THE TORT OF MISUSE OF PUBLIC OFFICE: SUGGESTED CLARIFICATIONS AND REFORMS

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Recently the Federal Court of Australia found that a Commonwealth Minister had committed the tort of misuse of public office. While this claim is often brought, it is usually unsuccessful, making this case noteworthy. The case shines a spotlight on this unusual tort. While it has a lengthy history in the common law, many of its contours remain unresolved. This article will explain the basis of the tort, before considering how it has developed in the United Kingdom and Australia. It will consider differences, or possible differences, between the tort in the two jurisdictions. It then critically considers some important aspects of the tort about which there continues to be controversy, including the notion of a public office, the question of vicarious liability, the question whether a duty of care is necessary, and the mental element required. It suggests some important changes in how courts should apply these principles in future cases, to better reflect the realities of government today, the rationale of the tort, and to make it consistent with the courts' approach to other intent-based torts with which the High Court has specifically related to this novel tort.

I INTRODUCTION

The Federal Court of Australia recently decided that a Minister of the Crown had committed the tort of misuse of public office.[1] This is a rare finding — the tort is often pleaded, but rarely successfully. The case concerned the Minister's decision to ban the live cattle trade from Australia, after reports of cruelty in some of the destinations to which the cattle were sent. The decision raised, but did not resolve, many uncertainties that continue to plague this tort.

Like most legal actions, the tort of misuse of public office seeks to balance apparently competing considerations. On the one hand, it is stated that those who hold public office, including public servants, hold a position of trust and confidence.[2] Given the powers they possess, and their ability to substantially affect

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1 *Brett Cattle Co Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337 ('*Brett Cattle*').

2 See *Comcare v Banerji* (2019) 267 CLR 373, 401–2 (Kiefel CJ, Bell, Keane and Nettle JJ), 415–16 (Gageler J), 431–3 (Gordon J), 447–9 (Edelman J); *R v Boston* (1923) 33 CLR 386, 412

the rights and interests of a broad range of individuals through their exercise, their behaviour must be above reproach. Literally, they are the 'servants' of the people. This fits with a social contract theory of society, where the individual cedes limited liberties to a government, which is charged with acting in the public interest for the benefit of all.[3] Inherent in this social contract is the notion that those who act on behalf of the government will, in fact, act in the public interest and comply with norms of behaviour appropriate to a person in a position of trust.[4] There are clear analogies with the notion in private law of fiduciary duties.[5] The threat of personal liability for improper behaviour in the course of carrying out such a role is designed to deter such behaviour.[6] On the other hand, if responsibilities are 'too' onerous, good individuals may be dissuaded from assuming a public office due to fear of personal liability for their actions and (possibly) omissions, or could become unduly reticent about making decisions for the public good.[7]

The tort is an interesting hybrid of public and private law. It involves one of the few examples of a public law tort, which can be committed only by the holder of a public office.[8] It has equivalents in criminal law.[9] Whilst it has a public law focus, and is anomalous in that way given that obviously torts are traditionally private law actions;[10] like other torts it is a loss-based action, and the remedy is compensation to the party or parties affected. The curious hybrid nature of the tort can be explained by the fact that, when it was conceived in the late 17th to early 18th century, what we would now recognise as administrative law did not exist.[11] Few remedies were available for alleged public maladministration. A generalised

(Higgins J); *Porter v Magill* [2002] 2 AC 357, 463 (Lord Bingham, Lord Steyn agreeing at 481 [59], Lord Hope agreeing at 481 [60], Lord Hobhouse agreeing at 502 [131], Lord Scott agreeing at 511 [164]); *Jones v Swansea City Council* [1990] 1 WLR 54, 85 (Nourse LJ) ('*Jones*').

3 *Three Rivers District Council v Governor and Company of the Bank of England [No 3]* [2003] 2 AC 1, 190 (Lord Steyn) ('*Three Rivers*'), quoting *Jones* (n 2) 85 (Nourse LJ): 'in a legal system based on the rule of law executive or administrative power "may be exercised only for the public good" and not for ulterior and improper purposes'. See also Robert J Sadler, 'Liability for Misfeasance in a Public Office' (1992) 14(2) *Sydney Law Review* 137, 139.

4 *R v Bembridge* (1783) 3 Dougl 327; 99 ER 679, 681 (Lord Mansfield).

5 See Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35(1) *Melbourne University Law Review* 1, 8–9 ('A Very Peculiar Tort'); Erika Chamberlain, 'Misfeasance in a Public Office: A Justifiable Anomaly within the Rights-Based Approach?' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 553, 578 ('Misfeasance in a Public Office').

6 *Ashby v White* (1703) 2 Ld Raym 938; 92 ER 126, 137 (Holt CJ) ('*Ashby*').

7 *Sanders v Snell* (1998) 196 CLR 329, 344 [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) ('*Sanders*').

8 Sadler, 'Liability for Misfeasance in a Public Office' (n 3) 138.

9 See, eg, *Criminal Code Act 1995* (Cth) sch 1 s 142.2 (abuse of public office); *Criminal Code 1899* (Qld) sch 1 ss 92, 92A. In the common law, see *R v Quach* (2010) 27 VR 310; *DPP (Vic) v Marks* [2005] VSCA 277, [4] (Eames JA); Law Commission (UK), *Misconduct in Public Office* (Report No 397, 4 December 2020).

10 Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 223.

11 Peter Cane, *Administrative Law* (Oxford University Press, 4th ed, 2004) 2.

duty of care did not exist. Government bodies enjoyed an immunity from liability for nonfeasance in some contexts.[12]

In this unappealing climate for those disgruntled with government decision-making, the tort of misuse of public office took root, providing a limited basis for recourse against some types of maladministration. It did not overcome the limitations of tort law in terms of duty of care in the context of public authorities,[13] and (historically) imposed no liability on public authorities (specifically relating to road maintenance) for nonfeasance.[14] It did not solve difficulties in successfully bringing an action for the tort of breach of statutory duty, which have become worse as the question of parliamentary intent has become dominant. A tort that could potentially have given those adversely affected by government decision-making an effective remedy has been largely neutered.[15]

In this climate, the tort of misuse of public office provides a possible remedy in cases of some of the more egregious examples of maladministration. Obviously, the development of judicial review in administrative law has vastly expanded the options open for someone affected by alleged maladministration,[16] although that area of law does not generally provide a remedy of compensation.[17] Of course,

12 *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 543–4 (Gaudron, McHugh and Gummow JJ).

13 Of course, a generalised duty of care would only be recognised in 1932: *Donoghue v Stevenson* [1932] AC 562. Still today, proposed negligence actions against public authorities can flounder on the basis that no duty of care is owed by the authority, since recognition of a duty of care in such cases would be inconsistent with the authority's statutory functions: *Sullivan v Moody* (2001) 207 CLR 562, 582 [60] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) ('*Sullivan*'); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 100–1 [288]–[292] (Hayne J dissenting); *Tame v New South Wales* (2002) 211 CLR 317, 335 [24]–[26] (Gleeson CJ), 342 [57] (Gaudron J), 361–2 [125] (McHugh J), 395 [228] (Gummow and Kirby JJ), 418 [298] (Hayne J); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.

14 *Russell v Men Dwelling in the County of Devon* (1788) 2 Term R 667; 100 ER 359 ('*Russell*'), cited in *Cowley v Newmarket Local Board* [1892] AC 345, 351 (Lord Halsbury LC). The High Court of Australia would eventually overturn that position in this country: *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

15 See Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41(4) *University of New South Wales Law Journal* 1159, 1177–8 (referring to the tort of breach of statutory duty).

16 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5 contains broad grounds for seeking judicial review of an administrative decision, including that there has been a breach of the rules of natural justice, taking into account irrelevant considerations, failing to take into account relevant considerations, exercise of power for improper purposes, bad faith, acting at the behest of another, inflexible application of policy, jurisdictional error or unreasonableness. Proportionality, potentially as part of an unreasonableness inquiry, is also relevant: see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364–6 (Hayne, Kiefel and Bell JJ) ('*Li*'), especially at 366 [72]; *McCloy v New South Wales* (2015) 257 CLR 178, 195 [3] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'). On the history, see *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 558 (Gummow J); Amnon Rubinstein, 'On the Origins of Judicial Review' (1964) 2(1) *University of British Columbia Law Review* 1, 1–2; Rock and Weeks (n 15) 1168–9.

17 At one time, there was the suggestion that compensation might be available in the United Kingdom for so-called *Wednesbury* unreasonableness, a ground of ultra vires first pronounced

these modern developments in administrative law and tort law raise questions about how, if at all, the tort of misuse of public office is affected by these developments, how the doctrines interact, and whether there continues to be a need for the separate tort. Its place in the tort family and its relationship with other torts, including other intention-based torts, is worthy of consideration. There may be value in consistency. In the late 19th and early 20th centuries, it seemed the tort might disappear[18] in light of the development, in particular, of administrative law remedies, though the tort was apparently revitalised in the late 20th century.[20] There remain questions regarding the scope of the tort, even now.

This article is structured as follows. Part II succinctly summarises the existing law in the United Kingdom and Australia on point. The former has obviously influenced the latter, so it makes sense to consider them both. There are some clear differences, and some possible differences, between the two, which will be identified. Part III then considers certain unresolved or doubtful issues that continue to surround the tort, in particular regarding the test for determining which individuals might be liable to such an action, whether a would-be defendant must be shown to have owed a duty to the would-be plaintiff, the question of whether a government organisation can be held vicariously liable for the tort, and the mental element required. Part IV concludes.

II EXISTING LEGAL PRINCIPLES: TORT OF MISUSE OF PUBLIC OFFICE

A *Development of the Tort in the United Kingdom*

An early manifestation of the tort appears in *Ashby v White*.[21] There a voter complained that public officials had prevented him from voting. Chief Justice Holt recognised a form of action against a public official for wrongdoing, on the basis that it would deter unlawful behaviour by public servants.[22] It was recognised in

in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229–30 (Lord Greene MR) ('*Wednesbury*'): see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 736 (Lord Browne-Wilkinson); *Stovin v Wise* [1996] AC 923, 952–3 (Lord Hoffmann) ('*Stovin*'). This however was quickly scotched: *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. See generally Rock and Weeks (n 15). The United Kingdom Law Commission recommended financial compensation should be available on administrative law grounds: Law Commission (UK), *Administrative Redress: Public Bodies and the Citizen* (Report No 322, 26 May 2010) 7 [2.2]–[2.4] ('*Administrative Redress Report*').

18 See *Davis v Bromley Corporation* [1908] 1 KB 170, 173 (Vaughan Williams LJ, Gorell Barnes P and Bigham J agreeing) ('*Davis*').

19 PD Finn, 'Public Officers: Some Personal Liabilities' (1977) 51(6) *Australian Law Journal* 313, 313. An example of this reasoning appears in *Davis*, where the Court of Appeal explained that, while no remedy was available for a decision by a public officer that was motivated by bad faith, a wronged party may well have a remedy in administrative law: *Davis* (n 18) 173 (Vaughan Williams LJ, Gorell Barnes P and Bigham J agreeing).

20 It continues to be oft-litigated: Kit Barker and Katelyn Lamont, 'Misfeasance in Public Office: Raw Statistics from the Australian Front Line' (2021) 43(3) *Sydney Law Review* 315, 324–5.

21 *Ashby* (n 6) 137 (Holt CJ).

22 Ibid.

the 1820s to include failure to exercise a power, as well as a misuse of power;[23] however, mere errors of judgment or mistakes would not ground an action.[24] It appeared to fall into disuse and disfavour, but was recognised as 'well-established' by the Privy Council, on appeal from Australia, in *Dunlop v Woollahra Municipal Council*.[25] Lord Diplock clarified that mere illegality, of itself, did not suffice, and some additional mental element was necessary in order to make out the requirements of the tort. Subsequent cases have struggled to precisely identify what that element might be.

In *Bourgoin SA v Ministry of Agriculture, Fisheries and Food*,[26] Mann J found that an action for misuse of public office would lie where either: the officer knew they lacked power to do what they did, and that their action would injure the plaintiff; or the officer knew they lacked power to do what they did, and it was foreseeable they would injure the plaintiff.[27] Further, the object of injuring the plaintiff would not need to be the sole, or even dominant, purpose in order that the tort be actionable.

The House of Lords considered the tort in some detail in *Three Rivers District Council v Governor and Company of the Bank of England [No 3]* ('*Three Rivers*').[28] The case concerned the issue of whether the Bank of England, as regulator of banks, could be liable in respect of the collapse of a bank over which it had prudential supervision, on the basis that it wrongly issued a banking licence to the collapsed bank, or failed to prevent it from trading at an earlier time. Lord Steyn explained the rationale for the tort in terms of 'a legal system based on the rule of law [where] executive or administrative power "may be exercised only for the public good" and not for ulterior and improper purposes'.[29] Lord Steyn explained two limbs to the tort of misuse of public office:

1. Targeted malice by a public officer, specifically intended to injure a person such as the plaintiff, involving the exercise of public power for an improper purpose;[30]

23 *Henly v Mayor and Burgesses of Lyme* (1828) 5 Bing 91; 130 ER 995, 1001 (Best CJ) ('*Henly*').

24 *Harman v Tappenden* (1801) 1 East 555; 102 ER 214, 216–17 (Lord Kenyon CJ), 217–19 (Lawrence J).

25 [1982] AC 158, 172 (Lord Diplock for the Court).

26 [1986] 1 QB 716 ('*Bourgoin SA*').

27 Ibid 740 (Mann J) (High Court). This point was affirmed on appeal: at 777 (Oliver LJ, Parker LJ agreeing at 788, Nourse LJ agreeing at 790) (Court of Appeal). The government did successfully appeal the decision, but on grounds not relevant to the current discussion.

28 *Three Rivers* (n 3).

29 Ibid 190, quoting *Jones v Swansea City Council* [1990] 1 WLR 54, 85 (Nourse LJ).

30 Ibid 191. It is not necessary in such cases to demonstrate additional facts demonstrating unlawfulness: Ellen Rock, 'Misfeasance in Public Office: A Tort in Tension' (2019) 43(1) *Melbourne University Law Review* 337, 358 ('A Tort in Tension'). The unlawfulness inheres in the exercise of a public power for an improper purpose. In this type of case, the fact that the public officer (otherwise) acted within their statutory power would be irrelevant; their conduct

2. Where a public officer acts in a way they know to be unlawful, and that the action will probably injure the plaintiff.[31]

Lord Steyn considered whether 'recklessness' would suffice to meet the second limb's requirement of knowledge of likely injury to the plaintiff. His Lordship agreed with the Australian and New Zealand courts which had found it to be sufficient, as the Court of Appeal had found in *Three Rivers*. This was on the basis that '[t]he policy underlying it is sound: reckless indifference to consequences is as blameworthy as deliberately seeking such consequences'.[32] It was not essential, for the misuse of public office tort, that a duty of care existed on the facts.[33] On the other hand, Lord Steyn rejected the argument that it was sufficient to meet the second limb that it be reasonably foreseeable that the officer's actions would injure the plaintiff.[34] Lord Hutton apparently adopted a similar position, agreeing that recklessness would be sufficient to support a claim under the second limb.[35] His Lordship also required that the defendant make an actual decision; mere inadvertence or oversight would not be sufficient.[36] His Lordship emphasised the bad faith requirement underlying both limbs,[37] and indicated that it was not necessary to demonstrate the existence of a duty to the plaintiff.[38]

Lord Hobhouse stated that the action arose only when the official was acting unlawfully. The official would either need to know they were acting unlawfully or wilfully disregard the fact that their behaviour was unlawful.[39] Regarding the state

is deemed unlawful because of the improper purpose to which it was directed: Harry Wruck, 'The Continuing Evolution of the Tort of Misfeasance in Public Office' (2008) 41(1) *University of British Columbia Law Review* 69, 82–3.

31 *Three Rivers* (n 3) 191.

32 Ibid 192.

33 Ibid 193.

34 Ibid 194–6.

35 Ibid 221–8.

36 *Three Rivers* (n 3) 228. See also at 230 (Lord Hobhouse), 237 (Lord Millett). In Lord Millett's opinion, a failure to act could only ground an action for misuse of public office where the officer's discretion could only be exercised in one way, the officer knows this but consciously decides not to act, and does so intending to injure the plaintiff, or where such intent can be presumed from the officer's conduct because it is the 'natural and probable consequence' of their failure to act: at 237.

37 Ibid 228.

38 Ibid. See also Donal Nolan, 'A Public Law Tort: Understanding Misfeasance in Public Office' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2016) 177. Nolan notes that 'it is not a precondition of misfeasance liability that the defendant owed the claimant any particular duty': at 180, citing *Northern Territory v Mengel* (1995) 185 CLR 307, 357 (Brennan J) ('*Mengel*') and *Three Rivers District Council v Bank of England [No 3]* [1996] 3 All ER 558, 584 (Clarke J) (High Court Queen's Bench Division). In contrast, the Privy Council couched statements regarding the tort in the language of duty, noting it was 'impossible to say that the [defendant public officer] did not owe some duty to the [plaintiff] with regard to the execution of [their] statutory power': *David v Abdul Cader* [1963] 1 WLR 834, 839 (Viscount Radcliffe for the Court).

39 *Three Rivers* (n 3) 230.

of mind that the official must have in relation to the impact of their conduct on the plaintiff, Lord Hobhouse held that any one of three requirements must be met:

1. Targeted malice — the official does the act intentionally to damage the plaintiff;
2. Un-targeted malice — the official does the act intentionally knowing that, in its 'ordinary course', it will directly damage the plaintiff or a member of an identifiable class to which the plaintiff belongs; or
3. Reckless un-targeted malice — the official does the act intentionally being aware that it might cause loss to the plaintiff or to an identifiable class of which the plaintiff is a member, and the official 'wilfully disregards that risk'.[40]

Recklessness here is applied in a subjective sense.[41] Lord Hobhouse considered it was better to avoid using the terms 'foreseeable' or 'foreseen' as they were negligence concepts that operate in the context of unintentional tort.[42]

Lord Millett agreed with the two limbs of Lord Steyn's formulation, in recognising:

1. Targeted malice — where the public officer intentionally harms the plaintiff or a class of individuals of which the plaintiff is a member; and
2. Where the officer acts knowing that their actions are unlawful and would likely injure the plaintiff, or a class of individuals of which the plaintiff is a member — where an intent to injure the plaintiff is inferred from the fact of knowledge of illegality and knowledge that the conduct was likely to injure the plaintiff.[43]

It was necessary to show the officer *did* foresee the consequences; it was not sufficient that they should have foreseen them.[44]

It is generally considered necessary to establish in order to make the public officer liable that they have committed an unlawful act. Unlawful here is taken to mean that the officer has acted in circumstances where they lacked power to do what they did. Lord Millett suggested that the first limb may not require proof of illegality.[45] Here the administrative law grounds upon which judicial review can be sought are very useful, in that the circumstances in which a decision might be successfully challenged (for instance, for a lack of procedural fairness, taking into

40 Ibid 230–1.

41 Ibid 231. Lord Hope also expressed recklessness in a subjective sense: at 247 [48]. His Lordship indicated that recklessness in the sense of 'not caring' whether or not the plaintiff will suffer damage or loss as a result of the unlawful action was sufficient: at 252 [62].

42 Ibid 231.

43 Ibid 235–6.

44 Ibid 236.

45 Ibid. His Lordship stated: 'If the plaintiff can establish the official's subjective intention to exercise the power of his office in order to cause him injury, he does not need to establish that the official exceeded the terms of the powers conferred upon him.'

account irrelevant considerations, failure to take into account relevant considerations, bad faith, etc) often form the basis of the alleged unlawfulness of the defendant's action.[46]

The correlation between administrative law grounds for relief and unlawfulness for the purposes of this tort can be very strong. This led the United Kingdom Law Commission in 2010, in the course of recommending that financial compensation should be available in cases where administrative law requirements have been breached, to recommend that the tort of misuse of public office should be abolished.[47] While this mooted reform has not occurred, the suggestion demonstrates the very close connection that some make between administrative law requirements and unlawfulness for the purposes of the tort. This tendency to equate unlawfulness for tort purposes with administrative law grounds for relief has been criticised.[48]

The United Kingdom courts have determined that a public officer is one 'appointed to discharge a public duty'.[49] One relevant indicium is whether the person derives payment from the Crown.[50] The Court of Appeal expressed it in *R v Cosford* as whether the relevant person was undertaking 'a public duty in the sense that it represents the fulfilment of one of the responsibilities of government such that the public have a significant interest in its discharge'.[51] This interest would be one additional to or beyond the interest of any person who might be directly impacted by a serious failure of the public officer to meet their responsibilities. There the Court found that the running of a prison was a responsibility of government, though it had outsourced it to a private company.[52] If this test is met, it is irrelevant whether the person's position is seen by some as junior.[53] The relevant act must be one that the person commits as a result of the 'power or authority with which [they are]

46 Lord Hobhouse referred to analogies between the tort of misuse of public office and administrative law relief: ibid 230.

47 Law Commission (UK), *Administrative Redress Report* (n 17) 35 [3.65].

48 Sadler notes:

> The courts have equated unlawfulness with invalidity and, in doing so, have used the grounds of judicial review as a measuring-stick for invalidity. But the grounds of judicial review and the rationale for the tort have related but separate histories. … To constrain the tort within the province of circumstances which generate justifiable challenges by way of judicial review binds the tort too tightly. The grounds of judicial review have only developed in any sophisticated way during the latter half of the 20th century. The tort has its roots in conduct that substantially predates the substance of the contemporary grounds of judicial review.

Robert J Sadler, 'Intentional Abuse of Public Authority: A Tale of *Three Rivers*' (2001) 21(2) *Australian Bar Review* 151, 168–9 ('Intentional Abuse of Public Authority'). See also Aronson, 'A Very Peculiar Tort' (n 5) 50; Susan Kneebone, 'Misfeasance in a Public Office after Mengel's Case: A "Special" Tort No More?' (1996) 4(2) *Tort Law Review* 111, 132.

49 *Henly* (n 23) 1001 (Best CJ).

50 Ibid. See also *R v Bowden* [1996] 1 WLR 98, 103 (Hirst LJ for the Court) ('*Bowden*'); *R v Whitaker* [1914] 3 KB 1283, 1296 (Lawrence J for the Court).

51 [2014] QB 81, 92 [34] (Leveson LJ for the Court).

52 Ibid 92–3.

53 *Bowden* (n 50) 103 (Hirst LJ for the Court).

clothed by virtue of [their] office'.[54] In contrast, in Canada, a broader view of public officer has been taken. A university administrator has been held to be a public officer,[55] as have members of professional regulation bodies in the legal[56] and medical fields.[57] This has been on the basis they were carrying out public functions and/or had statutory powers.[58] The fact that more and more government activities have been outsourced to private providers can place strain on the concept of public office.[59]

The courts appear somewhat reluctant to find an action for misuse of public office where the decision-maker has a discretion to exercise a particular power, but declines to do so. This mirrors the general reluctance to find government authorities liable in negligence for failing to exercise discretion.[60] In *Home Office v Dorset Yacht Co Ltd*, Lord Diplock claimed that, in the field of exercise of statutory discretion, administrative law concepts such as ultra vires had 'replaced' liability in negligence.[61] This point was made in *Davis v Bromley Corporation*,[62] where a council refused to approve building plans pursuant to a statute which gave them discretion in this regard. The complainant argued the council's refusal to approve his plans was based on personal animosity towards him. The Court found that, even if it were, no action for the tort of misuse of public office would lie:

> Even assuming the facts to be such as to suggest that the defendants were actuated by such motives, there remains the fact that the Legislature has vested in this body the duty of deciding whether or not its sanction shall be given to the plans sent in. In my opinion, where a statute vests in a local authority such a duty and such a power, no action will lie against that authority in respect of its decision, even if there is some evidence to shew that the individual members of the authority were actuated by bitterness or some other indirect motive.[63]

54 *Calveley v Chief Constable of the Merseyside Police* [1989] 1 AC 1228, 1240 (Lord Bridge).

55 *Freeman-Maloy v Marsden* (2006) 267 DLR (4th) 37, 46–7 [23]–[26] (Sharpe JA for the Court).

56 *Dechant v Stevens* (2001) 281 AR 1 (CA).

57 *McClelland v Stewart* (2003) 229 DLR (4th) 342.

58 Wruck (n 30) 87–91.

59 Sadler, 'Intentional Abuse of Public Authority' (n 48) 170.

60 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1031 (Lord Reid), 1049 (Viscount Dilhorne), 1066–8 (Lord Diplock) ('*Dorset Yacht*'); *Stovin* (n 17) 953 (Lord Hoffmann).

61 *Dorset Yacht* (n 60) 1067. His Lordship opined:

> [O]ver the past century the public law concept of ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament …

62 *Davis* (n 18).

63 Ibid 172 (Vaughan Williams LJ). It is not entirely clear from the judgment why this is, though the judgment goes on to suggest that, in granting statutory authority to the council to consider such applications, Parliament did not intend for the council's decisions to be set aside by civil action (as, for example, the tort). His Lordship does mention the possible availability of administrative law remedies: at 172–3. One other possible basis of the decision is to argue that, when the council exercises a discretion, it is not acting unlawfully, though on the other hand it

It has been confirmed that 'abuse of office' is sufficient to meet the requirement of wrongdoing, and that abuse of office can include omissions as well as commissions. This was established in the case of *Henly v Mayor and Burgesses of Lyme* ('*Henly*'), where the defendant failed to maintain a seawall, as a result of which the plaintiff's property suffered damage.[64] It has also occurred in the context of the criminal law offence of misuse of public office.[65] In *Three Rivers*, Lord Hutton stated that an omission could found the action, provided it involved an actual decision, as opposed to 'mere inadvertence or oversight'.[66] Lord Hobhouse expressed a similar view.[67] Lord Millett stated the ability to claim compensation under this tort for nonfeasance was more limited.[68] Lord Hope agreed that omissions such as failure to make a decision could form the basis of the action under this tort, provided they were wilful.[69]

As the tort is an action on the case, a plaintiff must show they have suffered special damage in order to be successful.[70] This has been the subject of weighty academic criticism,[71] particularly on the basis that it does not fit the relational model of tort law.[72] Punitive damages may be available.[73] English courts have also accepted that a government might be vicariously liable for misuse of public office.[74]

B *Developments in Australian Law*

Though some lower Australian courts had previously considered this tort,[75] the most important developments occurred when the High Court considered it in

may be argued that when a council fails to make a decision, for example because it takes into account irrelevant considerations, its decision is 'unlawful'.

64 *Henly* (n 23) 1001 (Best CJ).

65 *R v Dytham* [1979] 1 QB 722, 726–7 (Lord Widgery CJ for the Court).

66 *Three Rivers* (n 3) 228.

67 Ibid 230.

68 Ibid 237. In addition to the requirement that the failure be 'deliberate, not negligent or inadvertent', and other requirements of the tort, Lord Millett required that 'the circumstances [be] such that the discretion whether to act can only be exercised in one way so that there is effectively a duty to act'.

69 Ibid 254.

70 *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 408 [23] (Lord Bingham, Lord Hope agreeing at 410 [28], Lord Carswell agreeing at 424 [79]), 415 [46]–[47] (Lord Rodger), 423 [73] (Lord Walker).

71 Nolan (n 38) 193–6.

72 Erika Chamberlain, 'The Need for a "Standing" Rule in Misfeasance in a Public Office' (2007) 7(2) *Oxford University Commonwealth Law Journal* 215, 232–3.

73 See *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 ('*Kuddus*').

74 *Racz v Home Office* [1994] 2 AC 45, 50–3 (Lord Jauncey) ('*Racz*'); *Three Rivers* (n 3) 230 (Lord Hobhouse).

75 See, eg, *Tampion v Anderson* [1973] VR 715 ('*Tampion*').

Northern Territory v Mengel ('*Mengel*').[76] The Mengels owned cattle stations. They had recently purchased more property and intended to sell some of their stock to partly fund the sale. Testing by a public authority revealed that a small number of the Mengels' stock might be infected with a disease. The public authority told the Mengels they could not move their stock so that they could be sold, and that their only option was to slaughter the animals. The relevant inspectors believed they had the legal authority to order that the stock not be moved, but in fact did not have the authority to do so. As a result of the directions, the Mengels lost a substantial amount of money. They brought several actions against the public authority and its inspectors, including based on the tort of misuse of public office. All members of the Court rejected this claim, on the basis that the inspectors lacked the necessary mental element to commit the tort.

The joint reasons noted that the tort of misuse of public office was an intent-based tort — it was necessary either that the relevant officer intended to cause harm, or knowingly acted in excess of their power in circumstances where a particular mental element was required.[77]. That requirement is where the officer's conduct is 'calculated in the ordinary course to cause harm' or done with 'reckless indifference to the harm that is likely to ensue'.[78] The reasons also considered the possibility that it might be sufficient to meet this mental element if there was a foreseeable risk of harm, but their Honours did not need to, and did not, decide this matter.[79] The joint judgment did express a view that this might in any event be superfluous, in that the fact a foreseeable risk of harm existed might attract the application of a duty of care in negligence.[80]

In relation to the question of whether the officer needed to have 'knowingly' acted in excess of their power, the joint reasons concluded it might be sufficient for the officer to recklessly disregard the issue of whether their power extended to the extent to which they actually exercised it.[81] The joint reasons stated that the public officer would ordinarily be personally liable for committing the tort, unless there was 'de facto' authority.[82] This would apparently limit the circumstances in which vicarious liability could be applied in respect of the tort.[83]

76 (1995) 185 CLR 307 ('*Mengel*').

77 *Mengel* (n 38) 345 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

78 Ibid 347.

79 Ibid. The question of 'foreseeable' or 'foreseen' is discussed below at Part III(D).

80 Ibid 348.

81 Ibid 347.

82 Ibid. In other words, recklessness is relevant in two places — the officer's knowledge of the lawfulness of their actions, and also their knowledge of the likelihood that the plaintiff, or a class of persons including the plaintiff, would likely suffer harm as a result of the officer's conduct.

83 See Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office' (Pt 1) (2001) 9(1) *Torts Law Journal* 80, 91–3 ('Personal Liability Part 1'). In *Grimwade v Victoria* (1997) 90 A Crim R 526, Harper J stated that, where the public officer's duties involved the exercise of a discretion, the state could not be held vicariously liable for how it was exercised: at 568. The Full Federal Court in *Emanuele v Hedley* (1998) 179 FCR

Justice Brennan emphasised the need to demonstrate that the public officer acted beyond their power.[84] His Honour agreed that a further mental element was also necessary, stating it was necessary to prove either that the public officer engaged in the relevant conduct intending to inflict injury, or knowing that there was no power to engage in the conduct and calculating to produce injury.[85] Included within this element was reckless indifference by the official as to whether they had power to act as they did.[86] The plaintiff would need to demonstrate they suffered injury as a result of the wrongful exercise of such power.[87] Justice Brennan noted it could apply to the exercise of statutory and non-statutory powers, and included both acts and failures to act. It extended to '[a]ny act or omission done or made by a public official in purported performance of the functions of the office'.[88] His Honour denied it was a requirement that the plaintiff be a member of a class to whom the defendant owed a relevant duty.[89]

Justice Deane stated that the tort required proof that the officer acted intending to cause injury, or with knowledge that the exercise of power was wrongful or beyond power; and that it would cause or likely cause such injury, including in situations where the defendant acted with 'reckless indifference or deliberate blindness' as to that fact.[90]

290 apparently also took a narrow view of the circumstances (if any) in which the state could be vicariously liable for this tort: at 301 (Wilcox, Miles and RD Nicholson JJ). The state was nevertheless held to be vicariously liable in *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 ('*Lampard-Trevorrow*'). Aronson has criticised the High Court's framing of the possibility of vicarious liability for misfeasance in public office as unduly narrow: Aronson, 'A Very Peculiar Tort' (n 5) 46. Elsewhere, he expresses the view that the issue is not yet resolved: Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 (July) *Law Quarterly Review* 427, 438. The Full Federal Court in *Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311 ('*Nyoni*') held that a council was liable for the tort by reason of the actions of its Chief Executive Officer, which were held to amount to a misuse of public office. This was on the basis of direct liability, however; the unlawful behaviour and mental state of the officer was 'imputed' to the council as its own. The Court expressly disavowed the suggestion the council was *vicariously* liable for what their officer had done: at 329 [85] (North and Rares JJ).

84 *Mengel* (n 38) 356.

85 Ibid 356–7.

86 Justice Brennan justified this extension on the basis that recklessness was 'inconsistent with an honest attempt to perform the functions of a public office': ibid 357.

87 Ibid.

88 Ibid 355.

89 Ibid 357. See also *Garrett v A-G (NZ)* [1997] 2 NZLR 332, 346 (Blanchard J for the Court). The joint reasons in *Mengel* left this question open: *Mengel* (n 38) 346 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ). Some state-level cases have suggested a duty might be necessary: see, eg, *Tampion* (n 75) 720 (Smith J for the Court); *Cannon v Tahche* (2002) 5 VR 317, 347 (Winneke P, Charles and Chernov JJA) ('*Cannon*'), the latter being decided after *Mengel*. Academics meanwhile have suggested a duty of care is not necessary for the tort of misuse of public office: see Aronson, 'A Very Peculiar Tort' (n 5) 33; Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office' (Pt 2) (2001) 9(3) *Torts Law Journal* 245, 248.

90 *Mengel* (n 38) 370–1.

The High Court in *Sanders v Snell* ('*Sanders*') noted these findings in the course of deciding that the tort of misuse of public office should not be 'subsumed' into the tort of unlawful interference with trade or business interests.[91] The Court further clarified that in determining whether or not the actions of an officer were beyond power, the question of whether the actions taken amounted to a breach of administrative law principles, including denying natural justice to a person affected by a proposed decision, would be relevant.[92] An act beyond power by reason of procedural unfairness, the Court confirmed, could found a misuse of public office tort.

The tort was referred to briefly in obiter comments by four justices in *Federal Commissioner of Taxation v Futuris Corporation Ltd* ('*Futuris*').[93] There the Court appeared to focus the tort on intent. The joint reasons noted:

> This Court has accepted that in that context [of the tort of misuse in public office] it is sufficient that the public officer concerned acted knowingly in excess of his or her power. The House of Lords has since indicated that in English law recklessness may be a sufficient state of mind to found the tort.[94]

Without wishing to make too much of a statement of obiter dictum, this remark might suggest a difference between the law of Australia and that of the United Kingdom, in that in Australia the tort focuses on conscious wrongdoing, while in the latter jurisdiction recklessness would suffice. The dicta in *Futuris* indicate a possibly narrower view of the tort than had been expressed in *Mengel*.

One of the issues that has divided the Australian courts has been the possibility, expressly contemplated in the High Court judgment in *Mengel*, that the foreseeability of likely injury to the plaintiff, or a class of persons including the plaintiff, might be sufficient, as opposed to recklessness or intent.[95] In places, the *Mengel* joint reasons does seem to proceed on the basis that the matter is to be left open, though a fuller reading of the judgment arguably makes it clear that the Court's position was that recklessness was the minimum standard required.

The way in which the joint reasons discussed the matter in *Mengel* has arguably led to confusion at lower levels. So, for example, the Full Court in *South Australia v Lampard-Trevorrow* held it was sufficient to meet the reasonably foreseeable test;[96] in so doing, it purported to make its decision based on the relevant extract from the *Mengel* decision. However, the New South Wales Court of Appeal has

91 *Sanders* (n 7) 345 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

92 Ibid 344.

93 (2008) 237 CLR 146 ('*Futuris*').

94 Ibid 153 (Gummow, Hayne, Heydon and Crennan JJ) (citations omitted).

95 See above nn 79–80.

96 *Lampard-Trevorrow* (n 83) 387–8 [263]–[264] (Doyle CJ, Duggan and White JJ).

rejected this approach, insisting that a finding of recklessness is required.[97]

The approach of that Court was recently accepted and applied by Rares J in *Brett Cattle Co Pty Ltd v Minister for Agriculture* ('*Brett Cattle*').[98] In that case, Rares J found that a former federal Minister for Agriculture had committed the tort of misuse of public office. The Minister had ordered a ban on all live cattle exports to Indonesia, after a media story indicating that some animals exported from Australia were being slaughtered in a cruel way when they arrived at their destination. The Minister had received representations that the concerns related only to a small number of facilities in Indonesia, and that minor adjustments could be made to ensure that the cruel practices would not continue at those facilities. However, the Minister proceeded to ban all live cattle exports to Indonesia, without an exceptions provision permitting export where it could be demonstrated that the abattoirs to which the stock would be sent complied with relevant codes of practice designed to prevent cruelty to the animals. He had not received departmental advice to proceed on that basis. The industry was significant, and the ban caused significant economic damage to various farming businesses.

Justice Rares concluded that the former Minister had committed the tort of misuse of public office, by being recklessly indifferent to the risk that his order was unlawful, and recklessly indifferent to the likelihood that farmers such as the plaintiff would suffer loss as a result. He did not specifically seek advice as to the lawfulness of his proposed general prohibition, thereby deliberately shutting his eyes to this very real prospect.[99] He was aware that some of those affected by the general prohibition had not had problems with the cruel slaughter of animals. He did specifically seek advice as to the possible financial compensation payable in the event the Court found him guilty of maladministration.[100] The Court found that the Minister deliberately took the risk that his actions might be determined to be unlawful.[101] The Court found the Minister did not care about the impact of the decision on farmers.[102] In particular, Rares J found that the Minister had acted unlawfully, because the delegated legislation he had putatively enacted was disproportionate to achieving the statutory purpose.[103]

97 *Obeid v Lockley* (2018) 98 NSWLR 258, 293 [153] (Bathurst CJ, Beazley P agreeing at 302, Leeming JA agreeing at 302) ('*Obeid*'). Sadler suggests the use of foreseeability in the context of this tort is 'unwise and unhelpful': Sadler, 'Intentional Abuse of Public Authority' (n 48) 158.

98 *Brett Cattle* (n 1). See generally Janina Boughey, 'Brett Cattle: New Limits on Delegated Law-Making Powers?' (2020) 31(4) *Public Law Review* 347; Ellen Rock, 'Brett Cattle: A New Lease on Life for Misfeasance?' (2020) 31(4) *Public Law Review* 365.

99 *Brett Cattle* (n 1) 427–8 [376]–[378].

100 Ibid 429 [380].

101 Ibid 429 [381].

102 Ibid 429 [382].

103 Ibid 415–25 [317]–[363]. As indicated above, the High Court had earlier suggested the use of proportionality in an administrative law context: see *McCloy* (n 16) 195 (French CJ, Kiefel, Bell and Keane JJ). This is perhaps in the context of the unreasonableness ground of review, in indicating that unreasonableness for the purposes of Australian administrative law was broader than so-called *Wednesbury* unreasonableness: see *Li* (n 16) 364–6 (Hayne, Kiefel and Bell JJ).

As discussed above, members of the High Court in *Mengel* suggested that recklessness would be sufficient.[104] However, in *Futuris*, members of the High Court suggested in obiter dicta that conscious awareness of wrongdoing (intent) would be necessary.[105] Two members of the High Court referred briefly to the tort in terms of 'express malice'.[106] These differences have subsequently played out in the Federal Court and state Supreme Courts. For example, in *Porter v OAMPS Ltd*, Goldberg J set out requirements for the tort: the final requirement was that 'the public officer breached the duty *with the intention* of causing harm to the plaintiff or *with the knowledge* that he or she was acting in excess of his or her powers'.[107] This formulation does not mention the concept of recklessness. In *Neilson v City of Swan*,[108] Buss JA described the tort in terms of an abuse of power 'if the conduct which comprises the excess of power was intentional or deliberate and accompanied by dishonesty, malice or bad faith'.[109] There is no reference to recklessness. In *Nyoni v Shire of Kellerberrin*, the Full Federal Court expressed the tort in terms of intent and knowledge.[110] There is no reference to recklessness.

On the other hand, other formulations in lower courts expressly contemplate that reckless indifference as to the possibility that the behaviour is unlawful and that it will cause loss to the plaintiff, or a category of persons including the plaintiff, is sufficient. This appears, for example, in *Rush v Commissioner of Police*,[111]

See generally Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 377–82. The High Court had earlier applied proportionality analysis in considering the validity of delegated legislation: *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 37–43 [55]–[66] (French CJ), 56–7 [116] (Hayne J, Bell J agreeing at 90 [224]), 83–4 [198]–[201] (Crennan and Kiefel JJ). See also Judith Bannister, Anna Olijnyk and Stephen McDonald, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2nd ed, 2018) 122–5.

104 See above Part II(B).

105 *Futuris* (n 93) 164–5 [52]–[58] (Gummow, Hayne, Heydon and Crennan JJ). This position derives support from the Canadian Supreme Court decision of *Odhavji Estate v Woodhouse* [2003] 3 SCR 263, 285 (Iacobucci J): 'In order for the conduct to fall within the scope of the tort [of misuse of public office], the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.' Later, the judgment acknowledges that some decisions have recognised that (mere) recklessness is sufficient, but does not specifically endorse or reject that position: at 289.

106 *Commonwealth v AJL20* (2021) 273 CLR 43, 85 [83] (Gordon and Gleeson JJ).

107 (2005) 215 ALR 327, 352 [103] (emphasis added).

108 (2006) 147 LGERA 136 ('*Neilson*').

109 Ibid 162 [84].

110 *Nyoni* (n 83) 334 [109] (North and Rares JJ, Dowsett J agreeing at 339 [137]), citing *Mengel* (n 38) 345 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ). Justices North and Rares held: 'The tort of misfeasance in public office involves a misuse of the power of the office. The officer must either intend that misuse to cause harm … or know that he or she is acting in excess of his or her power'.

111 (2006) 150 FCR 165, 197–8 [121] (Finn J).

Cornwall v Rowan,[112] and *Brett Cattle*.[113] All members of the New South Wales Court of Appeal proceeded in *Obeid v Lockley* ('*Obeid*') on the basis that reckless indifference to the possibility of causing the plaintiff injury was required or sufficient.[114] The Court did not consider the application of concepts of recklessness to the question of the unlawfulness of the behaviour.

The cases have also dealt with who is a public officer or holder of a public office for the purposes of the tort. In *Mengel*, Brennan J adopted Best CJ's description in *Henly* of it as a person 'appointed to discharge a public duty'.[115] In *Obeid*, Bathurst CJ stated that a public officer includes persons 'who, by virtue of the particular positions they hold, are entitled to exercise executive powers in the public interest'.[116] It might apply also to the exercise of judicial powers.[117] In *Leerdam v Noori* the question was whether the person was either exercising public powers or discharging a public duty.[118] A similar formulation was accepted in *Cannon v Tahche* ('*Cannon*').[119] On the facts in *Obeid*, the Court held that officers of an anti-corruption agency were public officers.[120] However, the Court in *Cannon* found that a prosecutor was not a public officer.[121] It has been argued that the law should focus more on the nature of the power being exercised, not the status of the office.[122]

112 (2004) 90 SASR 269, 324–5 [212].

113 *Brett Cattle* (n 1) 405 [276] (Rares J), quoting *Sanders v Snell [No 2]* (2003) 130 FCR 149, 174 [95].

114 *Obeid* (n 97) 293 [153] (Bathurst CJ, Beazley P agreeing at 302 [206], Leeming JA agreeing at 302 [207]).

115 *Mengel* (n 38) 355, quoting *Henly* (n 23) 1001.

116 *Obeid* (n 97) 286 [114] (Bathurst CJ, Beazley P agreeing at 302 [206], Leeming JA agreeing at 302 [207]).

117 *Cannon* (n 89) 333–6 [41]–[48] (Winneke P, Charles and Chernov JJA).

118 (2009) 227 FLR 210, 215 [19] (Spigelman CJ) ('*Leerdam*'). President Allsop stated that 'the tort is concerned with the exercise of governmental or executive power vested in a person with a power or duty to exercise it': at 221 [50]. See also *Neilson* (n 108). Justice of Appeal Buss drew on the authorities to hold that the officer's conduct need 'concern the performance of public duties … or the exercise of public functions': 151 [39] (citations omitted), citing *Sanders* (n 7) 345 (Gleeson CJ, Gaudron, Kirby and Hayne JJ) and *Three Rivers* (n 3) 191 (Lord Steyn).

119 The Victorian Court of Appeal referred to the 'public duties that [an office] holder is required to discharge': *Cannon* (n 89) 337 [50] (Winneke P, Charles and Chernov JJA).

120 *Obeid* (n 97) 287 [118] (Bathurst CJ).

121 Ibid 339 [54] (Winneke P, Charles and Chernov JJA). This was on the basis that the duty was owed to the court, not the public at large: at 340–1 [57]–[59].

122 Sadler, 'Intentional Abuse of Public Authority' (n 48) 171. Sadler suggests recasting the tort as 'intentional abuse of public authority', as opposed to misuse of public office: at 172. Aronson states that the requirement that the person be a public officer is 'difficult to justify' otherwise than on the basis of precedent: Aronson, 'A Very Peculiar Tort' (n 5) 41. He reaches a similar position to that of Sadler, suggesting that the tort be rebadged as 'abuse of public power … or position': at 44. Cf *Jones* (n 2) 85 (Nourse LJ). His Lordship held: 'It is not the nature or origin of the power which matters. Whatever its nature or origin, the power may be exercised only for the public good. It is the office on which everything depends.'

Powers can be statutory or non-statutory in nature.[123] At times, the tort has been framed in terms of duty, in the sense that only a person to whom the defendant owed a duty to act could successfully bring action under it.[124] However, language suggesting that the only persons entitled to sue for the tort are those to whom a duty to exercise the power properly (specifically, in the public interest and not for improper purposes)[125] is owed may not be helpful, moving the tort more towards negligence language inappropriate in the situation of an intent-based tort.[126] This will be further discussed in Part III.

It is not entirely clear from the Australian authorities whether the failure to act might amount to the tort of misuse of public office.[127] This is sometimes connected with the existence of a discretion, and circumstances where a public officer declines to exercise that discretion. At least in some cases, it would be difficult to show that the failure to exercise a discretion was unlawful. Further, some argue that a discretionary power involves the question whether there even is a duty to the plaintiff; specifically that where there is a discretion, it might be difficult to show that a relevant duty exists.[128] Yet this assumes that a duty is required. As discussed above, the issue has not yet been definitively resolved in Australian law. Some argue cogently that failure to exercise discretion could be the basis of an action for the tort of misuse of public office where the claimant can demonstrate on the balance of probabilities that the failure caused them loss.[129]

Of course, damage is the gist of the action, and so the plaintiff must demonstrate they have in fact suffered loss, and that it was *caused by* the misuse of public office.

C *Similarities and Differences, or Possible Differences, between Australian and United Kingdom Law*

Both jurisdictions recognise this tort, and there is a broad degree of overlap in how they have framed it. In both cases, the tort applies to the holder of a public office, and requires unlawful action on their part. There is some doubt regarding the

123 *Leerdam* (n 118) 215 [18] (Spigelman CJ); *Pharm-a-Care Laboratories Pty Ltd v Commonwealth [No 3]* (2010) 267 ALR 494, 509–10 [60] (Flick J), quoting *Mengel* (n 38) 355 (Brennan J).

124 *Tampion* (n 75) 720 (Smith J for the Court). Sadler states that '[t]o succeed in a misfeasance action the plaintiff must show that he or she is owed a "duty" by the defendant': Sadler, 'Liability for Misfeasance in a Public Office' (n 3) 142. Kneebone writes that 'the officer must not only owe duties generally to members of the public as to how the office shall be exercised but that the duty must be owed to the individual plaintiff as a member of the public': Kneebone (n 48) 124, citing *Tampion* (n 75) 720 (Smith J for the Court). Rock has that 'the tort may not extend to offices in respect of which there is no duty owed to the public': Rock, 'A Tort in Tension' (n 30) 344.

125 *Cannon* (n 89) 328 [28] (Winneke P, Charles and Chernov JJA).

126 See *Mengel* (n 38) 357 (Brennan J).

127 In *Mengel*, Brennan J noted that the tort could apply to omissions: *Mengel* (n 38) 355.

128 See Kneebone (n 48) 126. Drawing on case law, Kneebone concludes: 'if there is an exercise of a discretionary power, it may be possible to argue that no duty was owed to the plaintiff'.

129 Aronson, Groves and Weeks (n 103) 1158.

required mental element in relation to unlawfulness and harm to the plaintiff — in the United Kingdom, recklessness has been accepted as sufficient.[130] As seen, while there is some evidence of this potentially lower threshold in Australian cases, there are also suggestions that intention might be required. Intention is sometimes considered to be a higher standard, as Part III will elaborate. The United Kingdom courts have determined that a duty is not required; in Australia, this has not been definitively determined.

The United Kingdom courts have, as mentioned, determined that a government organisation might be vicariously liable for the loss caused by the tort; the Australian courts have not considered this matter in detail, but *Mengel* indicated the possibility a narrower view might be taken. Part III will now explore these matters in more detail, with a view to clarifying Australian law, and with a view to law reform. Some specific suggestions will be made regarding how the existing Australian law might be improved. Developments in other areas of tort law, particularly intent-based torts, will also be considered, as they are relevant to the resolution of some of the issues in the current context.

III CLARIFICATION OF PARTICULAR ISSUES AND SUGGESTIONS FOR LAW REFORM

A *Public Office*

As discussed above, a range of views have been expressed as to what is meant by 'public office' in the context of this tort. While in many cases it is clear that a person holds a public office, in many other cases it is not so. Tests such as whether the power involves the discharge of a public duty, whether the person is paid by the Crown, whether they exercise executive powers in the public interest, and whether the person is fulfilling a government responsibility in which the public has a significant interest have been articulated. The United Kingdom Law Commission has noted that existing tests do not provide adversely affected individuals with a certain answer as to whether a given person is a public officer.[131]

For this purpose, it is believed that a line of cases not previously considered in this context might be of use. These cases considered whether or not a particular body should be considered part of the Crown. This was historically very important because traditionally bodies that were identified as being part of the Crown were not generally liable in statute,[132] and also enjoyed immunity from suit.[133] This situation was altered by statute, but it is not necessary to explore that change here. What is (or may be) relevant from those cases is the effort by courts to identify whether or not a particular organisation ought to be considered to be part of the

130 See *Three Rivers* (n 3) 192 (Lord Steyn), 228 (Lord Hutton).

131 Law Commission (UK), *Misconduct in Public Office* (n 9) 54 [4.12].

132 *R v Cook* (1790) 3 Term R 519; 100 ER 710, 711 (Lord Kenyon CJ). Per Lord Kenyon CJ: 'Generally speaking in the construction of Acts of Parliament the King in his Royal character is not included, unless there be words to that effect.'

133 *Prohibitions del Roy* (1607) 12 Co Rep 64; 77 ER 1342. This case was subsequently overturned by statute: *Petitions of Rights Act 1860* (UK).

Crown. The suggestion is that the kinds of factors that were used in these cases to determine whether or not a body was to be considered part of the Crown might be similar to those used in the current context to determine whether or not the relevant person held a 'public office'.

The New South Wales Court of Appeal specifically related the meaning of a public office for the purposes of the tort to the exercise of executive powers.[134] There is a very strong link between the Crown and the executive.[135] This may be considered to provide a justification for resorting to this line of cases, though it must be conceded that courts have not (as yet) made this connection, and made use of those cases in the context of the tort. I have not been able to find support for this suggestion in the literature. It is acknowledged that some might argue against the idea, on the basis that in one case, the question concerns whether a body should enjoy an immunity, whereas in the other context, the question concerns whether an individual should be exposed to liability. Cast in that way, the contexts are very different. However, in another way, they are similar. Both contexts involve determining the extent to which an organisation or individual should be held legally liable for a particular thing.

Two main tests have traditionally been developed to determine whether or not a particular body should be considered to be part of the Crown. The first was the 'functions' test. This test considered whether or not the body was conducting functions typically associated with government. For example, in *Mersey Docks and Harbour Board Trustees v Cameron*,[136] Blackburn J (on behalf of five justices) gave examples of what were considered to be typical government functions. They included those typically done by public servants, together with activities of police, the courts, and prisons; these were public purposes which typically fell within the province of government, and in which the public had a direct interest.[137] Justice Byles added the provision of educational institutions and hospitals as typically government functions.[138] Similarly in *Coomber (Surveyor of Taxes) v Justices of*

134 *Obeid* (n 97) 286 [114] (Bathurst CJ, Beazley P agreeing at 302 [306], Leeming JA agreeing at 302 [307]).

135 George Winterton indicated that the Crown in Australia effectively meant the executive government: George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 207.

136 (1865) 11 HL Cas 443; 11 ER 1405 ('*Mersey Docks*').

137 Ibid 1413 (Lord Pollock CB, Blackburn, Williams and Mellor JJ, Pigott B).

138 Ibid 1421. This position derives contemporary support from the judgment of Callinan J in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1. His Honour stated: 'Nowhere in the *Constitution* is it suggested that the provision of hospitals and related health services is other than the responsibility of and an essential role of the States. This has always been the position. From the earliest colonial times, administrations interested themselves in health and established public hospitals': at 59 [146] (citations omitted). In contrast, in *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282 ('*Townsville Hospitals Board*'), Gibbs CJ held that the provision of health services was not a 'traditional function of government': at 289 (Murphy J agreeing at 292, Wilson J agreeing at 292, Brennan J agreeing at 292).

the County of Berks,[139] there was reference to the administration of justice, the preservation of law and order and crime prevention as typical functions of government.[140] Lord Watson referred to departments of state, the post office, admiralty, servants of the Crown and police, courts and prisons as being public functions/purposes and 'primary and inalienable' functions of government.[141] These were sometimes expressly related to the scope of Crown prerogatives.[142]

Subsequent decisions in the United Kingdom[143] and in Australia[144] would focus more on the question of whether the government controlled, or had the potential to control, the relevant body, and the related question of the extent of the body's discretionary powers.[145] This was in recognition of the fact that notions of what were typical government functions might change over time,[146] and might be something over which legitimate views differ. It is possible that an organisation might have the shield for some of its activities and not others.[147]

How might the question of 'potential control' or 'actual control' apply in the context of the tort of misuse of public office? Most of the reasoning in these cases focuses on the former. It would be the potential for a government organisation to exert control over the office that would give it its public nature.

So, for example, the government would have significant potential to exert control over a government health service and its employees, or a government education service and its employees. A government Minister is significantly constrained in how they perform their role, controlled by Cabinet decisions, government policy

139 (1883) 9 App Cas 61.

140 Ibid 67 (Lord Blackburn).

141 Ibid 74.

142 See *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584, 627 (Lord Tucker), 630 (Lord Asquith) ('*Bank voor Handel en Scheepvaart NV*').

143 *Fox v Newfoundland* [1898] AC 667, 672 (Sir Richard Couch for the Court); *Metropolitan Meat Industry Board v Sheedy* [1927] AC 899, 905 (Viscount Haldane for the Court); *Bank voor Handel en Scheepvaart NV* (n 142) 607 (Lord Morton), 616–17 (Lord Reid), 628 (Lord Tucker), 631 (Lord Asquith).

144 *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 ('*SFIT*'). Justices Stephen and Aickin apparently fastened upon potential control: at 348 (Stephen J), 371 (Aickin J); Mason J fastening upon actual control: at 354 (Mason J). See also *Townsville Hospitals Board* (n 138) 289–91 (Gibbs CJ, Murphy J agreeing at 292, Wilson J agreeing at 292, Brennan J agreeing at 292); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 308 (Mason, Murphy and Deane JJ); *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90, 150 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

145 *SFIT* (n 144) 364–6 (Aickin J).

146 Ibid 349 (Stephen J); *Townsville Hospitals Board* (n 138) 288–9 (Gibbs CJ, Murphy J agreeing at 292, Wilson J agreeing at 292, Brennan J agreeing at 292). Recently, the UK Law Commission noted that 'the activities of the modern state have become extremely varied and complex, and the line between the public and private sectors has blurred': Law Commission (UK), *Misconduct in Public Office* (n 9) 52 [4.3].

147 *Townsville Hospitals Board* (n 138) 288 (Gibbs CJ, Murphy J agreeing at 292, Wilson J agreeing at 292, Brennan J agreeing at 292).

and parliamentary proceedings. The government has some control over the judiciary, in terms of appointment and removal, legislation applicable to judicial process, and statutes, containing a significant portion of the law, which it is the judge's duty to interpret and apply. Government has significant potential control over anti-corruption investigators who work for a government department.[148] On one view, government has significant control over boards that regulate particular professions, ratifying appointments to the board and regulating the board's activities by statute.[149] Government has significant potential control over prosecutors and (publicly funded) defence counsel in court proceedings.[150] Governments also retain significant control over public universities.[151]

One advantage of the control test is that it might be better able to deal with the increasing range of situations where a government's activities have been outsourced to private providers. The mere fact that the activity is outsourced to an independent contractor, or an individual working for a private organisation, would not prevent their holding a public office for the purposes of the tort. The question would be the extent to which the government organisation maintained the right to control the particular activity. To the extent that it did, the office would be considered a public office, amenable to this tort. This is consistent with the view of Sadler that it is the nature of the power that is relevant, not the status of the office.[152]

It is intellectually justifiable to focus on the question of control by the government organisation because the public places its trust in the government. It is this trust that has been breached when an individual who works in a public office with the government misuses that position. It is thus appropriate to focus on the extent to which the government potentially controls the office. If the government does not control the office, the office is not really part of the government; so the public trust justification is not applicable, and the tort should not be available.

148 See, eg, *Independent Commission against Corruption Act 1988* (NSW) s 5.

149 See, eg, *Legal Profession Uniform Law Application Act 2014* (Vic) ss 33, 35, 51.

150 On this basis, a public prosecutor, and a publicly funded defence counsel, may be held to hold a 'public office', a conclusion contrary to that which was reached in *Cannon* by the Victorian Court of Appeal: *Cannon* (n 89). There the Court of Appeal found that a public prosecutor's duty was to the Court, such that they could not be said to owe a duty to the public: at 339–47 [54]–[76] (Winneke P, Charles and Chernov JJA). As a result, it found the prosecutor did not hold a public office for the purposes of the tort. Part III of this article argues it ought not be necessary, in order to establish that a position is a public office, that a duty of care is owed. The position of this article is that the government's ability to exert or potentially exert significant control over a trial, and specifically in this context the conduct of the prosecution, should lead to the result that a prosecutor does in fact hold a public office for the purposes of the tort of misuse of public office.

151 See, eg, *Monash University Act 2009* (Vic). The government may appoint members to the university council; control the acquisition and divestment of land; university borrowing; and commercial activities: at ss 12, 36–7, 45, 55. Universities are also significantly regulated under the *Tertiary Education Quality and Standards Agency Act 2011* (Cth).

152 Sadler, 'Intentional Abuse of Public Authority' (n 48) 171.

B *Vicarious Liability*

It has traditionally been difficult to apply the concept of vicarious liability to situations of intentional wrongdoing,[153] as with the tort of misuse of public office. The classic formulation of the scope of vicarious liability is often considered to be that of Sir John Salmond ('Salmond test'), to the effect that an employer is vicariously liable for actions of an employee that were either authorised, or not authorised but connected with authorised acts such that they can rightly be regarded as modes — albeit improper modes — of carrying them out.[154] The Salmond test contrasts modes of doing authorised acts within the scope of vicarious liability, and independent acts where the employee is not acting within the course of their employment, but rather outside it. In the latter cases, the employee would be personally liable for any wrongdoing, but their employer would not. The Salmond test continues to be cited with evident appellate approval.[155]

The question is whether an employer of a public officer found to have engaged in a misuse of public office could be vicariously liable for such misuse. This has not been definitively determined yet by any Australian court. The most prominent reference is found in *Mengel*, where the joint reasons, in obiter dicta, indicate that generally, liability for the tort of misuse of public office is personal, unless there is 'de facto authority'.[156] The highest court in the United Kingdom has indicated that vicarious liability can apply to the tort of misuse of public office.[157] Yet it should be borne in mind that the law of vicarious liability in Australia is not necessarily the same as that in the United Kingdom.[158] There are numerous instances where courts have determined that an employer is liable for unlawful behaviour, including criminal behaviour, committed by employees.[159] On some occasions, too, courts have determined that an employer is not liable for unlawful behaviour committed by employees.[160]

Courts have struggled to identify a unifying rationale for the imposition of

153 See *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 400 [123] (Lord Millett) ('*Dubai Aluminium*'), citing *Lister v Hesley Hall Ltd* [2002] 1 AC 215 ('*Lister*').

154 John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907) 83–4.

155 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 149 [42] (French CJ, Kiefel, Bell, Keane and Nettle JJ) ('*Prince Alfred College*').

156 *Mengel* (n 38) 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ). This is not a phrase typically used in vicarious liability discourse.

157 *Racz* (n 74) 50–3 (Lord Jauncey, Lord Templeman agreeing at 49, Lord Goff agreeing at 49, Lord Browne-Wilkinson agreeing at 56, Lord Mustill agreeing at 56).

158 *Prince Alfred College* (n 155) 157–8 [74] (French CJ, Kiefel, Bell, Keane and Nettle JJ), 172 [130] (Gageler and Gordon JJ).

159 *Lloyd v Grace, Smith & Co* [1912] AC 716; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 ('*Morris*'); *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677.

160 See, eg, *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.

vicarious liability.[161] Various theories have been propounded.[162] The one that has apparently gained most traction in Canada and subsequently the United Kingdom has been the enterprise risk theory.[163] This is the idea that an 'enterprise' should bear the cost of the risks it inherently generates, in order for society to 'price' the activity fairly. The theory is that unless appropriate costs are allocated to a particular activity, an inefficient quantity of it will be produced.[164] The theory has its genesis in law and economic theory, but has gained acceptance in contexts quite removed from the commercial. For instance, it has been utilised to make educational authorities liable for sexual abuses committed by staff, on the basis that it is an inherent risk of running an educational institution that some within it might seek to exploit vulnerable young people in its care.[165] The employer would be liable where there is a close connection between the employment relationship and the wrong committed.[166] It has also been supported on the basis of deterrence.[167] It is sometimes supported on the basis of the employer's 'deep pockets'[168] and their capacity for loss management through insurance[169] — though this is hotly debated.[170] In such cases, the question of the plaintiff's vulnerability will be relevant.

As indicated, the Canadian Supreme Court's decision in *Bazley v Curry* proved very influential on United Kingdom vicarious liability law. Initially, the United Kingdom House of Lords accepted the close connection test, if not the enterprise risk theory that underpinned it.[171] Eventually, it would accept the enterprise risk

161 *New South Wales v Lepore* (2003) 212 CLR 511, 611 [299] (Kirby J) ('*Lepore*'), quoting *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 37–8 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

162 See generally T Baty, *Vicarious Liability: A Short History of the Liability of Employers, Principals, Partners, Associations and Trade-Union Members* (Clarendon Press, 1916).

163 *Bazley v Curry* [1999] 2 SCR 534 ('*Bazley*'). McLachlin J wrote for the Court at 554 [31]:

> Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss.

164 Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70(4) *Yale Law Journal* 499, 514.

165 See *Bazley* (n 163).

166 Ibid 557 [37]–[38] (McLachlin J for the Court).

167 Ibid 555 [34]. The United Kingdom Supreme Court has been reticent to accept the deterrence rationale of vicarious liability, claiming it is 'empirically untested': *Armes v Nottinghamshire County Council* [2018] AC 355, 382 [69] (Lord Reed JSC, Baroness Hale PSC, Lords Kerr and Clarke JJSC agreeing at 362) ('*Armes*').

168 *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 15 (Lord Phillips, Baroness Hale, Lords Kerr, Wilson and Carnwath JJSC agreeing at 7).

169 *Bazley* (n 163) 554 [31] (McLachlin J for the Court).

170 Baty (n 162) ch 8; PS Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 22.

171 *Lister* (n 153) 227–30 [20]–[28] (Lord Steyn, Lord Hutton agreeing at 238 [52]), 232 [37], 234 [43], 237 [50] (Lord Clyde), 245 [70], 249 [80] (Lord Millet), cited in *Various Claimants v Barclays Bank plc* [2020] AC 973, 981–2 [10] (Baroness Hale).

theory.[172]

After an initial flirtation with the enterprise risk reasoning,[173] the High Court of Australia seems to have adopted a different course. There is no mention of enterprise risk in the High Court's most recent decision on vicarious liability in *Prince Alfred College Inc v ADC* ('*Prince Alfred College*').[174] There the Court acknowledged differences between the Australian approach and that of the United Kingdom. The Court adopted an 'occasion' principle — whether the employment provided the occasion for the wrongful act. The Court made it clear this was not the same as, but narrower than, 'opportunity'. The majority judgment added:

> [T]he relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the 'occasion' for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim.[175]

These remarks are clearly a reflection of the factual matrix involved in the case, and unfortunately many of these cases have been determined in the context of sexual abuse of children within an institution. The current context of this article is very different. In particular, the question of an 'ability to achieve intimacy with the victim' is clearly irrelevant for present purposes. In contrast, notions of authority, power, trust and control are potentially applicable in the context of a public officer.

172 *Dubai Aluminium* (n 153) 377 [21]–[22] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66]):

> The underlying legal policy [of vicarious liability] is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged. … This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority. … [S]ometimes [employers'] agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses …

See also *Cox v Ministry of Justice* [2016] AC 660, 670 (Lord Reed JSC); *Armes* (n 167) 381 [67] (Lord Reed JSC, Baroness Hale PSC, Lords Kerr and Clarke JJSC agreeing at 362).

173 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 40 [42] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). The majority held: 'under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise'. See also *Lepore* (n 161) 582 [202] (Gummow and Hayne JJ), 612–13 [303] (Kirby J).

174 *Prince Alfred College* (n 155). Although vicarious liability arose in the 2017 decision of *New South Wales v DC* (2017) 344 ALR 415, it did so in a ground which involved potentially erroneous concessions made by the State in pursuance of the *Law Reform (Vicarious Liability) Act 1983* (NSW), and for which the High Court ultimately revoked special leave: at [17] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).

175 *Prince Alfred College* (n 155) 159–60 [81] (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172 [130]).

1 *Argument that Governments Should or Could Be Vicariously Liable for the Tort of Misuse of Public Office*

An argument that the government should (or could, depending on the precise factual scenario) be vicariously liable for the tort of misuse of public office would find support in the theory of enterprise risk. If it is accepted that the government is sufficiently analogous to an enterprise for current purposes, it can be stated that by carrying out executive functions, the government does create a risk of loss or injury to others, often caused through the actions of its employees. There is a risk that employees will act unlawfully, including intentionally so. This might harm innocent parties. The employer should thus be liable when these risks materialise, in fact causing loss to innocent third parties. This is 'a price to be paid' for engaging in the activity. There would often be a 'close connection' between what the employee was engaged to do, and the wrongful behaviour. It would find rational support from arguments that vicarious liability is concerned with finding someone with 'deep pockets' to compensate the plaintiff in cases of proven loss. The government is such a party. It is possible to argue 'vulnerability' — government officials sometimes wield significant power, potentially having serious impacts on individuals within society. Individuals may be vulnerable to their misuse of that power.

The High Court judgment in *Prince Alfred College* considered issues such as authority, power, trust and control as relevant to an employer's possible vicarious liability. In the current context, it can be argued that governments and government officials often have significant authority and wield significant power. It is fundamental to a public office that it involves trust. The holder of the public office exercises free control over what they do and the decisions they make.[176]

2 *Argument that Government Should Not or Could Not Be Held Vicariously Liable for the Tort of Misuse of Public Office*

'[V]icarious liability has no useful part to play in public law.'[177]

One of the rationales for the tort is that it is designed to deter those holding public office from engaging in unlawful behaviour. Their personal liability to pay compensation to a third party injured by their unlawful use of power, though highly unusual, is designed to reinforce that deterrence function of the tort. If the government itself, rather than the employee, is the one that would pay the compensation, with uncertain recourse to claim back from the employee, this might

176 Nolan concludes that on the

> public law conception of the tort as a mechanism for holding public officers to account for wilful misconduct, the possibility of vicarious liability seems unproblematic. What matters … is that there is a public demonstration of the fact that deliberate abuse of public office is intolerable behaviour for which the relevant official will be held to account by the courts. Who actually foots the bill is neither here nor there.

Nolan (n 38) 204. In my own respectful view, the question of which party is liable to pay compensation for the tort of misuse of public office is an important one, which must engage with the principles upon which vicarious liability is based.

177 Peter Cane, 'Damages in Public Law' (1999) 9(3) *Otago Law Review* 489, 511.

undermine the deterrence rationale.[178]

The government might argue it should not be vicariously liable for such a tort, based on remarks in the joint reasons in *Mengel*. Those reasons indicated a preference for personal liability (only) on the employee, and vicarious liability only on those occasions where the employee had 'de facto authority'.[179] It might be hard to envisage a case where an employee had 'de facto authority' to act in a way that either the employee knew was unlawful or involved recklessness as to that fact. It is not entirely clear, with respect, what the Court meant by this phrase.[180] It is possible it meant ostensible authority — what authority a reasonable third party would believe the particular employee had. However, it is still difficult to conceive that a third party would believe that a public officer would have power to act in a manner that was in fact unlawful. Of course, it is acknowledged here, as Gleeson CJ did in *New South Wales v Lepore*, that one of the difficult aspects of this area of the law is that the answers can depend on the level of abstraction at which the questions are asked.[181]

Government might argue that when an employee acts in a way that they know to be unlawful, or are reckless as to that fact, they are on a 'frolic of their own', for which the employer should not be held responsible.[182] There may not be a 'close connection' in such cases between the employment and the officer's actions — they are using their powers in a way that their employer did not intend, does not benefit from, and which is not in furtherance of the government's purposes.[183] Having stated that, it is conceded some courts have found a close connection even when the employee is committing a crime which the employer would never have authorised.[184] This argument might find indirect support from s 66 of the *Insurance Contracts Act 1984* (Cth) ('*Insurance Contracts Act*').[185] That section relates to subrogation actions by employers against employees, when the employer has incurred a loss (for example, by being required to pay a third party compensation)

178 Cockburn and Thomas, 'Personal Liability Part 1' (n 83) 93; Chamberlain, 'Misfeasance in a Public Office' (n 5) 578.

179 *Mengel* (n 38) 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

180 Nolan, in reference to the phrase 'de facto authority', lamented that '[q]uite what was meant by this was left unclear': Nolan (n 38) 203. Aronson doubts whether the High Court's statements in *Mengel* are correct: Aronson, 'A Very Peculiar Tort' (n 5) 46. Indeed, Aronson notes governments have often effectively conceded vicarious liability for conduct of public officers amounting to bad faith: at 47.

181 *Lepore* (n 161) 539 [51]. For my criticism of aspects of Australian law regarding vicarious liability, see Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018) 70–6.

182 *Joel v Morison* (1834) 6 C & P 501; 172 ER 1338, 1338–9 (Parke B).

183 Vines argues thus: 'The wrong in misfeasance in public office has been described as something which is an "abuse of office", and surely an abuse of an office could not be regarded as within the course of employment for that office': Vines (n 10) 228 (citations omitted), quoting *Mengel* (n 38) 355–6 (Brennan J).

184 See, eg, *Morris* (n 159).

185 *Insurance Contracts Act 1984* (Cth) ('*Insurance Contracts Act*').

because of something an employee did or did not do. The section bars an action by the employer against the errant employee, but only where the employee was *not guilty* of serious or wilful misconduct. This seems to suggest Parliament's intent that, where an employee *is guilty* of serious or wilful misconduct leading to a loss, they will (or may) be held personally liable for it. This supports an argument that the employer should not be held vicariously liable for an employee who has caused a third party loss through the tortious misuse of public office. This is on the basis of an analogy between misuse of public office and serious or wilful misconduct. This would effectively be the result if either: the government is not held vicariously liable at all for loss caused by the misuse; or the government is held vicariously liable, but then permitted to claim an indemnity against the public officer who caused the loss through the misuse of their office.

I must also concede that the nature of a 'public office' is broader than the nature of an employee, upon which vicarious liability has traditionally fastened.[186] However, the United Kingdom cases have extended the tentacles of vicarious liability beyond traditional employer–employee relationships. Thus, the content of s 66 of the *Insurance Contracts Act* can be considered relevant to an assessment of vicarious liability of an employer, beyond cases where the person who caused the third party loss is an 'employee'; in other words, its purpose could have application to those who hold a public office.

Finally, as noted above, it is possible that punitive damages might be payable for the tort of misuse of public office. In terms of the United Kingdom approach to punitive damages, oppressive, arbitrary or unconstitutional behaviour by a public officer is one of the expressed bases upon which such damages might be available.[187] In Australia, the availability of punitive damages is generally not so constrained,[188] although it is not entirely clear whether punitive damages would be available for the tort of misuse of public office. The High Court's statements on the availability of punitive damages for traditional vicarious liability certainly leave this possibility open.[189] Of course, the purpose of punitive damages is to punish and deter undesired behaviour. In this context, it makes sense to visit them upon the wrongdoer. It makes much less sense to visit them upon the wrongdoer's employer,[190] as Lord Scott noted in a case involving the tort of misuse of public

186 It has subsequently been determined that vicarious liability can apply to relationships sufficiently akin to employment: *Armes* (n 167) 378–9 [59]–[60] (Lord Reed JSC).

187 *Rookes v Barnard* [1964] AC 1129, 1226 (Lord Devlin, Lord Reid agreeing at 1179, Lord Evershed agreeing at 1197, Lord Hodson agreeing at 1203, Lord Pearce agreeing at 1238).

188 See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

189 *New South Wales v Ibbett* (2006) 229 CLR 638. Chief Justice Gleeson, Gummow, Kirby, Heydon and Crennan JJ accepted that an employer could be vicariously liable to pay punitive damages in respect of an employee's acts: at 653 [51]–[54].

190 Michael F Sturley, 'Vicarious Liability for Punitive Damages' (2010) 70(2) *Louisiana Law Review* 501, 516. Sturley notes: 'If punitive damages punish someone who is not guilty of any misconduct they do not accomplish their stated purpose.' Walker similarly states that '[t]o award exemplary damages indiscriminately against an employer for the wrong of its employees runs counter to the rationale of deterrence which would seem to enable the awarding of exemplary damages in the first place': Paul Walker, 'Vicarious Liability for Exemplary Damages: A Matter

office.[191] Thus, the possibility that punitive damages might be payable as a result of such behaviour is surely a further reason to not make the public body vicariously liable for the financial consequences of the employee who commits the tort of misuse of public office.

Of course, this does not necessarily mean that the public body has no legal responsibility for the consequences caused to a third party by the office holder who abuses their office. The public body might be liable directly: for example, there may be negligence on the public body's part in employing this particular individual, or in failing to adequately supervise them, effectively permitting them to commit the tort.

Much about vicarious liability remains opaque, but the narrower way in which it has been cast in Australia, the rationale of the tort of misuse of public office, and s 66 of the *Insurance Contracts Act* combined,[192] persuade me to conclude that the government should not generally be held vicariously liable for loss caused by one of its officers committing the tort of misuse of public office.

C *Whether a Duty Must Be Owed*

As explained above, it is not entirely clear in Australia whether, in order to bring an action for the tort of misuse of public office, a duty of care must be shown to exist on the office holder in relation to the plaintiff. State Supreme Court decisions indicated it would be necessary, but Brennan J opined in *Mengel* that it ought not be required.[193] Lord Hutton in *Three Rivers* also cast doubt on the requirement.[194]

It should not be necessary to show that a duty of care was owed by the public office holder to the claimant. To do so unacceptably mixes a negligence concept with the tort of misuse of public office, which is quite different in nature, involving an allegation of deliberate (or at least reckless) wrongdoing. As I have written elsewhere, the law has long drawn a distinction between deliberate, intentional wrongdoing, and mere inadvertence.[195] There is good sense in the distinction — typically, a positive act committed, or a deliberate omission, attracts more

of Strict Liability?' (2009) 83(8) *Australian Law Journal* 548, 548. Cane admits that to permit vicarious liability to apply in such cases 'undercuts' the punishment and deterrence aspects of punitive damages: Cane (n 177) 513.

191 *Kuddus* (n 73) 157:

> The proposition that exemplary damage awards against [the executive government] … can have a deterrent effect is, in my respectful opinion, fanciful. It is possible that exemplary damages awards against the actual wrongdoers which they would have to meet out of their own pockets would have a deterrent effect upon them and their colleagues.

192 *Insurance Contracts Act* (n 185) s 66.

193 See above n 89.

194 *Three Rivers* (n 3) 223.

195 This explains the tort action in *Wilkinson v Downton* [1897] 2 QB 57 ('*Wilkinson*') for the intentional infliction of emotional distress. Intention continues to be recognised as a requirement for this action: *O (A Child) v Rhodes* [2016] AC 219, 254 [87] (Baroness Hale DPSC and Lord Touson JSC), 259 [112]–[113] (Lord Neuberger) ('*Rhodes*').

opprobrium than mere inadvertence. This has been recognised by appellate decisions.[196] It has been noted that a claimant who is able to show the kind of intentional wrongdoing at the heart of the tort of misuse of public office might gain a 'psychological payoff' from being able to do so, in a way quite distinct from the case of a plaintiff merely showing that a defendant has been negligent.[197]

There are further reasons. As explained above, in quite a number of cases in the context of public authorities, the High Court has denied that the public authority defendant owes a duty of care to relevant claimants. It is typically posited that to recognise such a duty would be inconsistent with and contrary to the statute through which the public authority acts.[198] This has also appeared in Privy Council decisions.[199] It is not necessary to critically consider this reasoning here, and I have in any event done so elsewhere.[200] The relevant point for present purposes is that, given this state of affairs, it would unduly restrict the tort of misuse of public office to connect it with a requirement that a duty exists. A court might find that no duty exists, because it would be contrary to the statute through which the authority acts. On the other hand, it is most unlikely that the contents of the statute would be inconsistent with application of the tort of misuse of public office. Indeed, it is inherently not inconsistent because if it were, there would be no basis for the tort of misuse of public office to exist, because there would be no illegality. For this reason too, then, Australian law should not require a plaintiff wishing to proceed on the basis of the tort of misuse of public office to demonstrate they were owed a duty of care by the relevant public office holder.

D *Whether Reasonable Foreseeability Should Be Sufficient*

The High Court decision in *Mengel* left open the question whether it was sufficient that the public office holder could reasonably have foreseen damage or injury to the plaintiff. The New South Wales Court of Appeal indicated in *Obeid* that something more might be necessary, such as recklessness. In *Three Rivers*, the House of Lords did not accept that reasonable foreseeability was sufficient.[201]

This article agrees with the position taken in *Obeid* and in *Three Rivers* that mere reasonable foreseeability of the possibility that the plaintiff might suffer damage

196 *Rhodes* (n 195) 248 [63] (Baroness Hale DPSC and Lord Toulson JSC, Lords Clarke and Wilson JJSC agreeing at 231). Although the context was personal injury, the principle is not considered to be confined to that context: 'negligence and intent are very different fault elements and there are principled reasons for differentiating [them]'. See also *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 487 [74] (Spigelman CJ).

197 Erika Chamberlain, 'What Is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?' (2009) 88(3) *Canadian Bar Review* 578, 597–600; John Murphy, 'Misfeasance in a Public Office: A Tort Law Misfit?' (2012) 32(1) *Oxford Journal of Legal Studies* 51, 73.

198 See, eg, *Sullivan* (n 13) 579–80 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

199 See *Davis v Radcliffe* [1990] 1 WLR 821, 827 (Lord Goff for the Court).

200 See Anthony Gray, 'Liability of Police in Negligence: A Comparative Analysis' (2016) 24(1) *Tort Law Review* 34, 57–61

201 See above nn 34, 42–44, 79–80, 97.

or injury is not sufficient for the purposes of the tort. An overall reading of the decision in *Mengel* suggests that, if pressed, that Court might not have considered reasonable foreseeability to be sufficient either.

There is apparently some parallel between suggestions that in order to successfully sue for the tort of misuse of public office, the plaintiff must show that the defendant public office holder owed them a duty of care, and the suggestion that it might be sufficient that the defendant reasonably foresee that their actions (or omissions) might harm the plaintiff. Reasonable foreseeability is used in most cases as the basis for establishing that a duty of care is owed. Thus, for similar reasons as those expressed above for denying that it is necessary for the tort that the public office holder owe a duty to the plaintiff, I conclude that reasonable foreseeability of harm to the plaintiff is not relevant.

E *Whether Recklessness Should Be Sufficient*

The High Court indicated in *Mengel* that recklessness would be sufficient to meet the requirement of the tort of conscious wrongdoing. The House of Lords in *Three Rivers* had also indicated that (subjective) recklessness would be sufficient. Subsequent Australian decisions have apparently proceeded on the basis that recklessness would be sufficient. However, dicta comments by the High Court in *Futuris* focused on the intent aspect of the tort, apparently expressly distinguishing the Australian position from that of the United Kingdom, where apparently recklessness was sufficient.[202] Some may argue that recklessness can be equated with intent. This article does not take that position. However, the question of whether recklessness should be sufficient to ground the action for misuse of public office, or whether a higher degree of culpability should be required, is worthy of some consideration.

Clearly there is some ambiguity about the meaning of the word 'reckless'.[203] In an admittedly different context, Gummow, Hayne and Heydon JJ stated in *Banditt v The Queen* that 'in its ordinary use, "reckless" may indicate conduct which is negligent or careless, as well as that which is rash or incautious as to consequences'.[204] Of course, recklessness may be considered in an objective sense or a subjective sense — their Honours went on to explain that the first part of the above quoted sentence referred to objective recklessness, the latter part to subjective recklessness.[205] Neither in *Mengel* nor in *Sanders* did the High Court explain the sense in which it used the word 'recklessness' in the context of the tort of misuse of public office.[206] In *Brett Cattle*, Rares J interpreted it in a subjective

202 See above Parts II(A)–(B).

203 See *La Fontaine v The Queen* (1976) 136 CLR 62, 77 (Gibbs J).

204 *Banditt v The Queen* (2005) 224 CLR 262, 275 [36] ('*Banditt*').

205 Ibid.

206 *Mengel* (n 38); *Sanders* (n 7).

sense,[207] as had members of the House of Lords in *Three Rivers*.[208] It seems that 'reckless' in the context of the tort of misuse of public office refers to subjective, not objective, recklessness.[209] In a sense, when a defendant is subjectively reckless as to a particular outcome, they are taken to have intended to achieve that outcome, effectively meeting the intent-based nature of the tort. The matter is not free of difficulty — certainly in the schedule to the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'), a clear distinction is made between intent and recklessness.[210] The fact that a person is reckless does not suffice to substitute for a requirement of intent.

The position of the High Court on the sufficiency of recklessness must be considered in more detail. In *Mengel*, all justices accepted that it was sufficient for the mental element of the tort that the defendant be reckless as to the likelihood that their unlawful behaviour would injure the plaintiff.[211] The joint reasons explained this position on the basis that

> principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton*.[212]

The High Court in this passage was clearly referring to two other intention-based torts — intentional infliction of emotional harm, and intentional inducement of a breach of contract.[213] It did so in the context of justifying recklessness as being sufficient to meet the mental element required for the tort of misuse of public office. This invites a consideration of aspects of those torts relevant to the mental element. A detailed consideration of these torts is again beyond the ambit of this article; but as it happens, the United Kingdom courts have recently considered the meaning of 'intention' in relation to both torts. These deliberations are relevant. Importantly, they were decided after *Mengel*.

In *O (A Child) v Rhodes* ('*Rhodes*'),[214] the United Kingdom Supreme Court

207 *Brett Cattle* (n 1) 405 [277], citing *Banditt* (n 204) 265 [2] (Gummow, Hayne and Heydon JJ).

208 *Three Rivers* (n 3) 227–8 (Lord Hutton), 230 (Lord Hobhouse).

209 Objective recklessness would take the standard close to a negligence standard: Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 218.

210 *Criminal Code Act 1995* (Cth) sch 1. The terms are defined quite separately — proof of intent is obviously sufficient to demonstrate recklessness, but there is no legislation to make recklessness sufficient to establish intent: at s 5.4(4). Cf s 5.2.

211 *Mengel* (n 38) 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), 357 (Brennan J), 370–1 (Deane J).

212 Ibid 347 (citations omitted). The quote continues to refer to acts 'done with reckless indifference to the harm that is likely to ensue', such as someone recklessly ignoring the existence of a contract in committing the tort of inducing breach of contract.

213 Ibid.

214 *Rhodes* (n 195).

considered *Wilkinson v Downton* ('*Wilkinson*'),[215] the 19th century precedent for the tort of intentional infliction of emotional distress. In affirming the existence of the action, the Court reiterated its intent-based nature. It was an essential element of the tort that the defendant be shown to have intended to cause the plaintiff distress.[216] All members of the Court expressly stated that, in determining whether this intent element was satisfied, recklessness would *not* be sufficient.[217] It is conceded that this is a United Kingdom decision, and its reasoning will not necessarily be adopted by the High Court, which has not considered a *Wilkinson* claim since *Rhodes* was decided.

The joint reasons in *Mengel* also referred, as discussed, to the tort of inducing breach of contract (typically traced back to *Lumley v Gye*)[218] in justifying its use of recklessness. Again the United Kingdom Supreme Court considered that tort in *OBG Ltd v Allan* ('*OBG*'),[219] a decision which postdated *Mengel*. Again, that Court affirmed the requirement that the claimant demonstrate intent on the part of the defendant. Mere negligence or gross negligence would not be sufficient,[220] but deliberately turning a blind eye might be.[221] No member of the Court used the word 'reckless' to describe the mental element required, but Lord Nicholls noted that 'lesser' mental states than intention were *insufficient*.[222]

As it happens, the High Court also considered the tort of inducing breach of contract in *Mengel*. In discussing the intent-based tort, the joint reasons stated: 'it has been held that constructive knowledge of the terms of a contract is sufficient, so that a defendant may be liable if he or she recklessly disregards the means of ascertaining those terms'.[223] In so saying, the High Court referred to one judgment

215 *Wilkinson* (n 195).

216 *Rhodes* (n 195) 254 [87] (Baroness Hale DPSC and Lord Toulson JSC, Lords Clarke and Wilson JJSC agreeing at 231) ('first reasons'), 259 [112] (Lord Neuberger PSC, Lord Wilson JSC agreeing at 255) ('second reasons'). The first reasons noted that the concept of 'recklessness' was of uncertain scope, and had at times been taken to mean gross negligence or the taking of an unreasonable risk: at 253 [84]. The second reasons stated that recklessness was a 'tricky' concept, and took the position that intention was different from recklessness. At 259 [113], Lord Neuberger PSC stated:

> Intentionality may seem to be a fairly strict requirement, as it excludes not merely negligently harmful statements, but also recklessly harmful statements. However, in agreement with [the first reasons], I consider that recklessness is not enough [for a *Wilkinson* action].

217 Ibid 254 [87] (Baroness Hale DPSC and Lord Toulson JSC, Lords Clarke and Wilson JJSC agreeing at 231), 259 [112] (Lord Neuberger PSC, Lord Wilson JSC agreeing at 255).

218 (1853) 2 E & B 216; 118 ER 749.

219 [2008] 1 AC 1 ('*OBG*').

220 Ibid 29–30 [39]–[43] (Lord Hoffmann), 62–3 [191]–[192] (Lord Nicholls), 91–2 [320] (Lord Brown). Baroness Hale used the word 'deliberate' to describe behaviour caught by the tort: at 86 [306].

221 Ibid 63 [192] (Lord Nicholls).

222 Ibid 57 [166]. Neither *Mengel* nor *OBG* distinguished between recklessness in an objective or subjective sense.

223 *Mengel* (n 38) 342 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) (citations omitted).

of Lord Denning in *Emerald Construction Co Ltd v Lowthian*.[224] As noted, in its most recent pronouncement on that tort, the United Kingdom Supreme Court reaffirmed the central importance of intention, with Lord Nicholls expressly stating that '[l]esser states of mind' were insufficient.[225] It is not known at this point how the High Court might approach this area, in the light of *OBG*. The Federal Court has cited and applied *OBG*.[226] The High Court in *Sanders* appeared to take a narrow view of the requirement of 'intent' in relation to the tort of inducing breach of contract.[227] It must also be conceded that a lower court has apparently accepted that recklessness or wilful blindness might be sufficient.[228]

In sum, the High Court stated in *Mengel* that intention in the context of the tort of misuse of public office was a counterpart to, and should be confined in the same way as, other torts based on the intentional infliction of harm. As it turns out, in two of these contexts, the United Kingdom Supreme Court has determined that recklessness is not sufficient to meet the requirement of intent, although in *Three Rivers*, it found that recklessness was sufficient. Of course, it must not be assumed that Australian courts will necessarily adopt the positions taken by the United Kingdom Supreme Court in *Rhodes* and *OBG*. This article agrees with the High Court in *Mengel* that a consistent approach should be taken to questions of intent. For this reason, it is suggested that the High Court should find that (mere) recklessness is not sufficient to meet the requirement of intention. This would also be consistent with a clear expression of parliamentary intention, albeit as embodied in the *Criminal Code*, that recklessness is considered to be quite distinct from a requirement of intention.

Therefore, neither proof that the public officer holder did not care about the possibility that their behaviour was illegal, nor proof that they did not care about the possibility that the plaintiff would be injured as a result of the behaviour would be sufficient to attract liability. It should be necessary for the plaintiff to demonstrate a higher degree of culpability in order for this tort to apply. Of course, if the plaintiff could not demonstrate this higher degree of culpability, it would not necessarily mean they were without a remedy. Proof that the public office holder had been guilty of recklessness may well found an action against the public body in negligence, for employing or for failing to supervise the public office holder, or potentially for vicarious liability. However, the tort through which the public office holder is made personally liable should be reserved for the worst types of behaviour.

224 [1966] 1 WLR 691, 700–1, cited in ibid. It may be worth noting that in *OBG*, the UK Supreme Court overturned aspects of the law that had previously been developed in the area of the tort of inducing breach of contract, and the possible tort of unlawful interference with business relations, including aspects developed by Lord Denning MR: see *OBG* (n 219).

225 *OBG* (n 219) 57 [166].

226 *LED Technologies Pty Ltd v Roadvision Pty Ltd* (2012) 199 FCR 204, 215–16 [49]–[53] (Besanko J, Mansfield J agreeing at 205 [1], Flick J agreeing at 225 [96]).

227 *Sanders* (n 7) 339 [22]–[23] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

228 *Fightvision Pty Ltd v Onisoforou* (1999) 47 NSWLR 473, 512 [171] (Sheller, Stein and Giles JJA).

F *Interrelation between These Issues*

Of course, the above issues are somewhat interrelated, and should not be in conflict with one another. It is submitted that the suggested resolutions above are harmonious. For example, the fact that a duty need not be owed is consistent with an argument that reasonable foreseeability of damage or injury to the plaintiff is not relevant to the question of liability, given the centrality of the latter to establishment of the former. Secondly, it has been suggested that the tort be reoriented so that it focuses on intentional wrongdoing, not merely recklessness. This is consistent with the previous point, because recklessness is of uncertain meaning, and can easily be assimilated with negligence. A focus on the intention of the wrongdoer is consistent with the public body not being vicariously liable for what the public officer holder did. The raison d'être of the tort is deterrence and punishment of wrongful behaviour. In this context, it is appropriate, and only appropriate, to fasten upon the wrongdoer, not the organisation that engaged them. And it is considered appropriate to fasten personal liability on a public officer only in relation to the most egregious conduct, involving intentional wrongdoing intended to harm others. This finds (indirect) legislative support in s 66 the *Insurance Contracts Act*.[229]

IV CONCLUSION

This article has explained the development of the tort of misuse of public office in the United Kingdom and Australia. Though there is a high degree of overlap, in some respects there has been divergence or, at the very least, possible divergence in how the tort has developed in these jurisdictions. Further clarification is desirable. This article has suggested some ways in which the law in this area might be improved. Firstly, there is much dissatisfaction with the requirement of 'public office', and the uncertainty that currently attends such a concept. While no solution will be perfect, it suggests something not currently seen in the literature in this area — recourse to jurisprudence on whether a body ought, or ought not, to be entitled to the shield of the Crown — to determine whether or not an individual under that body ought to be regarded as a public office holder. This article has recommended that Australian law should not generally hold a government vicariously liable in situations where its public office holder commits the tort. To do so would undermine the rationale of the tort. It has recommended that a duty of care not be required in order to satisfy the tort, in order to preserve the defensible and sensible distinction between intent-based torts and mere negligence.

It has also considered the required mental element. While the tort was traditionally seen as requiring intention in terms of unlawfulness and harm to the plaintiff, some courts have apparently accepted reasonable foreseeability as being sufficient. This article suggests that Australian law should not accept this, which is perhaps the view of the High Court in *Mengel* in any event.

More controversially, this article suggests that recklessness should not be sufficient either. The High Court in *Mengel* advocated that a consistent position should be taken to intent-based torts such as the tort of misuse of public office, *Wilkinson*

229 *Insurance Contracts Act* (n 185) s 66.

actions and the tort of inducing breach of contract. So much may be agreed. However, the highest court in the United Kingdom has subsequently determined, in relation to the latter two torts, that intention must be shown, and that mere recklessness will not be sufficient. The High Court should accept these views and apply it to the tort of misuse of public office, by requiring proof of intent. This is appropriate, given that the tort visits personal liability upon the office holder. It is also consistent with federal legislation such as the *Criminal Code* and the *Insurance Contracts Act*. Coherence in the law wherever possible is a laudable objective.