unlikely that Harlow and Rawlings intended to buy into this unpleasant subtext by employing the term "activist".

50 Predominantly on the basis of the decision in *Bradley*, the Law Commission stated that "recent constitutional developments mean that the administrative landscape in relation to ombudsmen is currently in a state of flux" and declined to make recommendations about ombudsmen until a further process of review and consultation had been undertaken: Law Commission, *Administrative Redress* (2010), 70 [6.21].

51 Cf Snell's concern that we may be obtaining diminishing returns from the Ombudsman by treating the office as "an institutional treasure rather than a constitutional resource": R Snell, 'Towards an Understanding of a Constitutional Misfit' in C Finn (ed), *Sunrise or Sunset?* (2000) 188, 189. This concern remains, as yet, unfulfilled.

52 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 432-8.

53 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 480. The authors note that the spread of ombudsmen has continued into the private sector. As to the international spread of the Ombudsman institution, see R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 203.

54 See P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (2008) 851.

55 R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 201, 209.

the rule of law is upheld in Australia,[56] although suggestions to the effect that this is a function exclusively exercised by the courts[57] should not be held to amount to a serious contention that the rule of law should itself be defined as being the sole domain of the judiciary. McMillan's logic is sound: to the extent that the rule of law requires that disagreements between government and those governed "can be taken to an external forum for an independent ruling or opinion", it is essential that this function be exercised by tribunals and 'independent oversight agencies' like the Ombudsman since "[i]t is not practical to rely on the judiciary for this purpose in all but a minor fraction of the cases that arise".[58] It is undeniable that tribunals advance the aims of the rule of law; the proposition is also impossible to deny in regard to ombudsmen.

Perceptions that the High Court has suggested that the rule of law is protected *only* by the judicial review provisions in s 75(v) of the *Constitution* are misconceived. Kirby J remarked that s 75(v) was "*the* means by which the rule of law is upheld throughout the Commonwealth"[59] but was speaking specifically about the burden of persuasion lying upon applicants for the Constitutional writs. Similarly, Gaudron J's later comment that s 75(v) "provides *the* mechanism by which the Executive is subjected to the rule of law"[60] was made specifically by way of contrasting it with s 64 which "provides the machinery by which a Minister is accountable to Parliament". The better view of these *dicta* is that they are simply less precise expressions of Gleeson CJ's statement that s 75(v) "secures *a* basic element of the rule of law".[61] It cannot be denied on any sensible understanding of "the rule of law" that statutory measures enacted since federation are capable of upholding it and serve to supplement[62] the role of s 75(v) in this regard.[63] As much is implicit in Callinan J's reference to the protection that we now enjoy from "measures *both curial and otherwise*, unheard of in earlier times", which include *inter alia* "legislation for freedom of information; the expansion of remedies for the review of administrative action; the greater willingness of the courts to accord status to those who seek the intervention of the court in public affairs; [and] recourse to ombudsmen under ombudsmen legislation throughout the country".[64]

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56 He was not alone in this; there have been no fewer than three articles entitled "The Ombudsman and the Rule of Law" published by Ombudsmen in the *AIAL Forum*, including the very first article published in that journal: D Pearce, 'The Ombudsman and the Rule of Law' (1994) 1 *AIAL Forum* 1; J McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1; B Barbour, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 17.

57 See the quotations at the start of J McMillan, 'Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1, 1.

58 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Fed LR* 423, 433.

59 *Re Carmody; ex parte Glennan* (2000) 173 ALR 145, 147 (emphasis added) (Kirby J, '*Re Carmody*').

60 *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 415 (emphasis added) ('*Re Patterson*').

61 *Plaintiff S157* (2003) 211 CLR 476, 482 (emphasis added).

62 This is to say that non-curial accountability mechanisms do not merely mirror judicial review but perform a role that it cannot. Mark Elliott has argued that "an effective accountability system requires a degree of diversity, and accountability to courts should therefore be regarded neither as a panacea nor as a necessarily adequate substitute for other forms of accountability": M Elliott, 'Ombudsmen, Tribunals, Inquiries: Re-Fashioning Accountability Beyond the Courts' in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (2013) (forthcoming).

63 In as much as the inquiry is whether the rule of law is being upheld, it makes no difference that judicial review pursues that end based upon finding illegality or invalidity in the performance of administrative action, whereas non-judicial mechanisms such as the ombudsman focus on whether there has been maladministration. The point is that the aim of upholding the rule of law can be pursued by the appropriate mechanism, whether in court proceedings or not; cf *Fleet Street Casuals Case* [1982] AC 617, 663 (Lord Roskill).

64 *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199, 334 (emphasis added, citations omitted) ('*Lenah Game Meats*').

It may be that talk of the rule of law in regard to the Ombudsman is "invoked for effect as much as for meaning" [65] and that there is no substantive difference to talking about the Ombudsman's accountability functions. Arguments about the Ombudsman's contribution to upholding the rule of law become otiose at this point, since there can be no doubt that the Ombudsman is effective in holding the government to account,[66] both by responding to complaints against it and exercising its own investigatory powers. For reasons which remain unclear, placing the Ombudsman's accountability functions in terms of the rule of law seems to provoke increased responses to the effect that courts are the primary (or sole) upholders of the rule of law. However, if "accountability" refers to governments being required to account to the public on the basis of the rule of law through an external mechanism, it is hard to deny that the Ombudsman does indeed have much to do with upholding the rule of law. The debate at that point is essentially about no more than labels.

III: The Ombudsman's function and remedies

I have discussed above the fact that public sector ombudsmen[67] have no power to *order* remedies because they lack the constitutional capacity to make binding declarations of right. The focus of the Ombudsman is consequently much more practical than that of courts exercising a judicial review function or even merits review tribunals. Within the jurisdictional limits as to subject matter set out in legislation, the Ombudsman has a broad remit to make recommendations which will allow public authorities to "get it right" as a matter of fact,[68] in the sense of delivering fair specific outcomes and better general administration. There are a number of particular issues to note.

Ombudsmen can recommend all sorts of things, including things a court can't order

The practical limitations upon the scope of the Commonwealth Ombudsman's complaint-handling work are well understood. They should not, however, distract attention from the fact that the office investigates many thousands of complaints every year[69] and, for each of these complainants, the Ombudsman endeavours to obtain a suitable remedy. The *Ombudsman Act 1976* (Cth) does not provide much detail about what remedies are within the Ombudsman's purview. Section 8 contains references to the Ombudsman "consulting", "informing" or "bringing information to the attention of" relevant authorities. Section 10(1) contains one of the only hard-edged remedial powers, stating that where the Ombudsman certifies that there has been an "unreasonable delay" in making a decision or exercising a power, the decision maker shall be deemed from the date of the certificate to have refused to act or provide the benefit sought, clearing the way for the matter to brought before a tribunal for decision. The references in the Act add up to a picture in which the Ombudsman's

65 J McMillan, 'Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1, 2.

66 It is perhaps telling that both 'accountability' and the 'rule of law' have been characterised as "protean concepts"; see respectively M Elliott, 'Ombudsmen, Tribunals, Inquiries' in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (2013) (forthcoming); J McMillan, 'Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1, 2.

67 Cf industry Ombudsmen, which have determinative powers but exercise them as a matter of contract: R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 217.

68 See C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 536-7; T Buck et al, *Ombudsman Enterprise* (2011) Ch 5.

69 J McMillan, 'Future Directions' (2010) 63 *AIAL Forum* 13, 14; Commonwealth Ombudsman, *Annual Report 2011-12* (2012), 40-1.

capacity to secure beneficial outcomes is predicated on persuasion and recommendation rather than on the capacity to provide "remedies" as they are usually understood by lawyers.

At least one former Commonwealth Ombudsman does not view the incapacity to provide "traditional remedies"[70] as a problem, since he regards them as:[71]

> 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 to recommend 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 importance and utility where individuals are adversely affected by applications or failures to apply soft law, which also operate outside the scope of legal rights.

Moreover, just as the Ombudsman cannot *enforce* the usual legal remedies, nor is s/he *confined* to them. The Ombudsman is able to recommend relief that would not be within the power of a court to order or which may only be a possible outcome following litigation.[72] The Annual Report of the Commonwealth Ombudsman is replete with examples which illustrate this point.[73] In one instance, Australia Post compensated a man for the value of a parcel which could only be collected with the signature of the addressee or his agent but which had been released to an unknown third party. In another, Australia Post compensated a man for the value of a diamond ring lost in transit to the UK, although the man had used an inappropriate postal service and had subsequently made his claim out of time. The intervention of the Ombudsman was vital in both cases, which, in legal proceedings, may have descended into highly technical legal arguments about bailment and fraud. This would in turn have led to outcomes which would not likely have been satisfactory to either party because litigation of any kind is lengthy and expensive, both financially[74] and emotionally,[75] regardless of whether you 'win'. As it happened, the Ombudsman's investigations reveled that the man in the first matter could not possibly have signed for the parcel, leading to the inevitable conclusion that the post office staff had released it in error, and that the man in the second matter had been actively misled by poor advice from Australia Post employees on at least two occasions, leading directly to the choice he

70 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: J McMillan, 'Future Directions' (2010) 63 *AIAL Forum* 13, 17.

71 ibid. Groves, too, doubted that having determinative powers would improve the effectiveness of the Ombudsman and suggested that they would cause the Ombudsman's office to foreshorten its investigative role in many instances: M Groves, 'Ombudsmen's Jurisdiction in Prisons' (2002) 28 *Monash ULR* 181, 202. See also R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 217-8.

72 It is axiomatic amongst those who are professionally involved in litigation that there is no such thing as a matter which either party can be guaranteed to win. Litigation is of its very nature an activity filled with doubt, one of the reasons why it is always lengthy and expensive.

73 See Commonwealth Ombudsman, *Annual Report 2011-12* (2012), Ch5.

74 M Legg, 'Changes' in M Legg (ed), *The Future of Dispute Resolution* (Lexisnexis Australia, Chatswood, NSW, 2012) 3, 4.

75 Bathurst CJ has pointed out that "[e]nsuring access to justice means providing flexible options to those who want to avoid confrontation": TF Bathurst, 'The Future of Dispute Resolution: Access to Justice, the Role of the Courts and Internationalisation' in M Legg (ed), *The Future of Dispute Resolution* (Lexisnexis Australia, Chatswood, NSW, 2012) 15, 17.

made about posting the ring and the lateness of his claim. In both cases, Australia Post paid compensation, a remedy which is (as we have seen in chapter 4 above) beyond the scope of courts hearing judicial review matters.

Ombudsmen have the discretion to decline to investigate matters

In Australia,[76] the Commonwealth Ombudsman has a broad discretion to decide not to investigate a complaint, including if s/he forms the opinion that "an investigation … of the action is not warranted having regard to all the circumstances".[77] In practice, this provision provides the Ombudsman with the scope to select which matters s/he will investigate, having regard to the fact that ombudsmen never have a sufficient budget to investigate every complaint that they receive. In general, ombudsmen will refuse to handle an individual complaint until the complainant has examined which other remedial options are reasonably open.[78]

A connected issue is that, in addition to performing a "complaint-handling role", ombudsmen also perform a "system-fixing role" and have recently started to direct more resources to this latter function.[79] This has been explained in a number of ways, although to similar effect. Professors Creyke and McMillan regard the shift as an example of the Ombudsmen seeking to make "more strategic use of investigation resources",[80] which is to say that Ombudsmen have concluded that they have a greater influence on a limited budget if they elect to conduct specific investigations on their own motion. Professor Stuhmcke has placed a slightly different slant on this issue, arguing that there is an increased emphasis on the integrity functions of Ombudsmen, which are performed to better effect through their "proactive", own motion investigative functions rather than their traditional, responsive complaint-handling functions.[81] Indeed, the capacity to use "active" means, such as own-motion inquiries, to monitor and prevent maladministration is now seen as essential to an investigative body being accurately described as an 'ombudsman'.[82]

The point that emerges on either view (and it is likely that both are accurate to a great extent)[83] is that Ombudsmen are spending less time on investigating individual complaints than previously has been the case. In one sense, the complaints-handling function of ombudsmen has always been the point at

76 The statutory provisions are broadly the same in all Australian jurisdictions; see R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 206.

77 *Ombudsman Act 1976* (Cth) s 6(1).

78 See *Ombudsman Act 1976* (Cth) s 6. In 2011/12, the response of the Commonwealth Ombudsman to more than half of the complaints received was to decline to investigate until the complainant had first taken the matter up with the relevant agency: Commonwealth Ombudsman, *Annual Report 2011-12* (2012), 42.

79 The dual roles of the Ombudsman are covered well in T Buck et al, *Ombudsman Enterprise* (2011).

80 R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 210.

81 A Stuhmcke, 'Ombudsmen and Integrity Review' in L Pearson et al (eds), *Administrative Law in a Changing State* (2008) 349, 354-6.

82 C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 529-30.

83 Harlow and Rawlings regard the Parliamentary Ombudsman in the UK as having "an adjudicative and an inspectorial role, in which 'firefighting' and 'fire-watching' are combined": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 537-42. Under this analogy, 'firefighting' describes ombudsmen in quasi-judicial mode, filling whatever gaps exist between parliamentary procedures and judicial review, whereas 'fire-watching' describes the ombudsman's "inspection and audit" capabilities.

which that office comes closest to the judicial model.[84] Ombudsmen do not focus on invalidity or illegality alone and do not have the power to make binding determinations but examine the broad and flexible, but somewhat undefined,[85] scope of maladministration.[86] However, ombudsmen who investigate a specific allegation of a person are engaged in determining a single set of facts and whether a recommendation of compensation should follow.[87] By contrast, ombudsmen who are engaged in auditing and reporting on government issues are looking at polycentric issues,[88] which by definition reach beyond the concerns of any individual to the proper governance of the state generally.

Ombudsmen's recommendations are usually effective

Whatever antipathy (or apathy) may exist to the Ombudsman's office in the legal fraternity, ombudsmen themselves have long claimed that the office is effective precisely because it "commands a considerable degree of respect and moral authority" with public sector agencies and that this regard only increases the more frequently that the Ombudsman's office deals with a certain agency.[89] The Commonwealth Ombudsman has reported that agencies have adopted "a majority" of the recommendations made by that office and has given examples of "agency responsiveness to our reports and recommendations".[90] It has been noted elsewhere that ombudsmen make recommendations for the payment of damages, which are usually complied with, far more often than courts and in circumstances in which courts could not prescribe a damages remedy.[91]

Indeed, such is the remedial effectiveness of a recommendation from the Ombudsman's office that it has been considered a reason why the coverage of tort law need not be extended. In *Mohammed v Home Office*,[92] Sedley LJ rejected the imposition of a duty of care for maladministration when the claimant could have applied to the Parliamentary Ombudsman to recommend compensation:

> Save in particular circumstances unlike those we are concerned with, the common law has not recognised a concurrent duty of care outside or alongside the statutory framework, even if there is no other means of claiming damages. Nor, adopting the … test [in *Caparo Industries plc v Dickman* [1990] 2 AC 605], is it fair or just or reasonable to do so when other recourse is in fact available, in the present cases to the Parliamentary Ombudsman, who has power to recommend the payment of compensation.

84 Although the Law Commission correctly noted that, in general, "an ombudsman's investigation is very different in its nature from the adversarial processes of a court": Law Commission, *Administrative Redress* (2010), 59 [5.45].

85 See C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 534.

86 See T Buck et al, *Ombudsman Enterprise* (2011) 108-12.

87 Harlow and Rawlings point out, however, that by comparison to courts and even tribunals, ombudsmen apply a 'bottom-up' complaints handling approach which is "truly inquisitorial and investigatory": C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 529. Australian judges are not generally prepared to accept that they do or should engage in a process of 'top-down' reasoning; see the account in K Mason AC, 'Top-Down Legal Reasoning' in N Perram and R Pepper (eds), *Byers Lectures* (2012) 69.

88 See LL Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard LR* 353, 394-8.

89 E Biganovsky, 'New Values for Old? Is the Review Genie Trapped Inside the Lamp of Scrutiny?' in S Argument (ed), *Administrative Law & Public Administration: Happily Married Or Living Apart Under the Same Roof?* (AIAL, Canberra, 1993) 285-6.

90 Commonwealth Ombudsman, *Annual Report 2011-12* (2012), 16-17.

91 P Cane, 'Damages' (1999) 9 *Otago LR* 489, 514 (and see the source cited at n 79). The current authors of *De Smith* have also noted that discretionary compensation schemes are "in practice an important source of compensation": H Woolf et al, *De Smith's Judicial Review* (6th ed, 2007) 910.

92 *Mohammed v Home Office* [2011] 1 WLR 2862, 2867 [12] (emphasis added).

Sedley LJ appears to have considered the Parliamentary Ombudsman sufficiently effective that the claimant's mere *request* for compensation to be *recommended* amounted to recourse being available in fact rather than only a chance of recourse being available. While I share his Lordship's high regard for the Ombudsman as an institution capable of providing effective remedies, I would hesitate to characterise those remedies as being any more than potentially available. The Ombudsman's greatest tool in seeing recommendations followed is the goodwill built up by the office over the course of years.[93] To the extent that this approach is unsuccessful in any particular situation, ombudsmen are usually restricted to appealing either directly or indirectly to public opinion to persuade the relevant agency to implement a recommendation. This is part and parcel of the fact that ombudsmen are not granted determinative powers.

IV: The Ombudsman's capacity to review maladministration

This part has already concluded that the Ombudsman has a central function of protecting the rule of law, regardless of the formal Constitutional status of the office; that s/he lacks determinative powers but nonetheless is extremely effective in providing relief through the mechanism of making recommendations; that the Ombudsman is focused on maladministration generally rather than the specific question of whether certain administrative acts are either legal or valid;[94] and that the Ombudsman has the capacity to recommend relief which lies beyond the competence of the courts.[95] The conclusion that I draw from these points is that the Ombudsman is uniquely suited to addressing the problem of administrative decision makers who fail to adhere to their own soft law instruments.

That there is a role for the Ombudsman follows directly from the facts that the Ombudsman's remit is to investigate "action that relates to a matter of administration"[96] and that maladministration has a broader coverage than legality. The previous three chapters are essentially an account of how judicial procedures are ill-adapted for dealing with the specific problems thrown up by soft law. By contrast, maladministration is sufficiently broad to include, for example, soft law guidance which is misleading or broken promises. Such complaints are commonly made to ombudsmen precisely because they "raise problems to which the courts have as yet produced no satisfactory answer", such as "by reference to principles of estoppel".[97] To the extent that ombudsmen are able to assist in securing effective remedies for maladministration of this kind, the equally unsatisfactory approaches to the

93 T Buck et al, *Ombudsman Enterprise* (2011) 117.

94 One of the Commonwealth Ombudsman's key performance indicators is the promotion of the principles of "good administration" in government; see Commonwealth Ombudsman, *Annual Report 2011-12* (2012), 9.

95 Professor Harlow noted that the "area where legal liability overlaps with *ex gratia* compensation is a difficult one for the PCA. In the first place, his jurisdiction is in doubt [because] he has no jurisdiction in cases in which the complainant would have a legal remedy but, by section 5(2)(b) of the *Parliamentary Commissioner Act 1967,* he may exercise his discretion to investigate if he is satisfied that it is not reasonable to expect the complainant to resort to a court": C Harlow, *Compensation and Government Torts* (1982) 124. The Commonwealth Ombudsman does not appear to have any similar jurisdictional difficulty, given that s/he is empowered to report to the relevant Department, or later to the Prime Minister and Parliament, if *inter alia* s/he is of the opinion that a certain action "appears to have been contrary to law" or "was based either wholly or partly on a mistake of law or of fact": *Ombudsman Act 1976* (Cth) s 15(1)(a)(i) and (iv).

96 *Ombudsman Act 1976* (Cth) s 5(1)(a) & (b).

97 P Brown, 'Remedies for Misinformation' in G Richardson and H Genn (eds), *Administrative Law and Government Action* (1994) 309, 309.

substantive enforcement of legitimate expectations in Australia and the UK assume a significantly reduced level of importance.

Let us consider again the situation of Ms Tang,[98] which demonstrates that, where soft law is in issue, an equivalently 'soft' and flexible remedial structure is more effective than the usual judicial review remedies. While exercises of power by Universities are not inevitably of a public nature, there are solid arguments in favour of that position.[99] One is that each jurisdiction's Ombudsman has jurisdiction over university decisions and conduct.[100] In Ms Tang's case, the *Ombudsman Act 2001* (Qld) empowered the Queensland Ombudsman to "investigate administrative actions of agencies",[101] including any entity (other than an individual) established either "for a public purpose" or "by government for a public purpose" under an Act .[102] 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 coverage of judicial review's remedies[103] beyond public bodies to exercises of public, non-statutory power more generally,[104] 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)[105] to obtain remedies, which may include "an apology, financial compensation, proper explanation, reconsideration of agency action, and expediting agency action".[106] Clearly, some of these recommendatory remedial options would not work in circumstances where the Ombudsman was empowered only to make determinations.[107] It is also worth noting that not all Commonwealth Ombudsmen have been equally effective, suggesting that a significant element in being a successful Ombudsman may be the personality of the person in that role.

98 *Tang* (2005) 221 CLR 99.

99 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 14-15.

100 M Aronson, 'Soft Law in the High Court' (2007) 35 *Fed LR* 1, 14.

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

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

103 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 eg *Forbes* (1979) 143 CLR 242; cf *Hinkley v Star City* [2010] NSWSC 1389, [114]-[183] (Ward J). This extended coverage does not include judicial review's remedies: see generally M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [7.410].

104 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'": *Offshore Processing Case* (2010) 243 CLR 319, 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, although there are difficulties which must be overcome before that proposition can be accepted; see J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector' (2013) 36 *UNSWLJ* 316. The role of Independent Merits Reviewers is considered at n 347 above.

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

106 J McMillan, 'Future Directions' (2010) 63 *AIAL Forum* 13, 17. See also T Buck et al, *Ombudsman Enterprise* (2011) 114-17.

107 R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 218.

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 an non-adversarial setting that the University abide by its promise may have had no effect on 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.

B: Discretionary payments

Peter Cane has commented that "voluntary compensation schemes can, to some extent, make up for common law's unwillingness to award damages for breaches of public law".[108] This is true to the extent that Australia has a set of interlocking and overlapping compensation schemes which do not rely upon a claimant being able to establish that s/he has had certain legal rights infringed upon by a public authority.[109] These mechanisms are generally accepted as being appropriate ways of providing relief to those affected by maladministration, without the difficulties inherent in creating an "overarching" damages remedy at common law[110] or treading into the heavily contested ground of providing substantive relief.[111]

This Part will look at the remedies which are available for maladministration in Australia and their benefits, the legal standing of the various compensation schemes and the possibility of obtaining judicial review in regard to an adverse determination of a request for administrative compensation.

I: Practical remedies

In Part A of this chapter, I pointed out that ombudsmen have been successful in securing redress through the process of making recommendations.[112] In the catalogue of "Thirty Years … Thirty Changes" included in the Ombudsman's 2006-07 Annual Report, one item was headed "Providing a Practical Remedy".[113] It noted that:

> As problems and complaints change, so too must the way that an Ombudsman's office assists people. … It can be pointless or difficult in that setting to focus on whether the complaint is to be

108 P Cane, *Administrative Law* (5th ed, 2011) 313. See Chapter 4 Part A above.

109 See Administrative Review Council, *Federal Judicial Review in Australia* (2012), [2.53]-[2.57].

110 Administrative Review Council, *Federal Judicial Review in Australia* (2012), [10.16]-[10.22].

111 P Brown, 'Remedies for Misinformation' in G Richardson and H Genn (eds), *Administrative Law and Government Action* (1994) 309, 313.

112 Cane seemed to suggest that a recommendation by the Local Government Ombudsman is a necessary condition precedent to a local authority being empowered to make a payment to remedy maladministration: P Cane, *Administrative Law* (5th ed, 2011) 314. This statement is not, however, borne out on the face of *Local Government Act 2000* (UK) s 92. The Law Commission interpreted that section as meaning that "[l]ocal bodies are encouraged to offer redress on an *ex gratia* basis and even to form a 'corporate policy on remedies'. They have been given express statutory powers to offer payment in cases where they consider that an individual has been 'adversely affected' as a result of their 'maladministration'.": Law Commission, *Administrative Redress Consultation Paper* (2008), [3.46].

113 Commonwealth Ombudsman, (2007), 122. Such forms of compensation are sometimes known generically as 'grace and favour' payments; see C Harlow, *Compensation and Government Torts* (1982) 119.

> resolved in the complainant's or the agency's favour. The more pressing concern is to resolve a person's grievance and to provide a remedy, if appropriate.

However, when the appropriate redress goes beyond, for example, the administrative body providing a clearer explanation of its action, it helps that an ombudsman has something specific to recommend, such as the payment of administrative compensation.[114] Schemes for administrative compensation must therefore be understood not only in their own right but also as mechanisms for broadening the range of recommendations available to the Commonwealth Ombudsman.[115] As the Commonwealth Ombudsman's office has recognised, it has "a special interest in the remedies available to members of the public who suffer detriment as a result of poor administration".[116] In practice, the Ombudsman's role is also vital to the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme)[117] both because a very small proportion of those who deal with government agencies would otherwise know about the scheme[118] and because disappointed claimants under the CDDA Scheme will not generally have any available options for administrative review other than through the Ombudsman.[119] Although the Ombudsman cannot compel an agency to make a payment under the CDDA Scheme or overturn its decision not to do so, the terms of the scheme recognise that, where the Ombudsman has recommended that a compensation payment be made, that alone is sufficient reason for the agency to make it:[120]

> Where the circumstances of a case do not clearly fall within the exact criteria for defective administration, but the agency concerned agrees with the Ombudsman that detriment has occurred as a result of defective administration and the agency is inclined to compensate an applicant, a proposal or recommendation by the Ombudsman supporting compensation is sufficient basis for payment.

The Ombudsman can recommend[121] 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.[122] There are legal limitations on the capacity of government to remedy injustice by spending from consolidated revenue,[123] but

114 The experience of the Commonwealth Ombudsman in this regard does not match the difficulties experienced by the PCA in England in the event that there was, for example, both maladministration and the possibility of legal liability; see C Harlow, *Compensation and Government Torts* (1982) 124-9.

115 *Ex gratia* compensation schemes, of course, have a history that originates before Australian ombudsmen; see eg the scheme under consideration by the Court of Appeal in *ex parte Lain* [1967] QB 864. Prior to that, as I will discuss below, they had a somewhat more sinister purpose.

116 Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration*, Investigation Report No 11/2009, (2009) [1.18].

117 Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09: Discretionary Compensation and Waiver of Debt Mechanisms*' (2009/09, 2009), Attachment A.

118 See Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration*, Investigation Report No 11/2009, (2009) [2.1]-[2.8].

119 Commonwealth Ombudsman, *Putting Things Right* (2009), [2.52].

120 Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), Attachment A [92]. See also Commonwealth Ombudsman, *Putting Things Right* (2009), [1.17].

121 Although the Ombudsman need not be involved at all, given that individuals may use *Finance Circular No. 2009/09* to "go directly to the relevant department": M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.730].

122 Ombudsmen have often been more inclined to investigate matters where the process of law would be in some way inadequate; see C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 539.

123 *Auckland Harbour* [1924] AC 318. See also (1990) 169 CLR 195; *BAT v WA* (2003) 217 CLR 30; *Combet v The Commonwealth* (2005) 224 CLR 494; *The AAP Case* (1975) 134 CLR 338.

Australia has administrative schemes which circumvent this problem.[124] At Commonwealth level, there are discretionary mechanisms under the *Financial Management and Accountability Act 1997* (Cth) for the Finance Minister to authorise compensatory 'act of grace' payments[125] and to waive[126] or write off debts.[127] There are two additional, non-legislative remedial schemes which rely on the Commonwealth's executive powers under s 61 of the *Constitution*,[128] and are exercised by individual portfolio Ministers or their delegates.[129] One of these provides for *ex gratia* payments, which are designed as a remedy of last resort[130] which is able to be made quickly and flexibly, without the criteria which operate under the other discretionary schemes.[131] The second is known as the Scheme for Compensation for Detriment Caused by Defective Administration (CDDA Scheme).[132] Under the CDDA Scheme, a government agency may make a payment to an applicant which it has "directly caused to experience detriment as a result of defective administration" in circumstances where the agency bears no legal liability and "there is no other viable avenue to provide redress".[133] These schemes are all intended to be used to remedy *exceptional* losses, rather than merely as a method of expenditure for providing compensation which has not been envisaged by the relevant statute. The latter approach would run the risk of circumventing the intentions of the Parliament and Government.[134]

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124 The schemes are each set out in the Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009). In practice, it seems that they are often considered to be extensively interchangeable. For example, Rares J headed his consideration of the act of grace payment scheme under s 33 of the *FMA Act 1997* (Cth) "The Scheme for Compensation for Detriment Caused by Defective Administration": *Croker v Department of Families, Housing, Community Services & Indigenous Affairs* [2010] FCA 1136, (Rares J, '*Croker v FaHCSIA*'). His Honour denominated *Finance Circular No. 2009/09* as "The s 33 Scheme" and referred to Attachment A, dealing with the CDDA Scheme, with which the matter before him had nothing to do, in support of his reasoning with regard to the act of grace payment at issue: *Croker v Department of Families, Housing, Community Services & Indigenous Affairs* [2010] FCA 1136, [25] (Rares J, '*Croker v FaHCSIA*'). It is likely that no consequence will attach to reasoning of this sort, since a remedy under the CDDA Scheme is listed amongst the remedies which should be sought before an act of grace payment will usually be considered: Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), Attachment B, [21].

125 *FMA Act 1997* (Cth) s 33. A "simplified version" (see the Explanatory Memorandum at [326]) of this provision can now be found in *Public Governance, Performance and Accountability Act 2013* (Cth) s 65.

126 *FMA Act 1997* (Cth) s 34.

127 *FMA Act 1997* (Cth) s 47.

128 Both schemes are administered under the terms of the Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009). This circular replaced the Commonwealth Department of Finance and Deregulation, '*Finance Circular No.2006/05*' (2006/05, 2006). It had in turn replaced the Commonwealth Department of Finance and Administration, '*Finance Circular No. 2001/01*' (2001/01, 2001). The CDDA Scheme was originally established by the Commonwealth Department of Finance, '*Estimates Memorandum 1995/4*' (1995/4, 1995).

129 Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), [5].

130 Rares J heard evidence that "the approach of the Department of Finance and Deregulation in cases where a client of Centrelink asserted a legal entitlement to some form of payment, (whether through merits review by the Social Security Appeals Tribunal or the Administrative Appeals Tribunal, or in any legal proceeding in a Court, at the same time as making a request for an act of grace payment [was to] … suspend the processing of the act of grace payment request" because it " ... is regarded to be premature and inappropriate. This approach also ensures that there is no risk of a claimant being able to "double-dip" by having an act of grace payment approved prior to achieving a successful outcome in a legal claim.": *Croker v FaHCSIA* [2010] FCA 1136, [11]. This practice is reflected in Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), Attachment B, [21]-[22]. However, it seems superfluous, given that no court would allow a plaintiff to "double-dip" in any case.

131 Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), Attachment D.

132 Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), Attachment A; Commonwealth Department of Finance and Deregulation, '*CDDA Scheme Fact Sheet*'.

133 Commonwealth Department of Finance and Deregulation, '*CDDA Scheme Fact Sheet*'.

134 See the comments of the Permanent Secretary to the Minister of Transport in the UK Government, quoted by C Harlow, *Compensation and Government Torts* (1982) 120.

Methods of extra-judicial redress are not new. Carol Harlow has noted that:[135]

> Prior to [the enactment of the *Crown Proceedings Act* in] 1947, the efforts of reformers had been directed at Crown immunity as an affront to the rule of law. In practice the effects of immunity were probably limited. Actions in tort lay against local authorities and many other public bodies and where no action lay there were alternative options: public officials remained personally liable (Dicey's celebrated equality principle); the Crown although not vicariously liable in theory, usually stood behind its servants; the courts winked at legal fictions; awards of *ex gratia* compensation were often made.

The inclusion of *ex gratia* payments in this catalogue may be initially puzzling, given their overwhelmingly beneficial modern purpose. However, Professor Harlow recorded that, prior to the 1947 reform of proceedings against the Crown:[136]

> the attitude of lawyers to government officials was one of suspicion and hostility. The Crown was called "a peculiarly relentless litigant" whose legal advisers stood upon unmeritorious, technical defences and used the Crown's legal immunity to drive hard bargains. *Ex gratia* compensation was in principle an evil. It vested in officials an important discretionary power which allowed them to shelter their misdeeds behind the convenient screen of a secret settlement process. Perhaps it was assumed that, the immunity once ended, *ex gratia* payments would dwindle into insignificance.

As it transpired, they did not, although they adopted a significantly different purpose. The "alternative options" to which Professor Harlow referred in the first quotation above were designed to patch up a manifestly inadequate legal system, in which resort to legal fictions was necessary in order to do justice, even if only for the purpose of obscuring the government's "misdeeds".[137] The various Australian schemes currently in effect stand in contrast to the English history of discretionary compensation, which even in the 1990s included a "bewildering number of administrative schemes operating to provide compensation" and in which "the government's guidance to departments and agencies on the granting of redress in cases of maladministration was in fact outdated and directed more to the protection of the public purse than to the rights of the complainant".[138] The Australian schemes fit beneath a coherent system of merits and judicial review options, serving as 'remedies of last resort' when such options fail. They are a "safety net", and play a role amongst remedies analogous to that played by *Wednesbury* unreasonableness amongst grounds of judicial review.[139]

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135 C Harlow, 'Rationalising Administrative Compensation' [2010] *PL* 321, 321 (citations omitted).

136 C Harlow, *Compensation and Government Torts* (1982) 117; cf *Legal Services Directions 2005* (Cth). See Part A of Chapter 5 above.

137 In England, payments of *ex gratia* compensation are now calculated on a basis the same as that used to calculate damages payable in tort, ie placing complainants "in the position they would have occupied if they had been correctly advised at the outset": P Cane, *Administrative Law* (5th ed, 2011) 313; P Brown, 'Remedies for Misinformation' in G Richardson and H Genn (eds), *Administrative Law and Government Action* (1994) 309, 316. Harlow had commented on the unforeseen tendency for *ex gratia* payment schemes to make inroads into "areas traditionally earmarked for the law of torts": C Harlow, *Compensation and Government Torts* (1982) 117. This is likely to be due, at least in part, to the fact that "maladministration" is a sufficiently broad term to cover mistakes which are not negligent; see P Brown, 'Remedies for Misinformation' in G Richardson and H Genn (eds), *Administrative Law and Government Action* (1994) 309, 332-3.

138 D Fairgrieve, *State Liability in Tort* (2003) 250. Fairgrieve was citing First Report from the Select Committee on the Parliamentary Commissioner for Administration, *Maladministration and Redress*, Session 1994-95, No HC 112.

139 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.450].

The CDDA Scheme works effectively because it gets around restrictions on expenditure[140] to allow monetary compensation for persons harmed by maladministration, but does so through a mechanism which still exerts a fair measure of centralised control.[141] That mechanism is itself subject regularly to a range of accountability measures. In the 2009 report following his own motion investigation into the CDDA Scheme, the Commonwealth Ombudsman noted that the scheme had been the subject of three previous investigations since it was established in 1995.[142]

The CDDA Scheme "applies across government".[143] It has been described as "a vital measure to ensure administrative justice for the public"[144] and "a valuable and important means of securing administrative justice in a complex system".[145] It is therefore particularly apt for situations in which people have relied on soft law but cannot enforce it and:[146]

> will become steadily more important as legislation and government programs grow more complex; government regulation and benefit distribution become more extensive; and people and businesses rely more on government for correct advice, decision-making and regulation.

Agencies are sometimes reluctant to grant compensation under the scheme in circumstances where it would be justified, and sometimes seek to minimise the amount paid. The Ombudsman's office has recently exercised its "system fixing" role by highlighting some of these deficiencies in the *Putting Things Right* report. Of course, the CDDA Scheme is limited to providing financial compensation for defective administration, as opposed to mere "administrative problems".[147] In circumstances where this is not appropriate (for example, it was not a remedy which would have assisted someone in Ms Tang's position very greatly),[148] the broader remedial focus of the Ombudsman is still able to achieve results.[149] For the purposes of this thesis, it is important to note that defective administration is expressly defined to include "giving advice to (or for) an applicant that was, in all the circumstances, incorrect or ambiguous".[150]

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140 See the text accompanying n 123 above.

141 Cf C Harlow, *Compensation and Government Torts* (1982) 119. The centralised control is in the terms of the CDDA Scheme itself. However, the Commonwealth Ombudsman has pointed out that the bulk of the process of providing compensation has been devolved to individual agencies, which is efficient and promotes responsibility but also carries risks: Commonwealth Ombudsman, *Putting Things Right* (2009), [2.106]-[2.110].

142 The CDDA Scheme was reviewed by the Ombudsman's office in 1999, by the Australian National Audit Office in 2003–04, and by the Department of Finance in 2004–05: Commonwealth Ombudsman, *Putting Things Right* (2009), [1.20]-[1.23].

143 Commonwealth Ombudsman, *Putting Things Right* (2009), [1.15].

144 Commonwealth Ombudsman, *Putting Things Right* (2009), [1.18].

145 J McMillan, 'Future Directions' (2010) 63 *AIAL Forum* 13, 17. Less generously, Dowsett J characterised the CDDA Scheme as "designed to avoid public-relations problems involving public bodies and the political consequences of such problems": *Smith v Oakenfull* (2004) 134 FCR 413, 418 [20]. On the understanding that there is probably no such thing as a government act which is *purely* altruistic, it is likely that both comments contain strong elements of truth.

146 Commonwealth Ombudsman, *Putting Things Right* (2009), [1.18].

147 Commonwealth Ombudsman, *Putting Things Right* (2009), [2.43].

148 Of course, the CDDA Scheme operates at the federal level and *Tang* was a State case, so it was not available to assist Ms Tang at all on the facts.

149 See above in Part A of this chapter. In 2007/08, the Commonwealth Ombudsman recommended a remedy of some sort in 75% of the cases which it investigated.

150 Commonwealth Department of Finance and Deregulation, '*CDDA Scheme Fact Sheet*'; Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), Attachment A [26] (d).

II: Legal basis of discretionary compensation schemes

Payments under a scheme such as the CDDA Scheme are to be distinguished from other types of voluntary government payments, for example those made to settle litigation. Take, for example, the case of Shayan Badraie, a boy from Iran who spent time in the Woomera and Villawood immigration detention centres between 2000 and 2002. Litigation was commenced on his behalf in the Supreme Court of New South Wales against the Commonwealth and the operators of the detention centres,[151] in which it was claimed that Shayan had suffered severe psychological harm as a result of incidents that he had witnessed while in detention. During the trial, "testimony from the former detention camp commander exposed the practices and condition of the detention centre"[152] and the Commonwealth elected to offer to settle the claim, ultimately making a payment to him of $400,000.[153] Hoeben J made unreported orders which discontinued the hearing.[154]

While the effect may be similar – the government paid a sum as compensation for harm suffered as a result of apparent maladministration, apparently upon realising the strength of the plaintiff's case – the reason for a payment such as the one made to Shayan Badraie is fundamentally different to a payment under the CDDA Scheme.[155] No claim could have been made on Shayan's behalf under the CDDA Scheme because he had *legal* rights, which were evidently on fairly strong grounds, upon which he could rely and which he could reasonably be expected to pursue.[156] By contrast, the CDDA Scheme allows payments where it isn't reasonable to expect the claimant to litigate. The settlement of the matter which he had brought before the Supreme Court is best understood as having a contractual basis; the government's payment was made in consideration for Shayan's agreement to cease legal proceedings.

The CDDA Scheme, by contrast, is in place to aid people who have suffered loss as a result of maladministration but have no practical legal means of obtaining redress. Instead of possessing legal rights against the government, there is at best a state of *moral* responsibility on the part of the

151 The operators were Australasian Correctional Services Pty Ltd (ACS) and Australasian Correctional Management Pty Ltd (ACM); see *Badraie v Commonwealth of Australia* (2005) 195 FLR 119, (Johnson J, '*Badraie v Commonwealth*').

152 Maurice Blackburn Cashman, *Landmark Cases: Shayan Badraie Case* <http://www.mauriceblackburnnsw.com.au/about-the-firm/landmark-cases.aspx#shayan> at 16 January 2013.

153 'Immigration pay boy $400,000',*Sydney Morning Herald*, 3 March 2006. This would have been a 'major claim' under the terms of Appendix C (Handling Monetary Claims) to the *Legal Services Directions 2005* (Cth) pars 3 and 4. *Finance Circular 2009/09* advises (at [25]-[27]) that: "If a legal obligation to which the [Legal Services] Directions apply is established, the claim must be settled in accordance with legal principle and practice, which require at least a meaningful prospect of liability being established." Such a settlement payment may, however, be recoverable from the Government's insurer (or, since governments frequently don't insure, through government self-insurance arrangements), which a CDDA, act of grace or *ex gratia* payment or a waiver of debt would not.

154 It was reported that Hoeben J "secured the compensation in law during a brief hearing in the NSW Supreme Court": *SMH*, *Immigration pay boy $400,000*, (2006). It is likely that what occurred in fact was that the proceedings were discontinued at the application of the plaintiff as part of the settlement agreement; see *UCPR 2005* (NSW) r 12.1.

155 Cane, however, elides settling a case out of court and making a payment consequent on a recommendation from the Ombudsman: P Cane, *Administrative Law* (5th ed, 2011) 313.

156 See S Major, 'Am I Special Enough? The Payment of *Ex Gratia* Compensation by the Commonwealth' (1995) 6 *AIAL Forum* 14, 16; C Harlow, *Compensation and Government Torts* (1982) 121-4.

government to such people.[157] The Commonwealth Ombudsman has noted that, while decisions about whether to deal with claims in accordance with the *Legal Service Directions* (where the claimant's legal rights have been affected) or under the CDDA Scheme (where the claim is moral in nature) will necessarily be made in light of legal advice, "a legal frame of reference" becomes inappropriate once it has been ascertained that the claim will be decided under the CDDA Scheme. "Defective administration" is defined under the CDDA Scheme predominantly in terms of an agency officer's "unreasonableness" or the "ambiguity" of an officer's advice.[158] While agency decisions have been found to be "generally reasonable" in line with the defined standards,[159] the inappropriateness of an unduly legalistic approach is emphasised by the particular scope of soft law and oral advice[160] to be the instruments of maladministration.

The *Putting Things Right* report listed a number of ways in which agencies handle applications under the CDDA Scheme in an inappropriately legalistic way, such as by relying on legal advice as to liability, applying legal principles and concepts (such as those relating to negligence), exclusively using internal or external legal practitioners to handle claims or relying on agency manuals, which go beyond the *Finance Circular*[161] and focus inappropriately on legal concepts (such as mitigation).[162] The Ombudsman recommended both that agencies improve their performance in handling CDDA claims, and also "that Finance review its advice on the nature and effect of moral obligations within the circular to guide agencies in the identification and consideration of those obligations".[163] However, apart from including a process diagram, the guidelines for making a payment under the CDDA Scheme in Attachment A to *Finance Circular 2009/09* are no simpler and just as reliant on legalism[164] as the guidelines in *Finance Circular 2006/05*.

The CDDA Scheme, and indeed the other schemes outlined in *Finance Circular No. 2009/09*, are wholly discretionary and there are few review options open to disappointed claimants.[165] The decision by a government agency not to make an *ex gratia* payment[166] or a payment under the CDDA Scheme

157 S Major, 'Am I Special Enough?' (1995) 6 *AIAL Forum* 14, 16. Sometimes, especially in regard to act of grace payments, this is referred to explicitly in a government agency's reasoning; see eg *Croker v Minister for Finance and Deregulation* [2011] FCA 1188 [23]. See also Administrative Review Council, *Federal Judicial Review in Australia* (2012), [2.55], [5.32] (submission of the Department of Finance and Deregulation); Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), [9]; Commonwealth Ombudsman, *Putting Things Right* (2009), [1.3].

158 Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), Attachment A [26].

159 Commonwealth Ombudsman, *Putting Things Right* (2009), [2.37].

160 Commonwealth Ombudsman, *Putting Things Right* (2009), [2.59]-[2.68].

161 At the time of the report, the relevant document was Commonwealth Department of Finance and Deregulation, '*Finance Circular No.2006/05*' (2006/05, 2006).

162 Commonwealth Ombudsman, *Putting Things Right* (2009), [2.74]-[2.90].

163 Commonwealth Ombudsman, *Putting Things Right* (2009), [3.6].

164 See for example the references to pre economic loss, interest and taxation issues, deeds of release and indemnity and procedural fairness: Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), Attachment A.

165 Commonwealth Ombudsman, *Putting Things Right* (2009), [2.50].

166 There is also a system in operation in South Australia under which the Treasurer may make an *ex gratia* payment where "stamp duty liability may be an impediment to corporate restructures and, in particular, to those restructures intended to achieve simplification or rationalisation of an existing corporate structure". In circumstances where the Treasurer had made an offer of such an *ex gratia* payment only subsequently to withdraw his offer, White J held that an assessment of stamp duty liability by the Commissioner of State Revenue could not be challenged by reference to the Treasurer's separate and distinct decision to withdraw the offered *ex gratia* payment: *Chubb Electronic Security Australia Pty Ltd v Commissioner of State Taxation* [2012] SASC 164.

cannot be reviewed either in a merits review tribunal[167] or under the ADJR Act,[168] because it is neither a decision made "under an enactment" nor a decision made under an instrument made "under an enactment".[169] Indeed, in *Smith v Oakenfull*, Dowsett J was prepared to treat the relevant attachment to *Finance Circular No. 2001/01* in which the CDDA Scheme was set out as nothing more than soft law itself.[170] A proposal to expand the ADJR Act to cover the CDDA Scheme, which caused concern for government agencies and was opposed by the Department of Finance and Deregulation, was not ultimately endorsed by the ARC.[171] The Commonwealth Ombudsman has also stopped short of recommending reforms which would allow for AAT or ADJR review, stating that the "CDDA Scheme has worked well" in the absence of these review mechanisms.[172] There are no known cases in which an applicant has sought judicial review of a decision about whether to make discretionary compensation payment under the CDDA Scheme in the Federal Court's jurisdiction under s 39B of the *Judiciary Act*.[173] The reviewability of decisions under the *FMA Act 1997* (Cth)[174] is considered below.

There is a line of thought which suggests that the CDDA and *ex gratia* payment schemes may be vulnerable to constitutional challenge following the decision of the High Court in the *School Chaplains Case*.[175] This is because relief is premised on the assumption that the relevant agency did nothing unlawful or actionable and is therefore not in the "ordinary and well-recognised"[176] course of government business. The *School Chaplains Case* requires that expenditure of money by government under the authority of s 61 of the *Constitution* either have a basis in "the Commonwealth's inherent authority derived from its status as the national government",[177] or be connected to a head of power within s 51, or otherwise have statutory authority.[178] The CDDA and *ex gratia* payment schemes arguably possess none of these bases.

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167 Commonwealth Ombudsman, *Putting Things Right* (2009), [1.16].

168 Regarding the CDDA Scheme, see *Smith v Oakenfull* (2004) 134 FCR 413, 418 [22]; *Barron v Commonwealth Department of Health & Ageing* (2003) 176 FLR 192, (McInnis FM, '*Barron v DHA*').

169 *ADJR Act 1977* (Cth) s 3(1). Dowsett J held that the CDDA Scheme was revocable at will and created neither legal rights nor obligations, meaning that it was not an "instrument" for the purposes of the ADJR Act: *Smith v Oakenfull* (2004) 134 FCR 413, 418 [22]. The same reasoning would apply to the scheme for making *ex gratia* payments.

170 *Smith v Oakenfull* (2004) 134 FCR 413, 418 [20].

171 Administrative Review Council, *Federal Judicial Review in Australia* (2012), [5.32]-[5.34], [5.42].

172 Commonwealth Ombudsman, *Putting Things Right* (2009), [2.53]. The Ombudsman did, however, recommend the creation of an inter-agency panel chaired by a representative of the Department of Finance and Deregulation which would be able to provide a level of independent review of agency CDDA decisions: Commonwealth Ombudsman, *Putting Things Right* (2009), [2.55]-[2.58]. At the time of writing, there is no indication that this recommendation will be put into effect.

173 Administrative Review Council, *Federal Judicial Review in Australia* (2012), [5.39].

174 See eg *Croker v Minister for Finance and Deregulation* [2011] FCA 1188; *Toomer v Slipper* [2001] FCA 981, (Weinberg J, '*Toomer v Slipper*').

175 *The School Chaplains Case* (2012) 86 ALJR 713. Aronson and Groves commented that the debates over whether exercises of power are "more constrained in the hands of government than in a private person's hands" and, if so, whether judicial review would lie for breach of those constraints, "involve large questions, only one of which was answered" in the *School Chaplains Case*: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.60]. See also above at Chapter 3 Part A III.

176 See eg *The School Chaplains Case* (2012) 86 ALJR 713, 751 [138]-[142].

177 S Chordia, A Lynch and G Williams, '*Williams v Commonwealth*: Commonwealth Executive Power and Australian Federalism' (2013) 37 *Melbourne University Law Review* (forthcoming). See eg *The Tampa* (2001) 110 FCR 491, 542-3 [191]-[193]; *Pape* (2009) 238 CLR 1, 23-4 [8]-[9], 26-7 [19]-[20] (French CJ), 88-9 [230]-[234] (Gummow, Crennan & Bell JJ); cf the doubts of Hayne and Kiefel JJ and the persuasive dissent of Heydon J in *Pape* (2009) 238 CLR 1, 121-3 [346]-[353] (Hayne & Kiefel JJ), 193-5 [551]-[556] (Heydon J).

178 See S Chordia et al, 'Commonwealth Executive Power and Australian Federalism' (2013) 37 *MULR* (forthcoming).

Following the decision in the *School Chaplains Case*, the Constitutional validity of literally hundreds of schemes was shored up by special amending legislation,[179] but this legislation did not include the CDDA or *ex gratia* payment schemes.[180] It is at least possible that these schemes are therefore vulnerable to *Constitutional* challenge,[181] although I doubt that this is the case.[182] Expenditure under these schemes is arguably reasonably incidental to authorised action and expenditure by government Departments. That argument was unsuccessful in the *School Chaplains Case*, but that does not necessarily mean that it would fail in this context. In the *School Chaplains Case*, French CJ cited authority[183] to support his statement that "the executive power referred to in s 61 extends to powers necessary or incidental to the execution and maintenance of a law of the Commonwealth".[184] His Honour elaborated:[185]

> There are undoubtedly significant fields of executive action which do not require express statutory authority. … [T]he executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect. That field of action does not require express statutory authority, nor is it necessary to find an implied power deriving from the statute. The necessary power can be found in the words "execution and maintenance … of the laws of the Commonwealth" appearing in s 61 of the Constitution.

This view must be correct. The difficulty comes in determining what acts are "necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth". While federal funding of school chaplains in public schools owned and run by the States was held not to be, it must be true that there is a range of activities upon which federal government money can validly be spent without specific legislative support. The argument pursued in this chapter leads to the conclusion that, just as it is incidental to the operation of some departments and agencies to cause loss which they did not intend to cause and for which they bear no legal liability, so too is it incidental to their operation to be able expend money to mitigate financially the unintended losses they created.

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179 Over 400 schemes in all, including the act of grace and debt waiver schemes in the *FMA Act*; see *Financial Framework Legislation Amendment Bill (No3) 2012* (Cth) Sch 2 [407.059]. The schemes are now listed in the amended *Financial Management and Accountability Regulations 1997* (Cth) Schedule 1AA. This compendium legislation is currently the subject of High Court litigation by Mr Williams, the plaintiff in the *School Chaplains Case*: J Lee,'Father to take Canberra on again over chaplains', *National Times*, *The Age*, 7 July 2012; A Twomey,'Health reform: turning a deaf ear to the High Court and a blind eye to the Constitution', *The Conversation*, 27 February 2013. At the time of writing, that litigation was yet to be heard or decided.

180 Cf M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.730] (n 468).

181 Some of the schemes which are listed in the amending legislation are likely to be under even more proximate threat. James Spigelman has noted that while "[m]ost of the programs listed in the relevant Schedule are specific, … some are identified in such a general language that they could not withstand constitutional scrutiny": THJ Spigelman AC, 'Constitutional Recognition of Local Government' (Speech delivered at the Local Government Association of Queensland, Brisbane, 24 October 2012). The support for "Compensation and Debt Relief" (which is, strangely, listed amongst programmes administered by the Department of Education, Employment and Workplace Relations) has as its stated objective: "To provide access for eligible recipients to discretionary payments in special circumstances or financial relief from amounts owing to the Commonwealth": *Financial Framework Legislation Amendment Bill (No3) 2012* (Cth) Sch 2 [407.059]. This is expressed in the same "broad terminology" which caused Spigelman to doubt that there would be any legal effect to the 'broad-brush" identification of programmes within the purview of the Department of Regional Australia, and at a level of generality which must leave the programmes under the FMA Act vulnerable.

182 Apart from other considerations, it is difficult to see why anyone would be motivated to bring such a challenge.

183 *R v Kidman* (1915) 20 CLR 425, 440-1 (Isaacs J); *Re Residential Tenancies Tribunal (NSW); ex parte Defence Housing Authority* (1997) 190 CLR 410, 464 (Gummow J) ('*ex parte Defence Housing Authority*').

184 *The School Chaplains Case* (2012) 86 ALJR 713, 723 [22].

185 *The School Chaplains Case* (2012) 86 ALJR 713, 727 [34].

For the CDDA or *ex gratia* payment schemes to be invalidated would necessitate a court reaching a different conclusion.

III: Challenging decisions under discretionary compensation schemes

If the CDDA and *ex gratia* payments schemes were to prove to be unconstitutional, it is unclear whether there would still be a capacity for the government to make *ex gratia* payments (in the broad sense of that term). Payments to remedy defective administration in the absence of legal liability used to be authorised "usually by a Cabinet decision",[186] although that mechanism would not now make up for the lack of an executive or statutory power to expend money. In *ex parte Lain*,[187] Diplock LJ reasoned that the Board's decision to authorise a compensation payment was legally significant because it "makes lawful a payment to an applicant which would otherwise be unlawful",[188] a *dictum* which has been cited with approval in the High Court of Australia,[189] although the better view is that it is irrelevant for Australia.[190] What is clear is that mechanisms for making discretionary payments are necessary, given the existence of "grey or black legal holes" over which judicial review has partial or no coverage,[191] and further that their undoubted legal consequences "warrant judicial supervision".[192]

Unlike the CDDA and *ex gratia* payment schemes, which source their power from s 61 of the *Constitution*, the mechanisms under the FMA Act are reviewable, both at common law and under the provisions of the ADJR Act.[193] However, judicial supervision of the decision whether or not to make a discretionary compensation payment is generally conducted by Australian courts with a relatively light touch.[194] In *Collins (No3)*, Lucev FM noted that:[195]

> There are no statutorily prescribed criteria in relation to the assessment of an Act of Grace Payment Claim [under s 33 of the *FMA Act*]. In those circumstances, the matters to be taken into

186 S Major, 'Am I Special Enough?' (1995) 6 *AIAL Forum* 14, 14.

187 In the UK, *ex parte Lain* has been criticised on the basis that the Crown, like any ordinary person, can spend as it likes. Such a conclusion involves acceptance of the "Ram doctrine", which has been interpreted as allowing the state and its individual departments to do whatever a natural person can, subject to statutory limitations; see H Woolf et al, *De Smith's Judicial Review* (6th ed, 2007) 236; J McLean, *Searching for the State in British Legal Thought* (2012), 161-2; M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.250] (n 303). Acceptance of the "Ram doctrine" is unthinkable in a country like Australia, which has both a federal system and a written constitution.

188 *ex parte Lain* [1967] QB 864, 888.

189 The majority judgment of Brennan CJ, Gaudron and Gummow JJ seemed to endorse *ex parte Lain,* but noted that in that case "no legal rights in any ordinary sense were in question": *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 162. Note that Aronson and Groves urged caution before concluding that the brief consideration of *ex parte Lain* in *Hot Holdings* amounts to an endorsement: M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.250].

190 The High Court tried to preserve the Senate's powers of review in *The School Chaplains Case* (2012) 86 ALJR 713. By contrast, there was no need for the Court of Appeal in *ex parte Lain* to consider preserving the House of Lords' right of review because, unlike the Australian Senate, the House of Lords could scarcely have been considered democratic.

191 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.60].

192 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.250]. Administrative Review Council, *Federal Judicial Review in Australia* (2012), [5.40].

193 See eg *Toomer v Slipper* [2001] FCA 981.

194 By contrast, the authors of *De Smith* cited extensive authority to support their contention that, in the UK, "[d]ecisions as to whether to make payments of statutory or discretionary compensation … may themselves be susceptible to judicial review.": H Woolf et al, *De Smith's Judicial Review* (6th ed, 2007) 910. In Australia, this reasoning may apply at common law, but discretionary compensation schemes are unreviewable under the *ADJR Act*: *Smith v Oakenfull* (2004) 134 FCR 413.

195 *Collins v Department of Finance and Deregulation (No3)* [2012] FMCA 860 [125].

> account and weight to be given to the evidence as to those matters are generally for the decision-maker, and not the Court, to determine.[196]

Weinberg J concluded to similar effect in *Toomer v Slipper* that:[197]

> The legislature has entrusted the power to make act of grace payments to the Minister. Such payments are not based upon any legal entitlement but are *made in response to moral obligations* assumed by the Commonwealth as a result of the actions of its employees or instrumentalities. The power to make such payments is, by its very nature, one which is particularly suited to be exercised by the Minister. The role of the Court is to ensure that the Minister exercises that power lawfully. Provided he does so, his decision cannot be impugned.

Given that these schemes are designed only to fill lacunae where the government assumes a moral duty but has no legal liability,[198] the courts' reserve is understandable. Nonetheless, there is a role for the courts to play, as illustrated by the lengthy and wholly unfortunate story of the litigation commenced by Mr Croker. The Social Security Appeals Tribunal had concluded that Mr Croker was entitled to a small payment (less than $2,000) from Centrelink, which he would have received but for the fact that his right to a payment had been incorrectly determined,[199] and, following the passage of 15 months, Centrelink no longer possessed the power to make the requested payment.[200] Centrelink did, however, provide written support for Mr Croker's application for an act of grace payment under s 33 of the FMA Act. Such payments are able to be made in the discretion of the Minister of Finance or her delegate;[201] in this case her delegate made the decision, held by Rares J to be "inappropriate and unjustifiable on any view", not to exercise his discretion until after the matter had been fully litigated.[202]

His Honour further concluded that, to apply a blanket policy as to when act of grace payments would be considered, exposed potential claimants to the stress and inherent risks of litigation. In circumstances where there was already considerable government support for making the payment, in which the absence of legal liability on the part of the government was therefore already privately under consideration[203] and in which Mr Croker's possible liability for costs would far outweigh the benefit he was claiming, there could scarcely be a valid justification for refusing to exercise the discretion under s 33. The benefit of the court's involvement in these circumstances was not to lay down binding legal principles but to act as a circuit breaker. Rares J compelled the defendant Secretary to file an affidavit sworn personally, thereby ensuring that the matter had been brought to his attention, and included in his reasons (which he directed the Registrar to send to the Minister of Finance and Deregulation) a

196 *Peko-Wallsend* (1986) 162 CLR 24, 41 (Mason J); *Toomer v Slipper* [2001] FCA 981, [36]-[37] (Weinberg J).

197 *Toomer v Slipper* [2001] FCA 981, [47] (emphasis added).

198 This is now explicit in *Public Governance, Performance and Accountability Act 2013* (Cth) s 65. The same reasoning has, however, previously been used by a Minister on the floor of the House of Commons to justify *refusing* to make an *ex gratia* payment in a certain case: C Harlow, *Compensation and Government Torts* (1982) 130-1.

199 Centrelink had refused to pay Mr Croker a pensioner education supplement for a disability support pension in April 2008. The Social Security Appeals Tribunal determined, in June 2009, that he was entitled to be paid it: *Croker v FaHCSIA* [2010] FCA 1136, [2].

200 Which was accurate; the power to make act of grace payments is not delegated by the Minister of Finance to other agencies: Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09*' (2009/09, 2009), [10]. See also *Public Governance, Performance and Accountability Act 2013* (Cth) s 65.

201 Authorisation of payments must now be made by the Minister in writing: *Public Governance, Performance and Accountability Act 2013* (Cth) s 65(1).

202 *Croker v FaHCSIA* [2010] FCA 1136, [22].

203 Although note that Mr Croker's application was ultimately denied; see *Croker v Minister for Finance and Deregulation* [2011] FCA 1188.

"request for the Minister to reconsider the policy under s 33".[204] It is significant that, when Mr Croker ultimately challenged the refusal of his claim for an act of grace payment by the Minister, Robertson J dismissed his application with a customary unwillingness to interfere in the substance of the Minister's discretionary decision-making.[205]

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,[206] 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'.

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 Australian judicial review doctrine 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.

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204 *Croker v FaHCSIA* [2010] FCA 1136, [31]-[33].

205 *Croker v Minister for Finance and Deregulation* [2011] FCA 1188. In later proceedings, Mr Croker claimed to have made an application to the Finance Minister for an act of grace payment under s 33 of the FMA Act, but these proceedings were dismissed by Cowdroy J on the basis that Mr Croker was unable to prove that he had made the application in question: *Croker v Minister for Finance and Deregulation* [2013] FCA 429. Mr Croker had also requested that the Court compel the Finance Minister to make a payment to him under the CDDA Scheme on the basis that "the time which has elapsed since he made his claim is excessive". Cowdroy J dismissed this claim with the comment that "there could be no suggestion [of] any defective administration by the Minister or her department in the processing of an act of grace payment in the absence of a request" (at [12]).

206 *LIA 2003* (Cth) s 31. See also S Argument, 'Delegated Legislation' in M Groves and HP Lee (eds), *Australian Administrative Law* (2007) 134, 138.

Chapter Seven

Conclusions

A cursory examination of this thesis might suggest that it has succeeded only in the modest task of pointing out that an issue exists and the unwelcome task of stating that very little can be done about it. I hope that the reader will believe that it is my intention that, having reached this point, s/he will be left neither so unsatisfied nor so pessimistic. In concluding, therefore, I propose to revisit the major themes of this thesis and suggest some further developments that require consideration in the future. It is my belief that soft law should not be viewed as something to be feared, but that the law should have the capacity to hold accountable those who use it in public regulation.

Themes

Soft law must mean something

More than theory, more than remedies, more than regulation, the theme which unifies this thesis is that the phenomenon of soft law must itself have meaning. It is soft law's meaning which will ultimately shape the response which the rest of the law makes to it. It is because soft law means something that we care that the law responds to it at all.

Soft law means something because it is treated by the majority of those faced with it as though it does. We have long moved past the point where lawyers can dismiss as meaningless any form of regulation which does not come from Parliament or is not made under power delegated from Parliament. Robert Megarry was able to say as long ago as 1944 that that "administrative quasi-legislation" had invaded a legal world previously "bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions".[1] A lawyer could not advise his or her client without understanding this quasi-legislation, because, "although no Court would enforce [quasi-legislative announcements], no official body would fail to honour them … [The announcements] are intended to apply generally to all who fall within their scope".[2] Keyes has suggested that, nearly 70 years later, courts are now prepared to view soft law as both significant and persuasive, to the extent that it has "something approaching … binding legal effect".[3]

The practical effect of soft law has always been of greater significance than its legal character. If soft law is nothing more than an emperor with no clothes on, its power stems from the fact that the majority of people simply don't realise. Megarry was prepared to characterise the phenomenon as

1 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 125-6.

2 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 126.

3 JM Keyes, *Executive Legislation* (2nd ed, 2010) 51.

"quasi-legislation" because it was of legislative scope and effect.[4] Likewise, when we now use the term "soft law", the reference to law is made in the same way; it's softer than legislation but, if it is capable of the same effect, it's worth looking at as a species of "law".

Soft law can become 'hardened' as a result of its interaction with other legal processes. In chapter 2, I considered two examples. The first is of tribunals' application of policy, hardening that policy into precedent, as was the case in *Hua-Aus*.[5] The second is less an example of soft law 'hardening' than a recognition that it is already 'legal' in its effect. The *Freedom of Information Act*,[6] like similar legislation elsewhere,[7] requires that agencies publish "operational information"[8] and provides that failure to do so means that a person who acts while unaware of the unpublished information "must not be subjected to any prejudice only because of the application to that conduct of any rule, guideline or practice in the unpublished information, if the person could lawfully have avoided that prejudice had he or she been aware of the unpublished information".[9]

The requirement that law must be published is a rule of law principle of long application.[10] Fuller applied it both to hard and soft law, for reasons similar to those expressed by Megarry, being that "to predict the outcome of cases it is often essential to know, not only the formal rules governing them, but the internal procedures of deliberation and consultation by which these rules are in fact applied".[11] The UK Supreme Court has since applied much the same reasoning in invalidating a secret policy upon which the Home Office acted.[12]

Regardless, soft law is, in a sense, a common law power and it sits alongside the judicially reviewable executive and prerogative powers. The common law will allow the making and application of soft law; sometimes, it may compel it. This will happen on terms set by the common law and these terms should include that exercises of power through soft law are judicially reviewable.

The legal responses are limited to inadequate work-arounds

If soft law can be similar in effect to hard law, it should follow that, when it is, it should also be subject to the same protections and accountability measures as hard law. That is not the case. The difficulty is that legal remedies attach to law's *form* rather than to its effect or substance. An act performed in accordance with soft law cannot be characterised as *ultra vires*, either on the basis of the act or the

4 RE Megarry, 'Administrative Quasi-Legislation' (1944) 60 *LQR* 125, 126.

5 *Hua-Aus v FCT* (2009) 75 ATR 886.

6 *Freedom of Information Act 1982* (Cth). See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [5.250].

7 See JM Keyes, *Executive Legislation* (2nd ed, 2010) 55.

8 Defined as "information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities)": *FOI Act 1982* (Cth) s 8A(1).

9 *FOI Act 1982* (Cth) s 10. The relevant legislation in Queensland, NSW and Victoria each features an equivalent provision; see R Creyke and J McMillan, *Control of Government Action* (3rd ed, 2012) 672-3.

10 English legislation has required for 120 years that every statutory instrument be published and, from 1946, the publication of the "flood tide of rules and regulations which arrived with the welfare state": HWR Wade and C Forsyth, *Administrative Law* (10th ed, 2009) 760.

11 LL Fuller, *The Morality of Law* (1964) 50.

12 *R (Lumba) v Secretary of State for the Home Department; R (Mighty) v Secretary of State for the Home Department* [2012] 1 AC 245, ('*Lumba v Home Secretary*').

instrument being invalid, when (in Professor Wade's phrase) "it has no *vires* to be *ultra*".[13] Australia, in particular, has struggled to reconcile the similar but not coextensive concepts of law and public power. At Commonwealth level, the reason is Constitutional.[14] At State level, the ongoing debate about the meaning of *Datafin*[15] has still not been finally resolved, although it has still only been applied once[16] and looks unlikely to be applied again.[17] In summary, action under hard law is subject to judicial review, but the exercise of public power through soft law may escape judicial review. Furthermore, Australian judicial review is currently limited to providing procedural remedies and has steadfastly refused to follow English precedents which would allow substantive remedies.[18]

Judicial review does in some respects recognise that soft law must mean something. Soft law may therefore be a consideration that a decision-maker is required to take account, or it may create an obligation to provide procedural fairness, or a decision-maker may be found to have acted invalidly by fettering him- or herself to a soft law instrument.[19] The last of these grounds creates difficult issues of its own, because it is in direct conflict with the expectation that decisions in like cases be consistent with each other, an aim facilitated by soft law.[20] However, none of these grounds can lead to anything more than a procedural remedy in Australia and it is most unlikely that that position will change in the short term.

As desirable as a damages remedy for invalid administrative action may seem, the reasons against adopting it as a common law measure look almost insurmountable.[21] The summary rejection of the Law Commission's work on *Administrative Redress* by the UK Government[22] seems conclusive of the point that, even in a jurisdiction entirely at ease with substantive remedies for legal errors in administrative decision-making, administrative law damages are considered a bridge too far.

Restitution is an effective remedy where a public authority is unjustly enriched at a claimant's expense and has no applicable defence. However, the law of unjust enrichment exists within a rigidly defined taxonomy and, the *Woolwich* case notwithstanding,[23] it is hard to imagine enough disputes regarding soft law to fall within its boundaries for it to be more than a small part of the response.

13 HWR Wade, 'Beyond the Law: A British Innovation in Judicial Review' (1991) 43 *Administrative Law Review* 559, 561.

14 See J Boughey and G Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316.

15 *Datafin* [1987] 1 QB 815.

16 *Masu (No2)* (2004) 50 ACSR 554.

17 See eg *Chase Oyster* (2010) 78 NSWLR 393; *Khuu & Lee* (2011) 110 SASR 235. Special leave to appeal the decision in *Khuu & Lee* to the High Court was subsequently refused.

18 See G Weeks, 'Holding Government to its Word' in M Groves (ed), *Modern Administrative Law in Australia* (2013) (forthcoming).

19 The classic example is *Green v Daniels* (1977) 13 ALR 1.

20 See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [3.280].

21 See *NSW v Paige* (2002) 60 NSWLR 371 (Spigelman CJ).

22 The Law Commission, *Administrative Redress*, Report No 322, (2010).

23 *Woolwich* [1993] AC 70.

The recent history of tort liability for public authorities is one of traditional principles in retreat. Statutory changes to the law of negligence in Australia over the course of the last decade[24] have meant that when a public authority is acting in a regulatory capacity, it is now very difficult to prove liability for a negligent act or omission. Even where the UK Supreme Court held that two prisoners had been subject to false imprisonment due to the Home Office applying an *ultra vires* policy, they received no more than nominal damages.[25] Misfeasance in public office, a tort specifically applicable to public authorities, is so difficult to prove that it has been peripheral to this thesis.[26]

In chapter 5, I considered the possibility of equitable compensation being available where an estoppel is raised because a person has relied to his or her detriment on a soft law instrument from which the relevant public authority has since resiled.[27] Given that it is unlikely that a doctrine of public law estoppel will develop in Australia,[28] this is a possibility worth exploring.

What becomes clear from the assessment of these public and private legal doctrines is that providing a court-based remedy for a public authority's breach of its own soft law would involve developing the law in a way which is essentially inconsistent with centuries of previous developments. The possible remedies amount to nothing more than work-arounds,[29] which might produce a remedy here and there, but which effect no lasting or systemic change (and do not aim to so do). Existing legal doctrine is simply insufficiently flexible to accommodate soft law in a systemic way.

The most effective current controls on soft law are 'soft'

It is therefore unsurprising that the most effective remedies for maladministration involving soft law are also 'soft'. By 'soft', in this context I mean flexible and discretionary rather than determinative. This is often seen as code for 'ineffectual' but, just as soft law is remarkably effective despite lacking full legal force, so too is the Ombudsman more than effective at obtaining remedies where he sees them as being necessary. The fact is that public authorities rarely defy the Ombudsman. A soft remedy which the Ombudsman is able to recommend is a discretionary payment by a government agency, for example under the CDDA Scheme.[30] Such payments are made in the government's discretion where, despite having no legal liability, it accepts a moral responsibility for a claimant's loss.

These are remedies which are effective and fill the current lacuna in the availability of legal remedies. However, the discretionary payment schemes are not well-known and are limited in their application, both by the fact that payments are made in the unchallengeable discretion of an administrative decision-maker, and by the terms of the soft law instruments which set their terms. It is not

24 Since the *Ipp Report* (2002).

25 *Lumba v Home Secretary* [2012] 1 AC 245.

26 See M Aronson, 'Misfeasance in Public Office' (2011) 35 *Melbourne University Law Review* 1.

27 See also G Weeks, 'Estoppel and Public Authorities' (2010) 4 *JEq* 247.

28 The concept has been essentially moribund since 1990: *Quin* (1990) 170 CLR 1; *Kurtovic* (1990) 21 FCR 193.

29 M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) [6.730].

30 See Commonwealth Department of Finance and Deregulation, '*Finance Circular No. 2009/09: Discretionary Compensation and Waiver of Debt Mechanisms*' (2009/09, 2009).

acceptable for us to see the soft remedies examined in chapter 6 as being the whole of the response to the issue which is the topic of this thesis.

Future Directions

I wish, therefore, to finish by specifying three areas which will repay further consideration, and by making one more general plea.

First, further consideration must be given to a statutory damages remedy in public law. The one I propose in chapter 4 is a starting point, not a finished product. Not everybody agrees with the *dictum* of Lord Bingham in *X v Bedfordshire CC* that "the rule of public policy which has first claim on the loyalty of the law [is that] that wrongs should be remedied."[31] This statement is nothing if not "question-begging"[32] but that is somewhat beside the point. The real issue is that maladministration can and does result in loss which is not able to be remedied in full by judicial review's suite of procedural remedies, and is not covered by existing private law doctrines. There is a conversation to be had about whether this situation is acceptably met by the existing work-arounds, or if the legislature is obliged to find ways in which those wrongs might be remedied.

This shades into the second issue, which is that we need to revise our expectations. The statement that "wrongs should be remedied" does not equate to a statement that *all* wrongs should be remedied. Professor Harlow's concerns about a 'compensation culture'[33] should not be ignored. As a society, we need to define *which* losses suffered by *which* people should be remedied. This conversation need not, however, be irrevocably tied to existing causes of action.

The third issue for future consideration is the status of the *Woolwich* decision in Australia.[34] It is yet to be formally accepted by Australian courts but there does not seem to be a compelling reason why it ought not. Although a person's capacity to obtain restitution where a public authority is unjustly enriched at his or her expense is a limited response to the pervasive effect of soft law, it is not unimportant. It would be nice to see the acceptance of *Woolwich* in Australian courts confirmed at the earliest opportunity.

Finally, there is a very real risk that the vehemence with which the Law Commission's proposals on the issue of *Administrative Redress* were rebuffed will mean that similar bodies will shy away from revisiting these complex and important issues. That must not be allowed to happen. The Administrative Review Council should be asked to look at the implications of an administrative damages remedy. To the extent that the ARC lacks the jurisdiction to examine issues of

31 *X v Bedfordshire CC* [1995] 2 AC 633, 663 (Sir Thomas Bingham MR).

32 L Hoffmann, 'Reforming the Law of Public Authority Negligence' (Speech delivered at the Bar Council Law Reform Lecture, London, UK, 17 November 2009) [20].

33 See also C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) 791-3.

34 See generally S Degeling, 'Restitution of Overpaid Tax in Australia: The Woolwich Principle' in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (2013) 313.

compensation more broadly, I would suggest that a Law Reform Commissioner be appointed to conduct a comprehensive review. These issues are too important to be left unexplored.

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