AGS

Legal briefing

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Misfeasance in public office

Misfeasance in public office is a form of intentional tort. It is the only tort recognised by the common law that has an exclusively public law operation.

It has been described as 'a very peculiar tort'.[1] Although the tort is over 300 years old, it can be properly described as emerging and evolving. Despite being the subject of hundreds of decided cases, considerable uncertainty attends elements of the tort, which are 'notoriously … unsettled' (*Obeid v Lockley* (2018) 98 NSWLR 258, [225]).

Elements of the tort

The elements of the tort are as follows:

- The defendant must be the holder of a public office.
- The defendant must have purportedly exercised a power that was an incident of that office.
- The defendant's exercise of power must have been invalid or otherwise lacking lawful authority.
- The exercise of power must have been accompanied by one or other of the following forms of 'bad faith':
  - The defendant must have exercised the power knowing that he or she was acting in excess of power AND with the intention to cause harm to the plaintiff (sometimes referred to as 'targeted malice').
  - The defendant must have been recklessly indifferent to whether the act was beyond power AND recklessly indifferent to the likelihood of harm being caused to the plaintiff.
- The exercise of power must have been productive of loss.

In this issue

1 Emeritus Professor Mark Aronson, 'Misfeasance in public office: a very peculiar tort' (2011) 35 *Melbourne University Law Review* 1.

First element: holding a public office

There is no authoritative test for determining what constitutes holding a public office for the purpose of the tort of misfeasance (*Obeid*, [103], *Leerdam v Noori* (2009) 255 ALR 553, [3]). It has been suggested that in almost all cases the answer will be obvious.[2]

Occupancy of a public office connotes some sort of official position, but it is not confined only to a person appointed to a particular statutory office which expressly confers statutory powers and responsibilities (*Obeid*, [113]).

'Occupancy of a public office connotes some sort of official position...'

Difficulties of characterisation can arise. It has been held that pleading that an alleged tortfeasor was employed by the Commonwealth and had 'line management responsibility' for the plaintiff would not, even if proven, establish occupancy of a public office: *Skinner v Commonwealth of Australia* [2012] FCA 1194 at [39]. Further, although it is conventionally thought that a mere contractual engagement of a person by the Commonwealth is not enough,[3] the following observations of the High Court in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (at [51]) concerning the engagement of independent merits review officers to undertake reviews of government decision-making are somewhat salutary:

> It is appropriate to leave for another day, the question whether a party identified as 'an independent contractor' nevertheless may fall within the expression 'an officer of the Commonwealth' in section 75(v) in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been 'contracted out'.

If a person is an 'officer of the Commonwealth' for constitutional law purposes, there is much to be said for regarding him or her as occupying a public office for the purpose of the tort of misfeasance. Whether that is so may depend upon a consideration of the purposes served by s 75(v) and the tort respectively.

The need for a 'public office' to be occupied has been described by a Full Court of the Federal Court as the reason why the Commonwealth itself cannot be directly liable for misfeasance (since the Commonwealth does not occupy a public office).[4]

Second element: exercising 'public power'

It is not enough that the alleged misfeasant act be performed by the public officer; it must also involve the exercise of a public power or, at the very least, be 'connected to a power or function that the officer has by virtue, or as an incident, of his or her public office' (*Ea v Diaconu* [2020] NSWCA 12, [26]; *Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311, [109]).

This requirement will usually be satisfied in the context of the purported exercise of a power or function conferred by an identified statutory provision (subject to any questions of whether the act fell within the power as properly construed). However, more complex questions are likely to arise in cases where there is no clear statutory power or function.

It may be alleged that the act in question involved an exercise of non-statutory executive power. This will often raise particular constitutional issues – for example:

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2 *Society of Lloyds v Henderson* [2008] 1 WLR 2255, [23]; *Leerdam v Noori* (2009) 255 ALR 553, [3]; T Cockburn and M Thomas, 'Personal liability of public officers in the tort of misfeasance in public office' (2001) *Torts Law Journal* 80, 245.

3 *Leerdam*.

4 *Emanuele v Hedley* (1998) 179 FCR 290, [36].

- if it is alleged that executive action was taken outside the spheres of responsibility vested in the Commonwealth, or
- where issues arise as to the reach or application of s 61 of the Constitution, including where the alleged illegality arises as a result of the asserted operation of state laws (see *Re Residential Tenancies* Tribunal (NSW); Ex parte Defence Housing Authority (1997) 190 CLR 410).

Sometimes these constitutional issues will be obvious, but on other occasions they may be somewhat subterranean. It is important that Commonwealth departments and agencies obtain legal advice on any constitutional issues in accordance with the Attorney-General's directions on tied work: see para 2.1 and Appendix A of the Legal Services Directions 2017 (LSDs).

'It is important that Commonwealth departments and agencies obtain legal advice on any constitutional issues...'

It may also be alleged that the act in question involved the exercise of 'public power' simply because there was bare capacity to act using the authority of the public office. This raises complex and unresolved questions. (See the review of authorities in *Ea v Diaconu*, [76]-[128].)

Courts have declined to characterise all functions or acts of public officials as involving the exertion of public power.[5] Indeed, in *Emanuele v Hedley* (1998) 179 FCR 290 (*Emanuele*), the Full Court of the Federal Court held that a report submitted by a senior public servant to his supervisors concerning an allegedly improper conversation about a public tender process could not give rise to misfeasance. There, the Court considered the report to be 'simply the actions of an employee reporting an alleged event to superior officers', as opposed to an exercise of powers attaching to the public office, and the officer may not have been acting in public office as the 'actual activity was no different to that daily undertaken by many people in the private sector' (*Emanuele*, [34], [37]).[6]

However, it cannot be assumed that this reasoning will necessarily prevail. In *Nyoni v Shire of Kellerberrin (Nyoni)* the Full Court of the Federal Court distinguished Emanuele and treated a capacity to act using the authority of a public position as being sufficient to establish this element of the tort. There, the CEO of a shire council had written to regulatory authorities about the operations of pharmacy, with the intention that they would take steps to shut it down. Although there was no statutory power for the shire to take action against the pharmacy or a statutory power or function to make the complaints in question, the majority concluded that the CEO had exercised a public power because he had used the authority of his office when writing to the regulatory bodies.

Special leave to appeal from *Nyoni*, including in relation to this issue, was refused (*Shire of Kellerberrin v Nyoni* [2018] HCATrans 27 (16 February 2018)). However, this aspect of the reasoning in *Nyoni* has subsequently been described as 'an extension of the previously understood outer limits of the tort' and some doubt as to its correctness has been expressed, with such an argument being seen as a 'significant hurdle' for a plaintiff (*Ea v Diaconu*, [51], [60] and [160]). However, until such time as the High Court determines otherwise, the safer approach is for decision-makers to proceed on the basis that courts may take an expansive view of this element of the tort.

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5 In *Cannon v Tahche* (2002) 5 BR 317 it was held that public prosecutors did not necessarily exert public power; in *Leerdam* it was held that a lawyer employed by a private law firm who was engaged by a government agency did not exercise public power.

6 In light of the decision of the English Court of Appeal in *Jones v Swansea City Council* [1990] 1 WLR 54, the Full Court in *Emanuele v Hedley* (1998) 179 FCR 290 considered it preferable to assume, without deciding, that Mr Hedley acted in a public office in conducting his discussions with Mr Emanuele.

Must the public officer owe the plaintiff a duty with respect to the exercise of power?

Some cases have suggested that there is a further element of the tort of misfeasance – namely, the public official must owe a duty to the plaintiff in relation to the exercise of the impugned power.[7] That contention has been rejected by a number of appellate courts in Australian and overseas jurisdictions.[8] The suggestion that a public official must owe a duty not to commit the particular abuse complained of may insufficiently recognise that, because of the public law obligation to act in the public interest, public officials always owe a duty not to abuse their powers.

However, the requirement for a duty will be important in cases where the alleged misfeasance is a result of omissions rather than acts. Omissions will not be actionable unless the omission involves a conscious and dishonest failure to take action in knowledge of circumstances giving rise to, effectively, a positive duty to take lawful preventative action (*Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 228, 230, 237, 254, 288-289; *Minister of Fisheries v Pranfield Holdings Ltd* [2008] 3 NZLR 649, [62]-[75]; *Plaintiff M83A/2019 v Morrison (No 2)* [2020] FCA 1198, [72]). An inadvertent or negligent failure to act will not be sufficient to satisfy this element.

'...public officials always owe a duty not to abuse their powers...'

Third element: the exercise of power must be invalid or otherwise lacking lawful authority

An exercise of power will be invalid where no power exists at all. Invalidity can also arise as a result of the manner of the exercise of a power – for example, where the act of the public official was contrary to law and therefore liable to be set aside on judicial review. Further, as misfeasance claims can potentially include acts utilising the 'authority' of the public office, and where no particular statutory or common law powers are engaged, broader considerations concerning the manner of the exercise of the power (such as the intentions of the officer and surrounding factual circumstances) may be relevant to the question of the validity of, or lawful authority for, an action.

In the context of misfeasance claims, courts have found the third element to be satisfied in the following circumstances:

- delegated legislation, in the form of a disallowable legislative instrument, where the instrument was considered to be such an unreasonable exercise of the enabling statutory provisions so as to fall outside the scope of the power conferred (*Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732)

7 See the decision of the Privy Council in *David v Abdul Cader* [1963] 1 WLR 834, 839; *Tampion v Anderson* [1973] VR 715, 720 (a decision of the Full Court of the Supreme Court of Victoria); *Cannon v Tahche* (2002) 5 VR 317, [28] and [34] (a decision of the Court of Appeal of Victoria); *Pemberton v Attorney-General* [1978] Tas SR 1, 13–14 and 26–27.

8 See *Northern Territory v Mengel* (1995) 185 CLR 307, 357 (Brennan J), 371 (Deane J); *Garrett v Attorney-General* [1997] 2 NZLR 332, [54]–[55]; *Three Rivers*, 193; *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193, [28]–[29]. In *Leerdam* the New South Wales Court of Appeal acknowledged that it was reasonably arguable that there was no such duty requirement (at [115]). However, the plurality in *Mengel* left the question open (at 346 (Mason CJ, Dawson, Toohey, Gaudron, McHugh JJ)), as did the Western Australian Court of Appeal in *Neilson v City of Swan* (2006) WASCA 94, [49]–[67].

- the imposition of movement and quarantine restrictions on livestock by Territory government officers where the property in question was not subject to the relevant disease control legal frameworks – noting that, although the third element was therefore satisfied, as the officers neither knew that they lacked authority for their actions nor intended to cause harm, the misfeasance claim as a whole was not made out (*Northern Territory v Mengel* (1995) 185 CLR 307)
- the use of warrant powers to record the contents of documents which fell outside the scope of the warrant – although the claim was not ultimately successful, as the officers did not foresee the harm arising from the recording (*Obeid*)
- correspondence from the CEO of a shire council prompting authorities to take regulatory action against a pharmacy, where the correspondence utilised the authority of the office for an ulterior and an improper purpose (*Nyoni*).

However, some limits on statutory powers, or procedures governing the manner of their exercise, may be breached without resulting in invalidity: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. It is somewhat unclear whether the administrative law distinction between errors within jurisdiction and jurisdictional errors is an apposite distinction for the purposes of the tort of misfeasance. While it is true that most cases speak of jurisdictional type errors,[9] it is far from clear that true 'excess of power' resulting in invalidity is necessary. Given that the tort provides a remedy in cases of deliberate/reckless misuses of power, there is much to be said in favour of a lower test – namely, the act/decision of the public official was contrary to law and therefore liable to be set aside on judicial review. It is difficult to see why, as a matter of policy or principle, the deliberate wrongdoing must go to the existence of power rather than the manner of its exercise.

The above examples highlight how the intersection of statutory interpretation, administrative law and tort law adds layers of complexity to misfeasance claims. Developments in the way that courts approach questions regarding the lawfulness and validity of exercises of public power have the potential to significantly impact on the exposure of public officers to misfeasance claims – especially where the grounds on which such actions may be challenged are expanded by novel approaches to these questions (such as the approach of the court in *Brett Cattle*).

'A party alleging misfeasance will need to be quite specific about why the act/decision in question was invalid or lacked lawful authority.'

A party alleging misfeasance will need to be quite specific about *why* the act/decision in question was invalid or lacked lawful authority. This is because it will rarely be possible to allege that the public official knew of, or was recklessly indifferent to, some generalised and unidentified lack of lawful authority; it will be necessary to demonstrate the actual lack of lawful authority to which the official turned their mind (*M83A*, [111], [119(e)]).

9 See *Mengel*, 356; *Sanders v Snell* (1998) 196 CLR 329, [38]; and *Three Rivers*, 230.

Fourth element: the 'bad faith' mental element

The essence of the mental element is a 'bad faith' or dishonest abuse of power – not mere errors of judgment or even negligence. A useful formulation of the 2 main species of this element was given by Wigney J in *Farah Custodians Pty Limited v Commissioner of Taxation* (Farah) [2018] FCA 1185 at [101]-[106] as follows (citations omitted):

> [101] The fourth element concerns the defendant's intention or state of mind. In short terms, in engaging in the conduct, the defendant must have acted in bad faith. Bad faith may be manifested in this context in two circumstances: ...
>
> [102] The first circumstance, which is sometimes called 'targeted malice', is where the public officer engaged in the conduct *maliciously with the intention of causing injury or damage to the plaintiff, or for an improper or ulterior purpose* ...
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> [103] The second circumstance is where the defendant engaged in the conduct with either knowledge of, or reckless indifference about, two things; first, that their conduct was invalid, unauthorised or beyond power; and second, that their conduct would probably cause injury or damage to the plaintiff. The public officer's conduct in that circumstance involves bad faith because they acted despite the fact that they did not believe that their conduct was lawful ...
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> [105] *To the extent that the tort may be constituted by recklessness, or reckless indifference, it must be subjective recklessness*: ... The public officer must have believed or suspected that the conduct was invalid or unauthorised, and would probably injure the plaintiff, and yet gone ahead 'without ascertaining the position as a reasonable and honest person would do': ... The public officer's state of mind must be inconsistent with an honest attempt to perform or exercise their public functions or duties: ...

While these, or similar, formulations are generally accepted, the application of the elements to the factual circumstances of particular cases is complicated, and it is not unusual for judges to reach different views on the same facts.

Targeted malice

It is clear that a knowingly invalid and harmful exercise of power will be 'targeted malice'. However, there may be considerable difficulty in resolving questions of targeted malice in circumstances where the only alleged invalidity or lack of lawful authority arises from the malice or bad faith in question, and not from any other form of invalidity or lack of lawful authority (such as irrationality, absence of power, denial of procedural fairness or the like). For example, in *Nyoni* the majority held that an intention to harm establishes both excess of power (on the basis that a public officer acts beyond the scope of a public power where they act for an improper purpose) and the mental element (malice or bad faith, on the basis of the official's intention to harm). This reasoning raises some real difficulties in situations involving the exercise of statutory or other public powers that necessarily impose harm on affected persons or in situations where (as in *Nyoni*) the intentional imposition of harm was (also) actuated by a desire to advance a public interest (in that case the shire council's desire to improve the poor quality of services provided to a small rural community by its only pharmacy).

Knowledge / reckless indifference as to the lack of lawful authority

Regarding the second species of 'bad faith', a plaintiff must prove the public officer actually and subjectively held the relevant state of mind. It is not enough to allege objective recklessness, some type of imputed knowledge or intention, or that a person 'ought to have known' the conduct lacked lawful authority (M83A, [59]-[63], [94]-[105]). This is because the tort is not concerned with negligence but, rather, with a dishonest

exercise of power involving actual 'bad faith'. Accordingly, for reckless indifference to exist, a plaintiff must establish that the decision-maker was determined to proceed whether or not their actions lacked lawful authority.

Accordingly, it is important to recognise a fundamental distinction between reckless indifference on the one hand and gross negligence on the other hand. Reckless indifference involves an advertent disregard of risk – a 'wilful blindness' (*M83A*, [93]-[99]). Gross negligence involves serious carelessness in failing to appreciate the existence of risk. That distinction must be kept in mind for the purposes of the tort of misfeasance. Being grossly negligent in failing to recognise the lack of lawful authority for a particular act or decision cannot, as a matter of law, establish misfeasance.

'...important to recognise a fundamental distinction between reckless indifference on the one hand and gross negligence on the other hand.'

Further, in *Minister of Fisheries v Pranfield Holdings Ltd* (*Pranfield*), the New Zealand Court of Appeal drew a distinction between subjective recklessness capable of constituting the mental element and mere knowledge on the part of an officer holder that an action was 'legally doubtful' together with a failure to seek advice (at [115]). The Court of Appeal agreed with the proposition that an official is not recklessly indifferent merely because that official knows that the decision may be challenged or has legal advice that the legal position is uncertain – public administration would soon grind to a halt if certainty as to the legal position were required before any action could be taken (see *Pranfield*, [114]-[121]). As such, the latter state of mind was not 'inconsistent with an honest attempt to perform the functions of a public office' so as to constitute misfeasance – something more is required (see *Pranfield*, [118]-[121]).

At a practical level, it will usually be simpler to allege this fourth element when the nature of the alleged lack of lawful authority is clear and simple, such as acting directly contrary to the express terms of the power (as was the case in *Obeid v Lockley* (*Obeid*), where it was obvious that the conduct of the investigating officers exceeded what was authorised by the terms of the warrant). This is because it will be more readily shown or inferred that the public officer did have the subjective knowledge of, or reckless indifference to, that lack of lawful authority.

However, where the alleged lack of lawful authority is very complex (for example, one involving highly nuanced questions of statutory construction and the assessment of competing authorities) or far-reaching (for example, affecting the validity of a major executive program), it is likely to be much more difficult to demonstrate the dishonest state of mind necessary to make out this element of the tort. This is because it is far less likely that a decision-maker could be shown to be aware of an untested or controversial form of lack of lawful authority or that they would engage in a widespread, systemic and public abuse of power. In such cases it may almost be necessary, at a practical level, to show that the public official had received unequivocal legal advice that the act in question would be beyond power and that they consciously decided to ignore that advice (see *M83A*, [112]-[113]. Cf *Brett Cattle*, [375]-[381]).

In *Northern Territory v Mengel* (*Mengel*) the plurality expressed the reckless indifference limb using the phrase 'recklessly disregards the means of ascertaining the extent of his power' (at 342). However, this does not point to a different or 'lesser' species of recklessness but was merely a different way of expressing the requirement for subjective recklessness as just explained (*M83A*, [95]-[99]).

Further, the relevant state of mind must be held by the public officer actually exercising the power (or directing the exercise of the power by someone under their authority: *Obeid*, [194]; *M83A*, [113]) and not constructed through a composite or aggregate of the collective conduct and states of mind of a number of individual officers (see *Farah* [127]-[131], [144]-[147]).

Knowledge / reckless indifference as to harm

Various cases have suggested that there need be no subjective knowledge or reckless indifference in relation to the risk of harm (as opposed to the issue of validity/lawfulness) if, objectively assessed, the likelihood of that harm is reasonably foreseeable. While not yet conclusively decided by the High Court, the preponderance of recent authority is firmly against a softening of the required mental state in that way.

The notion that this aspect of the mental element of misfeasance can be satisfied if there is a foreseeable risk of harm to the plaintiff can be traced to the judgment of the English Court of Appeal in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* (*Bourgoin*) [1986] QB 716 (at 777). In the case of *Mengel*, the plurality (at 347) proceeded on the basis that, even assuming correctness of the decision in *Bourgoin*, no misfeasance in public office was made out. However, in *South Australia v Trevorrow-Lampard* (*Trevorrow-Lampard*) (2010) 106 SASR 331 at [263] the Full Court of the South Australian Supreme Court suggested that in *Mengel* the plurality had endorsed the conclusion in *Bourgoin*. It is noteworthy that in *Mengel* both Brennan J (at 358–9)) and Deane J (at 360) proceeded on the basis that the defendant must either know of, or be recklessly indifferent to, the likely harm caused to the plaintiff.

In *Three Rivers District Council v Bank of England (No 3)* (*Three Rivers*), the House of Lords declined to follow the decision in *Bourgoin*, holding instead that the defendant must know of, or be recklessly indifferent to, the likelihood of harm. A similar approach has been taken in New Zealand: *Garrett v Attorney-General* [1997] 2 NZLR 332 at 349. In Australia, the approach in *Bourgoin* has not been specifically rejected by the High Court, but was considered in detail, and rejected, in *Obeid* (at [153]-[172], [206], [222]-[242]). Most intermediate courts have formulated the mental element in terms inconsistent with *Bourgoin* (see *Sanders v Snell* (No 2) (2003) 130 FCR 149, [96]; *Commonwealth v Fernando* (2012) 200 FCR 1, [109]–[110]; *Cannon v Tahche* (2002) 5 VR 317, [34]-[49]). This is also the approach that has found most favour at single judge level (see *Rush v Commissioner of Police* (2006) 150 FCR 165, [120]-[123]; *Skinner v Commonwealth of Australia* [2012] FCA 1194).

Can the Commonwealth be vicariously liable for the misfeasance of its employees?

The traditional view has been that, absent so-called 'de facto authority'[10] liability for misfeasance will be personal rather than vicarious.[11] However, in the *Trevorrow-Lampard* the Full Court of the South Australian Supreme Court suggested, by way of obiter, that the Crown in right of the state of South Australia could be vicariously liable for the conduct of a departmental secretary (at [275]). The Court reasoned as follows in support of this obiter conclusion:

10 De facto authority will generally be present where the Commonwealth expressly or tacitly authorises the exercise of power in question. Awareness of what is occurring may be enough to create such 'de facto authority': *South Australia v Trevorrow-Lampard*, [273].

11 See *Mengel*, 347; *Rogers v Legal Services Commission of South Australia* (1995) 64. SASR 572.

> In the present case [the officers in question] each acted in apparent performance of their duties under or derived from the 1934 Act. They were doing the kind of thing (fostering a child) that was an appropriate exercise of the statutory powers. It is evident that they believed that the particular circumstances called for the action taken. They acted deliberately, but they acted for the benefit of the public and of the State, and not for any personal or private gain. If necessary, we conclude that this is a case in which the Crown in right of the State of South Australia is vicariously liable for the conduct of the tortfeasor ...

These observations were obiter because the Court found that the State, through its ministers and other emanations, had actual knowledge that public officers were unlawfully taking Aboriginal children from their parents and gave de facto authority to that conduct. However, the Court's observations suggest that, if the act/decision in question can be characterised as a misguided and unauthorised method of performing an otherwise authorised act, vicarious liability will arise. While this reasoning lends support to the Commonwealth or a state indemnifying a public official for their liability for misfeasance, doubt exists as to its conformity with the principle that, absent de facto authority, liability will ordinarily be personal.

Commonwealth liability for ministerial misfeasance?

In some respects, ministers can be regarded as comprising the directing mind and will of the Commonwealth, albeit they are not employees. That proposition might be regarded as lending support to the existence of direct liability on the part of the Commonwealth for the tortious conduct of a minister.[12] However, whether the Commonwealth may be liable, directly or vicariously, for personal torts committed by a minister (such as misfeasance in public office) is a different question, which is not the subject of clear authority. Further, the fact that a minister may be required to exercise an 'independent discretion' might arguably be inconsistent with the existence of liability on the part of the Commonwealth for misfeasant acts/decisions of a minister. In *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481 the Full Court of the Federal Court noted that it is 'not self-evident that in respect of acts and omissions of a Minister in the conduct of his portfolio the tortious liability is that of the Minister as a servant for which the Commonwealth is vicariously liable' (at 483–484).

The nature of liability, if any, on the part of the Commonwealth for the misfeasant acts/decisions of a minister (that is, whether such liability is direct or vicarious) remains unresolved. In this regard, in *Fernando v Commonwealth (No 4)* (2010) 276 ALR 586 (*Fernando*), the Court proceeded on the basis of what it, perhaps mistakenly, understood to be a concession by the Commonwealth that, for the purposes of those particular proceedings, it was vicariously liable for any misfeasant act which might be found against a minister.[13] Legal advice should be sought where this issue arises in legal proceedings.

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12 The extent to which the 'indoor management' of ordinary corporations is an appropriate analogy in the case of government bodies is unresolved: see *HMS Truculent: The Admiralty v The Divina (Owners)* [1951] 2 All ER 968; *Western Australia v Watson* [1990] WAR 248; *Babcock International v Babcock Australia* (2003) 56 NSWLR 51, [94]–[101]. Resort to that analogy may be unnecessary in the case of ministers: see *Ryder v Foley* (1906) 4 CLR 422 at 432–3; *Radio Corporation v Commonwealth* (1938) 59 CLR 170 at 192.

13 At [124]. In fact, the Commonwealth stopped short of conceding the existence of vicarious liability. The Commonwealth's position was that if liability was found against the Minister, it would consent to judgment being entered against the Commonwealth. On appeal the Full Court overturned the trial judge's finding of misfeasance, so it was unnecessary for the Full Court to consider the question of the characterisation of the Commonwealth's concession.

Importance of early and vigorous assessment of misfeasance claims

Misfeasance claims must be clearly alleged and proved. The serious nature of the claims made engage well-established principles regarding a claimant's obligations to properly satisfy a court that findings of that nature are warranted and to plead such allegations carefully and precisely.

It is clear that an allegation of misfeasance is a serious allegation that squarely and strongly engages the operation of the principles explained in the case of *Briginshaw v Briginshaw* Briginshaw (1938) 60 CLR 336 (at 362): 'the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences'. This principle is reflected in s 140 of the *Evidence Act 1995* (Cth).

Consistent with this, the High Court has held that allegations that public powers have been 'exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld' (*Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146, [60]). Even where misfeasance claims are made in support of an application for preliminary discovery (where the threshold test for an applicant to establish a 'reasonable cause to believe' is much lower than that for a final hearing), 'close attention' to the requirement that the claimant establish more than a 'mere possibility' is emphasised (*Rush v Commissioner of Police* (2006) 150 FCR 165, [121]-[123]).

The corollary of these principles is that misfeasance claims must be precisely pleaded. It has been repeatedly emphasised that the facts relied upon to support misfeasance claims must be fully and clearly specified – including the 'facts, matters or circumstances' which support the existence of the 'bad faith' alleged to accompany the exercise of the power.[14]

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It may be appropriate to seek to strike out or summarily dismiss pleadings of misfeasance when they do not meet these requirements. For instance, misfeasance claims are often articulated, through pleadings or otherwise, in terms that depend upon drawing inferences as to the public official's state of mind. In this regard, it must be remembered that whether or not a particular inference is open is a question of law, not a question of fact. Allegations of misfeasance should be analysed in light of this proposition. If the facts alleged in support of a pleading of deliberate or reckless wrongdoing are equally consistent with negligence, oversight or innocent error then, as a matter of law, the allegation of misfeasance is unsustainable (*Three Rivers* [184]-[189], applied in *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* (2011) 203 FCR 293, [116]; *Danthanarayana v The Commonwealth* [2014] FCA 552, [97]-[99]; M83A, [57], [115]-[116]).

14 See *Commonwealth v Fernando* (2012) 200 FCR 1; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, [184]; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 3)* (2010) 267 ALR 49, [69]; *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* [2011] FCA 1126, [109]–[111]; *Leinenga v Logan City Council* [2006] QSC 294, [64]; *MM Constructions (Aust) Pty Limited and Anor v Port Stephens Council (No 1)* [2010] NSWSC 241, [18]; *Lock v ASIC* (2016) 248 FCR 547, [124]; *Ea v Diaconu* [2019] NSWSC 795, [19]; *Danthanarayana v Commonwealth* [2014] FCA 552, [97]; *Streeter v Western Areas Exploration (No 2)* (2011) 278 ALR 291, [605]; *Plaintiff M83A/2019 v Morrison (No 2)* [2020] FCA 1198, [106]–[114].

Courts have been very willing to analyse both pleadings and evidence at an early stage in proceedings to ensure that a misfeasance claim is properly based and, where appropriate, to strike out pleadings or summarily dismiss misfeasance claims (see, for example, *Three Rivers* at [184]-[188]; *M83A*; *Danthanarayana*, [94]-[106]; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 3)* (2010) 267 ALR 494 at [69]; *Polar Aviation*, [109]–[111]). Nonetheless, consistent with the High Court's decision in *Spencer v The Commonwealth* (2010) 241 CLR 118 (at [25]-[26]), it may not be appropriate to exercise a power of summary dismissal as a means of dealing with contestable and uncertain aspects of the law. It was for this reason that an appeal against summary dismissal was successful in *Ea v Diaconu*.

A close analysis of the evidence adduced in support of an allegation of misfeasance will also need to be undertaken before a decision is made as to whether the decision-maker should be called to give evidence. Such a decision will need to be made in light of the principle in *Jones v Dunkel* (1959) 101 CLR 298 that an inference, otherwise open, may be more readily drawn if a defendant does not give evidence of matters of which they can be expected to give relevant evidence.

Although the failure of a party to call, or give, evidence may enable an adverse inference to be more readily drawn, the adverse inference must otherwise be open/available as a matter of law. And, while an unexplained failure to give evidence may permit a court to proceed on the basis that the evidence would not have assisted that party's case, it does not permit the court to assume that the evidence would have been harmful to the party's case. As noted above, seriously adverse inferences must be firmly based on evidence; inferences cannot overcome an absence of evidence or fill an evidentiary gap. In light of these principles, the emphasis placed by the Court on the failure of the Minister to give evidence in *Brett Cattle* (at [367]-[373]) (in circumstances where the Minister's evidence may have tended to reveal the deliberations of Cabinet and high-level negotiations with foreign governments) is somewhat unusual.

Damages

As with assault, battery and false imprisonment, misfeasance in public office is classified as an intentional tort. In the case of an intentional tort, a claimant may recover general damages both for the wrong itself and for any consequential loss that is not too remote. A consequential loss arising from an intentional tort will not be too remote if it was either intended by the defendant or the natural or probable consequence of the tortious conduct. This is a more generous test for recoverable loss than reasonable foreseeability, which applies to actions in negligence and other unintentional torts (see *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, [13], [73] and [114]; *TCN Channel Nine v Anning* (2002) 54 NSWLR 333, [100] and [103]). In assessing general damages for these torts, courts can take into account events and circumstances that occur after the tort was committed, including indignity, ongoing hurt feelings (such as disgrace and humiliation), damage to reputation, physical or psychiatric injury and consequential economic loss. This may include damages for physical or psychological injury, loss of liberty, damage to reputation and/or financial loss (including loss of profits). Since the tort is founded on the bad faith of the defendant, it is one where the award of exemplary damages may be a real possibility.

Assisting Commonwealth officers, other than ministers

Appendix E of the Legal Services Directions 2017 (LSDs) governs the circumstances in which the Commonwealth provides assistance to its employees in legal proceedings. Appendix E applies to requests for assistance from various classes of employees specified in para 1A, including officers employed in a non-corporate Commonwealth entity and staff of ministers (see Appendix E, para 3, regarding corporate Commonwealth entities or Commonwealth company employees).

'...expenditure should normally be approved to assist an employee who is a defendant in civil or criminal proceedings...'

Significantly, Appendix E currently provides that expenditure should normally be approved to assist an employee who is a defendant in civil or criminal proceedings if the proceedings arise out of an incident that relates to their employment with *the employing agency and the employee acted reasonably and responsibly* (Appendix E, [5]). However, para 6 of Appendix E contemplates that assistance will only be withheld where, if the Commonwealth itself were sued in the matter, it would be likely to seek an indemnity from the employee. The Commonwealth would be unlikely to seek indemnity or contribution from an employee unless the employee in question made no genuine attempt to act in the Commonwealth's interests and/or wilfully breached their duties. Approached in this way, an employee may be regarded as having acted 'responsibly and reasonably' within the meaning of Appendix E, despite the possibility of a high measure of wrongdoing on his or her part.

However, given the nature of the tort of misfeasance, there will be instances where a person alleged to have committed this tort will not have acted 'reasonably and responsibly'. In some instances, an agency may wish to defer some or all of the decision on legal assistance (see Appendix E, [7]). Of course, the LSDs do not preclude a full indemnity being given to an official simply because there is an allegation that the official committed misfeasance in public office.

Assisting Commonwealth ministers

Legal assistance to ministers is governed by the *Parliamentary Business Resources Regulations 2017* (Cth). These Regulations provide for the 'approving Minister' (usually the Attorney-General) to approve payment by the Commonwealth of ministers' legal costs, including damages, penalties and settlement costs. Subsection 86(1)(c) introduces a similar requirement to that contained in para 5 of Appendix E of the LSDs – namely, that the minister acted reasonably and responsibly in the matters giving rise to the proceedings. However, even if this condition is not satisfied, approval of assistance can nevertheless be given if the proceedings arose only because of the fact that the minister holds (or held) that office. An approval of assistance is subject to conditions, such as that the Commonwealth may have control over the conduct of the defence of the proceedings and the minister must provide assistance to the Commonwealth in exercising that control (ss 89 to 92). Like para 7 of Appendix E of the LSDs, the Regulations provide that approval for payment of legal costs can be deferred until a decision is reached as to whether it is appropriate to provide legal assistance.

Reducing the risk of misfeasance claims

Properly documented and sound decision-making that accords with all applicable legal requirements is the best antidote to misfeasance claims.

As the speed and volume of decision-making increases, there is a natural tendency for corners to be cut. For instance, in *Commonwealth v Fernando*, an acting minister was asked to make a decision, within a very short time frame, that had significant consequences for an individual. While the minister was ultimately held not to have committed the tort of misfeasance in public office, the following observations of the Full Court of the Federal Court (in the opening passage of its reasons for judgment) are apposite:

> From time to time public officials deem it necessary to cut corners when confronted with deadlines. In doing so they sometimes circumvent statutory requirements and deny procedural fairness to those whose interests are affected by their decisions. This case provides another illustration of the need for public officials strictly to observe legal requirements especially when they are dealing with the liberty of individuals.

Cutting corners when exercising coercive powers (for example, by police or regulators) is particularly risky. So, too, are situations where:

- a decision or conduct directly affects personal liberty or the financial position or reputation of a person to a significant extent
- the conduct is not otherwise subject to alternative statutory remedies such as internal reconsideration or external merits review
- there are doubts about the limits of power
- the decision or conduct relates to controversial/politically sensitive topics or people
- a history of acrimony precedes the decision.

In such circumstances it is not suggested that public officials should shy away from making what they conscientiously consider to be the preferable decision – rather, the reasons for the decision should be apparent from documentary records such as written briefings or investigation reports (which, as business records, will usually be admissible as evidence of the truth of their contents). The existence of such records will:

- reduce the risk of misfeasance claims being made
- increase the likelihood of such claims being withdrawn or settled before hearing
- reduce the 'pressure' for public officials to give oral evidence and thereby submit themselves to cross-examination
- reduce the risk of adverse judicial outcomes for public officials and the Commonwealth.

Other matters that may reduce the risk of a claim for misfeasance are:

- giving the subject of the decision-making process ample opportunity to be heard on the proposed decision (this should also reduce the chance of the decision being set aside as a denial of natural justice)
- the use of 'clean-skin' decision-makers who have not previously been involved in dealings with the subject of the decision-making process or matters relating to it
- obtaining legal advice. Paying careful attention to administrative law requirements is particularly important because a lawful decision cannot constitute misfeasance (and will normally constitute powerful evidence against any allegation of malice).

The need to report misfeasance claims as significant issues

Paragraph 3 of the LSDs requires non-corporate Commonwealth entities to report to the Office of Legal Services Coordination (OLSC) on significant issues that arise in the provision of legal services, especially in handling claims and conducting litigation. Failure to report a significant issue is a breach of the LSDs and the Attorney-General may impose sanctions for noncompliance with the LSDs (see [14] of the LSDs).

The OLSC's Guidance Note No 7 makes it clear that, for the purposes of the LSDs, an issue will be considered 'significant' if the tort of misfeasance in public office is in issue.

This briefing supersedes Legal Briefing 98, *Misfeasance in public office* (4 December 2012).

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