Distancing From Accountability?
Governments’ Use of Soft Law in the COVID-19 Pandemic

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Abstract
This article analyses how governments across Australia and the world have employed ‘soft law’ in their responses to the COVID-19 pandemic. Rather than simply directing the public to the text of voluminous, complex and everchanging public health orders, executive officials have utilised a variety of non-legal soft law instruments to inform the community of their rights and obligations. These instruments are beneficial — especially in a public health crisis — as they are comprehensible, adaptable and effective. However, their non-legal nature also presents significant accountability issues which challenge the Australian conception of the separation of powers. Soft law exists independent of any parliamentary authorisation or oversight. Subsequently, those affected by soft law lack almost any ability to challenge its use in court. To remedy such issues, this article recommends a greater role for administrative complaint mechanisms (such as Ombudsman recommendations and discretionary payment schemes) in combatting abuses of soft law. It further suggests that the limited adoption of two foreign doctrines — substantive legitimate expectations and epistemic deference — into Australian judicial review could aid in addressing this dilemma.

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Introduction
The COVID-19 pandemic has upended life around the globe, both through the devastating transmission of the coronavirus itself and the efforts of governments to tame it. Not since the Second World War has a series of government actions so rapidly and comprehensively altered the rights, obligations and activities of all Australian residents. The Commonwealth, state and territory governments have primarily responded to the crisis through delegated legislation — in the form of regulations, orders, directions and rules — made under broadly expressed provisions in public health legislation. However, most Australians are not engaging with these complex, voluminous, obscure and everchanging documents. Rather, they are relying on government interpretations of the law distributed in ‘soft law’ instruments such as guidelines, websites, advices and press releases.

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Use of soft law by governments is by no means a new phenomenon; however, an unprecedented pandemic which has concentrated emergency power in the executive branch provides a unique lens for analysing its significance. In Part II, I outline what soft law is and the nature of its use in the modern administrative state. Specifically, I examine the ways that governments across Australia and the world have utilised soft law in their responses to COVID-19. In Part III, the benefits of soft law as a form of regulation will be assessed, with the Australian response to the pandemic serving as an exemplar case study. In Part IV, I critically analyse the accountability issues which soft law presents, as illustrated through its use during the pandemic. The existence of soft law outside the Australian conception of the separation of powers effectively allows the executive to govern without parliamentary authorisation or oversight. Subsequently, those detrimentally affected by soft law are (in most cases) prevented from gaining meaningful remedial assistance from the courts. In Part V, I suggest possible reforms which could enable Australian administrative law structures to better account for modern governments’ use of soft law throughout the pandemic and beyond. Given their flexibility and accessibility, ‘soft’ administrative complaint mechanisms such as Ombudsman recommendations and discretionary payment schemes should take the forefront. Though less practically effective or implementable, the expansion of Australian judicial review through the adoption of the doctrines of substantive legitimate expectations and epistemic deference could also aid in better accounting for modern use of soft law.

Soft Law and Its Use in the Pandemic

What is Soft Law?

By its nature, ‘soft law’ is difficult to positively define, but is easier to understand by ‘first excluding that which [it] is not’. Often referred to as ‘quasi-legislation,’ ‘grey-letter law’ or ‘tertiary legislation,’ soft law encompasses a variety of regulatory instruments developed by the executive which are not enacted by, or made under the express authorisation of, Parliament. Creyke defines soft law as ‘a rule which has no legally binding force but which is intended to influence conduct’. Throughout this article, those instruments which are made pursuant to the will of Parliament and consequently hold formal authority — meaning primary and delegated legislation — will generally be referred to as ‘hard law’. Many instruments are capable of being soft law, including guidelines, public statements, codes of conduct, practice notes, circulars and advices. Official policies are likely to be soft law if they are ‘capable of securing both the trust and compliance of reasonable

1. Greg Weeks, Soft Law and Public Authorities: Remedies and Reform (Hart Publishing, 2016) 13 (‘Soft Law and Public Authorities’).
2. Stephen Argument, ‘Quasi Legislation: Greasy Pig, Trojan Horse or Unruly Child?’ (1994) 1(3) Australian Journal of Administrative Law 144 (‘Quasi-Legislation’); Commonwealth Interdepartmental Committee on Quasi-regulation, Grey-Letter Law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation (Report, December 1997); Robert Baldwin, Rules and Government (Oxford University Press, 1995) 80.
3. Robin Creyke, ‘Soft Law and Administrative Law: A New Challenge’ (2010) 61(1) Australian Institute of Administrative Law Forum 15, 15.
4. Greg Weeks, ‘Soft Law and Public Liability: Beyond the Separation of Powers?’ (2018) 39(2) Adelaide Law Review 303, 306 (‘Beyond the Separation of Powers?’); Robin Creyke and John McMillan, ‘Soft Law v Hard Law’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), Administrative Law in a Changing State (Hart Publishing, 2008) 377, 378.
5. Creyke (n 3) 15; Greg Weeks, ‘The Use and Enforcement of Soft Law by Australian Public Authorities’ (2014) 42(1) Federal Law Review 181, 183 (‘Use and Enforcement of Soft Law’).
people exposed to [them]. Administrative decisions are not soft law, but rather the application of hard law to specific circumstances by an executive decision-maker. Daly suggests that ‘[e]ven communications between a public authority and an individual may be understood as a form of soft law given that such advice can be generalised to apply to more than that particular person.’ The reason that soft law is thus considered ‘law’ is not through its legal authority (it has none) but by its actual influence over both decision-makers and the public. As will become apparent throughout this article, soft law is deserving of scholarly attention because of its effectiveness in regulating conduct.

This inability to easily define soft law illustrates the breadth of forms it can take. Soft law exists on a spectrum of ‘softness’. On the ‘softer’ end of the spectrum exist more informal, advisory instruments such as guidelines, infographics or videos — instruments which do not appear strictly ‘legal’. On the ‘harder’ end of the spectrum exists more formal, prescriptive instruments which appear ‘all but compulsory to follow’. This may include instruments purporting to be backed by parliamentary authorisation which in fact are not, due to a failure to adhere to established procedural requirements. The distinction between soft law, administrative decisions and hard law is often blurry, especially at the state level (Commonwealth legislative instruments are automatically deemed unenforceable if they are not registered as such). Creyke remarks that if ‘an instrument is legislative in character it can be assumed to fall outside the soft law category’. Soft law instruments can be ‘hardened’ by statutes requiring their consideration.

The necessity to produce (and in turn, study) soft law has arisen within Australia’s ‘age of statutes’. Primary and delegated legislation are rapidly increasing in volume, length and complexity, to the point that the ‘Australian public can no longer look (if it ever did) to statutory texts to form a clear understanding of their legal rights and obligations’. To preserve the fundamental democratic value that those subject to the law must know it, the executive branch has taken on a ‘communicative function’ in which it must ‘translate [the law’s] content, and … provide guidance as to how it might be implemented in a particular case’. Soft law instruments are the primary vehicle through which the executive performs this function. Free from the restraining principles of legislative drafting and statutory interpretation, the executive can rapidly produce, disseminate and amend soft law explaining their interpretation of the law for the Australian public to consume.

6. Weeks, ‘Beyond the Separation of Powers?’ (n 4) 311.
7. Federal Airports Corporation v Aerolineas Argentinas (1997) 76 FCR 582, 590; Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee (2007) 163 FCR 451, 458-461.
8. Stephen Daly, ‘The Rule of (Soft) Law’ (2021) 32(1) King’s Law Journal 3, 5.
9. Weeks, ‘Beyond the Separation of Powers?’ (n 4) 306.
10. Ibid 310.
11. Ibid.
12. Janina Boughey, ‘Executive Power in Emergencies: Where is the Accountability?’ (2020) 45(3) Alternative Law Journal 168, 171-172 (‘Executive Power in Emergencies’).
13. Legislation Act 2003 (Cth) s 15K(1).
14. Creyke (n 3) 15.
15. See, eg, Motor Accidents Compensation Act 1999 (NSW) s 133(2)(b). See also Weeks, Soft Law and Public Authorities (n 1) 47–53; Weeks, ‘Use and Enforcement of Soft Law’ (n 5) 209.
16. See Lisa Burton Crawford, ‘The Rule of Law in the Age of Statutes’ (2020) 48(2) Federal Law Review 159 (‘Age of Statutes’).
17. Lisa Burton Crawford, ‘Between a Rock and a Hard Place: Executive Guidance in the Administrative State’ in Janina Boughey and Lisa Burton Crawford (eds), Interpreting Executive Power (Federation Press, 2020) 7, 9 (‘Executive Guidance in the Administrative State’).
18. Ibid.
Soft Law and COVID-19

The response to the COVID-19 pandemic is an insightful vehicle for understanding governments’ use of soft law in the modern administrative state. The effectiveness of a response to the outbreak of an infectious disease like COVID-19 hinges on the behaviour of the public.19 Australian governments have principally responded to the crisis through delegated legislation made under extremely broad provisions in public health legislation.20 The various directions, orders, rules and regulations made are long, convoluted, difficult to find, full of legal jargon and constantly changing as the pandemic progresses.21 As a result, Boughey points out that ‘[o]rdinary people (ie, people who are not law academics!) are unlikely to spend hours searching government gazettes for the most recent COVID rules in order to figure out what their rights and obligations are’.22 For example, the Public Health (Non-Essential Gatherings) Emergency Direction 2020 (ACT) was the formal instrument which imposed significant restrictions on ACT residents’ movements while it was in force from 1 April 2020 to 1 May 2020.23 However, there were just 10,476 visits to the instrument as posted on the ACT Legislation Register during this (comparatively long) period,24 suggesting that less than 2.5 per cent of the affected population engaged with it.25

Given such disengagement, government interpretations of the law play an outsized role in informing how the public acts. Windholz argues that ‘[c]ompliance with these measures on the scale required is unlikely to be achieved by coercive policing tools alone. It also requires an unprecedented level of voluntary compliance’.26 To achieve such compliance in personal behaviours such as social distancing, handwashing and mask wearing, soft law instruments have attempted to relay both legal requirements and additional advice in comprehensible ways. Governments have blasted announcements on drones (Rwanda), sent nationwide emergency alert messages (New Zealand), produced music videos (Vietnam) and engaged in TikTok dance challenges (the Philippines) in order to inform the public of their rights and obligations.27 Most Australians receive information about restrictions applying to them through regular press conferences held by the heads of each

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19. See Emily K Vraga and Kathryn H Jacobsen, ‘Strategies for Effective Health Communication during the Coronavirus Pandemic and Future Emerging Infectious Disease Events’ (2020) 12(3) World Medical & Health Policy 233.
20. See, eg, Public Health Act 2010 (NSW), which provides that, in response to a public health risk, the relevant Minister ‘may take such action, and ... may by order give such directions, as the Minister considers necessary to deal with the risk and its possible consequences’; at s 7. See also Biosecurity Act 2015 (Cth) s 477; Public Health and Wellbeing Act 2008 (Vic) s 200.
21. Boughey, ‘Executive Power in Emergencies’ (n 12) 172.
22. Ibid.
23. Public Health (Non-Essential Gatherings) Emergency Direction 2020 (ACT), as at 1 April 2020.
24. Email from ACT Parliamentary Counsel’s Office to the author, 27 October 2020. PCO noted that this instrument had ‘a very high viewing rate for the register website’ and ‘was viewed 3 times more than any other document on the site’ during the relevant period. Similar data was sought from the governments of the Commonwealth, the states and the Northern Territory but was not made available.
25. Australian Bureau of Statistics, National, State and Territory Population (Catalogue No 3101.0, 31 March 2020).
26. Eric Windholz, ‘Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy’ (2020) 8(1-2) The Theory and Practice of Legislation 93, 96.
27. World Health Organization, ‘Rwanda: Drones for Community Awareness and Nation-Wide Measures in COVID-19 Response’, World Health Organization (online, 20 July 2020) <https://www.who.int/news-room/feature-stories/detail/rwanda-drones-for-community-awareness-and-nation-wide-measures-in-covid-19-response>; Zane Small, ‘Jacinda Ardern Discussed Alternatives to “Loud Honk” COVID-19 Mobile Phone Alert’, Newshub (online, 26 March 2020) <https://www.newshub.co.nz/home/politics/2020/03/jacinda-ardern-discussed-alternatives-to-loud-honk-covid-19-mobile-phone-alert.html>; Erin Handley, ‘How South-East Asia Is Using Catchy Pop Songs to Combat Coronavirus’, ABC News (online, 10 March 2020) <https://www.abc.net.au/news/2020-03-10/how-south-east-asia-is-using-pop-songs-to-combat-coronavirus/12038228>.
government and their respective public health officials. Additionally, they visit government websites, apps and social media channels devoted to the pandemic which summarise (and sometimes conflate) information about COVID-19 and the law. Media outlets serve as key conduits in the spread of the information contained in such instruments. They broadcast it to a wider audience, question leaders on the legality of specific actions and provide their own interpretations of restrictions for consumption.

The pandemic-related soft law instruments implemented demonstrate ‘variable degrees of “softness”’. For example, signs on public transport, celebrity videos and infographics produced by governments, if they amount to soft law, exist on the softer end of the spectrum. Other instruments are not so advisory. For example, the NSW Health website contains daily updates on locations where people ‘must’ get tested which are not included in the relevant public health orders. Government guidelines created for public hospital staff concerning COVID-19 ward arrangements and case reporting utilise similarly commanding language. Further, some purported delegated legislation may in fact be mere soft law. Boughey points to examples of orders made by the Victorian Deputy Chief Health Officer which — based on manner, form and procedural requirements—are not clearly either legislative instruments or administrative decisions. Various orders appear legislative in their general application to the community and their publication in the government gazette, yet they include provisions suggesting they are subject to merits review and have not been reported to the Victorian Parliament.

Benefits

Australia’s relatively successful response to the pandemic compared with other jurisdictions illustrates that soft law is an extremely effective method for regulating conduct. Restrictions are widely complied with and can be easily altered in changing circumstances. Generally, soft law is effective because ‘people believe it is law so tend to comply with it, without the need for heavy-handed government enforcement’. Rupp and Williams, in a psychological analysis of the effects of soft law within organisations, found that individuals were likely to internalise its content more than that of hard law. Much like COVID-19, the values contained in soft law have the ability to

28. Windholz (n 26) 94.
29. See, eg, ‘What you can and can’t do under the rules’, NSW Government (Web Page, 12 June 2020) <https://www.nsw.gov.au/covid-19/what-you-can-and-cant-do-under-rules>.
30. See, eg, ‘Victoria’s COVID lockdown restrictions: From masks, gatherings and shopping, to hospitals, school and work’, ABC News (Web Page, 12 February 2021) <https://www.abc.net.au/news/2021-02-12/victorias-coronavirus-lockdown-restrictions-explained/13149206?nw=0>.
31. Weeks, ‘Beyond the Separation of Powers?’ (n 4) 310.
32. See, eg, ‘Hegemon video: Magda Szubanski as Sharon Strzelecki’, Victorian Government (Web Page) <https://www.vic.gov.au/media/15774>.
33. ‘COVID-19 testing advice’, NSW Health (Web Page) <https://www.health.nsw.gov.au/Infectious/covid-19/Pages/case-definition.aspx>.
34. NSW Health, COVID-19 Ward Set Up Advice (Information Bulletin No IB2020_013, April 2020); Victorian Department of Health and Human Services, COVID-19 Daily Capacity and Occupancy Register: Guidelines for Reporting (Policy Document, 2020).
35. Boughey, ‘Executive Power in Emergencies’ (n 12) 172.
36. See Alyssa Leng and Hervé Lemahieu, ‘Covid Performance Index: Deconstructing Pandemic Responses’ Lowy Institute (Web Page, 28 January 2021) <https://interactives.lowyinstitute.org/features/covid-performance/>.
37. Boughey, ‘Executive Power in Emergencies’ (n 12) 172.
38. Deborah Rupp and Cynthia Williams, ‘The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum’ (2011) 12(2) Theoretical Inquiries in Law 581, 581.
spread amongst the community like a ‘social contagion’. Thio argues that the messages present in soft law ‘are subject to looser internal ‘sanctions’ inducing compliance, such as peer pressure or generated expectations’. The preference amongst executive leaders to make ‘strong recommendations’ on such activities as mask wearing, rather than mandating compliance, speaks to this effectiveness.

Soft law aimed toward the public is usually more accessible and digestible than hard law. For example, the Victorian Department of Health and Human Services (‘DHHS’) ‘daily update’ webpage simply states at the time of writing that ‘Victorians will be able to host up to 30 people in their home per day’. In contrast, the relevant hard law provision allowing 30 people to visit a home per day is one of 15 exceptions to a blanket ban on private gatherings. While not reflected in the language of the website, this limit excludes infants or those who ‘are in an intimate personal relationship’ with the people that ordinarily reside in the household. Justice Connect, in a submission to a parliamentary inquiry into the Victorian response to the pandemic, acknowledged this advantage. It recommended that the Victorian government ‘communicate any proposed changes clearly and widely — in multiple formats’ and ‘publish guidance about the new directions online as the changes are announced publicly’. It should be acknowledged, however, that many soft law instruments made for executive officials are less accessible. Argument stated in 1992 that quasi-legislative instruments which are not subject to the requirements in the precursor to the Legislation Act 2003 (Cth) (relating to the tabling and publishing of instruments) and its state equivalents ‘need be published to no-one’. Though developments in freedom of information law since 1992 may have led to greater publication of such instruments by governments, they remain (at least for lay people) difficult to locate or comprehend.

A feature of soft law which has been particularly beneficial during the pandemic is that it can be changed instantly. As they are not made through parliamentary authorisation, soft law instruments need not follow the debating, consultation, drafting or publishing requirements which attach to hard law. Thus, as public health advice rapidly changes, soft law can easily reflect the changes required of the public, often before a hard law instrument itself can be amended. As states have experienced outbreaks, Premiers have been able to foreshadow what legal restrictions will apply hours or days before their actual implementation or enforcement. Weeks argues that, as a result of the deliberative nature of Parliament, ‘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

39. Ibid 596.
40. Thio Li-Ann, ‘Constitutional “Soft” Law and the Management of Religious Liberty and Order: The 2003 Declaration of Religious Harmony’ [2004] (2) Singapore Journal of Legal Studies 414, 434.
41. Sarah Thomas, ‘NSW Premier Gladys Berejiklian Issues ‘Strong Recommendation’ for Masks to Fight Coronavirus’, ABC News (online, 2 August 2020) <https://www.abc.net.au/news/2020-08-02/nsw-sunday-coronavirus-update-masks-recommended/12516026>.
42. ‘Coronavirus (COVID-19) daily update’, Victoria Department of Health and Human Services (Web Page) <https://www.dhhs.vic.gov.au/coronavirus-covid-19-daily-update>.
43. Stay Safe Directions (Victoria) (No 16) 2020 (Vic) cl 7(2)(h), as at 1 March 2021.
44. Justice Connect, Submission No 54 to Public Accounts and Estimates Committee, Parliament of Victoria, Inquiry into the Victorian Government’s Response to the COVID-19 Pandemic (July 2020) 12.
45. Stephen Argument, Parliamentary Scrutiny of Quasi-Legislation (Papers on Parliament No 15, Department of the Senate, Parliament House, May 1992) 24 (‘Parliamentary Scrutiny’).
46. Weeks, Soft Law and Public Authorities (n 1) 57.
47. Ibid 30.
48. See, eg, NSW Health, ‘COVID-19 Update — 2 January 2021’ (Press Conference, 2 January 2021) <https://vimeo.com/507303044/756af387fe>.
rapidly changing circumstances’. These benefits illustrate that soft law is ‘unlikely to disappear from the regulatory landscape’. As will be discussed below, however, the benefits and detriments created by soft law are by no means symmetrical between government and governed.

**Accountability Issues**

The Australian conception of the separation of powers does not account for the existence — let alone contemporary use — of soft law. Australia’s constitutional setup, ‘in classic Diceyan style … fails to acknowledge the reality of the administrative state’, The separation of powers doctrine presupposes that all law is made through legislative power and that the executive simply administers it. Soft law’s existence outside this doctrine severely undermines the ability of the legislature and judiciary to impose accountability on the executive. By ‘accountability,’ I refer to the definition of ‘government accountability’ offered by Boughey and Weeks (and recently endorsed by Gordon and Steward JJ in *MZAPC v Minister for Immigration and Border Protection*), being ‘the basic idea that the executive branch and its delegates must be answerable, and as a general principle justify their actions, to the public, the Parliament, the courts or any administrative agency’. This article is limited to a discussion of the accountability gaps presented by soft law as they apply to legislatures and courts. As will be discussed below, administrative complaint mechanisms such as Ombudsmen and discretionary payment schemes already play an outsized role in addressing such gaps. Though beyond the scope of this essay, more attention should be paid to other accountability mechanisms which have the capacity to interact with use of soft law, including Auditors-General, royal commissions, anti-corruption bodies, freedom of information requests, and claims in tort and equity.

**Ruling Without Parliament**

Soft law is not made through a grant of legislative power. As such, it is not subject to the parliamentary accountability mechanisms which restrain the creation and use of primary and delegated legislation. Weeks remarks that federal ‘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’. It need not be published, prompting Argument to label it ‘secret legislation’. More significantly, once implemented, soft law is not subject to the parliamentary oversight mechanisms which apply to hard law (or at the Commonwealth level, registered legislative instruments) such as disallowance or committee scrutiny.

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49. Weeks, *Soft Law and Public Authorities* (n 1) 44.
50. Weeks, ‘Beyond the Separation of Powers?’ (n 4) 304.
51. Crawford, ‘Executive Guidance in the Administrative State’ (n 17) 8.
52. See generally Weeks, ‘Beyond the Separation of Powers?’ (n 4).
53. (2021) 95 ALJR 441, 465 [98] (Gordon and Steward JJ).
54. Janina Boughey and Greg Weeks, ‘Government Accountability as a “Constitutional Value”’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99, 103. See also Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020); Jerry Mashaw, ‘Accountability and Institutional Design: Some Thoughts on the Grammar of Governance’ in Michael Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 115; Richard Mulgan, ‘Accountability Deficits’ in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 545.
55. Weeks, *Soft Law and Public Authorities* (n 1) 30.
56. Argument, ‘Quasi-Legislation’ (n 2) 148-150.
57. See Brendan Gogarty and Gabrielle Appleby, ‘The Role of Tasmania’s Subordinate Legislation Committee during the COVID-19 Emergency’ (2020) 45(3) *Alternative Law Journal* 188, 193.
Many would argue that it is beneficial to circumvent these processes in order to quickly adapt to changing public health circumstances. However, it should be noted that ‘parliamentary committees have demonstrated an ability to act swiftly in the past’.58

This absence of parliamentary participation, coupled with the practical effectiveness of soft law discussed above, ‘derogate from the primacy of the … Parliament as the supreme law-maker’.59 Though an imperfect system, it remains a keystone of Australian public law that the legislature, as the most democratic branch of government, is the source of all law. The executive’s ability to ‘govern without Parliament’ through soft law has been exacerbated by the pandemic, leading to a severe lack of accountability over executive action.60 Legislatures and courts often acquiesce to the executive in times of emergency. Petrov argues that this ‘is a logical step since it is the executive … which has what responding to an emergency needs: hierarchical structure … access to expertise, and qualities that allow for swift and decisive action’.61 The fact that pandemic-related soft law has conflicted with, expanded and even influenced amendment of hard law illustrates the extent of such executive dominance.

For example, Justice Connect, in its above-mentioned submission, noted that the Victorian DHHS FAQ webpage contained ‘an answer which didn’t properly reflect the law’.62 The NSW Health ‘daily updates’ page has often incorrectly suggested that masks are mandatory on public transport at times when they were merely recommended.63 In Ontario, an emergency alert message was sent to residents suggesting they were required to remain in their homes at all times, despite no such requirement being formally enacted.64 When such conflicts occur, the dominant interpretation of the law amongst the public is usually that reflected in soft law. Researchers from the University of York conducted surveys across the United Kingdom aimed at measuring understanding of COVID-19 restrictions amongst the population. Their findings ‘suggest significant misunderstanding and confusion on the part of the public about the formal legality of lockdown restrictions’.65 A similar misunderstanding of the legal status of various face covering restrictions was found amongst respondents, despite the fact that ‘[m]ost people (97%) stated they either fully or mostly understand the rules’.66

The New Zealand High Court recently addressed a case of the executive utilising soft law alone to govern in Borrowdale v Director-General of Health (‘Borrowdale’).67 In March 2020, the Prime Minister announced the implementation of ‘Alert Level 4 [COVID-19] Restrictions’ on New Zealanders at a press conference and on social media.68 However, these restrictions were not

58. Boughey, ‘Executive Power in Emergencies’ (n 12) 170.
59. Argument, ‘Parliamentary Scrutiny’ (n 45) 20.
60. Weeks, ‘Beyond the Separation of Powers?’ (n 4) 309.
61. Jan Petrov, ‘The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?’ (2020) 8(1-2) The Theory and Practice of Legislation 71, 75.
62. Justice Connect (n 44) 11.
63. ‘What you can and can’t do under the rules’, NSW Government (Web Page, 12 June 2020) <https://www.nsw.gov.au/covid-19/what-you-can-and-cant-do-under-rules>.
64. Paul Daly, ‘Governmental Power and COVID-19: The Limits of Judicial Review’ in Colleen M Flood et al (eds), Vulnerable: The Law, Policy and Ethics of COVID-19 (University of Ottawa Press, 2020) 211, 220 (‘Governmental Power and COVID-19’).
65. Simon Halliday, Jed Meers and Joe Tomlinson, Public Attitudes on Compliance with COVID-19 Lockdown Restrictions (Interim Report No 2, 25 June 2020) 3.
66. Simon Halliday et al, Public Attitudes on Compliance with COVID-19 Restrictions (Face Coverings) (Interim Report No 3, 10 November 2020) 2.
67. [2020] NZHC 2090 (‘Borrowdale’).
68. Jacinda Ardern, ‘Prime Minister: COVID-19 Alert Level increased’ (Press Release, New Zealand Government, 23 March 2020) <https://www.beehive.govt.nz/speech/prime-minister-covid-19-alert-level-increased>.
reflected in law until 9 days later, when the Director General of Health made orders under the relevant legislation. The Court recognised the regulatory effectiveness such ‘soft messaging’ had on the public. The statements, it held, ‘carried with them the full authority of her office and the State’ and subsequently ‘created the overwhelming impression that compliance was required by law’. Hickman, in relation to action taken by the United Kingdom government during the early stages of the pandemic, similarly argues that soft and hard law were purposely conflated to ensure compliance. He comments that ‘the Government used the fusion of criminal law and public health advice in the coronavirus guidance as a sui generis form of regulatory intervention that sits outside the regime of emergency governance established by Parliament’.

The High Court of Ireland dealt with a similar issue in Ryanair Dac v An Taoiseach (‘Ryanair’). The case involved a challenge to coronavirus travel advice which was displayed prominently on an Irish government website. The Court, distinguishing the facts before it from those in Borrowdale, ultimately rejected the plaintiff’s submission that the travel advice was in fact a ‘restriction’ and thus traversed into the realm of the legislature. Nevertheless, in a passage seemingly directed at the government itself, the Court painstakingly laid out the apparent consequences of such a situation:

Were this to happen, then the executive branch would be able to achieve a result which is similar in effect to legislation, ie, members of the public might well be coerced into complying with the government’s guidance in the mistaken belief that it is legally enforceable. This is especially so in the context of the coronavirus pandemic. The very fact that the government’s guidance—to use a neutral term—on the measures to be taken to restrict the spread of coronavirus is, of necessity, constantly changing means that members of the public will rely heavily on official sources, such as government websites, to obtain information on what are the current requirements. It is unrealistic to expect that a member of the public will wade through reams of statutory instruments in order to determine what the precise legal requirements are at any given moment. The difficulties which a member of the public faces in ascertaining the legal requirements in force at any moment in time are compounded by the fact that different legal requirements may apply in different geographical areas … In circumstances where members of the public will, inevitably, rely on official sources, such as government websites, there is an obligation upon the government to ensure that it does not publish information which creates the mistaken impression that certain recommended restrictions are legally enforceable if, in truth, there is no legislation in force to that effect. It would undermine the rule of law, and offend against the separation of powers, were the government to do so.

The capacity for soft law to affect the content of hard law was illustrated in Loiolo v Associate Professor Michelle Giles (‘Loiolo’). In September 2020, the Victorian Premier released a press statement declaring changes to the state’s pandemic curfew conditions, despite the fact that the relevant Chief Health Officer (‘CHO’) empowered to formally enact such changes was yet to do so. In proceedings challenging the state wide directions subsequently enacted by the CHO, the
Supreme Court of Victoria ultimately held that she made her decision independent of the Premier’s soft law statements. However, the Court also acknowledged the ability for soft law to influence — or at least appear to influence — hard law. It held the CHO ‘was in an awkward position, in that she was being asked to make an independent decision after [the Premier] had announced what, in effect, was a decision on the same issue’.

Ruling (Mostly) Without Review

Further, soft law’s nonconformity with the separation of powers doctrine ensures that those detrimentally affected by it are usually unable to seek judicial review. Even if successful, the remedies available are unlikely to be of value to most. Weeks remarks that ‘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 itself is neither. A challenge to it would not constitute a ‘matter’ for constitutional purposes, since soft law is ‘an implausible source of legal duties’. At the federal level, a decision made under soft law is not ‘made under an enactment’ for the purposes of the Administrative Decisions (Judicial Review) Act 1977 (Cth). Some forms of soft law guiding the making of administrative decisions — particularly policies — may be reviewed on the basis that they are directly inconsistent with hard law and have been applied to specific circumstances. Such an unwieldy standard is often difficult to prove in court. The Court in Ryanair stated that ‘[i]n principle, the making of unequivocal statements by the executive branch of government, through official channels … which purport to restrict the personal rights of individuals in the absence of primary or secondary legislation and under threat of compulsion, would be amenable to judicial review’. However, ‘the threshold which would have to be met before the courts would intervene on this basis is a very high one’.

Currently, soft law is only ‘indirectly reviewable by courts’ if it is relevant to established avenues of review. For example, soft law may be relevant if it fetters a discretion, if it is a (statutorily imposed) relevant consideration, or if to depart from it would be unreasonable. The Premier’s statements in Loielo were not themselves reviewable, but pertinent to whether the CHO acted at his direction. In most common law jurisdictions (notably including Victoria, Queensland and the ACT), those affected by soft law may seek to challenge it on the basis that it breaches statutorily or constitutionally-protected rights (as occurred in Borrowdale, Ryanair and Loielo). In most cases, Australians are unable to do so. Thus, only specific forms of soft law guiding the discretion of a decision-maker are likely to even be ‘indirectly reviewable,’ such as guidelines or policy documents. Many of the soft law forms utilised throughout the pandemic which have enabled jurisdiction-wide restrictions would not be. For example, Daly, regarding the emergency alert

78. Ibid [167]-[171].
79. Ibid [169].
80. Weeks, Soft Law and Public Authorities (n 1) 62.
81. Australian Constitution s 75; Transport Accident Commission (Vic) v Kaddour [2019] NSWSC 1738, [21] (Basten J).
82. Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3(1).
83. Green v Daniels (1977) 13 ALR 1, 9.
84. Ryanair (n 73) [41].
85. Ibid [42].
86. Creyke (n 3) 19.
87. See Weeks, ‘Use and Enforcement of Soft Law’ (n 5) 190-199; Weeks, Soft Law and Public Authorities (n 1) 119-141.
88. Loielo (n 76) [43]-[49].
89. Borrowdale (n 67) [193]-[226].
system used by the Ontarian government, notes that ‘it would be difficult if not impossible to persuade a court to judicially review an alert that did not impose any obligations or otherwise modify anyone’s legal position’.90

Even if a challenge by a person detrimentally affected by soft law is successful, the remedies available are unlikely to assist. Weeks suggests that judicial review remedies ‘were not developed with the modern phenomenon of soft law in mind’.91 As such, they remain ‘implicitly procedural’.92 Soft law cannot create a duty for an order of mandamus to enforce. Certiorari and prohibition require a finding that a decision was without power, but ‘the very point of soft law is that it is not susceptible to ultra vires review’.93 An injunction would not be imposed to prevent an executive officer from taking a strictly legal action.94 Thus, the only remedy available to those detrimentally affected by soft law appears to be a declaration. In Borrowdale, the Court declared that the soft law statements issued by the government were ‘not prescribed by law and therefore contrary to the New Zealand Bill of Rights Act’.95 Geiringer and Geddis label this remedy ‘a relatively safe move for the Borrowdale Court’.96 Given the extent to which pandemic-related soft law has impacted rights, obligations and activities, courts should be able to hold governments accountable for their failures by providing plaintiffs with more than declaratory relief.97

Rethinking Soft Law Through the Pandemic and Beyond

It is clear that Australian administrative law structures do not accurately reflect the way that modern governments use soft law, or indeed, the way that they have used it throughout the pandemic. Given its benefits, use of soft law is only likely to increase going forward. To address the above accountability issues, soft law must be rethought across the administrative law system. I ultimately agree with Weeks that ‘the most effective remedies for maladministration involving soft law are also “soft”’ so suggest a greater role for administrative complaint mechanisms such as Ombudsman recommendations.98 Australian judicial review must also adapt to better acknowledge and respond to soft law. It may possibly do this by adopting two key doctrines found across the common law world: substantive legitimate expectations and epistemic deference. Though beyond the scope of this article, further attention must also be paid to the potential role for parliamentary scrutiny in countering these issues.99 The pandemic has greatly increased the attention paid to the role of soft law in modern governance. It has also crafted a unique opportunity for administrative law structures to adapt accordingly.

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90. Daly, ‘Governmental Power and COVID-19’ (n 64) 220.
91. Weeks, Soft Law and Public Authorities (n 1) 145.
92. Ibid 141.
93. Ibid 143.
94. Ibid.
95. Borrowdale (n 67) [292].
96. Claudia Geiringer and Andrew Geddis, ‘Judicial Deference and Emergency Power: A Perspective on Borrowdale v Director-General’ (2020) 31(4) Public Law Review 370, 379.
97. Though beyond the scope of this article, there exists a growing body of work on whether remedies in tort or equity may be suited to addressing soft law. See Matthew Groves and Greg Weeks, ‘Soft Law and Liability in Tort’ (2020) 27(3) Australian Journal of Administrative Law 131; Weeks, Soft Law and Public Authorities (n 1) 180-234. See also Greg Weeks, ‘Estoppel and Public Authorities: Examining the Case for an Equitable Remedy’ [2010] (4) Journal of Equity 247.
98. Weeks, Soft Law and Public Authorities (n 1) 271.
99. See generally Argument, ‘Parliamentary Scrutiny’ (n 45).
Various administrative complaint mechanisms currently serve a key role in combatting abuse of soft law. Chief among these are various jurisdictional and issue-specific Ombudsmen. Ombudsmen are integrity bodies created by statute which are designed to hold executive officers accountable for the quality of their administration. Ombudsmen (like soft law) do not fit neatly into the Australian conception of the separation of powers, practically operating within the fourth ‘integrity branch’ of government. Consequently, they are empowered only to make recommendations in pursuance of the values of good administration, rather than to rule on the merits or legality of executive action. Weeks argues that this flexibility makes Ombudsmen the most suited mechanism for practically dealing with the consequences of soft law. They are able to recommend almost anything, and their recommendations are usually accepted by the executive. With soft law here to stay, such recommendations can ensure consistency and fairness by influencing how executive officials draft, publish, apply or ignore their own soft law. Indeed, various Ombudsmen have dealt with issues related to soft law during the pandemic. The Victorian Ombudsman received over 550 complaints from various small business owners about government lockdown grants — including that ‘applicants received incorrect information from the [Department of Jobs, Precincts and Regions] call centre’. It made various recommendations that the department ‘take measures to … improve communication with applicants’ which were quickly accepted. The Commonwealth Ombudsman has investigated whether official guidelines for preventing the spread of COVID-19 in immigration detention facilities ‘are adhered to by facilities in practice’. Another example relates to the Queensland Human Rights Commission (‘QHRC’), an analogous statutory integrity body designed to conduct investigations and suggest changes to executive action which protect human rights. In October 2020, the QHRC made various recommendations to the Queensland Police Service (‘QPS’) in response to complaints that its stringent policy on fresh air breaks for those in mandatory hotel quarantine breached various human rights. Their public reprimand of the policy led to increased public scrutiny and subsequently, a shift away from the use of hotels lacking balconies or openable windows. To preserve their flexibility, the statutory jurisdiction of these bodies need not be amended to specifically cover pandemic-related soft law issues. Rather, to practically respond to the above accountability issues, each must receive additional funding which would allow them to handle more complaints and conduct more investigations. Weeks argues that

100. Weeks, Soft Law and Public Authorities (n 1) 235-242.
101. Michael Frahm, Australasia and Pacific Ombudsman Institutions: Mandates, Competences and Good Practice (Springer, 2013) 69-71. See, eg, Ombudsman Act 1976 (Cth) s 15; Ombudsman Act 1974 (NSW) s 26; Ombudsman Act 1973 (Vic) s 23.
102. Weeks, Soft Law and Public Authorities (n 1) 271.
103. Ibid 248-249.
104. ‘Complaints about financial grants for small business’, Victorian Ombudsman (Web Page) <https://www.ombudsman.vic.gov.au/our-impact/case-examples/complaints-about-financial-grants/>.
105. Ibid.
106. Commonwealth Ombudsman, ‘Statement by the Commonwealth Ombudsman Michael Manthorpe on the Management of COVID-19 risks in Immigration Detention Facilities’ (Press Statement, Commonwealth Ombudsman, 1 July 2020) 1.
107. See Human Rights Act 2019 (Qld) pt 4.
108. Queensland Human Rights Commission, Hotel Quarantine: Unresolved Complaint Report Under Sec. 88 Human Rights Act 2019 (Report, 15 October 2020) [36]-[52].
109. Stuart Layt and Lydia Lynch, ‘CHO Defends Hotel Quarantine Amid Concerns from Human Rights Watchdog’, Brisbane Times (online, 10 December 2020) <https://www.brisbanetimes.com.au/national/queensland/cho-defends-hotel-quarantine-amid-concerns-from-human-rights-watchdog-20201210-p56mc7.html>.
Ombudsmen are ‘making limited funds go further by … attempting to influence systemic change rather than redress individual grievances’. In its submission to an inquiry conducted by a parliamentary committee, the NSW Ombudsman stated that:

Underfunding means that a body is unable to perform its mandate in accordance with the legislative terms, Parliamentary intent and community expectations. Underfunding also risks contributing to the very problems that these bodies exist to address — namely a lack of public trust and confidence in the integrity, capability and fairness of public institutions.

A further mechanism available is the making of an *ex gratia* payment by the executive to those detrimentally affected by soft law, usually through a discretionary payment scheme. Such payments are often recommended by the Ombudsmen, but may be independently utilised by executive officers at their discretion. Weeks suggests this would be most appropriate for individuals who have suffered a direct loss and who have ‘no enforceable legal right to damages’. Given the extent of reliance on soft law during the pandemic, additional revenue should be set aside for use in discretionary payment schemes such as the Commonwealth’s Scheme for Compensation for Detriment caused by Defective Administration.

**Judicial Review**

Australian judicial review, though commonly perceived as stuck in its own eccentricity, may yet have the capacity to adapt and better address the accountability gaps caused by modern use of soft law. Two interpretative doctrines found across the common law world — substantive legitimate expectations and epistemic deference — present possible avenues for doing so. Their limited adoption could allow judges to uphold interpretations of hard law which align with those presented in soft law, when such interpretations favour individuals who have relied on them. These doctrines would be available merely as interpretative presumptions for courts which could easily be rebutted in circumstances where they would be unreasonable to follow.

**Substantive Legitimate Expectations.** Australian courts have notably signalled their aversion to a doctrine of substantive legitimate expectations. The concept of a ‘legitimate expectation’ is difficult to define, given the various tests and exceptions espoused by judges and academics across the common law world. Generally, it concerns whether the expectations which an individual holds as a result of executive conduct should be legally recognised and upheld. As discussed above, in relation to the pandemic, the public gain most of their understanding of the law from soft law instruments. Thus, those instruments create expectations amongst the public of what the law is and

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110. Weeks, *Soft Law and Public Authorities* (n 1) 237.
111. NSW Ombudsman, Submission No 8 to Legislative Council Public Accountability Committee, Parliament of New South Wales, *Budget Process for Independent Oversight Bodies and the Parliament of New South Wales* (18 November 2019) 12.
112. See, eg, *Ombudsman Act 1974* (NSW) s 26A.
113. Weeks, *Soft Law and Public Authorities* (n 1) 253.
114. See generally, ‘Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme)’, Australian Government Department of Finance (Web Page) <https://www.finance.gov.au/individuals/act-grace-payments-waiver-debts-commonwealth-compensation-detriment-caused-defective-administration-cdda/scheme-compensation-detriment-caused-defective-administration-cdda-scheme>; Weeks, *Soft Law and Public Authorities* (n 1) 252-267.
115. Jason NE Varuhas, ‘In Search of a Doctrine: Mapping the Law of Legitimate Expectations’ in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 17, 18.
how it will be applied. Crawford notes that ‘[t]he executive is often directed to give guidance, sometimes in a very formal guise, which the public should have every reason to expect is authoritative. There is often no other viable source of information’. Australian courts have accepted that some procedural legitimate expectations can be enforced, but this has largely been absorbed into the concept of procedural fairness generally. Groves notes that, at most, if an executive officer creates an expectation that they will exercise their discretion in a certain way, then ‘any change affecting this belief should be conditioned by the rules of natural justice,’ merely meaning that notice of the change and a chance to respond are afforded. By contrast, the High Court has heavily criticised the substantive protection of legitimate expectations by courts in the United Kingdom and other jurisdictions. They argue that the adoption of a doctrine of substantive legitimate expectations would shatter the revered legality-merits distinction and elevate soft law promises and statements above statute, thus undermining parliamentary supremacy. As made blatantly clear through its power during the pandemic, however, what is more problematic to parliamentary supremacy is the practical ascendency of soft law over hard law in the lives of the Australian population.

The barriers to reconciling such a doctrine with Australian administrative law are less insurmountable than perceived. Crawford suggests that Australian courts do have the capacity to ‘read a statutory conferral of executive power on the presumption that it must be exercised consistently with the decision-maker’s prior statements about the law’. This would introduce a standard of substantive legitimate expectations which recognises the reliance placed by individuals on soft law, while preserving the superiority of statute. She points to recent High Court developments — including use of structured proportionality in implied freedom of political communication cases — which illustrate a growing openness amongst the judiciary to shaping law to match modern administrative practice. The pandemic’s dramatic exposure of unaccountable executive power has perhaps hastened this process, as illustrated by the seismic adoption of structured proportionality in cases involving s 92 of the Constitution by a majority of the High Court in Palmer v Western Australia. Though it still faces considerable hurdles, the importation of a doctrine of substantive legitimate expectations to Australia thus seems ever more plausible.

Even if courts remain hesitant to take such action, there remains the option of expressly legislating similar presumptions, including in schemes used throughout the pandemic. Provisions in the Taxation Administration Act 1953 (Cth) (‘TA Act’) relating to the making of rulings by the Commissioner of Taxation (‘Commissioner’) provide a useful precedent for protecting legitimate expectations in this way. Under the TA Act, the Commissioner may provide private or public rulings to persons outlining the Commissioner’s opinion of the way in which a relevant provision applies, or would apply, to you under various pieces of taxation legislation (arguably some of the most

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116. Crawford, ‘Executive Guidance in the Administrative State’ (n 17) 14.
117. Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32(2) Melbourne University Law Review 470, 472.
118. Ibid 471.
119. Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1.
120. Crawford, ‘Executive Guidance in the Administrative State’ (n 17) 15.
121. Ibid 16.
122. Ibid 19.
123. [2021] HCA 5, [62] (Kiefel CJ and Keane J), [217] (Edelman J). Earlier, the Federal Court of Australia also signified such a shift through its use of structured proportionality in Brett Cattle Company Pty Ltd v Minister for Agriculture (2020) 274 FCR 337, 411 [300] (Rares J).
incomprehensible statutes in Australia). Schedule 1, s 357–60 makes such rulings binding on the Commissioner if ‘the ruling applies to you’ and ‘you rely on the ruling by acting (or omitting to act) in accordance with the ruling,’ regardless of whether it was a correct interpretation of the relevant legislation. The legitimate expectations created through rulings are substantively upheld, thus ‘[ameliorating] the substantial unfairness that would undoubtedly arise if taxpayers were penalised for failing to comply with legislation that is utterly unknowable’. Similar provisions could be introduced in various public health orders to protect the expectations engendered through soft law instruments such as government websites or press conferences.

Courts would be free to depart from this presumption — and in turn to disappoint a person’s expectations — if there are adequate reasons to do so. The standard for determining whether to do so remains in question. The ‘unruly English jurisprudence’ illustrates that a proportionality standard — whereby a court itself balances the interests of departing from or following a soft law expectation — is not appropriate. Boughey remarks that such a standard could ‘potentially [create] new “rights” each time [government] made a promise or a policy’. Instead, Daly recommends the implementation of a ‘pluralist’ approach whereby a departure from a substantive legitimate expectation is judged through an ‘assessment of reasonableness or rationality’. Australian courts are already comfortable with applying standards of reasonableness without fear of intruding onto the merits of executive decision-making. Thus, this approach would preserve the sacrosanct legality-merits distinction while also allowing courts to substantively protect expectations engendered through soft law which cannot be justifiably abandoned by an executive officer. Besides remedying individual cases of unfairness, the adoption of this doctrine could influence systemic changes to how governments draft, publish, follow and ignore their own soft law.

Epistemic Deference. Similarly, Australian courts have long refused to openly defer to executive interpretations of law, based on the constitutionally enshrined strict separation of judicial power. Such interpretations may be contained in formal instruments such as delegated legislation, or in less formal soft law instruments utilised by executive officials. Deference can refer to a court exercising either ‘respectful acknowledgement of the authority’ or ‘respectful regard for the judgment or opinion’ of the executive. While the former requires a court to accept and apply an executive interpretation so long as it is reasonable, the latter merely requires that a court give weight to it. Adoption of the latter type of deference — referred to as ‘epistemic deference’ or ‘Skidmore deference’ — to executive interpretations of law, may go some way to addressing the above

124. Taxation Administration Act 1953 (Cth) sch 1, s 357-1.
125. Ibid sch 1, s 357-60.
126. Crawford, ‘Age of Statutes’ (n 16) 174.
127. Varuhas (n 115) 18.
128. Janina Boughey, ‘Proportionality and Legitimate Expectations’ in Matthew Groves and Greg Weeks (eds), Legitimate Expectations in the Common Law World (Hart Publishing, 2017) 121, 146.
129. Paul Daly, ‘A Pluralist Account of Deference and Legitimate Expectations’ in Matthew Groves and Greg Weeks (eds), Legitimate Expectations in the Common Law World (Hart Publishing, 2017) 101, 117.
130. See Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135.
131. Stephen Gageler, ‘Deference’ (2015) 22(3) Australian Journal of Administrative Law 151, 152-3.
132. Janina Boughey, ‘Re-Evaluating the Doctrine of Deference in Administrative Law’ (2017) 45(4) Federal Law Review 597, 603.
accountability issues. Justice Gageler notes that epistemic deference ‘can be seen in the long-standing practice of the High Court’ in determining constitutional facts. The High Court has also expressed its openness to extending such a doctrine to determinations of jurisdictional fact, something which scholars have notably predicted could be concluded in cases involving emergency public health powers. While it has not yet signalled a similar tolerance for deferring to executive interpretations of law, such a move remains possible. The primary justification for rejecting deference in Australia, imported from the foundational American constitutional case of Marbury v Madison, is simply that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is’. To allow the judiciary to pass on its interpretative responsibilities to another branch of government, this line of reasoning follows, would severely undermine the separation of powers doctrine. However, as Crawford points out, the assertion that statutory interpretation is ‘always a question of law and hence the exclusive province of the courts’ rests on unsteady assumptions. She argues that the task of ascribing meaning to an ambiguous statute can be conceptualised as one of policy, which the executive is ultimately most suited to. Decades of American case law ultimately support this position. The pandemic has highlighted that in the age of statutes, the word of the executive practically holds more sway than any statutory text. A doctrine of deference could substantially narrow the gap between this reality and current legal thinking.

Boughey makes the case for adoption of a doctrine of epistemic deference in Australia which could be used only to give weight to interpretations of the law espoused by expert executive officials administering complex regulatory schemes. This approach would have courts presumptively accept such interpretations, ‘especially where those interpretations are reflected in published advice’. Such interpretations would undoubtedly favour individuals who, given the complexity of primary and delegated legislation, have relied on soft law. The presumption could even be framed as only applying to interpretations based on soft law which favour an individual. If there are good reasons to depart from the presumption, including that it reflects statements of the law which have unfairly misled individuals, then courts would be free to do so. This would prevent the executive from simply dictating their own statements of the law for courts to accept without question. Boughey proffers various compelling justifications for introducing such a doctrine, but for the purposes of this article, I will focus on the two most relevant to combatting abuse of soft law. Firstly, in the ‘age of statutes’ there is a normative argument that, due to legislative complexity, ‘fairness dictates that a member of the public should be able to rely on the guidance given by the administering agency in organising their affairs’. Secondly, this would make outcomes generally

133. Paul Daly, A Theory of Deference in Administrative Law: Basis, Application and Scope (Cambridge University Press, 2012) 7–8; Skidmore v Swift & Co, 323 US 134 (1944).
134. Gageler (n 131) 152.
135. HP Lee et al, Emergency Powers in Australia (Cambridge University Press, 2018) 249.
136. Marbury v Madison 5 US (1 Cranch) 137 (1803) (Marshall CJ).
137. Crawford, ‘Executive Guidance in the Administrative State’ (n 17) 21.
138. Ibid.
139. Ibid 20-2.
140. Janina Boughey, ‘The Case for “Deference” to (Some) Executive Interpretations of Law’ in Janina Boughey and Lisa Burton Crawford (eds), Interpreting Executive Power (Federation Press, 2020) 34, 36-7 (‘The Case for Deference’).
141. Ibid 47.
142. Ibid 53.
143. Ibid 49.
more predictable for those dealing with soft law.\textsuperscript{144} The adoption of such a doctrine would thus ensure that ‘soft law is able to promote consistent decision-making without being binding’.\textsuperscript{145}

If such a doctrine were adopted, it is not fully clear what pandemic-related soft law would be affected. Across all Australian jurisdictions, responses to the pandemic have been divided amongst various departments, so there exists no single expert agency or officer responsible for administering all relevant laws. In some Australian jurisdictions, public health officials provide advice to governments which subsequently informs the enactment of delegated legislation by Ministers. In others, ‘significant executive power has been vested in unelected technocrats absent many of the institutional and procedural checks and balances that normally control the exercise of that power’.\textsuperscript{146} An epistemic doctrine of deference would thus seem applicable to certain soft law instruments which are created on the basis of such expertise. As mentioned above, various public health orders made directly by the Victorian Chief Health Officer are likely to be soft law instruments. Thus, if such a standard of deference applied, courts dealing with public health legislation would be free to presume the interpretation of restrictions contained in the orders is correct. More simply, courts would be able to presume that published interpretations by the Australian Tax Office explaining the meaning of complex ‘JobKeeper’ legislation should be followed.\textsuperscript{147}

**Conclusion**

The COVID-19 pandemic has highlighted the extent to which modern governance relies on the proliferation of soft law. The Australian population cannot be expected to understand the restrictions applying to their daily lives simply by reading the long, convoluted and legalistic text of ever-changing public health orders. In our age of statutes, governments do have an obligation to explain the law to the governed, and soft law remains the most effective way to do so. Such reliance on the executive should not, however, exist without comparable accountability mechanisms. In this article, I have explained the phenomenon of soft law and its use throughout the pandemic. The benefits of soft law as a form of regulation were discussed, as illustrated through Australia’s successful response to the pandemic. Namely, it is effective, comprehensible and adaptable. Next, the accountability issues which soft law presents due to its position outside the Australian conception of the separation of powers were critically analysed. The creation of soft law without reference to the authority of the legislature allows the executive to govern alone and (in most cases) without judicial interference. To address these accountability issues through the pandemic and beyond, ‘soft’ controls such as Ombudsmen and discretionary payment schemes will be pivotal. Further, Australian judicial review should be updated to better account for modern use of soft law. The adoption of the foreign doctrines of substantive legitimate expectations and epistemic deference provide possible solutions for doing so.

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\textsuperscript{144} Ibid 50.  
\textsuperscript{145} Weeks, *Soft Law and Public Authorities* (n 1) 49.  
\textsuperscript{146} Windholz (n 26) 95. See, eg, *Public Health Act 2005* (Qld) s 362B.  
\textsuperscript{147} See Boughy, ‘The Case for Deference’ (n 140) 48-9. See also Ansari and Sossin, ‘Legitimate Expectations in Canada: Soft Law and Tax Administration’ in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 293; Stephen Daly, ‘Oversight of HMRC Soft Law: Lessons from the Ombudsman’ (2016) 38(3) *Journal of Social Welfare and Family Law* 343.